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**
	)	**FILED UNDER SEAL**

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AIRTRAN'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION AND OVERVIEW

Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Class Certification ("Pl. Suppl. Br.") was filed over fourteen months ago, and almost three years have passed since AirTran filed its original Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel ("AirTran Opp'n Br."). In that time, the Supreme Court has soundly rejected the Rule 23 legal standards that Plaintiffs have been urging, and as a result, key cases relied upon by Plaintiffs have been reversed or vacated.[1]

In 2011, the Supreme Court began sharpening the standards that apply to class certification in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011) ("*Dukes*"), emphasizing that judicial efficiency is a touchstone and that "[t]he class action is an *exception*" that requires an affirmative showing of compliance with the Rule 23 requirements before certification can be granted.[2] Class certification

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[1] *See* Pl. Suppl. Br. at 5-6 (citing *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013), and other cases relying on it)); Pl. Suppl. Br. at 10-13 (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1 (D.D.C. 2012), *vacated & remanded*, 725 F.3d 244 (D.C. Cir. 2013)).

[2] *Dukes*, 131 S. Ct. at 2550-52 (citation and internal quotations omitted). Judicial efficiency depends not just on whether plaintiffs have raised common "questions," but also whether "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 131 S. Ct. at 2551 (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

undermines efficiency and is not proper where it would deny the defendant defenses that are unique to individual class members, nor when "a great deal of individualized proof" remains to be presented (and challenged) after class wide issues are adjudicated.[3] The Supreme Court in *Dukes* further held that "Trial by Formula" based on a subset of class members cannot be used to deny the defendant the right to dispute damages claimed by individual class members.[4]

Last term, the Supreme Court decided three more class action cases that built upon *Dukes*: *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) ("*Amgen*"), *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013) ("*Comcast*"), and *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013) ("*Italian Colors*"). *Dukes* and these decisions, and their lower court progeny, have clarified the exacting standards that district courts are required to apply before certifying a class when analyzing the underlying merits of Plaintiffs' case, resolving conflicting expert opinions, and determining the extent of alleged harm throughout the proposed class.[5]

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[3] *In re Fla. Cement & Concrete Antitrust Litig.*, No. 09-23187-CIV, 2012 WL 27668, at *5-6 (S.D. Fla. Jan. 3, 2012).

[4] *Dukes*, 131 S. Ct. at 2561 ("The Court of Appeals believed that it was possible to replace such [individual] proceedings with Trial by Formula. . . . We disapprove that novel project.").

[5] Moreover, class certification for injunctive relief under Rule 23(b)(2), as Plaintiffs originally claimed (Reply in Support of Plaintiffs' Motion for Class

First, *Amgen* clarified the extent to which district courts must examine the merits of Plaintiffs' case during class certification. Although the district court should not decide whether the plaintiffs would win or lose, it must decide whether the proposed class is sufficiently cohesive that the class members will "prevail or fail in *unison*."[6] Here, because the putative class contains not just "losers" but also "net winners," the class members will not "prevail or fail in unison."

Comcast followed, and had perhaps the clearest direct impact on antitrust class actions such as this one. The Court instructed that predominance cannot be shown when "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[7] To make that determination, the district court must rigorously analyze plaintiffs' expert opinions. It is not enough that an expert gives assurances that he can submit a methodology that can be applied class wide—the district court must be satisfied that the proposed

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Certification and Appointment of Class Counsel ("Pl. Reply Br.") at 35-36), is inappropriate unless the monetary relief sought is incidental to the injunctive or declaratory relief. *Dukes*, 131 S. Ct. at 2557.

[6] *Amgen*, 133 S. Ct. at 1191 (emphasis added). On the *Amgen* facts, "[i]n no event will the individual circumstances of particular class members bear on the inquiry." *Id.*

[7] *Comcast*, 133 S. Ct. at 1433.

methodology is reasonable and that it will work. Doing less would reduce Rule 23's predominance requirement to a "nullity."[8]

Finally, in *Italian Colors*, another antitrust class action, the Second Circuit had held that, because individual class member harm would be too small to pursue individually, invalidating a "no class action" clause in defendant's contracts was justified to permit the class to proceed. The Supreme Court reversed, holding that the lack of a financial incentive to pursue individual claims did not create an exception to Rule 23.[9]

These Supreme Court cases, and lower court decisions that followed (*e.g., In re Rail Freight Fuel Surcharge Antitrust Litigation,* 725 F.3d 244 (D.C. Cir. 2013); *In re Deepwater Horizon*, Nos. 13-30315, 13-30319, 2013 WL 5473330 (5th Cir. Oct. 2, 2013); *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16 (D.D.C. 2012)), have only strengthened AirTran's opposition to class certification in this case.

As AirTran demonstrated in its Opposition Brief, and as further supported by recent case law, class certification is inappropriate in this case because the unbundling of first bag fees from the base fare had widely variable effects on

[8] *Comcast*, 133 S. Ct. at 1433.
[9] *Italian Colors*, 133 S. Ct. at 2309-10.

individual members of the putative class. Indeed, some members of the proposed class were not injured at all.

Basic economics predicts, and the evidence confirms, that AirTran's unbundling of the first bag fee led to reductions in base fares. But, these reductions were neither uniform nor formulaic. Rather, the evidence shows that AirTran reduced base fares over time and across routes differently based on many factors, including demand, the percentage of passengers who check a bag on a route, the date of the flight, and whether the fare was relatively expensive or inexpensive. Even if published fares remained unchanged, the effective base fare declined because airlines continuously manage the number of seats in different fare "buckets" for each flight, adding and subtracting seats in different buckets as seats are sold or remain unsold. As a result, two passengers traveling on the same route at different times, or at the same time on different routes, or even on the same flight, could have been impacted very differently by unbundling. And some class members could have flown on flights that would not have been offered at all in the absence of unbundling.

Record evidence also shows that some passengers benefitted from unbundling. If a passenger checked a bag only one-way on a round trip itinerary, often the base fare reduction would exceed the bag fee. Similarly, if a family or

group traveled together but checked fewer bags than passengers, their total fare could be lower after unbundling. And on average, passengers who traveled on AirTran two or more times during the class period for every bag fee they paid would be better off. Plaintiffs have not excluded these "net winners" from their proposed class, and have not proposed a reliable method to do so. A class cannot contain members who were not injured.[10]

It is not surprising that Plaintiffs have not proposed an acceptable methodology to determine which individual class members were harmed and by how much.[11] To determine whether any specific passenger was better or worse off would require evidence specific to that passenger's bag fee itinerary(ies) and overall travel history during the class period. To measure harm and damages, plaintiffs would have to compare the "but for" price without the alleged antitrust violation (*i.e.*, without unbundling) and the actual total price paid. But, Plaintiffs have done neither. Establishing each "but for" fare would require Plaintiffs to offer evidence about route, time of day and year, advance purchase and other

[10] *In re Deepwater Horizon*, 2013 WL 5473330, at *13-14. Some class members who were the initial purchasers of bag fees may have been uninjured because they were later reimbursed for travel expenses.

[11] Plaintiffs have proposed only a methodology that relies on class wide averages, an approach the law condemns. *See* Memorandum of AirTran Airways, Inc. in Support of Its Motion to Strike Class Certification Testimony of Dr. Hal J. Singer ("AirTran *Daubert* Br."), Part II.B. and *infra* Section IV.

factors as to thousands of the members in the proposed class.[12] AirTran would of course be entitled to challenge such evidence as to each passenger, as appropriate. In addition, AirTran may in its defense offer proof that a specific flight flown by a class member would not have existed at all but for unbundling. A class action cannot deprive AirTran of those defenses, or the right to challenge the extent of damages claimed by differently situated class members.[13]

Plaintiffs nevertheless argue that common issues predominate because: (1) Class members who suffered net harm are "widespread" within the class; (2) By presenting its evidence of base fare reductions at this stage, AirTran is asking the Court to "prematurely" resolve the merits of Plaintiffs' claims; (3) Plaintiffs have proven, sufficiently to win class certification (*i.e.,* by a preponderance of the evidence), that AirTran did *not* reduce its base fares after unbundling; and (4) Even if AirTran did reduce its base fares, Plaintiffs can still prove antitrust injury and amount of damages for each class member with common evidence (and remove un-injured members from the class at a later time), because their expert provided a

[12] The proposed class is over 9 million strong for AirTran passengers alone, Exh. 1, Gaier Surreply Report Fig. 13, and growing every day under Plaintiffs' open-ended class definition.

[13] *Dukes*, 131 S. Ct. at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (quoting 28 U.S.C. § 2072(b)).

methodology based on aggregate damages and class wide averages. Plaintiffs' arguments are without merit.

First, Plaintiffs' argument is premised on an outdated legal standard that has been rejected by the Supreme Court and Eleventh Circuit. Under the proper legal standard, Plaintiffs must show, at this stage and by a preponderance of the evidence, that "all or virtually all" of the class members were in fact injured by unbundling. Plaintiffs have not met that burden. *Second*, Plaintiffs ignore or dismiss extensive evidence showing that Defendants (and all unbundling airlines) reduced base fares relative to their bundled competitors following adoption of first bag fees, offering in response only a handful of incomplete or misconstrued sound bites from the record, and their expert's self-contradictory analysis, which is against the clear weight of the record. *Third*, Plaintiffs' expert's harm and damages methodology is insufficient as a matter of law because it estimates only aggregate damages for the class as a whole, and can calculate only whether a hypothetical average class member was injured by unbundling. But an antitrust plaintiff must prove that he was injured, and being a member of a class does not expand his rights to recover damages. The law does not permit such averaging techniques that gloss over whether individual class members in fact suffered an antitrust injury.

II. PLAINTIFFS' ASSERTED RULE 23 STANDARD HAS BEEN SOUNDLY REJECTED

Plaintiffs rely on obsolete principles of law to support their motion for class certification.[14] In a single subheading of their Supplemental Brief, Plaintiffs misstate the applicable law three times:

> Recent Cases Confirm That Class Certification Is Appropriate Where *Plausible* Common Methods Can Show That *Most* Class Members Were *Affected*

Pl. Suppl. Br. at 4, heading 2 (emphasis added).

A. A "Plausible" Methodology for Measuring Harm Is Insufficient

Plaintiffs assert that their burden only requires that they proffer a "plausible" methodology to meet the Rule 23 requirements.[15] After *Comcast* and *In re Rail Freight Fuel Surcharge*, that is no longer sufficient. "It is not enough to submit a questionable model whose unsubstantiated claims cannot be refuted through *a priori* analysis. Otherwise, 'at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how

[14] While Plaintiffs did not have the benefit of *Amgen*, *Comcast, In re Rail Freight Fuel Surcharge,* or *In re Deepwater Horizon* for their Supplemental Brief, their neglect of *Dukes* and the Eleventh Circuit's opinion in *Sher v. Raytheon Co.,* 419 F. App'x 887 (11th Cir. 2011), is glaring.

[15] Pl. Suppl. Br. at 4-5.

arbitrary the measurements may be.'"[16] "Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity."[17]

The district court in *In re Rail Freight Fuel Surcharge* granted class certification after accepting plaintiffs' expert's models as "plausible and workable," even though it generated "false positives" that attributed damages to uninjured class members.[18] The D.C. Circuit reversed on this precise point and noted that while prior to *Comcast* "the case law was far more accommodating to class certification under Rule 23(b)(3)," it is clear that "Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance – the rule commands it."[19]

B. It Is Not Enough To Show Harm to "Most" Class Members, or that Harm Was "Widespread"

Class certification is improper if Plaintiffs cannot reliably isolate, without individualized inquiry, those customers who were harmed by unbundling from those who were not.[20] To succeed, an antitrust plaintiff must prove that it suffered

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[16] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 254 (quoting *Comcast*, 133 S. Ct. at 1433).
[17] *Comcast*, 133 S. Ct. at 1433.
[18] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 250, 253.
[19] *Id.* at 255.
[20] *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003) ("no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the

injury from alleged antitrust violation. Because the Rules Enabling Act says that rules of procedure, like Rule 23, "shall not abridge, enlarge or modify any substantive right,"[21] a class cannot contain persons who were not injured and thus could not assert an antitrust claim.[22] Further, such a class would violate the *Amgen* requirement that class plaintiffs must "prevail or fail in unison."[23]

Plaintiffs, however, contend that they need only show "widespread impact," or that "most" class members were "affected" rather than universal harm throughout the class.[24] But court of appeals have held that plaintiffs must show that all or nearly all class members were in fact injured by the challenged conduct to satisfy the Rule 23 requirements; "most" or "widespread" harm is insufficient.[25]

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named representatives of the class."); *In re Deepwater Horizon*, 2013 WL 5473330, at *13.

[21] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)).

[22] *In re Deepwater Horizon*, 2013 WL 5473330, at *13 (the Fifth Circuit reversed certification of a settlement class holding "the district court had no authority to approve the settlement of a class that included members that had not sustained losses at all, or had sustained losses unrelated to the oil spill").

[23] *Amgen*, 133 S. Ct. at 1191.

[24] Pl. Suppl. Br. at 4, 7-8 (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 818 (7th Cir. 2012).

[25] *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252 (plaintiffs must "show that they can prove, through common evidence, that *all* class members were in fact injured" (emphasis added)); *see also In re K-Dur Antitrust Litig.*, 686 F.3d 197, 222-23 (3d Cir. 2012) (concluding that plaintiff's theory of impact, if successful, would prove that "all (or virtually all) class members" were injured), *vacated on other grounds & remanded*, 133 S. Ct. 2849 (2013).

Here, as in *Valley Drug*, *In re Rail Freight Fuel Surcharge* and *In re Deepwater Horizon*, AirTran and Delta have presented extensive evidence showing that a significant number of putative class members were not harmed, but instead benefitted from the adoption of the first bag fee.[26] For that reason alone, the proposed class cannot be certified.

C. A Class Cannot Be Certified When Some Class Members Benefitted From Unbundling Bag Fees

As AirTran explained in its Opposition to Plaintiffs' Motion for Class Certification,[27] the Eleventh Circuit held in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003) that a class could not be certified under Rule 23 where some putative class members realized net benefits from the defendants' allegedly anticompetitive conduct in separate, subsequent transactions.[28] One of this Court's sister district courts recently applied this rule and found that Rule 23(b)(3)'s predominance requirement was not satisfied when, in a price fixing case, the fact "[t]hat some customers avoided paying price increases or artificially-stabilized prices, is inconsistent with Plaintiffs' theory of common impact."[29]

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[26] AirTran Opp'n Br. at 10-15; Exh. 2, Gaier Expert Report at ¶¶ 63-65 & Fig 16.
[27] AirTran Opp'n Br. at 17-21, 23.
[28] *Valley Drug*, 350 F.3d at 1190-91.
[29] *In re Fla. Cement & Concrete Antitrust Litig.*, 2012 WL 27668, at *9.

Other districts have similarly denied class certification in antitrust cases where the mix of different products purchased by class members made it difficult to segregate class members who had ambiguous harm or offsetting gains. In *Kottaras*, 281 F.R.D. at 22-25, the district court denied class certification where an allegedly anticompetitive merger caused some grocery prices to rise and others to fall, and where the specific purchases by each class member would have to be proven with individual evidence to determine whether the member was, on balance, harmed by the merger.[30]

Plaintiffs even ignore class members who could have benefitted from unbundled bag fees during a single transaction, including passengers who (1) paid a first bag fee to AirTran on only one flight of a round trip itinerary or other multi-segment trip;[31] (2) paid for other passengers to travel on their same itinerary;[32] and (3) traveled on routes that AirTran would not have serviced but for unbundling the first bag fee.[33]

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[30] *See also In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090, 2012 U.S. Dist. LEXIS 103215, at *29-30 (D. Minn. July 16, 2012) (rejecting class certification because significant variance between mix and price of products purchased by class members precluded finding of predominance).

[31] AirTran Opp'n Br. at 12.

[32] *Id.* at 13.

[33] *Id.* at 13-14.

Although Plaintiffs attempt to distinguish cases from other circuits requiring that net benefits of challenged conduct be considered, their suggestions that bag fees and base fares are purchased "separate and apart" from one another, or that the air travel with baggage is not an "indivisible product," are without merit.[34] A checked bag cannot be purchased without a base fare, and indeed the Court has already acknowledged that first bag fees are "part of the total price paid for air travel," even if only a small part.[35]

Plaintiffs also argued in their Supplemental Brief that they merely need to show that class members were "affected" by unbundling, that is, that they paid a bag fee at some point during the class period,[36] and that offsetting benefits from an alleged conspiracy to fix prices are irrelevant to antitrust injury as a matter of law.[37] In arguing that offsetting benefits are irrelevant, Plaintiffs rely on three Supreme Court cases that stand for a completely different proposition – that only the "direct purchaser" has "antitrust standing" in an antitrust case. A "direct purchaser" has antitrust standing even if he has passed on all or part of the alleged

[34] Pl. Reply Br. at 23-25 (citing *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir 2005); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506 (S.D. Ill. 2004)).
[35] Order (granting in part defendants' motion to dismiss [Dkt. 137]) at 41; *see also* AirTran Opp'n Br. at 19, n.74.
[36] Pl. Suppl. Br. at 4-5; Pl. Reply Br. at 1.
[37] Pl. Reply Br. at 19-21.

overcharge to an "indirect purchaser."[38] In *Valley Drug*, the Eleventh Circuit explained why this line of authority is entirely inapplicable to the issues here, noting that the Supreme Court's direct purchaser cases present a "distinctly separate question from the issue of whether class certification is appropriate."[39] The issue here is not whether direct purchasers (passengers who paid bag fees) have standing, but rather whether net beneficiaries of unbundling belong in a Rule 23 class.[40] They do not. 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."[41]

D. *Daubert* Challenges and Conflicting Expert Testimony Must Be Resolved Prior to Class Certification

Dukes, *Comcast*, and *Sher v. Raytheon Co.,* 419 F. App'x 887 (11th Cir. 2011) ("*Sher*") stand in direct conflict with Plaintiffs' assertion that consideration of the merits in assessing compliance with the Rule 23 requirements is premature

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[38] *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).
[39] *Valley Drug*, 350 F.3d at 1192, 1193.
[40] *See* AirTran Opp'n Br. at 11-12 (citing Exh. 2, Gaier Expert Report at ¶¶ 63-65 & Fig. 16); Exh. 1, Gaier Surreply Report at ¶ 60 ("at least 21% of the frequent travelers I identified would not be harmed.").
[41] *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000). Contrary to Plaintiffs' argument (Pl. Reply Br. at 23-24), cases alleging price fixing are not exempt from the requirement that courts consider the harms and the benefits from the challenged conduct at the class certification stage. *In re Fla. Cement & Concrete Antitrust Litig.*, 2012 WL 27668, at *6.

or impinges their Seventh Amendment rights.[42] In *Sher*, the Eleventh Circuit had held—even before the Supreme Court's decision in *Comcast*[43]—that full *Daubert* examinations are necessary as a matter of law at the class certification stage where the expert's opinion is critical to class certification. 419 F. App'x at 890-91. In so holding, the Eleventh Circuit followed the Seventh Circuit's analysis in *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010), where that court found that "when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."[44] And

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[42] Pl. Suppl. Br. at 6 (citing *Messner*, 669 F.3d at 823). Plaintiffs fail to understand that the Rule 23 merits inquiry is necessarily antecedent to trial, limited in scope to issues relevant to the Rule 23 inquiry, and is not binding on the trial court on the merits. *Amgen*, 133 S. Ct. at 1195 ("[m]erits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied (citations omitted)).

[43] The Supreme Court in *Comcast* characterized the lower court's refusal to consider the merits as "flatly contradict[ing] our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast*, 133 S. Ct. at 1433 ("And it is clear that . . . respondents' [expert's] model falls far short of establishing that damages are capable of measurement on a classwide basis."); *see also Dukes,* 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *We doubt that is so* . . ." (emphasis added, internal citation omitted)).

[44] *Accord In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 253 ("[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim'"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)

where the experts disagree, it is "error for the district court to decline to declare a proverbial, yet tentative winner."[45]

E. Plaintiffs' Reliance on Older District Court Decisions Granting Class Certification in Airline Cases Is Misguided

Plaintiffs rely on three district court cases, decided long before *Dukes, Amgen*, and *Comcast*, to argue that courts have rejected attempts to defeat class certification based on the complexity of pricing in the airline industry.[46] While the three cases are plainly distinguishable,[47] they all applied the same outdated legal standard advanced by Plaintiffs that has now been soundly rejected by the Supreme Court. Whatever persuasive authority they may have had, it is now clear that they no longer accurately describe the law of class certification.[48]

(holding that the district court correctly applied the evidentiary standard set forth in *Daubert* to a motion to strike an expert opinion submitted in support of class certification), *remanded to* 285 F.R.D. 492 (N.D. Cal. 2012).

[45] *Sher*, 419 F. App'x at 890.

[46] Pl. Reply Br. at 2 n.1.

[47] AirTran Opp'n Br. at 29, 32-34.

[48] The district court in *In re Northwest Airlines Corp.* declined to "delve into the merits of an expert's opinion or indulge 'dueling' between opposing experts" prior to granting class certification. 208 F.R.D. 174, 218-19 (E.D. Mich. 2002). The district court in *In re Domestic Air Transportation Antitrust Litigation,* 137 F.R.D. 677, 684 (N.D. Ga. 1991), analyzed the class certification question based on a passage in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), which the Supreme Court in *Dukes* characterized as "the purest dictum and is contradicted by our other cases." 131 S. Ct. at 2552 n.6. Finally, in *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001), the court found that defendants' showing that individualized questions existed as to the damages

III. COMPELLING EVIDENCE SHOWING NON-UNIFORM REDUCTIONS IN BASE FARES DUE TO UNBUNDLING PRECLUDES CLASS CERTIFICATION

Notwithstanding plaintiffs' contentions to the contrary, there is extensive evidence that AirTran and Delta reduced base fares after adopting a first bag fee.[49] Controlling Eleventh Circuit authority requires the court to consider the offsetting benefits attributable to these base fare reductions,[50] which are not uniform across markets (or even within routes) and thus require individualized determination. This makes class certification inappropriate.

A. Extensive Evidence Shows That Unbundled Carriers' Base Fares Fell After They Adopted First Bag Fees

Even Plaintiffs' expert conceded that AirTran's unbundled competitors (other than Delta) reduced base fares.[51] Thus, on AirTran routes that did not overlap with Delta, which account for over 50% of AirTran's passengers, and presumably a comparable share of the proposed class members, the unbundled

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calculation was insufficient to defeat class certification, a legal proposition that is highly dubious following *Comcast*, 133 S. Ct. at 1433-35.

[49] AirTran Opp'n Br. at 9-14; *see also* Exh. 2, Gaier Expert Report at ¶¶ 39, 42-43, 54 & Fig. 10; Exh. 1, Gaier Surreply Report at ¶ 29.

[50] *Valley Drug*, 350 F.3d at 1190.

[51] Exh. 3, Singer Dep. Tr., Nov. 22, 2010, at 387:24-388:24.

base fares of AirTran's competitors were reduced.[52] Assuming AirTran remained competitive with its non-Delta competitors, AirTran's passengers on these non-overlap routes received base fare reductions as well.[53] In addition, an internal AirTran pricing analysis—also relied upon by Dr. Singer—showed that Southwest earned an average $3 premium on its bundled fares compared with AirTran's base fares on select overlap routes.[54] The same analysis also demonstrates that such base fare differentials varied by market.[55] Internal emails at AirTran and Delta similarly show that the Defendants viewed ancillary fees like the first bag fee as offsetting reductions in the base fare due to unbundling.[56]

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[52] Exh. 1, Gaier Surreply Report at ¶ 4 ("even under Dr. Singer's view of the challenged conduct, more than 50% of AirTran's passengers would have obtained lower base fares as a result of AirTran's adoption of the first bag fee.").
[53] *Id.* ("even under Dr. Singer's view of the challenged conduct, more than 50% of AirTran's passengers would have obtained lower base fares as a result of AirTran's adoption of the first bag fee.").
[54] Exh. 4, Healy Dep. Ex. 24, AIRTRAN402702, AIRTRAN402703.
[55] *Id.*; Exh. 5, Singer Reply Report at ¶ 10 & n.15.
[56] *See* Exh. 6, Phillips Dep. Ex. 20, DL-CID25324E-00031788 (e-mail from Gail Grimmett indicating that she would prefer AirTran "stop all this crazy sale fare activity and take a fare increase" as an alternative to setting a first bag fee, because with a bag fee "there is no incentive to increase fares"); Exh. 7, AIRTRAN00190715 (e-mail from Roger Morenc speculating that Southwest can earn a premium in base fares over AirTran because customers "add up what will be their total trip costs," including the first bag fee); Exh. 8, AIRTRAN00473084 (e-mail from Matt Klein questioning whether a customer, who believed the price of checking a bag should be included in the base fare, would be "willing to pay more up-front that included the 1st bag fee").

Finally, AirTran's expert Dr. Gaier found that AirTran reduced its round-trip base fares in 2009 on average compared to bundled carriers, and that the amount of these base fare reductions varied over time and across routes.[57] For example, AirTran reduced its average roundtrip fare between Indianapolis and Tampa by $2.64 more than Southwest/JetBlue, but between Philadelphia and Orlando, AirTran's reduction was $10.42 more than Southwest.[58]

A government report on airline pricing corroborates Dr. Gaier's conclusions. In a study published in mid-2010, the U.S. Government Accountability Office ("GAO") reported that carriers "said that by charging fees for services, they are able to keep fares lower than if fares were inclusive of checked baggage and other services as they had been in the past."[59] Another recent study found that bundled carriers had higher fares, by route, than carriers charging a separate first bag fee.[60]

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[57] AirTran Opp'n Br. at 10; Exh. 2, Gaier Expert Report at ¶¶ 54-55, 60 & Fig. 14; Exh. 1, Gaier Surreply Report at ¶¶ 17, 29, 44-51 & Figs. 3, 5, 8, 10, & 11.
[58] Exh. 2, Gaier Expert Report Fig. 10.
[59] Exh. 9, U.S. Government Accountability Office, *Commercial Aviation: Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees*, at 13 (July 2010).
[60] Exh. 10, Jan K. Brueckner, Darin N. Lee, Pierre M. Picard, and Ethan Singer, *Product Unbundling in the Travel Industry: The Economics of Airline Bag Fees* (Sept. 24, 2013), CESifo Working Paper Series No. 4397, at 17-22 (finding that average base fares decreased after airlines adopted first bag fees, but that the decrease varied based on a number of factors including whether the passenger purchased a nonstop or connecting fare, traveled from a "higher-income market," or traveled to a "leisure market").

B. Plaintiffs' Evidence Purportedly Showing Base Fares Have Been Unaffected By Unbundling Is Unpersuasive

Plaintiffs' latest offering in support of class certification suffers the same incurable flaw as their prior briefs – the evidence submitted does not undermine the fact that base fares declined following the adoption of first bag fees. For example, Plaintiffs make much of documents that they contend show advance purchase base fares increasing.[61] These documents do *not* show whether fares were lower than they would have been but for unbundling, and cannot be used to prove common impact to all class members.[62] More revealing is that Delta's analysis shows that its fares *declined* relative to JetBlue, the only bundled carrier included in the chart.[63]

Similarly, Plaintiffs' expert's opinions regarding the impact of the first bag fee on base fares are internally contradictory and cannot show that all putative members of the class were harmed. Dr. Singer's primary damages methodology assumes, at least implicitly, that passenger demand for air travel is unaffected by unbundling,[64] but his game theory model presumes that passengers *do* consider

[61] Pl. Supp. Br. at 1-4.
[62] Exh. 11, DLBAG-00018701-03; Exh. 12, AIRTRAN015390288.
[63] Exh. 11, DLBAG-00018701-03.
[64] *See* AirTran *Daubert* Br., Part II.B.1.

first bag fees when making purchasing decisions.[65] Dr. Singer's own regression analysis showed that non-Defendant unbundled carriers did reduce base fares.[66] Finally, Dr. Singer's proposed "corrections" to Dr. Gaier's analysis leads to absurd results, such as that AirTran, had it not unbundled, would have nevertheless reduced its base fare by as much as 41% below Southwest's contemporaneous base fares.[67]

IV. RECENT CASES CONFIRM THAT PLAINTIFFS CANNOT RELY UPON A TRIAL-BY-FORMULA METHODOLOGY

While Plaintiffs argue that they need only demonstrate that antitrust injury is capable of proof at trial through evidence common to the class, they have failed to offer any method though which they may do so. Instead, Plaintiffs have offered an expert, Dr. Singer, who provided a method for calculating "aggregate damages"

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[65] Exh. 13, Singer Class Cert. Report at ¶ 29 (acknowledging that "Delta has gained market share during the course of 2008 at the expense of other legacy airlines, such as U.S. Airways, which imposed a first bag fee while Delta did not. Delta's analysts emphasized that Delta would likely suffer similar losses in ATL to AirTran if it instituted a first bag fee and AirTran did not do the same."); *id*. at ¶ 34 ("Delta's analysis of the effects of other legacy carriers' imposition of first bag fee [sic] demonstrates that when one or several airlines impose a bag fee and a market rival(s) does not, market share shifts to the airline(s) not charging the fee.").

[66] Exh. 5, Singer Reply Report at ¶ 34 & Table 1 (unbundling first bag fees caused fares of airlines other than defendants to decline 2.37%); Exh. 3, Singer Dep. Tr., Nov. 22, 2010, at 387:24-389:2.

[67] Exh. 14, Gaier Reply Merits Report at ¶ 58.

that relies on "average offsets" of base fares.[68] AirTran has moved to exclude Dr. Singer's opinions because his methodology ignores extensive evidence presented by Defendants that base fares and fare reductions vary widely by route and over time based on variables that are not properly captured by aggregating and averaging.[69] Consequently, the "average offset" offered by Dr. Singer is not helpful in assessing by how much, if at all, any particular class member was injured. Indeed, the Supreme Court in *Dukes* specifically rejected the Ninth Circuit's "novel project" to replace a defendant's entitlement to individualized damages determinations for each class member with a formulaic determination of damages based on a subset of the putative class members.[70] AirTran is entitled to litigate its defenses to individual claims.[71] Numerous courts, including one in this

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[68] Exh. 5, Singer Reply Report at ¶¶ 92-121; *see also* Exh. 15, Singer Dep. Tr., Nov. 23, 2010, at 585:24-586:6 (one of three opinions offered that "aggregate damages can be performed reliably with common methods and evidence.").
[69] AirTran *Daubert* Br., Part II.B.3; AirTran Opp'n Br. at 4-6.
[70] *See Dukes*, 131 S. Ct. at 2560-61 ("We disapprove that novel project . . . [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); *see also United States v. City of N.Y.*, 276 F.R.D. 22, 37 (E.D.N.Y. 2011) ("*Wal-Mart*'s rejection of 'Trial by Formula' means that the underlying substantive law determines whether individual proceedings are required; a litigant may not convert an individual question into a common question by concocting a method of classwide proof that subverts rights created by the underlying substantive law.").
[71] *Dukes*, 131 S. Ct. at 2560 ("Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for back pay.").

circuit, have rejected the use of averages to prove damages to individual class members.[72]

V. PLAINTIFFS' NONSENSICAL CLAIM THAT DEFENDANTS FAILED TO PLEAD SET-OFF IS NO BASIS FOR CLASS CERTIFICATION

In their Reply (to which AirTran has had no opportunity to respond), Plaintiffs raised a new argument that Defendants failed to plead the defense of set-off in their answers.[73] But base fare reductions are not setoffs. A setoff is "a type of counterclaim" that "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'"[74] AirTran's reduction of base fares does not create a "mutual debt" or give rise to a claim against its customers. Even if there could be a set off, in the Eleventh Circuit, a defendant is "not required to assert its set-off claims in its answer."[75]

VI. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Class Certification.

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[72] AirTran *Daubert* Br., Part II.B.3; *see also In re Fla. Cement & Concrete Antitrust Litig.*, 2012 WL 27668, at *10.
[73] Pl. Reply Br. at 25.
[74] *United States v. Finch*, 239 F.R.D. 661, 663 (S.D. Ala. 2006) (quoting *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995)).
[75] *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1259 (11th Cir. 2003).

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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**
	)	**FILED UNDER SEAL**

CERTIFICATE OF SERVICE

Pursuant to LR 7.1, NDGa, I hereby certify that this pleading has been prepared in 14 point, Times New Roman font, consistent with LR 5.1, NDGa.

I further certify that on October 25, 2013, I filed *Defendant AirTran's Opposition to Plaintiffs' Supplemental Brief in Support of Motion for Class Certification* with the Clerk of the Court and caused the same to be delivered via email to the following attorneys of record:

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