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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION NO. 1:09-md-2089-TCB ALL CASES

AIRTRAN'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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I. PRELIMINARY STATEMENT

Plaintiffs allege that AirTran and Delta illegally agreed to "unbundle" the cost of a first checked bag ("first bag fee" or "FBF") from their base fares. Plaintiffs do *not* allege an agreement on the base fares themselves, or on the amount of the FBF.[1] Plaintiffs further contend that persons who paid an FBF to AirTran or Delta on or after December 5, 2008 were injured by the nominal amount of the FBF (initially $15 charged by each Defendant) and may recover that amount under Section 4 of the Clayton Act. Based on these contentions, Plaintiffs move to certify the following class under Rule 23:

> All persons or entities in the United States and its territories that directly paid Delta and/or AirTran one or more first bag fees on domestic flights from December 5, 2008 through the present (and continuing until the effects of Delta's and AirTran's anticompetitive conspiracy ceases).[2]

Plaintiffs' Motion should be denied because, applying the rigorous analysis the Eleventh Circuit requires, the proposed class fails to satisfy Federal Rule of Civil Procedure 23. First, the named Plaintiffs have failed to show that they can fairly and adequately represent the class. Second, Plaintiffs have failed to show

[1] In their Consolidated Amended Complaint ("CAC"), Plaintiffs also alleged a conspiracy between the Defendants to reduce capacity, but appear to have abandoned that allegation. Exh. 1, Singer Dep. Tr., Nov. 22, 2010, at 403:11–23.
[2] Plaintiffs' Motion for Class Certificaiton and Appointment of Class Counsel ("Pl. Mem.") at 17.

that common proof can be used to prove either the *fact of injury* to all or substantially all class members, or the *amount* of damage to any individual class members who were in fact injured.

Applying the relevant legal principles to the record evidence shows:

(1) Depending on their dates of travel, and because the nominal FBFs charged by AirTran and Delta diverged sharply within the proposed class period (Delta raised its FBF higher and more often than AirTran), putative class members may take different, and potentially conflicting, positions on the terms and duration of the alleged conspiracy.

(2) To demonstrate the fact of injury under Section 4, Plaintiffs must prove that the alleged agreement raised each class member's *total* cost of air travel—which necessarily includes both the FBF and the base fare paid by each class member.

(3) Unbundling the FBF caused air carriers in general, and AirTran in particular, to *reduce* base fares as a necessary offset to the FBFs. These base fare reductions varied widely across routes, flights, and seats, creating what Plaintiffs' expert described as "winners" (class members who benefited from Defendants' unbundling of the FBF) and "losers" (class members who were harmed by the

unbundling) within the proposed class.[3] Winners include class members who traveled on AirTran and/or Delta more than once during the class period but did not pay an FBF each time they flew and class members who paid for a group to travel together (e.g. couples, families, and work associates) where there were fewer checked bags than passengers.

(4) To separate winners from losers and measure each loser's damages, the Court must establish the "but for" total price for each putative class member (i.e., what that passenger would have paid absent an unbundled FBF). Establishing these but for prices will require the Court to consider numerous passenger-specific factors such as (a) the Defendant(s) who served the class member; (b) the route traveled; (c) whether the carrier would have served that route at the time of travel but for the FBF; (d) the date and time of the flight; (e) the base fares available on that flight but for the FBF; (f) the date of purchase; (g) the fare class; and (h) whether that fare class would have been available but for the FBF.

(5) Because the numerous winners directly benefited from the challenged conduct, the named Plaintiffs cannot fairly and adequately represent their interests. Moreover, because separating winners from losers and measuring each loser's damages requires individualized evidence, common issues do not predominate.

[3] Exh. 2, Singer Reply Report, at ¶ 113.

II. FACTUAL BACKGROUND

A. Base Fares Vary From Passenger to Passenger Based on Numerous Route-, Flight-, and Seat-Specific Factors.

Base fares vary based on the competitive conditions, demand, and costs that exist for each route. AirTran has a broad network through which it competes not only with Delta, but with all legacy carriers and low cost carriers ("LCCs"). AirTran operated 700 flights a day during 2009, traveling 143 nonstop routes to 63 different cities.[4] Competition varies considerably across routes and affects the level of base fares.[5]

Each route (*i.e.*, "city pair") has unique cost and demand conditions.[6] Factors such as the time, day, season, and mix of business and leisure passengers vary across routes, and thus have route-specific effects on demand.[7] Fuel, labor, and facilities costs also differ for each route.[8] Carriers account for these different

[4] Exh. 3, Haak Dep. Exh. 28, at 22; Exh. 4, Gaier Expert Report, at ¶ 22.
[5] Exh. 5, Schwartz Expert Report, at ¶¶ 12–17; Exh. 4, Gaier Expert Report, at ¶¶ 27–29 and Fig. 4.
[6] Exh. 5, Schwartz Expert Report, at ¶¶ 14, 17; Exh. 1, Singer Dep. Tr. Nov. 22, 2010, at 357:13–358:7;
[7] Exh. 1, Singer Dep. Tr. Nov. 22, 2010, at 357:13–358:16; Exh. 15, Lee Expert Report, at ¶ 38.
[8] Exh. 6, Healy Dep. Tr., June 3, 2010, at 8:15-10:14.

demand and cost conditions when setting prices for "base fares" on specific routes, so that prices differ markedly across routes and over time.[9]

Even on a single flight, passengers pay vastly different fares depending on their dates of purchase and the services they require. Most carriers use a tiered pricing structure, in which separate "fare buckets" are used for different dates of purchase, class of service, and sales or promotions.[10] A carrier's distribution of sales across its fare buckets is reflected in the "realized average fare" for a flight, which is simply the average of the fares paid by passengers on that flight.[11]

Revenue management systems adjust available seat prices in real time to reflect fluctuating demand. Carriers adjust the availability of the diverse published fares associated with each flight in real time to reflect fluctuating demand using revenue management, a system that "controls how many seats to

[9] Exh. 1, Singer Dep. Tr., Nov. 22, 2010, at 357:13–358:16; Exh. 6, Healy Dep. Tr., June 3, 2010, at 24, 117, 152; Exh. 4, Gaier Expert Report, at ¶ 27.
[10] Exh. 6, Healy Dep. Tr., June 3, 2010, at 9:2-23; Exh. 4, Gaier Expert Report, at ¶ 30 and Fig. 5.
[11] Realized average fare differs from "published fares," the fares offered for sale in a market. *See* Exh. 7, Healy Dep. Tr., Nov. 19, 2010, at 135:25–136:9 ("The published fares [are] all the fares that you offer for sale in a market. The DOT data [showing realized average fare] is essentially based on a ten percent sample of all tickets sold, which would then show you not what was published, but what people bought. . . . [T]he distinction really, is [published fares are] historical, . . . out there for sale, but not an indication what . . . consumers[] are actually buying.").

offer for sale at each [fare] level."[12] If bookings for a flight are slow, the revenue management system will stimulate demand by opening up more seats in lower-priced fare buckets. Conversely, if there is high demand for a flight, the revenue management system closes off seats in lower-priced fare buckets, making only the higher fares available.[13] The revenue management system adjusts the availability of lower-priced tickets in real time to reflect demand. Indeed, even if a carrier raises all published fares for a flight, it may realize a lower average fare because of revenue management.[14]

B. The Net Economic Effect of Unbundling First Bag Fees From Base Fares Varies Significantly From Passenger to Passenger.

Through unbundling, passengers pay for only the services they want.

Over the last few years, airline pricing became even more passenger-specific when carriers began offering "ancillary" services with separate fees apart from base fares. Airlines commonly charge ancillary fees for in-flight Wi-Fi, upgraded

[12] Exh. 8, Haak Dep. Exh. 29, at 23.
[13] *See* Exh. 10, Klein Dep. Tr., at 118:20–24 ("[I]f there is a lot of demand for any specific flight, we'll make an effort to raise our fares through revenue management policy; and if there's weakness, we'll make an effort to reduce fares through revenue management policy.").
[14] *Id*. at 159:23–161:22.

service, unaccompanied minors, changing and canceling reservations, in-flight food and beverages, and oversized and overweight luggage.[15]

Some ancillary fees represented new services (e.g. in-flight Wi-Fi). Others reflect services that were previously incorporated into the base fare (e.g. in-flight beverages).[16] These "unbundled" fees gave consumers greater choice over the services they purchased.[17]

Unbundling the first bag fee altered demand for, and the pricing of, air travel. In 2008, airlines unbundled the price of carrying checked bags from the base fare for air travel, when all legacy carriers and most LCCs adopted a "second bag fee."[18] In May 2008, American Airlines became the first legacy carrier to charge an FBF. Over the next six months, United, US Airways, Northwest, Continental, Frontier, Delta, and AirTran (collectively, "Unbundled Carriers") followed suit. In contrast to earlier, largely discretionary ancillary fees, the FBF changed the value proposition for air travel because many passengers are unable to

[15] Exh. 9, Haak Dep. Tr., at 103:8–24; *see generally* Exh. 7, Healy Nov. 19, 33:18–37:2.
[16] Exh. 7, Healy Dep. Tr., Nov. 19, 2010, at 37:8–18.
[17] Exh. 7, Healy Dep. Tr., Nov. 19, 2010 at 34:14–23; Exh. 11, AIRTRAN2524306; Exh. 12, AIRTRAN2522857; Exh. 13, AIRTRAN2855003, at 2855029 ("[A]ncillary revenue focus to reduce reliance on commodity transportation revenue. Unbundling product allows pricing attached to value of particular product features to reflect value to customers.").
[18] One LCC, Spirit Air, began charging for checked luggage in 2007.

avoid paying the FBF.[19] Because FBFs were unavoidable for a significant number of passengers, airlines recognized that customers would consider them in making purchasing decisions,[20] and thus adjusted base fares to seek preferred total prices for "Bag-Checkers" and "Non-Bag-Checkers."[21]

While the first bag fee is a flat fee that applies system-wide, its effect on base fare levels varies significantly by route, time of year, and time of day. To mitigate the impact on demand caused by raising prices to Bag-Checkers, Unbundled Carriers necessarily reduced their base fares.[22] As AirTran's expert, Professor Marius Schwartz explained, an Unbundled Carrier's "incentive will be to raise the price to passengers who check a bag—by charging the bag fee—but reduce it to other passengers by cutting the base fare."[23] The Plaintiffs' expert, Dr. Hal Singer, agreed.[24] Unbundled Carriers' reductions in base fares varied substantially across routes.[25]

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[19] Exh. 7, Healy Dep. Tr., Nov. 19, 2010, at 37:18–38:5, 38:19–24.
[20] *Id*. at 58:5–11; 86:17–87:8.
[21] Exh. 5, Schwartz Expert Report, at ¶¶ 19–20.
[22] Exh. 6, Healy Dep. Tr., June 3, 2010, at 53:4–21, 116:12–119:12.
[23] Exh. 5, Schwartz Expert Report, at ¶ 32.
[24] Exh. 14, Singer Dep. Tr., Nov. 23, 2010, at 714:1–8 ("[I]f you were in equilibrium and you unilaterally raise the cost of traveling by $30 to our subscribers, there's a good chance that there would be a share shift or defection from your customers – from your airline to your rival's airline, in which case you would be required to provide an offset on your base fare.")
[25] *See* Exh. 15, Lee Expert Report, at ¶¶ 35 and 37 and Tables 5 and 6.

Consistent with these incentives, the Parties' experts demonstrated empirically that unbundling the FBF in fact caused Unbundled Carriers to lower their base fares. Delta's expert, Dr. Darren Lee, concluded that Unbundled Carriers reduced their base fares on nonstop routes by 2.9% on average due to unbundling the FBF.[26] Plaintiffs' expert concurred. Although Dr. Singer disagreed with Dr. Lee's precise methodology, he acknowledged that unbundling FBFs caused carriers other than Defendants to reduce base fares by 2.37%.[27]

While passengers traveling on Unbundled Carriers thus pay lower average base fares, the total price paid by any specific passenger due to the unbundling of FBFs varies according to route- and time-specific factors, such as each route's percentage of Bag-Checkers and price-cost margin, which both vary across routes and over time.[28] In 2009, for example, the percentage of Bag-Checkers by quarter on AirTran's top 20 routes varied between 21% and 54%,[29] and its 2009 margins on these routes varied between a high of 37.6% and a low of 11.7%.[30]

AirTran's expert, Dr. Eric Gaier, found wide variation in AirTran's average base fare reductions from route to route compared to Southwest and JetBlue (the

[26] Exh. 15, Lee Expert Report at ¶ 28 and Table 1.
[27] Exh. 2, Singer Reply Report, at ¶ 34 and Table 1; Exh. 1, Dep. Tr., Singer Nov. 22, 2010, at 386:18–24, 387:24–388:8.
[28] Exh. 5, Schwartz Expert Report, at ¶ 48.
[29] Exh. 4, Gaier Expert Report, at ¶ 47 and Fig. 12.
[30] *Id*. at ¶ 49 and Fig. 13.

"Bundled Carriers"), which did not charge FBFs.[31] The lowest average base fare reduction was $2.64 for Indianapolis-Tampa; the largest reduction was $19.75 for Detroit-Orlando.[32] In addition to this wide variation, AirTran's base fares in a handful of city pairs actually *increased* slightly relative to Bundled Carriers,[33] further demonstrating the many demand- and passenger-specific factors at play.

C. Many Putative Class Members Benefited From AirTran's Unbundling of the First Bag Fee.

AirTran reduced its base fares relative to its "bundled" competitors in 2009. Dr. Gaier found that AirTran reduced its roundtrip base fares in 2009 on average by $16.91 per roundtrip compared to Bundled Carriers, thus isolating the FBF's average impact on AirTran's base prices.[34] The amount of these base fare reductions varied over time and across routes. In particular, the amount of the reduction varied with the percentage of Bag-Checkers on a route,[35] the date of the flight,[36] and the amount of the base fare.[37]

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[31] *Id*. at ¶ 43 and Fig. 10.
[32] Exh. 4, Gaier Expert Report, at ¶ 43 and Fig. 10.
[33] *Id*. at ¶ 43 and Fig. 10.
[34] Exh. 4, Gaier Expert Report, at ¶¶ 54–55; s*ee also* Exh. 16, Gaier Surreply Report, at ¶ 29 and Fig. 5 (finding AirTran reduced base fares by $17.24 when data from the second half of 2007 is included).
[35] Exh. 16, Gaier Surreply Report, at ¶¶ 44–51 and Figs. 8, 10, and 11.
[36] *Id*. at ¶ 17 and Fig. 3..
[37] Exh. 4, Gaier Expert Report, at ¶ 60 and Fig. 14.

Internal documents show that AirTran's pricing and revenue management executives understood that Bundled Carriers charged higher base fares.[38] For example, Matthew Klein, AirTran's Senior Director of Pricing and Distribution, noted that bundling FBFs would lead to higher base fares.[39]

Many putative class members paid less for their air travel because the FBF was unbundled. Many putative class members—defined by Plaintiffs to be "all persons [who] directly paid Delta and/or AirTran one or more first bag fees"[40]— benefited from the unbundling of the FBF. As revenue management made more seats in lower fare buckets available, class members obtained lower

[38] *See*, *e.g.*, Exh. 17, AIRTRAN00190715 (Roger Morenc, AirTran's Director of Revenue Management, speculates that Southwest earned premium in base fares over AirTran because customers "add [up] what will be their total trip costs," including ancillary fees, when shopping for air travel). In addition, an AirTran internal document relied on by Plaintiffs' expert, Dr. Singer, comports with Dr. Gaier's findings. The document, prepared by an AirTran pricing analyst, Ben Munson, shows that Southwest's earned a $3 premium on base fares versus compared to AirTran's on a selection of overlap routes during the first quarter of 2009 compared to the first quarter of 2008. Exh. 18, Healy Dep. Exh. 24; *see also* Exh. 7, Healy Nov. 19, at 141:19–144:17. The document also shows the amount of the fare differential between AirTran and Southwest varied by market—AirTran's base fares were $4 less in Indianapolis city pairs and $2 less than in Orlando city pairs. Exh. 28, Singer, Nov. 22, 2010, Dep. Exh. 5.

[39] *See* Exh. 19, AIRTRAN00238600 (Mr. Klein writes, "I can't believe people would pay more on the ticket to get a[n] [unaccompanied minor] fee for free (see 1st bag fee)."); Exh. 20, AIRTRAN00473084 (regarding a customer who believed AirTran should include the price of checking a bag in the base fare, Mr. Klein asks, "Any idea if he sounded like he'd be willing to pay more up-front that included the 1st bag fee"?).

[40] Pl. Mem. at 17.

base fares that fully offset the FBF. For example, even with the FBF, Plaintiff Stephen Powell paid less overall for his May 12, 2009, flight from Baltimore to Boston—a $79 standard published fare—by obtaining a $39 sale fare (for a total price of $54) that would have been unavailable absent the unbundling of the FBF.[41]

In addition, many individuals who paid an FBF to AirTran on one occasion also traveled other times on AirTran without checking a bag—avoiding the FBF and paying lower base fares that likely completely offset the total amount paid in FBFs.[42] For example, ignoring the substantial, passenger-specific variations in the effect of the FBF, the available data shows that 21% of AirTran frequent fliers (about 100,000 passengers) flew twice as often without paying an FBF as they did with paying an FBF.[43] On average, these class members benefited on net ($16.91 in base fare reductions × 2 roundtrips - $30 in FBFs for one roundtrip = $4 net benefit).[44] Moreover, to the extent passengers flew on both AirTran and Delta combined more times without a bag than with one, they would likely benefit from the unbundled FBFs.

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[41] *See* Exh. 21, Responses to Interrogatory Nos. 3 and 4, Defendant AirTran's Responses and Objections to Plaintiffs' Third Set of Interrogatories.
[42] *See*, *e.g.*, Exh. 22, Powell Dep. Tr., at 94:19–25, 96:9–11, 102:18–103:9, 103:24–105:16, 106:16–22 (testifying to traveling on AirTran several times without checking bag after flying on AirTran and paying FBF).
[43] Exh. 4, Gaier Expert Report, at ¶¶ 63–65 and Fig. 16.
[44] *Id.* at ¶ 62 and Fig. 15.

Similar benefits flowed to putative class members who paid for other passengers to travel on their same itinerary, such as couples traveling together and checking only one bag.[45] For example, Marshall Avery, of Plaintiff Avery Insurance, testified that he and his wife traveled roundtrip on Delta in January 2010 and paid a single FBF each way.[46] On average, such class members enjoyed a net benefit of $4,[47] though the precise amount of the benefit varied.[48] About 22% of AirTran's unique itineraries—more than 750,000—had at least twice the number of passengers as checked bags.[49]

Putative class members also may have benefited if they traveled on routes that AirTran would not have served but for unbundling the FBF. AirTran began serving several new city pairs after introducing the FBF.[50] Some of these routes became profitable only because AirTran could use the FBF to earn additional revenues from Bag-Checkers.[51] In particular, some "sunshine" routes—routes from northern cities to warm-weather vacation destinations—became profitable due to the FBF because they attracted leisure passengers who were likely to check

[45] Exh. 16, Gaier Surreply Report, at ¶¶ 64–65 and Fig. 13.
[46] Exh. 23, Avery Dep. Tr., at 159:1–164:17.
[47] Exh. 16, Gaier Surreply Reporet, at ¶¶ 64–65 and Fig. 13.
[48] Exh. 4, Gaier Expert Report, at ¶ 57; Exh. 5, Schwartz Expert Report, at ¶ 48.
[49] Exh. 16, Gaier Surreply Report, at ¶ 65 and Fig. 13.
[50] Exh. 6, Healy June 3, at 86:2–8, 118:19–119:1, 119:22–120:4, 158:1–161:21, 162:14-17, 163:5-15.
[51] *Id*. at 75:6-11, 158:20-159:12.

a bag.[52] Unbundling the FBF benefited those who traveled on "FBF-enabled" routes if the total amount paid was lower than the price that would have prevailed if AirTran had not unbundled and entered the market.

D. The Net Effect of the First Bag Fee on Individual Class Members Cannot Be Determined by Common Evidence.

Determining the "but for" total price of air travel that a passenger would have paid in the absence of FBF unbundling requires consideration of passenger- and route-specific factors, such as the season, day, and time of the flight, the percentage of Bag-Checkers on the flight, the mix of passengers, and the amount of the base fare. Plaintiffs' expert, Dr. Singer, did not attempt to demonstrate whether any individual class member paid an overcharge on the total price of air travel, and if so, by how much.[53] Instead, Dr. Singer offered a method for calculating aggregate damages based on a series of calculations that purport to subtract the aggregate base fare reduction enjoyed by the class as a whole.[54]

Moreover, Plaintiffs have not proposed a method for establishing the net benefit or detriment to individual class members who paid for more than one trip. Frequent traveler numbers can only be used to track the travel histories of the

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[52] *Id*. at 158:20-159:12.
[53] Exh. 14, Singer Dep. Tr., Nov. 23, 2010, 734:17–25.
[54] Exh. 2, Singer Reply Report, at ¶¶ 92–121; *see also* Exh. 14, Singer Dep. Tr., Nov. 23, 2010, at 585:24–586:6 (one of three opinions offered is that "aggregate damages can be performed reliably with common methods and evidence.").

limited number of AirTran passengers who possess them.[55] Moreover, AirTran and Delta frequent traveler numbers cannot show whether a class member traveled on one Defendant when checking a bag, but traveled on the other Defendant without paying an FBF. And AirTran's passenger name records ("PNRs") consistently fail to provide other identifying information, such as addresses and phone numbers, so it is impossible to determine whether passengers traveled on AirTran and/or Delta more than once.[56]

III. ARGUMENT

A. Under Rule 23, This Court Must Apply a Rigorous Analysis to Determine Whether Plaintiffs Have Carried Their Burden.

"For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)."[57] The Eleventh Circuit has instructed this Court to perform a "rigorous analysis" of Plaintiffs' Motion.[58] Plaintiffs bear the burden of

[55] Exh. 4, Gaier Expert Report, at ¶ 66; Exh. 16, Gaier Surreply Report, at ¶¶ 61–63.
[56] Exh. 16, Gaier Surreply Report, at ¶ 62–63.
[57] *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009). *See* STATUTORY APPENDIX for the text of Rules 23(a), 23(b)(2), and 23(b)(3).
[58] *Vega*, 564 F.3d at 1266.

meeting the Rule 23 requirements by a preponderance of the evidence,[59] and must do so with respect to the elements of Section 4 of the Clayton Act, on which their claim is premised.[60] To meet their burden, Plaintiffs may not rest on the allegations in the complaint,[61] nor on mere speculation or unsupported argument.[62] Furthermore, the Court "can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied."[63] To that end, courts may not assume the correctness of a plaintiff's theoretical model of proving injury and damages, and must resolve conflicting expert testimony that bears on the propriety of class certification.[64]

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[59] *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320–321 (3d Cir. 2008) (rejecting "threshold showing" standard); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202–203 (2d Cir. 2008) (rejecting "some showing" standard).

[60] *Vega*, 564 F.3d at 1266 (court must look to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues) (*internal citation omitted*); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978) ("In order to make the findings required to certify a class action under Rule 23(b)(3) . . . one must initially identify the substantive law issues which will control the outcome of the litigation.").

[61] *Vega*, 564 F.3d at 1266.

[62] *Id.* at 1267; *Heffner v. Blue Cross & Blue Shield of Ala.*, 443 F.3d 1330, 1337 (11th Cir.2006).

[63] *Vega*, 564 F.3d at 1267 (*internal citation omitted*).

[64] *Hydrogen Peroxide*, 552 F.3d 305, 307, 323–25 (3d Cir. 2009); *see also In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 272 (N.D. Ala. 2009).

B. The Named Plaintiffs Cannot Adequately Represent the Proposed Class Under Rule 23(a).

1. The named Plaintiffs who were allegedly harmed by AirTran's unbundling of the first bag fee are not adequate representatives of the many class members who benefited.

To carry their burden on class certification, Plaintiffs must satisfy Rule 23(a)(4), which "requires that the representative party in a class action must adequately protect the interests of those he purports to represent."[65] Plaintiffs must show that "no fundamental conflict exists within the class."[66] "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class."[67] Conversely, Defendants need not "show actual antagonistic interest; the potentiality is enough."[68]

In *Valley Drug*, the Eleventh Circuit Court of Appeals vacated a district court order certifying a class because the evidence showed that some putative class members had benefited from the conduct alleged.[69] Plaintiffs, regional drug

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[65] *Valley Drug*, 350 F.3d at 1189 (*citation omitted*); *see also* Fed. R. Civ. P. 23(a)(4) (requiring "named representatives will be able to represent the interests of the class adequately and fairly.").
[66] *Valley Drug*, 350 F.3d at 1190.
[67] *Id.*; *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000) ("[A] class cannot be certified . . . when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.").
[68] *Valley Drug*, 350 F.3d at 1194 (*quoting In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 462 (N.D. Ala. 2003)).
[69] *Valley Drug*, 350 F.3d at 1184.

wholesalers, alleged that defendant drug manufacturers had conspired to suppress generic competition for a branded drug, Hytrin, thereby raising the prices paid by a proposed class of direct purchasers of that drug. The Eleventh Circuit recognized that some putative class members had charged the same percentage mark-up on branded and generic drugs and could charge higher prices for branded drugs without losing volume due to inelastic demand.[70] Although they paid more for Hytrin initially, these class members also earned more from the higher resale prices they set, so the challenged conduct—suppressing generic competition—benefited them once all transactions were considered. In vacating the district court's order certifying the class, the Eleventh Circuit held "it would be impossible for the named representatives to vigorously prosecute the interests of the class if significant members in the class actually experience a net benefit from the conduct challenged by the named representatives."[71]

Here, as in *Valley Drug*, some class members benefited from AirTran's unbundling of the FBF, the very conduct the named Plaintiffs challenge. As the Court has found, FBFs "are only a small part of the total price paid for air travel,

[70] *Id.* at 1190–1191.
[71] *Id.* at 1196 (*citation omitted*); *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000) ("[A] class cannot be certified . . . when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.").

by just a subset of consumers."[72] Thus, contrary to their assertion that there are no conflicts between the named Plaintiffs and the class because all were "similarly injured by Defendants' wrongful conduct in the form of overcharges for first bag fees,"[73] the relevant inquiry is whether class members were injured by paying an overcharge on the "total price."[74] To determine whether class members paid an overcharge for the total price of air travel, the Court must assess the costs and benefits that specifically accrued to each class member arising from the challenged conduct.[75]

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[72] MTD Order (Dkt. No. 137) at 41.

[73] Pl. Mem. at 26.

[74] *See Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982), *cert. denied*, 459 U.S. 857 (1982) (in tying cases, customers injured if "payments for both the tied and tying products exceeded their combined fair market value. . . . Unless the fair market value of both the tied and tying products [is] determined and an overcharge in the complete price found, no injury can be claimed; suit, then, would be foreclosed"); *Robinson v. Texas Automobile Dealers Assn.*, 387 F.3d 416 (5th Cir. 2004) (assessing injury with respect to total price of automobiles); *Collins v. Int'l Dairy Queen*, 59 F. Supp. 2d 1312, 1314 (M.D. Ga. 1999) (plaintiffs failed to allege net economic loss from total price of tying and tied products); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004) ("[A] class member could not have actually been injured unless the alleged conspiracy inflated its *net payments* for textile rental services above the competitive (or 'but-for') price. In the matter before the Court it is the *total invoice amount* that matters for this purpose. If the total invoice price is equal to the but-for price, the customer would not be injured.").

[75] *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) ("[A]n antitrust plaintiff may recover only to the 'net' extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused

When AirTran unbundled the FBF, it also reduced the base fares that class members necessarily paid. AirTran's expert, Dr. Gaier, estimated that AirTran reduced base fares on average by $16.91 per roundtrip in 2009 because of its FBF.[76] AirTran's internal documents echo Dr. Gaier's results.[77] For many putative class members, base fare reductions exceeded their FBF payments. Net beneficiaries include class members (such as Plaintiff Stephen Powell) who traveled on AirTran and/or Delta more times without paying an FBF than when paying an FBF,[78] and class members (such as Avery Insurance Company) who paid for groups to travel on the same itinerary where not all of those other passengers were charged an FBF.[79]

Other net beneficiaries include class members (such as Plaintiff Stephen Powell) who obtained sale fares or lower fare buckets that would not have been available absent unbundling,[80] and class members who flew on FBF-enabled routes

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by the illegal conduct."); *Siegel v. Chicken Delight*, 448 F.2d 43, 52 (9th Cir. 1971) (holding district court erred by not offsetting reasonable value of tying product against overcharge for tied products); *Kypta*, 671 F.2d at 1285 (endorsing *Siegel*).

[76] Exh. 4, Gaier Expert Report, at ¶ 54.

[77] Exh. 18, Healy Dep. Exh. 24; Exh. 17, AIRTRAN00190715; Exh. 19, AIRTRAN00238600; Exh. 20, AIRTRAN00473084; *see also* Exh. 7, Healy Nov. 19, at 141:19-144:17.

[78] Exh. 4, Gaier, at ¶¶ 61–66 and Figs. 15 and 16; Exh. 22, Powell Dep. Tr., at 96.

[79] Exh. 16, Gaier Surreply, at ¶¶ 64–65 and Fig. 13.

[80] *Id*. at ¶ 65 and Fig. 13.

and paid a lower price for travel than would have been available to them had AirTran not entered the route.[81]

Because Plaintiffs claim injury (overcharges from FBFs) from the same conduct (unbundling the FBF) that benefited many class members, it is "impossible for [Plaintiffs] to vigorously prosecute the interests of the class."[82] In such circumstances, "Rule 23(a)(4) does not permit a class to be certified."[83]

2. Dr. Singer's criticisms of AirTran's experts do not establish adequacy and are without merit.

Plaintiffs' expert, Dr. Singer, challenges AirTran's and Delta's evidence that they reduced base fares due to their unbundling of FBFs. As outlined below, his opinions suffer from a number of methodological flaws and misapplications of economic theory, which AirTran's experts, Dr. Gaier and Professor Schwartz, address more fully in their Surreply Reports.[84]

Dr. Singer misapprehends Plaintiffs' burden. Dr. Singer criticizes Defendants' experts for failing to identify specific putative class members who traveled on AirTran or Delta without checking a bag more times than they did with

[81] Exh. 6, Healy June 3, at at 86:2–8, 118:19–119:1; 119:22–120:4; 158:1–161:21; 162:14-17; 163:5-15.
[82] *Valley Drug*, 350 F.3d at 1196 (*citation omitted*).
[83] *Id.*
[84] *See* Exh. 16, Gaier Surreply; Exh. 24, Schwartz Surreply Report.

paying an FBF.[85] This critique is inapposite because under Rule 23(a)(4), Plaintiffs bear the burden of showing that "no fundamental conflict exists within the class."[86] In contrast, Defendants need only establish that the unbundling of the FBF may have benefited individual class members—"potentiality is enough."[87]

Dr. Singer's opinions are contrary to law because they invite the Court to ignore benefits that accrued to class members from flights on which they did not pay FBFs. Dr. Singer's argument that Plaintiffs can show classwide injury from common evidence assumes that the Court should view flights on which class members paid FBFs as "discrete events," ignoring the benefits that class members received on flights on which they did not pay FBFs.[88] Even if the Court were to accept this "discrete event" theory, it overlooks class members who purchased tickets for a group of passengers where not all passengers checked bags, so that the sum of base fare reductions may well have exceeded the FBFs paid for a single flight.

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[85] Singer Reply Report at ¶ 87.
[86] *Valley Drug*, 350 F.3d at 1190.
[87] *Id.* at 1194 (*quoting In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 462 (N.D. Ala. 2003)).
[88] Exh. 2, Singer Reply, at ¶¶ 78–81 (class members similarly impacted because amount paid in FBF on a flight ordinarily greater than amount of base fare reduction on that flight); *id.* at ¶ 88 (illogical to consider benefits enjoyed for flights on which class members did not pay FBFs to extent Court considers each time class member paid FBF a "discrete event").

But Dr. Singer's "discrete event" theory is not the law. In *Valley Drug*, the Eleventh Circuit expressly considered the benefits that were realized by some class members in subsequent transactions.[89] There, certain class members charged the same fixed percentage mark-up on branded and generic drugs, so that, though they paid increased prices for a branded drug, they earned more when they resold it. Thus, adopting a rule that precludes consideration of subsequently-realized benefits of the alleged conspiracy would directly conflict with the law of the Eleventh Circuit.[90]

Here, AirTran reduced base fares because it adopted the FBF, and putative class members therefore benefited in the amount of any base fare reductions they enjoyed after December 5, 2008. Because the Court must take into account "any benefits" flowing from the alleged conspiracy,[91] it must consider the net economic effect on class members from all flights on AirTran or Delta, not just those on which they paid FBFs.

Dr. Singer misconstrues and selectively quotes AirTran's and Delta's documents and testimony. Dr. Singer argues that the record evidence supports his

[89] *Valley Drug*, 350 F.3d 1190–1191.
[90] *See also L.A. Mem'l Coliseum*, 791 F.2d at 1367 (calculation of impact and damages "must take into account any benefits which would not have been received by plaintiff 'but for' the defendant's anticompetitive conduct." (emphasis added)).
[91] *Id.* at 1367 (*quoting Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946)).

opinion that the unbundling of FBFs did not cause AirTran and Delta to reduce base fares due to unbundling FBFs, but his reliance on the record is misleadingly selective. For example, Dr. Singer relies heavily on the deposition testimony of Richard Anderson, Delta's CEO, for his statement, "I don't think [the FBF has] had any impact on average fares…"[92] But Dr. Singer's well-placed ellipsis omits Mr. Anderson's qualification: ". . . *but we haven't done that analysis.*"[93] Moreover, while Mr. Anderson grouped FBFs together with discretionary ancillary fees, such as in-flight Wi-Fi, Kevin Healy, AirTran's SVP of Marketing and Planning, pointed out that discretionary ancillary fees have little effect on demand, while unavoidable FBFs affect purchasing decisions,[94] as confirmed in AirTran's and Delta's share shift analyses.[95]

3. Plaintiffs cannot adequately represent the class because of internal conflicts over proof of the alleged conspiracy.

Plaintiffs proposed class definition presumes that the effects of the alleged conspiracy began on "December 5, 2008," continued "through the present," and will persist "until the effects of Delta's and AirTran's anticompetitive conspiracy

[92] Exh. 2, Singer Reply, at ¶ 52.
[93] Exh. 25, Anderson Dep. Tr., at 102:6–7; *see also id.* at 101:20–21 ("I don't know that we've done a correlation between average fares and bag fees.").
[94] Exh. 7, Healy Dep. Tr., Nov. 19, 2010, at 38:22–24.
[95] Exh. 26, Healy Dep. Exh. 23; Exh. 27, Haak Dep. Exh. 15; Exh. 19 of Pl. Mot. for Class Cert (Dkt. No. 155-18).

ceases."[96] This presumption begs the question, however, of how the putative class members can be aligned around an alleged conspiracy that subsumes FBFs which diverged sharply over time. Specifically, Delta raised its FBF to $20 on August 4, 2009, and to $23 (on line) and $25 (at the airport) on January 12, 2010. AirTran, meanwhile, kept its FBF at $15 despite the Delta increases, only raising its FBF to $20 on September 10, 2010.

This divergence renders it improbable that the putative class members share a common theory of antitrust liability. For example, a putative class member whose claims arise from travel taken when both carriers' FBFs were $15 may have little interest in assuming the burden (and risk) of attempting to prove that AirTran and Delta conspired to charge different FBFs after August 3, 2009.

C. Individual Issues Predominate Injury and Damages, Making Plaintiffs' Claim Unsuited for Class Certification Under Rule 23(b)(3).

Plaintiffs seek class certification under Rule 23(b)(3), which requires "(1) that common questions of law or fact predominate over questions affecting only individual class members ('predominance'); and (2) that a class action is superior to other available methods for adjudicating the controversy ('superiority')."[97] "'Where, after adjudication of the classwide issues, plaintiffs must still introduce a

[96] Pl. Mem. at 17.
[97] *Vega*, 564 F.3d at 1264; *see also* Fed. R. Civ. P. 23(b)(3).

great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3).'"[98]

1. Plaintiffs have not shown that common evidence can establish that putative class members paid a greater overcharge on the total price for air travel.

To certify the proposed class under Section 4 of the Clayton Act, Plaintiffs must show that they can prove liability with common evidence. Proof of liability includes proof of "impact," *i.e.*, that AirTran's and Delta's conduct in fact injured all members of the putative class.[99] Classwide proof of impact "is admittedly difficult, because under Eleventh Circuit law, impact is a question unique to each particular plaintiff and must be proven with a fair degree of certainty."[100] Courts

[98] *Id.* (*citing Klay v. Humana, Inc.*, 382 F.3d 1241, 1257 (11th Cir. 2004)).
[99] *Williams*, 568 F.3d at 1358 ("The issue of liability includes not only the question of violation, but also the question of fact of injury, or impact.") (*citing Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 320 (5th Cir. 1978)).
[100] *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 617 (*quoting In re Domestic Air Travel Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991); *see also Williams*, 568 F.3d at 1358 (*citing Blue Bird*, 573 F.2d at 320) (determining whether impact can be proved through common evidence is "of utmost importance.").

accept common proof of impact only where it "adequately demonstrates some damage to each individual."[101]

Courts typically reject common proof of impact in cases like this one, in which collusion allegedly affects but one element of the total price paid by class members.[102] For example, in *Robinson v. Texas Automobile Dealers Association*, plaintiffs claimed that the defendants conspired to include a state Vehicle Inventory Tax ("VIT") as a separate line item charged in addition to the cash price for a vehicle.[103] The district court certified a class of vehicle purchasers who were charged the VIT in addition to the cash price.[104] The Fifth Circuit reversed. The court rejected plaintiffs' assumption "that the VIT represents an additional charge that artificially increases the final purchase price for every consumer in the class,"[105] and instead focused on whether the separate line item charge for VIT increased a class member's total price for a vehicle.[106] Because assessing whether

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[101] *Blue Bird*, 573 F.2d at 325 (emphasis added) (*citing Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3rd Cir. 1977)); *see also Polypropylene Carpet*, 178 F.R.D. at 620 (common evidence "must allow each class member to prove the conspiracy actually was implemented in the class member's relevant market and did in fact cause injury to the class member.").

[102] *See, e.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 572–573 (8th Cir. 2005); *Robinson*, 387 F.3d at 423–424; *Exhaust Unlimited*, 223 F.R.D. at 513.

[103] *Robinson*, 387 F.3d at 419.

[104] *Id.* at 420.

[105] *Id.* at 423.

[106] *Id.* at 423.

the VIT increased the total price required evidence of each class member's negotiating style, plaintiffs could not establish predominance. [107]

Similarly, in *Blades v. Monsanto Co.*, plaintiffs alleged a conspiracy with respect to genetically modified ("GM") seeds, claiming that defendants agreed to charge "premiums" for GM seeds over non-GM seeds.[108] The district court denied class certification, in part, because "plaintiffs allege that only the 'premium' portion of the seed product is the result of the price-fixing scheme, but the germ-plasm [*i.e.*, "premium"] component of the seed cannot be segregated from the rest of the seed,"[109] and the Eighth Circuit affirmed.[110] In particular, the appeals court stated that, "to show injury . . . , each plaintiff would need to present evidence that the list price of the seeds he purchased, not just some or even most of the hundreds of list prices on [defendants'] price lists, were inflated."[111]

And in *Exhaust Unlimited v. Cintas Corp.*, the district court denied class certification where the named plaintiff alleged a conspiracy to fix a separate environmental add-on charge for textile linen services.[112] The court held that individual issues predominated, in part, because the total price paid by class

[107] *Id.* at 424.
[108] *Blades*, 400 F.3d at 570.
[109] *Id.*
[110] *Id.* at 572.
[111] *Id.* at 573–574.
[112] 223 F.R.D. at 513.

members was "a diverse mix of base prices and ancillary charges and of products and services, with total invoice prices varying from customer to customer."[113]

Courts have also held that individualized inquiries predominated where class members purchased products or services in many different relevant markets and paid a range of total prices.[114] Thus, in *Rodney v. Northwest Airlines*, the Sixth Circuit rejected class certification where proof of impact was an issue for each route served by the defendant airline.[115] The Court noted, "If [plaintiff]'s class were certified, the proofs would include evidence specific to each of 74 different routes and the class action would inevitably degenerate into 74 mini-trials."[116]

Here, Plaintiffs argue that proof of impact (that class members paid an overcharge) follows from proof of violation (that Defendants conspired to

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[113] *Id.*

[114] *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 790 (6th Cir. 2005); *Blades*, 400 F.3d at 572–574; *Exhaust Unlimited*, 223 F.R.D. at 513.

[115] *Rodney*, 146 Fed. Appx. at 790–791.

[116] *Id.* at 792. Plaintiffs distinguish *Rodney* on the grounds that market-by-market analysis required is not required for *per se* violations of Section 1 of the Sherman Act, as alleged here. But the Sixth Circuit considered market-by-market analysis in conjunction with impact, and proof of impact is required in cases, such as this one, brought under Section 4 of the Clayton Act. Moreover, proof of impact from an overcharge requires that Plaintiffs establish the price that would exist in each relevant market absent the alleged conspiracy. *See Exhaust Unlimited*, 223 F.R.D. at 513 ("The but-for price of a supplier-customer transaction cannot be established without delineating the market in which it occurs."); *see also Polypropylene Carpet*, 178 F.R.D. at 620. Finally, *Blades* and *Robinson*, discussed above, were both *per se* cases. *See* 400 F.3d at 565; 387 F.3d at 419–420. Consequently, Plaintiffs' distinction is without merit.

unbundle and adopt FBFs).[117] But this syllogism ignores that FBFs "are only a small part of the total price paid for air travel."[118] To prove that the alleged conspiracy to adopt FBFs resulted in a uniform increase in the total price that each class member paid for air travel, Plaintiffs must show not only that the net increase in total fare paid by the class members on FBF trips was uniform, but also that the total base fare reductions were constant and did not exceed the total amount that each class member paid in FBFs. This proposition does not withstand scrutiny, because base fare reductions varied by route, flight, carrier, and date of purchase, precluding common proof of any alleged increase in the total price of air travel.[119]

Dr. Gaier demonstrated that there was significant variation in the base fare reductions enjoyed by putative class members. For example, he showed that, on its top forty routes, AirTran's base fare reductions ranged from -$2.64 to -$19.75. [120]

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[117] Pl. Mem. at 31.

[118] MTD Order (Dkt. No. 137) at 41.

[119] Plaintiffs have not alleged Defendants agreed to raise base fares. And while Plaintiffs alleged that Defendants conspired to reduce capacity to increase prices, CAC at ¶¶ 1, 28, 32–34, 36, their Opening Memorandum abandons such allegations. Dr. Singer did not opine on proving collusive capacity reductions with respect to specific routes, or injury or damages from such reductions. Exh. 1, Singer Dep. Tr., Nov. 22, 2010, at 403:11–24; Exh. 14, Singer Dep. Tr., Nov. 23, at 644:23–645:5.

[120] Exh. 4, Gaier Expert Report, at Fig. 10; Exh. 16, Gaier Surreply Report, at Fig. 8. Dr. Singer has not contested the method Dr. Gaier used to reach these conclusions. *See also* Exh. 28, Singer Dep. Exh. 5 (analysis showing AirTran's base fare reductions relative to Southwest varied by city).

Dr. Gaier also showed that AirTran's base fare reductions varied with a route's percentage of Bag-Checkers—class members traveling on routes with the highest percentage of Bag-Checkers paid $15 less on average, while class members traveling on routes with the lowest percentage paid only $4.61 less on average.[121] Further, Dr. Gaier found that AirTran's base fare reductions varied over time—year-over-year, class members paid an average of $12.44 less during the first quarter of 2009, $12.95 less during the second quarter, and $19.49 less during the third quarter.[122] Finally, Dr. Gaier showed that AirTran's base fare reductions increased in proportion to the amount of the base fare—AirTran reduced base fares by $14.85 on average where class members paid 10th percentile (lowest) base fares and by $28.77 on average where class members paid 90th percentile (highest) base fares—nearly 100% of the FBF.[123]

In view of the variation in base fare reductions caused by unbundling the FBF, proof of impact requires individualized evidence bearing on each class member's travel itineraries and fares paid on AirTran and Delta. Specifically, the Court would need to hear evidence concerning: all of a class member's flights on AirTran and Delta after December 5, 2008, including the route, date and time of

[121] Exh. 16, Gaier Surreply Report, at ¶ 51 and Fig. 11.
[122] *Id*. at ¶ 17 and Fig. 3.
[123] Exh. 4, Gaier Expert Report, at ¶ 60 and Fig. 14.

travel, date of purchase, base fare, and fare bucket; whether the flight was enabled by the FBF; whether the class member paid an FBF on each of those flights; whether the class member paid for other passengers' travel on those flights; and whether the other passengers checked bags on those flights.[124] The Court would need to determine the base fare the class member would have paid but for the alleged conspiracy. Finally, the Court would need to compare the total amount of base fare reductions with the total amount paid in FBFs for each class member. These myriad considerations show that individual issues vastly predominate the issue of impact, and compel the conclusion that this case is ineligible for class treatment under Rule 23.

2. Plaintiffs' and their expert's contentions that impact can be proved using common evidence are meritless.

Despite the numerous individualized inquiries that would be required to prove impact, Plaintiffs and their expert, Dr. Singer, nevertheless claim that common issues predominate this element of Plaintiffs' Section 4 claim.[125] Plaintiffs rely on three cases involving the airline industry, asserting that the

[124] A detailed example of the type of individualized inquiry Plaintiffs' claim would require is set forth in AirTran's response to Plaintiffs' interrogatory requiring AirTran to specify the net impact of the FBF on Plaintiff Stephen Powell's Baltimore-Boston flight. *See* Exh. 21, Responses to Interrogatory Nos. 3 and 4, Defendant AirTran's Responses and Objections to Plaintiffs' Third Set of Interrogatories.

[125] Pl. Mem. at 30–32; Exh. 2, Singer Reply Report, at ¶¶ 77–91.

present case involves "much simpler claims and even more common issues than the issues presented" in those cases.[126] But none of these cases involved an alleged conspiracy to fix "a small part of the total price paid for air travel,"[127] and so none of them required a court to consider the effect of offsetting base fare adjustments, which ensure continued competition. As such, this case does not present the concern Judge Shoob expressed in *Domestic Air* that declining to certify the class would "exempt[] [the airline industry] from the purview of the civil antitrust laws."[128] Perhaps more importantly, these cases were decided before the trend amongst courts of appeals towards more rigorous standards for class certification.[129] For example, while the Eastern District of Michigan declined to resolve the battle of the experts in *Northwest Airlines* in 2002,[130] the Sixth Circuit considered and rejected the plaintiff's expert evidence in *Rodney* in 2005.[131]

Plaintiffs also rely on *Domestic Air* to argue that "transportation of a first checked bag on a domestic airline passenger flight" is a "homogenous service,"

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[126] Pl. Mem. at 20–22 (*citing In re Nw. Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002); *Midwestern Mach. v. Nw. Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991)).
[127] Order at 41.
[128] *Domestic Air*, 137 F.R.D. at 683.
[129] *See Vega*, 564 F.3d at 1265–1266; *Hydrogen Peroxide*, 552 F.3d at 311–312, 316–318; *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 32–41 (2nd Cir. 2006), *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–677 (7th Cir. 2001)..
[130] 208 F.R.D. at 223.
[131] 146 Fed. Appx. at 789 (crediting defendant's expert evidence over plaintiff's).

and thus susceptible to common proof of impact. But *Domestic Air* bears no resemblance to the facts of this case, where the challenged pricing conduct had complex effects that increased an unbundled cost to Bag-Checkers, but caused system-wide base fare reductions and corresponding benefits to class members across routes and over time.

Dr. Singer opines that common evidence exists "to show that all or nearly all Class members paid an overcharge, and thus suffered antitrust injury."[132] This opinion is incorrect for three reasons. First, Dr. Singer claims that common evidence shows that class members necessarily paid overcharges for flights on which they also paid FBFs.[133] As explained above, this approach is incomplete because it ignores the base fare reductions a class member received, and therefore conflicts with *Valley Drug*.[134]

Second, Dr. Singer claims that Plaintiffs can exclude putative class members who benefited by using information "such as names and addresses" that may be obtained from Defendants' passenger records.[135] But Dr. Singer admitted that he has never examined Defendants' passenger records.[136] In fact, AirTran's PNRs

[132] Exh. 2, Singer Reply Report, at ¶ 77.
[133] *Id*. at ¶¶ 78–82.
[134] *See* II.A., II.B., *supra* (discussing *Valley Drug*, 350 F.3d at 1190–1191).
[135] Exh. 2, Singer Reply Report, at ¶ 114.
[136] Exh. 14, Dep. Tr., Singer Dep. Tr., Nov. 23, 2010, at 571:11–25.

lack identifying information, such as addresses and phone numbers, for many passengers.[137] And because many names in the PNRs are not unique, they cannot reliably be used to identify class members who flew additional trips on AirTran and/or Delta.

Third, although he concedes that unbundling could induce carriers to enter new routes,[138] Dr. Singer provides no methodology at all for determining impact for class members who traveled on FBF-enabled routes.[139] For such routes, assessing injury requires the Court to determine what the putative class member would have paid but for the FBF, and the "but for" price on FBF-enabled routes must be based on non-party airlines that compete on those routes. By failing to offer any method for determining injury or damages for such class members, Plaintiffs have not met their burden under Rule 23(b)(3).

3. Plaintiffs have failed to offer a reliable method for calculating damages using common evidence.

To carry their burden under Rule 23(b)(3), Plaintiffs must also offer a reliable method for calculating the amount of damages by common evidence.[140] This method must "reasonably approximate actual economic losses" for each class

[137] Exh. 16, Gaier Surreply Report, at ¶¶ 62–63.
[138] Exh. 1, Singer Dep. Tr., Nov. 22, 2010, at 493:22–494:6.
[139] Exh. 14, Singer Dep. Tr., Nov. 22, 2010, at 491:25–493:12.
[140] *See Polypropylene Carpet.*, 178 F.R.D. at 617–25.

member.[141] "Even in class actions, proof of damages must be presented plaintiff-by-plaintiff, and generalized, broad-brush damages arguments will not suffice."[142] In particular, "[i]t is not permissible to use methods such as averaging damages to sweep individual issues under the judicial rug."[143] Moreover, aggregating classwide damages is impermissible when it results in a "fluid recovery," which is "the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class."[144]

Plaintiffs have not proposed a method for calculating the damages suffered by each putative class member. Instead, Dr. Singer has offered a method for calculating the aggregate damages suffered by the class as a whole.[145] He proposes to calculate damages beginning with the aggregate amount of FBFs collected by

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[141] *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303 (5th Cir. 2003).
[142] *Lemon v. Harlem Globetrotters Int'l, Inc.*, 437 F. Supp. 2d 1089, 1104 n. 10 (D. Ariz. 2006) (collecting cases).
[143] *Id.* (*quoting In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 87 (D. Mass. 2005)).
[144] *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) (emphasis in original) (*internal citation omitted*); *see also Windham v. American Brands*, 565 F.2d 59, 62–63 (4th Cir. 1977) (*en banc*) (describing fluid recovery as "illegal, inadmissible as a solution of the manageability of problems of class actions and wholly improper."); *In re Hotel Tel. Charges*, 500 F.2d 86, 89–90 (9th Cir. 1974) (finding hotel telephone surcharges "varied from hotel to hotel" and holding that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes."); *Domestic Air*; 137 F.R.D. at 691–692 (fluid recovery improper).
[145] Exh. 29, Singer Expert Report, at ¶¶ 88–89; Exh. 2, Singer Reply Report, at ¶¶ 92–121; Exh. 14, Singer Dep. Tr., Nov. 23, 2010, at 585:24–586:6.

AirTran and Delta, and then subtracting various other aggregate amounts, such as the "aggregate offsets to all passengers," "aggregate offsets on flights where a bag was checked," and "total offsets paid to Class members."[146] In each case, the input for the calculation is an average amount. Dr. Singer offers no method for calculating the specific amount of each class member's overcharge, considering the flights, routes, dates of purchase, base fares, or numbers of passengers traveling with the class member, nor does he propose how to calculate the "but for" price of air travel. Dr. Singer's proposed aggregation methods fail to satisfy predominance under Rule 23(b)(3).

More fundamentally, Dr. Singer includes a set of calculations that purport to separate "winners" from "losers" based on "the number of occasions on which [a] Class member flew without checking a bag,"[147] relying on AirTran's and Delta's passenger records to determine the number of times class members flew without checking a bag.[148] For the reasons described above, one cannot consistently and reliably obtain this information from AirTran's and Delta's passenger records,[149] and so one cannot identify and exclude net "winners" from the class.

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[146] Exh. 30, Singer Dep. Exh. 22; *see also* Exh. 14, Singer Dep. Tr., Nov. 23, 2010, at 734:17–25.
[147] Exh. 2, Singer Reply Report, at ¶¶ 114–116.
[148] *Id.* at ¶ 114.
[149] *See* III.B.2, *supra.*

Consequently, Dr. Singer's damages methodology would produce an impermissible fluid recovery in which the class would recover damages for unsubstantiated claims. The Court should thus reject Plaintiffs' damages methodology as insufficient under Rule 23(b)(3).[150]

D. A Class Action Is Manifestly Not a "Superior" Means of Resolving the Millions of Idiosyncratic Factual Determinations Subsumed by Plaintiffs' Sweeping Class Definition.

For the reasons set forth above, Plaintiffs have also failed to establish by a preponderance of the evidence that a class action is "superior" to other methods of adjudication within the meaning of Fed. R. Civ. P. 23(b)(3)(D), because any attempt at certification would quickly founder on "likely difficulties in managing . . . [the proposed] class action."[151] As in *Rodney*, while Plaintiffs may contest the issues raised here as to individual class members, the resulting inquiries would devolve into numerous mini-trials, rendering this case unmanageable.[152]

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[150] *Bell Atl. Corp.*, 339 F.3d at 303; *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. Appx. 296, 298 (5th Cir. 2004).

[151] *Vega*, 564 F.3d at 1278 (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.2d 1180, 1190 (9th Cir. 2001); *Robinson*, 387 F.3d at 425 (noting that, under Rule 23(b)(3)(D), "'the difficulties likely to be encountered in the management of a class action'" presented "the most troublesome aspect" of the district court's certification order).

[152] 146 Fed. Appx. at 792.

E. Class Certification Is Inappropriate Under Rule 23(b)(2) Because the Plaintiffs Primarily Seek Monetary Damages.

Plaintiffs also move to certify a class to obtain injunctive relief pursuant to Rule 23(b)(2). But where plaintiffs seek monetary damages, Rule 23(b)(2) certification is appropriate only if the monetary damages are "incidental" to injunctive relief,[153] not when "appropriate final relief relates exclusively or *predominantly* to money damages.[154] Here, Plaintiffs focus predominantly on monetary damages,[155] as such, it is the injunction that is "incidental." Moreover, this case requires the Court to engage in "complex individualized determinations," making Rule 23(b)(2) certification inappropriate.[156] Consequently, the Court should deny Plaintiffs' motion for class certification under Rule 23(b)(2).

IV. CONCLUSION

For the foregoing reasons, AirTran respectfully requests that the Court deny Plaintiffs' Motion for Class Certification and Appointment of Class Counsel.

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[153] *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).
[154] *Cooper v. Southern Co.*, 390 F.3d 695, 721 (11th Cir. 2004) (*quoting* Fed. R. Civ. P. 23, advisory committee's note) (emphasis in original).
[155] *Compare* Pl. Mem. at 27–35 (discussing Rule 23(b)(3)) *with id.* at 35–36 (discussing Rule 23(b)(2)).
[156] *Murray*, 244 F.3d at 812 (rejecting class certification under Rule 23(b)(2) because assessing damages for individualized injuries compelled inquiry into each class member's individual circumstances).

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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION NO. 1:09-md-2089-TCB ALL CASES

CERTIFICATE OF SERVICE

I hereby certify that this pleading has been prepared in 14 pt. type consistent with the Rules of this Court. I further certify that on December 8, 2010, I electronically filed the foregoing, **AIRTRAN'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL** using the CM/ECF system, which will automatically send email notification of such filing to the following:

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APPENDIX OF RELEVANT RULES AND STATUTES

Federal Rule of Civil Procedure 23(a) and (b)

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

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

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * *

15 U.S.C. § 15(a)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee. The court may award under this section, pursuant to a motion by such person promptly made, simple

interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.