No. 10-10821

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BARBER AUTO SALES, INC.,
individually and on behalf of all persons similarly situated,

Plaintiff-Appellee,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant,

On Appeal from the United States District Court for the Northern District of Alabama, Hon. Inge Prytz Johnson Presiding (Case No. 5:06-CV-04686-IPJ)

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLANT UNITED PARCEL SERVICE, INC.

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: 202.463.5337

RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

DEANNE E. MAYNARD
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: 202.887.1500

Counsel for Amicus Curiae

APRIL 20, 2010

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

***Barber Auto Sales, Inc. v. United Parcel Service, Inc.*, No. 10-10821-G**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Eleventh Circuit Rules, amicus curiae Chamber of Commerce of the United States of America hereby states as follows:

A. The Chamber of Commerce of the United States of America has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

B. The undersigned further certifies that the following persons, associations of persons, or corporations have either a financial interest in or other interest that could be substantially affected by the outcome of this case:

1. Alexander Corder Plunk & Shelly, PC
2. Barber Auto Sales, Inc.
3. Barber, Bruce
4. Borenstein, Ruth N.
5. Chamber of Commerce of the United States of America
6. Clement, Paul D.
7. Conrad, Robin S.
8. Corder, James M., Jr.
9. Eyster Key Tubb Roth Middleton & Adams LLP

10. Goheen, Barry
11. Grammas, Peter A.
12. Haskins, S. Stewart, II
13. Hearron, Marc A.
14. Johnson, Hon. Inge Prytz
15. King & Spalding LLP
16. Lightfoot, Franklin & White, L.L.C.
17. Lowe & Grammas LLP
18. Lowe, E. Clayton, Jr.
19. Maynard, Deanne E.
20. McCarthy, Terrence W.
21. Morrison & Foerster LLP
22. Murphy, Paul J.
23. Pantazis, Dennis G.
24. Roth, Nicholas B.
25. Sarwal, Amar D.
26. United Parcel Service, Inc. (ticker symbol UPS)
27. Varner, Chilton Davis
28. Ventry, Anthony, III

29. White, Jere F., Jr.

30. Wiggins Childs Quinn & Pantazis, LLC

Respectfully submitted,

By: Ruth N. Borenstein /mmm

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: 202.463.5337

RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

DEANNE E. MAYNARD
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: 202.887.1500

Counsel for Amicus Curiae

APRIL 20, 2010

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

Among those issues of concern to the Chamber is the use of the class-action procedural device in an abusive manner. In this case, amicus is particularly concerned that the district court's decision permits class members to recover more than they are entitled to under the substantive law. The certification order included in the class customers who had not complied with contractual and statutory notice requirements as a condition precedent to bringing suit, even though those requirements would have barred those plaintiffs' actions had they been brought individually rather than in a class. Additionally, in order to certify a class, the district court had to frame the purportedly predominating common issue so broadly

[1] A motion for leave to file this brief amicus curiae is being filed herewith.

that its resolution would have no direct impact on the merits of each individual class member's claim.

The decision below thus invites plaintiffs to abuse the class action device against amicus's members as a tool to expand plaintiffs' substantive legal rights. Accordingly, amicus has a strong interest in this Court's reversal of the decision below.

STATEMENT OF THE ISSUES

1. Whether parties to recurring consumer contracts may use the procedural class action mechanism to avoid substantive contractual and statutory notice provisions that are conditions precedent to each individual's bringing suit.

2. Whether a class may be certified in a breach of contract case, based on the purported predominance of an alleged business practice, even though proof of that practice would not establish breach of contract and resulting harm as to each individual class member.

SUMMARY OF THE ARGUMENT

Two aspects of the district court's decision raise particular concern about class action abuse. First, the district court permitted unnamed class members to evade clear contractual and statutory requirements that customers give UPS timely notice of each disputed charge before resorting to litigation. Using class action procedures to alter notice obligations for unnamed class members would deprive

businesses of the opportunity to resolve customer disputes in a cost-effective manner by avoiding litigation and would create class-wide liability for claims that could not succeed on an individual basis.

Second, the court accepted the named plaintiff's novel theory that a class may be certified based on proof of a common business practice that purportedly constitutes a breach of contract, even though the practice lacks a nexus to the claimed wrong and would not suffice as proof of breach by an individual plaintiff pursuing an individual claim. Identifying an issue that would be common to all class members required the district court to define UPS's allegedly wrongful conduct at such a broad level of generality that it was divorced from the actual merits of the class members' claims.

Thus, the court defined the allegedly wrongful practice as the use of purportedly flawed measuring devices ("MDMDs") that resulted in claimed overcharges for mismeasured packages. But defining UPS's use of MDMDs as the common issue and breaching conduct is both too broad—as it would allow class members to hold UPS liable for packages that the MDMDs had measured accurately and ignores evidence that some customers receive downward price adjustments on audited packages—and too narrow—as UPS's proof of the machines' accuracy will deprive class members of an opportunity to prove that they were overcharged because particular packages were mismeasured. As evident

here, acceptance of Barber's theory would expose any business to potential class-wide liability based on whatever common conduct a customer could identify and would impermissibly substitute proof of that business practice for the showing required to prove an individual claim.

ARGUMENT

THIS COURT SHOULD REVERSE THE CLASS CERTIFICATION ORDER AND PRECLUDE CLASS ACTIONS FROM ALTERING THE PARTIES' SUBSTANTIVE RIGHTS

A. The Class Certification Order Expands Substantive Rights By Permitting Unnamed Class Members To Evade Contractual And Statutory Notice Requirements

The district court's class certification order in this case sets a dangerous precedent that this Court should reverse, because the district court's rationale permits plaintiffs to use class actions to evade contractual and statutory notice provisions that require claimants to provide notice of a dispute before filing suit. These notice provisions have widespread use, as many businesses place such provisions in their recurring consumer contracts to maximize opportunities to resolve consumer disputes outside the court system, preserve customer relationships and good will, and in the event that informal resolution is unsuccessful, preserve evidence that may be needed to defend against the actions. The decision below, however, included in the certified class customers of UPS who had never notified UPS that they had a dispute. Indeed, it is likely that the

certification order swept in as unnamed plaintiffs against UPS customers who did not even have a dispute at all.

Were this not a class action, each individual plaintiff would have had to establish as a condition precedent to filing suit that he or she had individually complied with the notice requirements. By certifying a class based only upon the named plaintiff's compliance with the contractual and statutory notice requirements, the district court effectively waived the notice requirements for the unnamed plaintiffs. In so doing, the court used procedural law (the class action device) to alter substantive law (the contractual and statutory notice requirements). This Court should give full effect to such notice requirements and make clear that class actions may not be used to defeat them.

1. All members of the class, including unnamed members, are bound by valid, enforceable contractual and statutory notice provisions that serve to protect against costly and unnecessary litigation

The contract between UPS and its customers contains a standard notice provision that imposes a condition precedent on the filing of a lawsuit. The UPS contract plainly requires any customer with a billing dispute to notify UPS "within 180 days of receiving the contested invoice," or else the "billable dispute is waived." Doc. 145 at 3. And it provides that claims against UPS arising from a billing dispute are "extinguished" unless the claimant "complies with all applicable notice and claims periods" and "pleads on the face of [the] complaint filed against

UPS satisfaction and compliance with those notice and claims periods as a contractual condition precedent to recovery." Doc. 119, Ex. 2 at 14 ¶ 505.

That contractual provision is in addition to, and consistent with, a parallel provision imposed by federal statute. Congress imposed the same notice requirement as a condition precedent to filing suit against an interstate shipper over a billing dispute. *See* 49 U.S.C. § 13710(a)(3)(B) ("A shipper" who "seeks to contest the charges originally billed or additional charges subsequently billed . . . . must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.").

Notice requirements such as the ones in UPS's contract and in Section 3710(a)(3)(B) serve important purposes. First and foremost, they guarantee that the parties will have an opportunity to attempt to solve disputes without resorting to litigation. Indeed, the record below establishes that the plaintiff-appellee invoked the notice provisions on multiple occasions and received credits for disputed charges. Doc. 119, Ex. 4 at 15. By creating a mechanism for resolving disputes short of litigation, these provisions encourage the efficient and economical resolution of consumer disputes that helps alleviate strains on burdened court systems. The provisions also help weed out meritless disputes or grievances that are not genuine. They give businesses an opportunity to improve relationships with their customers and maintain customer satisfaction. And perhaps most

significant, by reducing litigation costs and helping reduce exposure to liability, notice provisions help businesses stay competitive both domestically and globally.

Because of this array of benefits, such notice provisions have become more widely used in recurring consumer contracts, and legislatures likewise have imposed notice prerequisites in a variety of areas. Indeed, these notice provisions have long historical roots. Union-negotiated collective bargaining agreements have long included provisions requiring employees to pursue remedies through grievance procedures prior to arbitration or suit. *See, e.g.*, *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). And the Uniform Commercial Code requires a buyer to notify the seller of a breach of warranty within a reasonable time after the breach is discovered, or else "be barred from any remedy." U.C.C. § 2-607(3)(b) (2004).

Courts have responded to these notice provisions favorably. Indeed, courts routinely enforce contractual provisions like UPS's notice requirement mandating that the parties attempt to resolve disputes through some specified non-binding process before filing suit. Thus, this Court in *Kemiron Atlantic, Inc. v. Aguakem International, Inc.* held that a party could not invoke an arbitration clause because

he had not satisfied the contractual condition precedent of requesting and pursuing non-binding mediation. 290 F.3d 1287, 1289, 1291 (11th Cir. 2002).

Other circuits have similarly held that a party's failure to comply with mandatory non-binding dispute resolution procedures bars that party from pursuing litigation. For example, the Ninth Circuit enforced an agreement to submit disputes to non-binding arbitration as a condition precedent to filing suit. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208-1209 (9th Cir. 1998). And both the Sixth and Seventh Circuits enforced provisions in Ford Motor Company's dealership contracts that require dealers to submit certain disputes to a Dealer Policy Board (an impartial panel appointed by Ford) as a precondition to filing suit. *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 208 (6th Cir. 1995); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335 (7th Cir. 1987). *See also HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (refusing to enforce agreement to engage in binding arbitration where arbitration agreement made mediation precondition to arbitration but parties had not engaged in mediation). Indeed, courts routinely enforce contractual and statutory provisions obligating parties to exhaust non-binding alternative dispute resolution before resorting to litigation. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 105, 108 (2006).

2. The class certification order disregarded the substantive notice requirements in order to facilitate litigating this case on a class-wide basis

The decision below must be reversed because it opens the door to the use of the procedural class action device to override these contractual and statutory notice provisions in recurring consumer contract disputes.

Notice provisions such as the provision in UPS's contract must be given the same force and effect in the class-action context as they would be given if the lawsuit had been brought by an individual plaintiff. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, No. 08-16430, 2010 U.S. App. LEXIS 6517, at *37-*38 (11th Cir. Mar. 30, 2010). To permit customers who have not satisfied the notice requirements to be included as plaintiffs in the class, even though those same plaintiffs would have no cause of action apart from the class action—would violate the Rules Enabling Act by elevating the procedural class-action device over substantive law. *See* 28 U.S.C. § 2072(b) (Rules of Civil Procedure cannot be used to "abridge, enlarge or modify any substantive right"); *Sacred Heart Health Sys.*, 2010 U.S. App. LEXIS 6517, at *37-*38 ("The Rules Enabling Act, 28 U.S.C. § 2072—and due process—prevents the use of class actions from abridging the substantive rights of any party."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (holding that class certification

violated Rules Enabling Act because it would have permitted plaintiffs to recover damages that have no relationship to their actual individual harm).[2]

But that is precisely what the class certification order here does. The district court disregarded the Rules Enabling Act's limitations on procedural law and excused the fact that the unnamed class members had not complied with the contractual and statutory notice provisions, simply because a class action lawsuit had been filed on their behalf. The certification order thus effectively rewrote the contract for the unnamed class members when it held that the lead plaintiff's filing of this lawsuit "suffices . . . as notice of a claim for purposes of the 180 day contract requirement" for *all* class members whose claim arose within 180 days of the class action complaint, including those who did not individually notify UPS of a dispute. Doc. 145 at 8.[3]

---

[2] Thus, other circuits have held that the class representative cannot give notice on behalf of putative class members for purposes of satisfying statutory notice requirements. *See Drobnak v. Andersen Corp.*, 561 F.3d 778, 785 (8th Cir. 2009); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 463-464 (5th Cir. 2004).

[3] Moreover, the district court nonsensically treated the filing of the lawsuit as notice to UPS even for customers who had not yet shipped their packages, much less received an invoice. The court included in the class customers who shipped packages over a nearly *3-year* period—from the filing of the lawsuit on May 15, 2006 to the class certification order on September 29, 2009—including customers who shipped packages *after* the lawsuit was filed.

Indeed, the district court effectively admitted that it was ignoring the individual notice requirements precisely so that the claims would be amenable to class certification: "From a much more practical standpoint, the court finds that should each individual shipper be required to give notice for every contested additional charge resulting from an audit remeasurement, the entire policy of allowing class actions, that being the problem that small recoveries do not provide the incentive for any individual to bring a solo action presenting his or her rights, is nullified." Doc. 145 at 26 n.9.

By holding that the filing of the class-action complaint itself satisfied the notice requirements for the unnamed class members, the district court turned the notice provisions on their head. The contract provides that the notice requirement is a "condition precedent"—i.e., a condition that must be satisfied *before* suit may be filed. And the contract requires every claimant to plead on the face of the complaint that he or she has complied with the notice requirement—a provision that would be rendered a nullity if the filing of the complaint could itself satisfy the notice requirement. Similarly, 49 U.S.C. § 13710(a)(3)(B) requires the disputatious customer to provide notice "in order to have the right to contest [the] charges." The district court, however, treated the provisions as simply statutes of limitations rather than as conditions precedent to suit. *See* Doc. 145 at 18-19

(discussing whether filing of a class action complaint may commence suit for all plaintiffs for statute of limitations purposes).[4]

Further, the purpose behind such notice requirements is not merely "to make defendant aware of a problem prior to a plaintiff running off to court to file a lawsuit," as the district court stated. Doc. 145 at 16. Rather, these provisions give businesses an opportunity to propose a satisfactory resolution to a customer's dispute without first resorting to the courts. *See Drobnak*, 561 F.3d at 785 (failure to provide notice deprives defendant of "opportunity to cure the alleged defect" and to explore "normal settlement through negotiation"); *see also* U.C.C. § 2-607 cmt. 4 (same). That purpose would be defeated and the notice requirements rendered superfluous if the act of filing suit were deemed sufficient.

Had the district court held, as it should have, that each plaintiff—both named and unnamed—must individually satisfy the notice requirement, it would have been clear that a class never should have been certified in this case. As UPS argued below, the question whether each class member complied with the

[4] Accordingly, contrary to the district court's reliance on them, Doc. 145-18-19, the court's reasoning is not supported by *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984). The issue in *American Pipe* was the effect of a class action lawsuit on the statute of limitations, which governs *when* a lawsuit may be filed and not what steps must be taken *before* suit can be filed. *See* 414 U.S. at 550-551. And in *Kornberg*, the dispute arose from a one-time event as to the entire class and did not involve recurring consumer disputes arising from alleged breaches over a long period of time, as this case presents. *See* 741 F.2d at 1337.

contractual condition precedent is an individualized inquiry that cannot be resolved through common proof, and thus common issues of fact and law do not predominate. Cases like the instant one that present the individualized question whether each plaintiff satisfied a contractual or statutory notice requirement are therefore incompatible with class certification. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009) ("claims are not suitable for class certification under Rule 23(b)(3)" where plaintiffs must "introduce a great deal of individualized proof"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (same).

3. The district court's policy concerns relating to the notice requirements were misplaced

The district court's concern that the contractual and statutory notice requirements "eliminate[] the entire logic behind class actions" was unfounded. Rather, notice-and-claim procedures like that in UPS's contract further important policy interests described above and are consistent with the purposes of Rule 23 class actions. The process is mutually non-binding in that it does not deprive either party of the right to have the dispute heard by a neutral decisionmaker. And it addresses the common problem of the overbroad class by identifying and filtering out those unnamed class members who were not actually injured and therefore had no reason to seek redress through the informal process. It therefore furthers the

Rule 23 requirements that all class members be similarly situated and that their claimed injuries be concrete rather than speculative or latent.

Rather, it is the certification of this class that sets a dangerous precedent. Notice provisions, by facilitating out-of-court resolution of customer disputes, act as a limit on exposure to liability. Businesses have therefore added these provisions to recurring consumer contracts to keep litigation costs in check and thereby maximize shareholder value and minimize costs passed on to consumers. But if the certification order is affirmed, those contractual provisions will effectively be erased. All it will take is one plaintiff who has complied with the notice provision, and that plaintiff (who cannot possibly know the details of the putative class members' disputes, or if they even have disputes) will be able to bring an action on behalf of all of the defendant's customers. That will be true even though most of those unnamed customers have not complied with the notice provision and thus could not have brought suit individually.

Accordingly, this Court should order the class decertified in light of the individualized inquiries required to determine whether each plaintiff has complied with the contractual and statutory notice provisions.

B. The Certification Order Is Premised On A Novel System-As-Breach Theory That, Even If Proved, Would Have No Direct Impact On Each Class Member's Right To Recovery

The district court accepted Barber's novel theory that a class may be certified based on the purported predominance of a single question common to the class—whether UPS used inaccurate MDMDs to measure package dimensions—even though that alleged common business practice has no direct connection to the merits of the plaintiffs' contract claims. The plaintiffs here are not owed a duty concerning the accuracy of the MDMDs that UPS uses; rather, the duty UPS owes them is that any adjustments that UPS makes to the customers' invoices be appropriate. Moreover, proof of inaccuracies in the MDMDs in general would not prove that any individual customer was overcharged, and thus that any individual plaintiff was harmed. Therefore, the alleged common business practice upon which the district court based its class certification was stated at such a level of abstraction that it would not support a claim for breach of contract in an action pursued individually rather than as a class.

The rationale of the district court's certification order invites abuse by class-action plaintiffs. Under the district court's reasoning, class certification is warranted—and amicus's members can be subjected to the possibility of class-wide liability—whenever a customer can identify purportedly common conduct, even without proof that the alleged business practice caused harm to every class

member. In large, lucrative class actions like this one, certification imposes enormous pressure to settle even the least meritorious claims. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2004). The district court's ruling exacerbates that problem and opens the door for further abuse of the class-action device against amicus's members.

1. The purportedly predominant issue identified by the district court was at such a level of abstraction that it is divorced from the merits of the plaintiffs' individual claims

To conclude that this case was amenable to class certification, the district court had to identify an issue that was purportedly common to all class members and would predominate over other issues. This Court has made clear that for an issue to predominate, the issue must "have a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief." *Klay*, 382 F.3d at 1255 (quoting *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001)); *see also Vega*, 564 F.3d at 1270. Thus, whether a common issue will predominate "can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Vega*, 564 F.3d at 1270; *Klay*, 382 F.3d at 1255 (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000)). Contrary to those precepts, the district court ignored the proof required for each class member's breach of contract claim—because it is not common to all class

members—and instead focused on a different question that (even assuming it is common) would have no direct impact on the merits of the class members' individual claims.

The class representative alleges that UPS breached the "appropriate adjustments" clause of its contract, Doc. 131 at 9, which provides that "UPS . . . reserves the right to audit invoices to verify service selection, package and shipment weight, and applicability of any changes, and to make appropriate adjustments," Doc. 131 at 2. To establish breach of that clause, an individual plaintiff would ordinarily need to prove that UPS made an adjustment to his or her invoice and that the adjustment was not "appropriate" because it resulted in the plaintiff being overcharged, and thus harmed. *See Reynolds Metals Co. v. Hill*, 825 So. 2d 100, 105 (Ala. 2002) ("resulting damages" is element of breach of contract claim under Alabama law).

Not so under the named plaintiff's theory, which the district court adopted. The plaintiff diverted the question away from whether each individual invoice *adjustment* was appropriate and instead presented the question as "whether UPS' *system* of auditing package dimensions . . . is appropriate. . . . The common and overriding question is whether a *system* as flawed as UPS's is a breach of contract." Doc. 131 at 14 (emphasis added); *see also* Doc. 145 at 20 ("[I]t is not the adjustments themselves over which the plaintiff claims a breach, but the fact

that the adjustments are based on audits from allegedly inaccurate machines."); *id.* at 23 ("The plaintiff contests solely defendant's use of auditing equipment which the plaintiff believes to be inaccurate."); *id.* at 28-29 ("The plaintiff simply seeks to have defendant use accurate machines to audit package dimensions . . . .").

The district court accepted this system-as-breach theory and likewise treated the MDMDs as monolithic, setting aside the possibility that any inaccuracies may have been localized to only one or a few machines and may have been short-lived, or even that packages were measured by means other than MDMDs. The court instead treated the machines' accuracy (or inaccuracy) as a blanket business practice that applied uniformly to all class members, no matter where or when their packages were shipped.[5] The class certification order holds that if the plaintiffs can establish inaccuracies in the MDMDs' readings, then all "charge adjustments" are automatically "not appropriate" and are therefore breaching. Doc. 131 at 9. Thus, the district court held that a single issue—"[A]re the [MDMD] machines accurate[?]"—would resolve every class member's claim. *Id.*

Defining the purportedly wrongful practice at that level of generality is the only way the district court could find an issue that might be sufficiently common to

[5] Indeed, the contractual notice provision discussed in Part A, *supra*, is all the more important precisely because a defect with a particular MDMD for a period of time would have no impact on other MDMDs.

be the basis for class certification. But it resulted in the claimed wrong being divorced from the actual merits of the claims. That is so for at least two reasons.

First, the district court should not have permitted the named plaintiff to define the breach as the use of inaccurate MDMDs, because the contract does not govern *how* the audits of the packages' dimensions will occur; it guarantees only the *result* that any adjustments will be appropriate—that is, that the invoices will not be adjusted in such a way that results in overcharges. But to find a common issue for class certification purposes, the named plaintiff had to abandon "inappropriate invoice adjustments" as its theory of breach, in favor of a theory that requires UPS to use accurate machines in its audits—a duty that UPS does not owe. *See* Doc. 145 at 20 ("it is not the adjustments themselves over which the plaintiff claims a breach, but the fact that the adjustments are based on audits from allegedly inaccurate machines").

Second, as an element of a contract action under Alabama law, plaintiffs must prove harm that resulted from the breach. *See Reynolds Metals*, 825 So. 2d at 105. Simply showing that the MDMDs are inaccurate in general, without also establishing that MDMDs caused an inaccurate reading that resulted in an overcharge in any particular instance, does not prove harm and therefore cannot, without more, establish breach of contract. *See Klay*, 382 F.3d at 1264 (proof that HMO's computer systems were programmed to sometimes underpay doctors "does

nothing to establish [for contract claim] that any individual doctor was underpaid on any particular occasion"); *see also Rutstein*, 211 F.3d at 1235 (proof of policy or practice of discrimination does not show that individual plaintiff was discriminated against); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (same).

The evidence that will be needed at trial to prove that each class member was allegedly overcharged, and by how much, will be inherently individualized.[6] Even if the lead plaintiff can prove that the MDMDs are widely inaccurate and have produced flawed measurements in various circumstances, that would not relieve each plaintiff's burden to prove that he or she was overcharged. Each customer seeking to prove breach of contract would still have to establish the fact and amount of each overcharge by proffering individualized evidence for each shipment, such as the actual dimensions of the package shipped, the price that should have been charged, and the amount that UPS invoiced after making an adjustment to the original charge. *See Klay*, 382 F.3d at 1264 ("regardless of whether facts about the conspiracy or computer programs are proven, each doctor, for each alleged breach of contract (that is, each alleged underpayment), must

[6] The named plaintiff proffered no evidence of any systemic problem with the MDMDs' accuracy, *i.e.*, that the MDMDs always overestimate the dimensions of packages by the same amount (or at all). Indeed, the district court conceded that the evidence showed "a variety of measuring errors" that were allegedly "caused in multiple ways." Doc. 131-15 n.4.

prove the services he provided, the request for reimbursement he submitted, the amount to which he was entitled, the amount he actually received, and the insufficiency of the HMO's reasons for denying full payment"). The named plaintiff has not identified any common issue that would, when resolved, substantially assist in meeting that burden.

2. The rationale of the decision below vitiates the predominance requirement and permits class certification whenever a plaintiff can identify any business practice common to all class members

The decision below creates a vehicle for class-action abuse because its rationale would justify class certification whenever a plaintiff can recast an inherently individualized wrong as a "system" of wrongdoing, or identify a common business practice that may in certain circumstances cause individualized harm. Under the district court's rationale, class certification would be warranted in these circumstances regardless of the evidence required to actually prove the wrong and the harm.

But such a result is contrary to Rule 23's predominance requirement. This Court has made clear that the predominance inquiry must include analyzing how, and whether, resolving the common question would impact the underlying claims. *Vega*, 564 F.3d at 1270 (in making predominance determination, court must "consider[] what value the resolution of the class-wide issue will have in each class member's underlying cause of action" (quoting *Klay*, 382 F.3d at 1255)); *see also*

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008) ("Deciding this [predominance] issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove [the merits] at trial.").

By certifying a class based upon a purportedly predominant issue that in reality has no direct impact on the merits of the plaintiffs' claims, the court in effect altered the merits of the claims to fit the plaintiff's allegations. The court held that proof of the "system" of inaccuracies would suffice to prove breach for the class, even though it would not do so if the claims were brought individually.[7] In so doing, the district court abused its discretion and expanded the plaintiffs' substantive contract law rights, in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b) (procedural rules cannot be used to "enlarge . . . any substantive right"). The Rule 23 class action "is not a one-way ratchet, empowering a judge to conform the law to the proof." *McLaughlin*, 522 F.3d at 220.

[7] Indeed, the district court at one point appeared to recognize that this is what it was doing. In response to UPS's argument that the plaintiffs at trial will have to come forward with proof of each individual shipment and its overcharge, the district court expressed concern that imposing such a requirement (notwithstanding that foundational contract law so requires) would make it much more difficult for plaintiffs to prove breach, since the packages have already been shipped and the plaintiffs can no longer measure them. *See* Doc. 145-6 ("[Y]ou cannot look at each individual transaction ever [again] if the package is gone. Ever. You cannot.").

3. The certification order below resulted in a class that is simultaneously too broad and too narrow

The district court's approach resulted in a class that is too broad, because it encompasses class members who were not harmed. *See id.* at 232 (Rules Enabling Act is violated if some uninjured class members benefit from the class's recovery). Even if the class representative were to successfully prove at trial that the MDMDs in certain circumstances produce erroneous measurements, there will still undoubtedly be a large segment of the class whose packages were in fact measured accurately or who may have benefitted from measuring errors in their favor. Even if some MDMDs were occasionally inaccurate, most packages that were measured by an MDMD (including those by unnamed class members) were likely measured correctly, and the measurement produced an appropriate adjustment. Moreover, the class as certified appears to include customers with packages that were measured manually rather than through the use of an MDMD. Additionally, even where an inaccurate MDMD led to an adjustment with an increased invoice price, it is entirely possible (due to the MDMD's alleged inaccuracy) that the adjustment to the invoice should have been *even higher* than the adjustment UPS actually made, and that the customer thus benefited from, rather than being harmed by, the

inaccurate MDMD.[8] Therefore, proof that UPS uses flawed MDMDs will not establish that UPS breached its contract as to *every* class member. *See Vega*, 564 F.3d at 1270 (common issue must have "direct impact on every class member's effort to establish liability" (citation omitted)).

Accordingly, to protect UPS's due process rights, the district court would have to allow UPS to defend the action by presenting individualized evidence establishing that particular plaintiffs were not overcharged. *See McLaughlin*, 522 F.3d at 231-232 (discussing due process right to present evidence as to individual plaintiffs' claims); *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008) (same). But the need for that individualized evidence—such as evidence of a customer's history of inaccurate self-reported measurements or that the MDMD used to measure a customer's particular shipment was accurate—belies the notion that the purportedly common issue of the MDMDs' accuracy predominates. *See Vega*, 564 F.3d at 1274.

While the class is overly broad, it is simultaneously too narrow as well. If the case proceeds as a class action and UPS prevails at trial because there is insufficient proof of the MDMDs' malfunctioning, then *every* class member's claim will be conclusively resolved in UPS's favor. But some class members may

[8] Accordingly, it is no answer that the district court limited the class to UPS customers who were charged a higher amount than they self-reported, because that class still includes customers who were unharmed.

in fact have valid claims that they were overcharged because their particular packages were mismeasured by UPS, including because they were measured by a different measuring system or by an MDMD that measured a package incorrectly. Those class members with valid claims will simply be out of luck.

CONCLUSION

For the reasons set forth above and in the petition, this Court should reverse the district court's order granting class certification.

Respectfully submitted,

By: Ruth N. Borenstein /mmm

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: 202.463.5337

RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

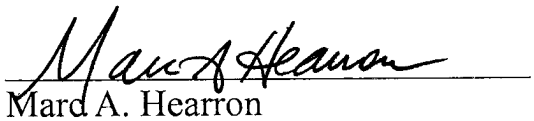
DEANNE E. MAYNARD
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
Telephone: 202.887.1500

Counsel for Amicus Curiae

APRIL 20, 2010

RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I certify pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the foregoing Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Defendant-Appellant United Parcel Service, Inc. complies with the type-volume limitation required by this Court's rule. The foregoing brief contains 5,804 words, as calculated using the Microsoft Office Word® software program.



Mard A. Hearron

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2010, a copy of the foregoing Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Defendant-Appellant United Parcel Service, Inc. was served in both paper and electronic format by UPS Overnight Delivery upon the following:

Dennis G. Pantazis
Wiggins Childs Quinn & Pantazis
The Kress Building
301 19th Street, N.
Birmingham, Alabama 35203

E. Clayton Lowe, Jr.
Lowe & Grammas, LLP
1952 Urban Center Parkway
Vestavia Hills, Alabama 35242

James M. Corder, Jr.
Alexander, Corder, Plunk, & Shelly, P.C.
P.O. Box 1129
Athens, Alabama 35612

Nicholas B. Roth
Eyster Key Tubb Weaver & Roth
P.O. Box 1607
Decatur, Alabama 35602-1607

Paul D. Clement
King & Spalding LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Chilton Davis Varner
King & Spalding LLP
1180 Peachtree Street
Atlanta, Georgia 30309

Jere F. White, Jr.
Lightfoot, Franklin & White, L.L.C.
The Clark Building
400 North 20th Street
Birmingham, Alabama 35203

Marc A. Hearron

dc-599163