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

DELTA AIR LINES, INC.'S SUPPLEMENTAL BRIEF
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

As explained in Delta's Brief Opposing Class Certification, certification here is foreclosed for at least two overriding reasons: (1) class members are not ascertainable without extensive class-member specific discovery and adjudication; and (2) Delta has genuine and serious defenses to the injury claim of many class members, and allowing this case to proceed as a class action would improperly deprive Delta of its right to litigate and assert those defenses. Since the parties completed class certification briefing,[1] Plaintiffs' certification request has been further undercut by the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and by several Eleventh Circuit decisions. Those cases reinforce what was already clear: this case cannot be certified as a class action without running afoul of Rule 23, the Rules Enabling Act, and Delta's constitutional rights.

[1] Plaintiffs moved for class certification on June 30, 2010 (Dkt. 122). Delta filed its brief opposing class certification (Dkt. 221) ("Delta Opp'n") on December 8, 2010. Plaintiffs filed their Reply Brief (Dkt. 269) ("Plfs' Reply") in support of class certification on February 4, 2011. Plaintiffs filed their supplemental brief regarding class certification on September 10, 2012 (Dkt. 357) ("Plfs' Supp. Brief").

DISCUSSION

I. Plaintiffs Cannot Satisfy the "Ascertainability" Requirement for Class Certification

As the Eleventh Circuit recently reaffirmed, a class may not be certified unless the proposed class members are readily identifiable. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) ("Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is 'adequately defined and clearly ascertainable.'") (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)).

Plaintiffs, however, have failed to offer ***any*** methodology for identifying proposed class members—a failure that, on its own, dooms Plaintiffs' request for certification.

As Delta previously explained, it does not have data sufficient to identify members of the proposed class. Delta Opp'n at 28-30. This is due in large part to the fact that while **the class is defined to cover those who paid a first bag fee**, an airline *passenger* (whom Delta generally can identify) frequently is not the payor of a bag fee—as evidenced by the experiences of several of the Plaintiffs. *Id.* at 30-32.[2] As a result, **extensive, individualized discovery is the only possible**

[2] Plaintiffs' expert conceded that the payor of the bag fee is not necessarily the passenger. *See* Ex. 1, Singer Dep. Tr. at 177:9-12.

means to determine who paid for any given bag fee, and therefore to determine the identity of putative class members.[3]

Two recent decisions by the Third Circuit highlight the significance of Plaintiffs inability to propose a method of ascertaining the identity of putative class members. In *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012), the Third Circuit explained:

> The ascertainability requirement serves several important objectives. First, it eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.

Id. at 593 (internal citations and quotations omitted). Thus, "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* Moreover, "where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Id.* Because defendants' records

[3] Plaintiffs' expert never opined that class members could be identified readily. In fact, he disclaimed knowledge about the subject of class definition and membership, testifying at his deposition: "I'm not sure what constitutes a class member." Ex. 1, Singer Dep. Tr. at 176:8-9; *see also id.* at 176:24-177:8 (acknowledging his disclosed opinions and reports did not include a methodology for ascertaining the identity of putative class members).

were insufficient to identify putative class members, the Third Circuit reversed the district court's order granting class certification.

And in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013), the Third Circuit once again found the ascertainability requirement unfulfilled, and vacated a district court order granting certification. As that Court explained: "The method of determining whether someone is in the class must be 'administratively feasible.' A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership . . . . [T]o satisfy ascertainability as it relates to proof of class membership, the ***plaintiff must demonstrate*** his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." *Id*. at 307-08 (emphasis added).

Consistent with the approach of the Third Circuit, the Eleventh Circuit has recently affirmed denials of class certification based on problems with readily identifying class members. *See Walewski v. Zenimax Media, Inc*., 502 Fed. Appx. 857, 861, 2012 WL 6631506 (11th Cir. 2012) (affirming denial of class certification in light of difficulty identifying class members "without extensive fact-finding"); *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices*, 715 F. Supp. 2d 1265, 1275 (S.D. Fla. 2010)

("[T]he defendants' records only reveal the names of the attorneys who ordered their services, without regard to who ultimately bore the cost of the defendants' services, that is, the class members. . . . Because of the varying fee arrangements, it is impossible to ascertain the ultimate payor without requiring all of the defendants' customers to produce their accounting records so that the Court or an appointed administrator can determine whether the costs were absorbed by the attorney or the client."), *aff'd sub nom. Webber v. Esquire Deposition Servs.*, 439 Fed. Appx. 849, 851, 2011 WL 3822001 (11th Cir. 2011) (unpublished) ("The district court did not abuse its discretion in denying Appellants' motions for class certification. The district court discussed the difficulties associated with identifying class members who fit Appellants' proposed class definition.").

Here, like in *Marcus*, nothing in Delta's databases "shows or could show whether individuals should be included in the proposed class" because they cannot be used to determine who actually paid a first bag fee. Delta Opp'n at 28-30. Instead, "extensive and individualized fact-finding or 'mini-trials'" would be required to determine membership in the proposed class. *Id.* at 30-33.

Seeking to elide this problem, Plaintiffs suggest "the ascertainability requirement is satisfied here because 'the proposed class definition allows *prospective plaintiffs to determine whether they are class members with a potential*

right to recover.'" Plfs' Reply at 43 (quoting *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D. Cal. 2008)) (emphasis added). But the notion that the ascertainability requirement can be satisfied by having putative class members *themselves* determine their membership in the class has been expressly (and appropriately) rejected by several courts. For instance, as the Third Circuit explained in *Marcus*: "We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so. . . . Forcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." 687 F.3d at 594; *see also Carrera*, 727 F.3d at 309-12 (rejecting Plaintiffs' contention that "the class is ascertainable using affidavits of class members"); *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 214 F.R.D. 614, 617 (W.D. Wash. 2003).[4]

[4] The *PPA Products Liability Litigation* court rejected plaintiffs' proposal that proof of injury and class membership could be addressed during claims administration through "the use of sworn oaths or affidavits" to establish proof of purchase because such evidence does "not constitute conclusive proof of injury" and "'defendants would be permitted to cross-examine each class member[ ] regarding that alleged injury.'" 214 F.R.D. at 619 (quoting *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 554 (D. Minn. 1999)); *id.* at 618 ("It is unrealistic to suppose that defendants will accept sworn oaths or affidavits under these circumstances. Indeed the court would not expect them to do so.").

II. Recent Supreme Court and Eleventh Circuit Decisions Reaffirm Delta's Right to Present Class-Member Specific Evidence Necessary to Adjudicate Each Class Member's Claim of Injury-in-Fact

Delta has never disputed that the facts and legal issues concerning the *existence* (or non-existence) and *scope* (if any) of the alleged conspiracy concerning first bag fees are identical with respect to all members of the proposed class. But "the issue of liability in antitrust cases includes not only the question of violation, *but also the question of fact of injury, or impact*." *Alabama v. Blue Bird Body Co., Inc*., 573 F.2d 309, 320 (5th Cir. 1978) (emphasis added); *see id*. at 318 (liability under Section 4 of the Clayton Act "necessarily includes proof of injury to business and property"). And injury or impact must be established by ***each individual member of the proposed class***—just as would be required if these claims were brought in individual lawsuits rather than a mass action. *See*, *e.g*., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2009) ("Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, *every class member* must prove at least some antitrust impact resulting from the alleged violation.") (emphasis added). Both the Supreme Court and Eleventh Circuit have repeatedly made clear that the standards for proving injury are not lessened because the action is brought on behalf of a proposed class. *See*, *e.g*., *Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 613 (1997) (Rule 23 "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Sikes v. Teleline, Inc*., 281 F.3d 1350, 1365 (11th Cir. 2002) ("We reiterate that class treatment may not serve to lessen the plaintiffs' burden of proof.").

As explained in Delta's initial class certification opposition brief, Delta has substantial meritorious defenses to the injury claims of many class members. Specifically, Delta could show with individualized evidence that many members of the proposed class suffered no injury from Delta's adoption of a first bag fee, for one or more of the following reasons: (1) members of the proposed class were reimbursed for first bag fees they paid; (2) the adoption of first bag fees resulted in reductions in base fares more substantial than any bag fees paid; and (3) Delta's reduction of its second bag fee from $50 to $25 in conjunction with its adoption of a $15 first bag fee reduced the aggregate price of checking two bags from $50 to $40. *See* Delta Opp'n at 7-25.

Whether any particular proposed class member suffered injury as a result of the alleged conduct requires an assessment of *each* of these issues for that particular person or entity. Such assessments require substantial amounts of class-member specific information—as evidenced by the Plaintiff-specific discovery in

this case. *See* Delta Opp'n at 6-27. The issue of impact or injury cannot be fully adjudicated for a single member of the proposed class based solely on evidence common to all class members.

The Supreme Court's decision in *Dukes* reaffirms Delta's right to litigate these defenses to individual claims: "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*." 131 S. Ct. at 2561 (emphasis added); *see also id.* at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay.").[5]

Recent Eleventh Circuit case law also makes clear that Delta cannot be deprived of its right to show that common issues do not predominate because of the need to consider class-member specific evidence on the question of injury. In *Coastal Neurology, Inc. v. State Farm Mutual Auto. Ins. Co*., 458 Fed. Appx. 793,

[5] In *Dukes* and *Comcast* the Supreme Court reiterated that "the class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,' . . . [and that] in order to justify a departure from that rule 'a class representative must . . . suffer the same injury as the class members." *Dukes*, 131 S. Ct. at 2550 (internal citations omitted); *Comcast*, 133 S. Ct. at 1432 (same). Because Delta would prove through class-member specific evidence that not all class members did "suffer the same injury," this is further instruction from the Supreme Court about why class certification is inappropriate here.

2012 WL 205800 (11th Cir. 2012) (unpublished), reviewing an order denying class certification, the Eleventh Circuit rejected the argument that the district court had misapplied Eleventh Circuit precedents when it took account of State Farm's defenses in assessing the predominance requirement of Rule 23. As the court explained: "In performing its Rule 23(b)(3) predominance analysis, the district court did not err in considering the individualized defenses that State Farm would have to the proposed class members' claims." *Id.* at 794; *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1178 (11th Cir. 2010) (reversing order granting class certification, and criticizing the district court for "minimize[ing] the impact of Humana's defenses on the outcome of the predominance inquiry"); *Carrera*, 727 F.3d at 307 ("A defendant in a class action has a due process right to raise individual challenges in defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.").

A. Delta Has a Right to Show That The Adoption of First Bag Fees Resulted in Lower Fares for Some Class Members

Both economic theory and empirical evidence presented by Defendants' experts demonstrate that the adoption of a first bag fee resulted in lower base fares

for some passengers. Delta Opp'n at 8-13.[6] In their Supplemental Brief Plaintiffs ask the Court to (1) conclude now, as a matter of fact, that the adoption of a first bag fee did *not* result in lower base fares for some passengers, and (2) conclude now, as a matter of law, that base fare "offsets" do not preclude class certification. Plfs' Supp. Br. at 2-4; 9-13.[7] Both of Plaintiffs' requests should be rejected.[8]

---

[6] A recent paper by leading airline industry economists, including Professor Jan Brueckner of the University of California, updates and confirms the work of Delta's expert, Darin Lee, showing average fare reductions as a result of the adoption of first bag fees. Jan K. Brueckner et al., *Product Unbundling in the Travel Industry: The Economics of Airline Baggage Fees* at 11 (Working Paper Aug. 2013), *available at* http://www.socsci.uci.edu/~jkbrueck/ bag_fee.pdf (last visited Oct. 25, 2013).

[7] In their briefing Plaintiffs generally confuse a question relevant to the merits of each putative class member's claim ("What was the impact of adopting a first bag fee on a given base fare?") with an irrelevant question about motives ("Was a first bag fee adopted with the *intention* of reducing base fares?"). *See, e.g.*, Plfs' Supp Brief at 1-4. Plaintiffs also conflate published fares with average fares actually realized by the airline. *Id.* at 2-4. Average fares may go down because the airline is forced by make more lower fare seats available to passengers in response to reduced demand—even as published fares remain the same or even increase. *See* Delta Opp'n at 9 & n.6; Delta Opp'n Ex. 1, Expert Report of Daniel M. Kasper at ¶¶ 3, 7-15; Delta Opp'n Ex. 4, Expert Report of Darin N. Lee, Ph.D. at ¶ 13.

[8] Ironically, Plaintiffs warn against resolving merits issues at the class certification stage (Plfs' Supp. Brief at 6), but effectively ask the Court to rule now on a contested merits issue by rejecting at the class certification stage Delta's argument that the imposition of a first bag fee resulted in lower base fares for some putative class members. The Supreme Court recently made clear whether and to what extent merits issues are relevant at the class certification stage: "Merits 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." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

If the adoption of the first bag fee economically helped and harmed a putative class member, both effects must be considered.[9] *See, e.g.*, *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 140 (1968) ("The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages."); *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380 (4th Cir. 1982) (recognizing that "the beneficial byproducts of a legal wrong must be taken into account in measuring a plaintiffs' injury" as a "long-established principle[] of general applicability"); *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986) ("An antitrust plaintiff may recover only to the 'net' extent of its injury;

Plaintiffs also ask the Court to disregard the fact that their operative pleading alleges a conspiracy to "*increase prices*," in the hope the Court will prevent Delta from defending itself by addressing the impacts of the challenged conduct on "prices." *See* Delta Opp'n at 17-18 n.12.

[9] Plaintiffs' own expert has acknowledged the importance of considering "offsets" when assessing at class certification whether impact can be proven using classwide evidence. *See* Hal J. Singer, *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, ANTITRUST, Summer 2011, at 37 ("Economists who analyze common impact in cases with complementary products should understand . . . the different approaches that courts may apply to balance allegedly offsetting price effects, which may affect the ultimate conclusion on whether the burden to prove common impact can be satisfied.").

if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.").[10]

A recent Eleventh Circuit decision runs counter to Plaintiffs' contention (*see* Plfs' Reply at 2-4, 26-28) that class proceedings can be used to deprive a defendant of its right to litigate "offsets," "set offs" or other similar class member-specific issues going to the injury of each plaintiff. Reviewing an order denying class certification, in *DWFII Corp. v. State Farm Mutual Auto. Ins. Co*., 469 Fed. Appx. 762, 2012 WL 1002234 (11th Cir. 2012) (unpublished), the Eleventh Circuit determined that class certification had been denied appropriately given the defendant is "entitled to present *any unbundling or set off defenses* that would allow it to properly reduce the amount" due to each plaintiff. *Id*. at 765 (emphasis added).

Plaintiffs' Supplemental Brief ignores the Eleventh Circuit's discussion in *DWFII* of a party's right to present an "offset" defense, and instead relies on

[10] Plaintiffs are missing the point when they claim "Defendants do not dispute that a regression analysis using class-wide data is an appropriate methodology for determining whether there were base fare offsets." Plfs' Supp. Br. at 12. Regression analysis about ***average*** fares does not establish the effects on base fares paid for any particular class member. Indeed, as the Supreme Court's *Comcast* decision makes clear, the mere use of a regression analysis does not mean that it is sufficient to satisfy Rule 23. *See* 133 S. Ct. at 1433 ("[I]t is clear that, under the proper standard for evaluating certification, respondents' [regression] model falls far short of establishing that damages are capable of measurement on a classwide basis.").

district court decisions in *In re Blood Reagents*, 283 F.R.D. 222 (E.D. Pa. 2012) and *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 287 F.R.D. 1 (D.D.C. 2012), as support of their claim that any base fare "offsets" should be disregarded in deciding whether to certify the proposed class. But neither decision lends support to Plaintiffs' pursuit of class certification here.

Blood Reagents did not reject consideration of offsets in class certification analysis generally. Instead, the court rejected a particular methodology it found to be too "speculative" but expressly reserved the need to consider in certain cases *both* the helpful and harmful economic effects on putative class members in cases with "stronger evidence" of "offsetting benefits to consumers." 283 F.R.D. at 240.

As for the *Rail Freight* order upon which Plaintiffs rely, it subsequently was vacated by the court of appeals. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013) (vacating class certification order, and noting that before the Supreme Court's *Comcast* decision "the case law was far more accommodating to class certification under Rule 23(b)(3)").[11] But even that

[11] Plaintiffs' Supplemental Brief (Plfs' Supp. Br. at 5) relied on two other decisions that subsequently have been reversed or vacated. *See Behrend v. Comcast*, 655 F.3d 182 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013). *But see In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 722 F.3d 838 (6th Cir. 2013).

vacated decision did not categorically reject consideration of offsets, and instead expressly determined that the issue of potential "offsets" was "relevant to whether common evidence can be used to establish impact at trial." *Id.* at *21.

B. Delta Has a Right to Determine Whether Individual Class Members Were Reimbursed For Bag Fee Payments and Therefore Not Injured

A bag fee payor reimbursed for payment of a first bag fee has suffered no injury, and cannot establish liability or damages. *See*, *e.g.*, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 270-71 (D. Mass. 2004) (excluding from class "all persons or entities who suffered no economic harm" such as "those who are reimbursed in full for all drug purchases") (citing *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181 (11th Cir. 2003)). But determining whether the payor of a particular bag fee was reimbursed requires specific information about each transaction—a fact recognized by both current and former Plaintiffs.[12] Delta Opp'n at 30-32. The

[12] It is clear that any putative class member reimbursed for *all* bag fee payments suffered no injury or damages. For putative class members who were reimbursed for some *but not all* of their bag fees payments, ascertaining impact and damages requires determining for each and every bag fee payment whether reimbursement occurred.

inability to make this determination with proof common to the class is dispositive of the predominance inquiry mandated by Rule 23.[13]

In their Supplemental Brief Plaintiffs rely on *AT&T Mobility Wireless Data Services Tax Litigation*, 789 F. Supp. 2d 935, 967 (N.D. Ill. 2011), which Plaintiffs claim "found" that reimbursement "does not prevent certification." Plfs' Supp. Br. at 13. As Plaintiffs themselves note, however, *AT&T* concerned a proposed *settlement*. The district court—addressing the arguments of a single non-party objector to the settlement—considered the objector's suggestion that for those class members reimbursed by an employer the settlement funds should go to the employer instead of the employee. The court determined this objection was "not an obstacle to approving the settlement." *Id.*

The "reimbursement issue" in *AT&T* bears no resemblance to that presented here. Named Plaintiffs in this case have been reimbursed for the bag fees which supposedly are the source of their injuries. Delta contests the right of these and any other putative class members to seek damages for reimbursed first bag fees, and is entitled to class member-specific discovery to ensure it is not compelled to pay people who have suffered no conceivable injury. No such issues were

[13] Delta identified reimbursement as an affirmative defense in each of its Answers to Plaintiffs' complaints in the constituent individual actions prior to their consolidation before this Court. *See* Delta Opp'n at 22 n.16.

presented in *AT&T* where the court was asked to approve a settlement in which the defendant *agreed* to make payments to all class members, without regard to whether they were reimbursed. Nor was the *AT&T* court faced with the manageability issues presented here in the context of a proposed *litigation* class.

Nor can the reimbursement issue be brushed aside on the theory that instances of reimbursement are anomalies. On the contrary, reimbursement is prevalent.[14] Delta Opp'n at 30-32. In fact, at least one of the seven current named plaintiffs, and two of the 15 original plaintiffs who filed complaints in the constituent actions in this case, were reimbursed for one or more of the bag fees they allegedly paid to defendants. Extrapolating from the experiences of the class representatives suggests reimbursement is an issue for between 13% and 14% of the plaintiffs in this case. As set forth in Table 1, applying those percentages across the millions of passengers who paid a first bag fee to Delta between December 5, 2008 and September 30, 2013, suggest millions of passengers were reimbursed for those payments.

[14] According to a survey of 651 North American company travel departments by the Global Business Travel Association, 91% of the participating companies said they reimburse an employee's checked baggage fees. *See* Ex. 2, 2011 GBTA 2nd Annual Corporate Travel Policy Benchmarking & Insight Study at 23.

Table 1[15]

Number of Putative Class Members	Percentage of Putative Class Members Reimbursed	Potential Number of Putative Class Members Reimbursed
28,367,884	13%	3,687,825
	14%	3,971,504

Thus, Plaintiffs appear to be engaged in wishful thinking when they claim "there is no credible argument that any large segment of class members here could not have been harmed." Plfs' Supp. Br. at 8 n.13; *see also id.* at 9 ("Defendants are unable to identify or provide evidence of a 'great number' of proposed class members who 'could not have been harmed.'").

Former Plaintiff David Watson, who filed the original complaint in this litigation in May 2009, withdrew from this case *precisely because* he was reimbursed by his employer for first bag fees he paid, and therefore was not injured. *See* Delta Opp'n Ex. 21, Watson Dep. Tr. 11:12-12:8, 18:5-24. Mr. Watson testified that "[b]y getting reimbursed I felt like I had no skin in the game." *Id.* at 18:13-21.[1] He further testified that this meant he had suffered no economic harm as a result of Defendants' alleged unlawful conduct. *Id.* at 18:22-24 ("Q. You had been reimbursed by your employer and, therefore, you had no economic harm? A. Correct."). There is every reason to think that hundreds or thousands or

[15] *See* Ex. 3, Declaration of Darin N. Lee, Ph.D.

millions of proposed class members, like Mr. Watson, have "no skin in the game" and therefore have suffered no cognizable economic harm.

Plaintiffs further argue that Delta has failed to identify a case where reimbursement was recognized as posing a challenge for class treatment. But Delta has previously discussed *In re Northwest Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002),[16] where the district court did not resolve the reimbursement issues raised in initial briefing regarding class certification, but expressly acknowledged the rights of the airline defendants to explore those issues on a class member-specific basis. As the court explained: "the Court can find ***no principled basis*** for denying Defendants the opportunity to at least explore whether each individual class member incurred any out-of-pocket losses as a result of a Defendant's overcharge." *Id.* at 225 (emphasis added). Because there is no "principled basis" upon which Delta can be denied the right to class member-specific discovery to determine whether and to what extent each class member was reimbursed, class certification is inappropriate in this case.[17]

---

[16] *See* Delta's Reply in Support of Its Motion for Summary Judgment as to the Claim Asserted by Plaintiff Henryk Jachimowicz (Dkt. 276) at 8-9 & n.13.

[17] Plaintiffs appear to be under the impression that Delta is arguing no case can be certified if one or a few putative class members among millions were reimbursed for payment that caused the alleged harm. *See* Plfs' Supp. Br. at 14 n.17. Delta is making no such argument, and takes no position on that question. Here, there is evidence strongly suggestive that *large numbers* of putative class members have

III. Plaintiffs' Request for Certification Under Rule 23(b)(2) is Plainly Inappropriate After *Dukes*

Plaintiffs seek certification under Federal Rule of Civil Procedure 23(b)(2) "to enjoin Defendants' continued imposition of the unlawful first bag fee." Plfs' Opening Brief (Dkt. 124) at 36. As Delta observed in its initial class certification brief, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Comm. Note to Fed. R. Civ. P. 23(b)(2); *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001). Delta also observed in its initial class certification opposition brief that the relief sought in this case is predominantly money damages—a fact Plaintiffs did not contest in their Reply Brief. *See* Plfs' Reply at 44-45.

Dukes put to rest any notion that a case like this, where monetary damages are the thrust of the relief sought, can be certified under Rule 23(b)(2). As the Supreme Court clearly held: "[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)." 131 S. Ct. at 2558; *see also id.* at 2557 (having

---

been reimbursed, and there is no dispute that *evidence about that reimbursement requires class member-specific discovery*. In those circumstances, it is apparent that common evidence cannot be used to adjudicate critical elements of liability for each putative class member, and class certification is therefore inappropriate. *Cf. Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (reversing grant of class certification, and observing that "if the defendant has non-frivolous defenses to liability that are unique to individual class members, any common question may well be submerged by individual ones").

already "expressed serious doubt about whether class claims for monetary relief may be certified under [Rule 23(b)(2)] . . . [w]e now hold they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief").[18]

IV. Recent Case Law Makes Clear That Proposed Expert Testimony Must Be Scrutinized at the Class Certification Stage

Plaintiffs have submitted reports from their proposed expert, Dr. Hal Singer, in support of class certification. *See* Plfs' Opening Brief (Dkt. 124), Ex. 1; Plfs' Reply Brief, Ex. 29. Because Dr. Singer's testimony fails to satisfy the requirements of Federal Rule of Evidence 702 and relevant case law, Delta plans to file a motion to strike. And the Supreme Court's decisions in both *Dukes* and *Comcast* make clear that scrutiny of Dr. Singer's work and opinions is necessary at the class certification stage.[19]

---

[18] Post-*Dukes*, courts have consistently denied certification under Rule 23(b)(2) in cases where the final relief sought relates exclusively or predominantly to money damages. *See, e.g.*, *Davis v. Cintas Corp.*, 717 F.3d 476, 489-91 (6th Cir. 2013) (affirming denial of class certification); *Nationwide Life Ins. Co. v. Haddock*, 460 Fed. Appx. 26, 28-29, 2012 WL 360633 (2d Cir. 2012) (vacating order certifying class under Rule 23(b)(2) and remanding case in light of *Dukes*); *Wang v. Chinese Daily News, Inc.*, --- F.3d ----, 2013 WL 4712728, *4 (9th Cir. Sept. 3, 2013) (reversing order certifying class under Rule 23(b)(2) and remanding in light of *Dukes*); *Lawson v. Life of the South Ins. Co.*, 286 F.R.D. 689, 700 (M.D. Ga. 2012); *Likes v. DHL Exp.*, 2012 WL 6685555, *13 (N.D. Ala. Dec. 21, 2012).

[19] The Court also made clear that courts must scrutinize an expert's analysis at class certification, even in the absence of a objection to that testimony under the

Dukes, for instance, dispensed with the idea, previously held by some courts, that expert testimony in support of class certification should be credited, with little or no scrutiny. As the Supreme Court explained: "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 . . . ." 131 S. Ct. at 2554. The Court then proceeded to itself substantively evaluate expert testimony proffered by the plaintiffs in support of class certification, "reject[ing]" some of the expert's analysis and finding other aspects insufficient to establish that Rule 23 could be satisfied. 131 S. Ct. at 2554-55. And the Supreme Court's decision in *Comcast* further demonstrates the scrutiny that must be applied to expert testimony concerning the propriety of class certification. 133 S. Ct. at 1433-34 (finding that Plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement due to a shortcoming in Plaintiffs' expert's analysis.).[20]

Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Comcast*, 133 S. Ct. at 1431 n.4 (stating that the failure to move to strike the expert's testimony "does not make it impossible for [defendants] to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis.'").

[20] *See also Sher v. Raytheon Co.*, 419 Fed. Appx. 887, 888, 2011 WL 814379 (11th Cir. 2011) (unpublished) (reversing order granting class certification, finding "the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony presented by the parties at the class certification stage").

V. Plaintiffs' Reliance on Pre-*Dukes* and Pre-*Comcast* District Court Cases Is Unavailing

Plaintiffs' Reply Brief in support of class certification relied heavily on three district court cases decided well before *Dukes* and *Comcast*: *In re Northwest Airlines Corp*., 208 F.R.D. 174 (E.D. Mich. 2002); *Midwestern Machinery v. Northwest Airlines, Inc*., 211 F.R.D. 562 (D. Minn. 2001); and *In re Domestic Air Antitrust Litig*., 137 F.R.D. 677 (N.D. Ga. 1991). *See* Plfs' Reply at 1, 2 n.1, 3, 17, 26, 27, 30-34. While Plaintiffs' reliance on these decisions was misplaced even before *Dukes* and *Comcast*, after *Dukes* and *Comcast* they clearly provide no support for class certification here.

In *In re Northwest Airlines Corp*., the court granted class certification based on two rationales that clearly could not withstand scrutiny today. First, the court relied extensively on the assertions of plaintiffs' expert, believing that at the class certification stage "it is enough that Plaintiffs and their experts have put forth a 'colorable method' of establishing their antitrust claims through generalized, class-wide proof." 208 F.R.D. at 219; *id.* at 223 ("*All that matters*, at this stage, is that Plaintiffs' theory of liability rests upon a colorable analytical method that is susceptible to generalized proof.") (emphasis added). Second, the court's class certification decision focused solely on whether the *plaintiffs* could present their case at trial by common evidence. *Id.* at 225. Regardless of whether either

approach to class certification was correct in 2002, when the decision was rendered, it is clearly wrong today in light of developments in the case law including, most notably, *Dukes* and *Comcast*.[21]

In *Midwestern Machinery*, the court similarly failed to accord appropriate weight to defendants' right to put on defenses based on class-member specific evidence. While recognizing that when "determining actual injury to each class member, it is inevitable that individualized proof will be presented," the court nevertheless certified the class. 211 F.R.D. at 572. Kicking the proverbial can down the road, the court explained it would address these "complexities . . . when appropriate whether through the use of a special master, subclasses, or other available means." *Id.* This approach could not survive in the wake of *Dukes* and *Comcast*.

[21] At the time certification was granted, the district court judge observed that he eventually would have to figure out "how to effectively and efficiently safeguard Defendants' entitlement to insist that each class member establish a right to recovery." *Id*. at 225. Because no such mechanism was possible in the context of a class action, defendants eventually moved to decertify the class. *See In re Northwest Airlines Corp. Antitrust Litig.*, No. 96-74711 (E.D. Mich.), Defs' Motion to Decertify the Class (Dkt. 562) (Aug. 19, 2005). Shortly before oral argument on the motion was set to occur, the case was stayed by Northwest's filing for bankruptcy, and plaintiffs later voluntarily dismissed the lawsuit. *See In re Northwest Airlines*, No. 96-74711, Notice of Hearing (Dkt. 566) (Aug. 20, 2005); Order of Administrative Closing (Dkt. 574) (Sept. 20, 2005); Order of Voluntary Dismissal (Dkt. 582) (Aug. 21, 2006).

In *Domestic Air*, the court correctly observed that "impact is a question unique to each particular plaintiff and one that must be proven with a fair degree of certainty." 137 F.R.D. at 689. However, the court mistakenly examined only plaintiffs' approach to proving impact and ignored defendants' defenses, apparently on the assumption that the only test was whether plaintiffs' evidence was "of sufficient substance that it could be submitted to the jury for consideration." *Id.* at 692; *see also id.* at 693 ("Plaintiffs have presented evidence sufficient for the jury to render an award of damages."). Again, regardless of whether the law would have permitted certification based on this analysis in 1991, it would clearly not do so today.[22]

CONCLUSION

For the foregoing reasons, and the reasons stated in Delta's original opposition (Dkt. 221), Plaintiffs' motion for class certification should be denied.

[22] Plaintiffs also ignore the court ultimately concluded, in approving a proposed settlement of the case, that defendants had the "right to defend" against the injury claims of individual class members and that "individual determinations of [] reimbursement . . . would be not only impracticable but impossible, given judicial resources." *In re Domestic Air Antitrust Litig.*, 148 F.R.D. 297, 318 (N.D. Ga. 1993). But even approval of the settlement class in *Domestic Air* would be erroneous today under the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (holding that proposed litigation and settlement classes are judged by the same standards under Rule 23, except for the manageability requirement under Rule 23(b)(3)(D)).

Dated: October 25, 2013

Respectfully submitted,[23]

s/ Randall L. Allen
Randall L. Allen
Georgia Bar No. 011436
randall.allen@alston.com
Samuel R. Rutherford
Georgia Bar No. 159079
sam.rutherford@alston.com
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Tel: 404-881-7196
Fax: 404-253-8473

James P. Denvir
jdenvir@bsfllp.com
Scott E. Gant
sgant@bsfllp.com
Michael S. Mitchell
mmitchell@bsfllp.com
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
Tel: 202-237-2727
Fax: 202-237-6131

Counsel for Defendant Delta Air Lines, Inc.

[23] Pursuant to Local Rule 7.1D, counsel for Delta certifies that this brief was prepared with a font and point selection approved in Local Rule 5.1.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, the foregoing DEFENDANT DELTA AIR LINES, INC.'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION was submitted to the Court via e-mail for filing and served on the following counsel of record via e-mail:

Interim Liaison Counsel for Plaintiffs:
David H. Flint
SCHREEDER, WHEELER & FLINT LLP
1100 Peachtree Street
Suite 800
Atlanta, GA 30309
dflint@swfllp.com

Interim Co-Lead Counsel for Plaintiffs:
Daniel A. Kotchen
Daniel L. Low
KOTCHEN & LOW LLP
2300 M Street NW, Suite 800
Washington, D.C. 20037
dkotchen@kotchen.com
dlow@kotchen.com

Counsel for Defendant AirTran Airways, Inc.:
Alden L. Atkins
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
aatkins@velaw.com

Roger W. Fones
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006
rfones@mofo.com

Bert W. Rein
WILEY REIN LLP
1776 K Street. NW
Washington, DC 20006
brein@wileyrein.com

s/ Samuel R. Rutherford
Samuel R. Rutherford
Georgia Bar No. 159079
sam.rutherford@alston.com
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Tel: 404-881-7196
Fax: 404-253-8473