**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| **WILLIAM CLEARY, et. al.,** | § | |
| | § | |
| **Plaintiffs,** | § | |
| | § | |
| **v.** | § | **Civil Action No. 4:21-cv-00184-O** |
| | § | |
| **AMERICAN AIRLINES, INC,** | § | |
| | § | |
| **Defendant.** | § | |

**ORDER**

Before the Court are the Plaintiffs' Motion for Class Certification (ECF No. 32), filed June 11, 2021; Defendant's Response (ECF No. 40), filed June 25, 2021; and Plaintiffs' Reply (ECF No. 45), filed July 9, 2021. After reviewing the briefing, relevant law, and applicable facts, the Court finds the Motion should be **GRANTED in part and DENIED in part.**

## I. BACKGROUND

This is a putative class action against American Airlines, Inc. ("AA" or "American") for, allegedly, charging customers excessive baggage fees in breach of the parties' contracts. In certain circumstances, American offers customers one or more free checked bags when they travel.

On or around February 6, 2017, class representative William Cleary ("Cleary") was at his home when he purchased tickets online from American for travel from Los Angeles, CA, to Dallas, TX, and a return flight. Cleary and his wife were logged into his wife's American "AA" account when he made this transaction. When he purchased these tickets, Cleary and American entered a contract which specified that he could check his first bag for no additional charge. *See* ECF No. 37, Ex. 1.2. American presented this term of its contract both in the confirmation screen shown at the conclusion of booking, and in the e-ticket confirmation email American sent after booking. *See*

*id*. However, when Cleary arrived at the airport on March 21, 2017, with a bag to check, American required him to pay to check his bag, and similarly required payment upon his return three days later. Cleary paid the fees. *See* ECF No. 37, Exs. 2-3.

Class representative Filippo Ferrigni ("Ferrigni") resides in St. Louis, Missouri. In approximately 2014, Ferrigni was onboard an American international flight from Jamaica to the United States when an oral solicitation invited him to apply for an American-partner credit card, which he understood would allow him to check a bag at no additional charge on each of his future flights with American. *See* ECF No. 37, Ex. 4, Deposition Transcript of Dr. Filippo Ferrigni ("Ferrigni Dep.") at 37:15-24. A flight attendant gave Ferrigni an application for the card, *see id*., and Ferrigni later applied for it online. *See id*. at 43:21-23.

On November 12, 2018, Ferrigni purchased a ticket online from American for travel for himself and his wife from St. Louis to St. Kitts and a return flight. *See* ECF No. 37, Ex. 5. When Ferrigni arrived at the St. Louis airport on April 2, 2019, the American check-in agent told him his credit card provided a free checked bag for him and his travel companion only on domestic flights. *See* ECF No. 37, Ex. 4, Ferrigni Dep. at 84:2-9. Ferrigni had no choice but to pay the fee in order to check his bag. *See* Ex. 6. On April 9, 2019, Ferrigni and his wife arrived at the St. Kitts airport to begin their journey home, and again he (because he had no choice) was required to pay to check his bag and his wife's bag. *See* ECF No. 37, Ex. 7. After an overnight connection in Miami, Ferrigni and his wife arrived at the Miami airport on April 10 for the domestic flight from Miami to St. Louis. Yet again, and despite this flight segment being entirely domestic, American required Ferrigni to pay to check his bag and his wife's bag. *See* ECF No. 37, Ex. 6. Ferrigni paid the fees on all three occasions.

Plaintiffs filed a putative class action lawsuit against American on February 24, 2021. The putative class representatives, William Cleary and Filippo Ferrigni, assert that American promised free checked bags in at least six situations: (1) Customers with specific email confirmations ("Email Confirmations"), (2) American-partner credit cards ("Credit Cards"), (3) American Gold or Platinum members ("Gold Members"), (4) Business or First-Class ticket holders ("Business Class"), (5) Customers with premium benefits ("Premium Members"), and (6) First Class, Business Class, Executive Platinum, and oneworld Emerald Members who check "overweight" bags ("Overweight Baggage"). The motion for class certification is now ripe for review.

## II. LEGAL STANDARD

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)) (internal quotation marks omitted). The party seeking class certification "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). "The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of rule 23." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)). A district court must "look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination'" of the certification issues. *Stukenberg*, 675 F.3d at 837 (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003)).

Federal Rule of Civil Procedure 23 governs whether a proposed class falls within this limited exception. "To obtain class certification, parties must satisfy Rule 23(a)'s four threshold

requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007). Rule 23(a)'s four threshold requirements are

> (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.

Fed. R. Civ. P. 23(a). These four threshold conditions are "commonly known as numerosity, commonality, typicality, and adequacy of representation." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (citing Fed. R. Civ. P. 23(a)) (additional citation and internal quotation marks omitted). Additionally, the Fifth Circuit has articulated an "ascertainability" doctrine implicit in Rule 23. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "To maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (citations omitted).

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA)*, 482 F.3d 372, 295 (5th Cir. 2007). Rule 23(b)(3) applies when the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

## III. ANALYSIS

Plaintiffs seek to certify one class: all American ticket holders who were charged excessive baggage fees in breach of an applicable contractual agreement. The precise definition is as follows:

> All persons who purchased a ticket for air travel on American Airlines ("AA") subject to AA's promises in the (1) Checked Baggage Policy, (2) E-ticket Confirmation Email, (3) booking confirmation screen, (4) point of purchase, and/or (5) credit card offers that their ticket would allow the passenger to check a specified number of bags for free, who were required to pay to check one or more such bags, during the period September 16, 2013, to the present (the "Class Period").

However, Plaintiffs concede that six distinct categories[1] of class members exist: (1) Email Confirmations, (2) Credit Cards, (3) Gold Members, (4) Business Class, (5) Premium Members, and (6) Overweight Baggage. Plaintiffs concede that only the first two categories apply to the class representatives but assert that the class representatives may still effectively represent the other categories because each category is an instance of American overcharging its customers. The Court declines to certify the four categories that do not have an adequate representative because a class as broad as "all American Airlines customers who have been overcharged baggage fees" would fail to satisfy the Rule 23 standards of commonality and typicality, and the Plaintiffs here do not have standing to challenge other instances that American denied customers free checked baggage.

Accordingly, the Court *sua sponte* narrows the proposed class definitions to (1) qualified American ticket holders who received email confirmation that promised them free checked baggage and (2) qualified American partner credit card holders that were promised free checked baggage, to be certified as two separate classes because the merits of each class are distinct. For the reasons stated below, Plaintiff's Motion for Class Certification should be **GRANTED in part** and **DENIED in part.**

**a. Ascertainability**

[1] The putative class representatives only directly represent the first two categories; therefore, the Court will only address these two categories in its certification analysis. Plaintiffs assert that they could locate plaintiffs who would adequately represent the remaining four categories, but have not done so, so the Court will not address the categories for which the class representatives do not have standing to challenge.

While ascertainability is not a requirement under Rule 23, "courts only certify classes ascertainable under objective criteria." *Vita Nuova v. Azar*, 2020 U.S. Dist. LEXIS 250182, at *6 (citing *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam)). However, "the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015) (citations omitted). As this Court recently noted, "[t]he Fifth Circuit has upheld the ascertainability of a class even when a definition necessitates individualized membership assessments that might follow litigation, so long as the class definition is sufficiently clear." *Vita Nuova*, 2020 U.S. Dist. LEXIS 250182, at *6 (citing *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir. 1999)). So long as the proposed class is not "amorphous" or "imprecise," it should be certified. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.5 (5th Cir. 2007). "[I]f the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." *Sartin v. EKF Diagnostics, Inc.*, CV 16-1816, 2016 WL 7450471, at *6 (E.D. La. Dec. 28, 2016) (internal quotations omitted); *see also* 7A Fed. Prac. & Proc. Civ. § 1760 (3d ed.) (stating same).

American disputes that the Email Confirmation Class is ascertainable, because in prior litigation, *Bazerman v. Am. Airlines, Inc.*, No. 1:17-cv-11297-WGY (D. Mass. July 13, 2017), Cleary was mistakenly not notified of the litigation, even though the complaint in that case was based on the same coding error that inadvertently sent email confirmations regarding free checked baggage. American asserts that it would be unable to identify those similarly situated to Cleary because it failed to identify Cleary in the prior litigation. Resp. 22, ECF No. 40. Additionally, American states that a third-party sends the email confirmations, so American does not keep a running list of which customers would qualify as a class member. However, American does not

dispute whether the Credit Cards Class is ascertainable. The Court finds that both the Email Confirmation Class and Credit Cards Class are ascertainable by objective criteria. The Email Confirmation Class can be identified using a process similar to the process used in *Bazerman*. And for both classes, it does not matter that the list of recipients or card holders is in the hands of a third-party.

**b. Numerosity**

American has stipulated to numerosity. *See* ECF No. 37, Ex. 44, May 28, 2021, Letter from Nicholas Lessin at 2. Further, the Court finds that given American's size, the number of passengers and checked luggage that it transports each day, the hundreds of millions of dollars in revenue that it generates from checked baggage fees, and the large number of customer complaints alleging bag fee overcharges, it is readily apparent that the class is numerous. Therefore, this element is satisfied for both classes.

**c. Commonality**

To satisfy the commonality requirement, a plaintiff must allege a "common contention of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). The Fifth Circuit has held that the test for commonality "is not demanding and is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1997) (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). The bar for proving commonality is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members. *Forbush v. JC Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993). Even where there are

individual variations in the facts relating to a particular named plaintiff or proposed class member, the commonality requirement is satisfied so long as the class shares some common question of law or fact. *See, e.g. Lightbourn*, 118 F.3d at 426 ("allegations of similar . . . practices generally meet the commonality requirement").

The Court finds that this is the prototype for a class action because the common questions of law or fact relate to American's operations and baggage fee agreements, in amounts too small to seek relief on an individual basis. In this case, thousands of customers, if not more, have been impacted in the same or similar amounts and ways. The need for individualized inquiry at some phase of the litigation does not negate the propriety of class certification, as American argues. Resp. 15, ECF No. 40. Accordingly, the Email Confirmation Class and the Credit Cards Class satisfy the commonality requirement.

**d. Typicality**

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims . . . of the class." The test for typicality "focuses on the similarity between the named plaintiff's legal and remedial theories and the theories of those whom they purport to represent." *Mullen*, 186 F.3d at 625. Meeting this requirement usually follows from the presence of common questions of law. *See James v. City of Dallas, Tex*., 254 F.3d 551, 571 (5th Cir. 2001) ("critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class"); *Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002) (same); 3B Moore's Federal Practice ¶ 23.06-2, at 23-325. It is a "permissive" requirement; "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 697 (S.D. Fla. 2015) (citations omitted).

Typicality and commonality tend to merge. The common questions present in Cleary and Ferrigni's claims are representative of the class. Cleary claims he was promised free luggage in an email confirmation, and Ferrigni claims he was promised free luggage pursuant to a credit card partnership. Each of those claims are typical of other class members, which is what is required at this stage, even if American ultimately prevails on the merits of these claims.

**e. Adequacy of Representation**

The final requirement for class certification, set out in Rule 23(a)(4), is that the named plaintiffs "will fairly and adequately protect the interest of the class." The two principal elements of this requirement are: (1) that the class representative's interests are co-extensive and not antagonistic to the class members' interests; and (2) that counsel for the named representatives is qualified. *Johnson v. Georgia Highway Express, Inc*., 417 F.2d 1122, 1124-25 (5th Cir. 1969). To the extent that the Court narrowed the class certification, adequacy of representation is no longer an issue. The class representatives each respectively represent one class and can effectively represent the interests of those class members. Accordingly, the Court finds that the Plaintiffs have established adequacy of representation.

**f. Rule 23(b)(3)**

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA)*, 482 F.3d 372, 295 (5th Cir. 2007). This action meets the requirements of Rule 23(b)(3), which is satisfied if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Predominance is "readily met" in certain consumer cases. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625. The touchstone for predominance analysis is efficiency. An issue "central to the validity of each one of the claims" in a class action, if it can be resolved "in one stroke," can justify class treatment. *Dukes*, 131 S. Ct. at 2551. There is predominance where the "qualitatively overarching issue" is the defendant's liability, such that "the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 273 (4th Cir. 2010) (addressing predominance in FCRA case seeking damages for alleged class-wide violations).

A class action is the ideal way to resolve claims such as these, as opposed to thousands of breaches of contract claims for less than $100, which is an undesirable and unlikely alternative. The history and purpose of the class action is to remedy injuries that otherwise would be impractical or uneconomical for an individual plaintiff to bring. *See* Brian T. Fitzpatrick, The Conservative Case for Class Actions 3, 28 (2019); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 (5th Cir. 2004) ("A 'negative value' suit is one in which class members' claims 'would be uneconomical to litigate individually.'") (quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985)). Class action is the most efficient way to resolve Cleary and Ferrigni's claims, as well as similarly situated consumers who would likely never go through the trouble to bring a claim on their own. Therefore, the Court finds that both classes satisfy Rule 23(b)(3).

## IV. CONCLUSION

For the reasons stated, the Court finds that Plaintiffs' Motion for Class Certification should be **GRANTED in part** and the Email Confirmation Class and Credit Card Class should be certified.

**SO ORDERED** on this **2nd day of September, 2021.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE