

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Jim Ball Pontiac-Buick-GMC, Inc.,

on behalf of itself and all others
similarly situated,

Plaintiffs,

v.

Civ. No.: _____

CLASS ACTION

(1) DHL Express (USA), Inc.,
(2) DHL Worldwide Express, Inc., and
(3) DHL Holdings (USA), Inc.,

Defendants.

CLASS ACTION COMPLAINT

Plaintiff, Jim Ball Pontiac-Buick-GMC, Inc. ("Jim Ball") on behalf of itself and all others similarly situated, allege as its Complaint against defendants DHL Express (USA), Inc., DHL Worldwide Express, Inc., and DHL Holdings (USA), Inc. (collectively "DHL") as follows:

Introduction

1. This breach of contract case is brought as a nationwide class action to recover damages from DHL, a package delivery company that has been improperly charging the plaintiff and the members of the class *jet fuel* surcharges for package deliveries that DHL transports solely by *ground transportation*.

2. In the circumstances at issue here, where DHL transports packages solely by ground, DHL's contract requires it to charge a ground fuel (a.k.a. diesel fuel) surcharge. In

breach of its contract, however, DHL has charged plaintiff and the members of the class its jet fuel surcharge, which is substantially higher than its ground fuel surcharge, on shipments transported solely by ground.

3. This class action seeks to hold DHL to the terms of its own bargain with plaintiff and the members of the class.

Parties

4. The representative plaintiff, Jim Ball, is a corporation organized and existing under the laws of the State of Delaware, with a principal office for the transaction of business located at 3475 Southwestern Boulevard, Orchard Park, New York.

5. James P. Ball and members of his family help to operate Jim Ball. They, along with Jim Ball's management and office staff, have personal knowledge of the facts alleged in this Complaint, except to the extent of certain allegations that are described as being made upon information and belief.

6. The members of the plaintiff class are defined in the "Class Action Allegations" section, below.

7. Upon information and belief, defendant DHL Express (USA), Inc. is a corporation organized and existing under the laws of the State of Ohio with a principal office for the transaction of business located at 1200 South Pine Island Road, Plantation, Florida 33324.

8. Upon information and belief, defendant DHL Worldwide Express, Inc. is a corporation organized and existing under the laws of the State of Ohio with a principal office for the transaction of business located at 1200 South Pine Island Road, Plantation, Florida 33324.

9. Upon information and belief, defendant DHL Holdings (USA), Inc. is a corporation organized and existing under the laws of the State of Delaware with a principal office for the transaction of business located at 1200 South Pine Island Road, Plantation, Florida 33324.

10. Upon information and belief, the DHL defendants are subsidiaries of Duetsche Post World Net, a German company that is not named as a party in this case.

Jurisdiction and Venue

11. DHL is doing business in this District and elsewhere in New York and is subject to personal jurisdiction in this Court.

12. Upon information and belief, DHL is authorized to do business in New York.

13. This Court has jurisdiction over the subject matter of this class action under 28 U.S.C. § 1332(d). The amount in controversy exceeds \$5 million; there are more than 100 class members; and the requisite diversity of citizenship exists.

14. Venue is proper in this jurisdiction under 28 U.S.C. §§ 1391(a) and (c).

Class Action Allegations

15. This action is properly maintainable as a class action pursuant to Federal Rule of Civil Procedure 23.

16. The class represented by Jim Ball in this action, and of which Jim Ball is itself a member, consists of all individuals and entities who have, at any time from 2003 to the date of any class certification order, paid DHL a *jet fuel surcharge* for package deliveries within the United States that DHL transported *solely by ground transportation*; the class *excludes* the judge, attorneys, consultants, and their respective staffs who are working on this case, DHL's employees, DHL's independent contractor delivery network, and federal, state, and local governmental entities.

17. The exact number of class members is not yet known but, upon information and belief, there are as many as several hundred thousand class members, or more.

18. The class, which has members across the nation, is so numerous that joinder of all members is impracticable.

19. This case involves questions of law common to the class. One common legal question, for example, is whether DHL's contract permits DHL to impose its jet fuel surcharge for shipments traveling solely by ground.

20. This case also involves questions of fact common to the class. One common factual question, for example, may be whether DHL's jet fuel surcharge practice amounts to a breach of the contract as it relates to class plaintiffs.

21. Jim Ball's claims are typical of the claims of the class.
22. Jim Ball will fairly and adequately protect the interests of the class.
23. Jim Ball has engaged qualified and experienced counsel on this case.
24. Jim Ball has no relevant interests that are antagonistic to the class.
25. Jim Ball is prepared to engage in a vigorous prosecution of this class action.
26. This class action is proper under Rule 23(b). Without limitation, it is proper under Rule 23(b)(3).
27. Questions of law or fact relating to the contract, DHL's breaches, and DHL's fuel surcharge practices are common to the class, and they predominate over any questions that might affect only individual class members.
28. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy.
29. This action is properly maintained as a class action because, as such, it will achieve economies of time, effort, and expense, and promote uniformity of decision, without sacrificing procedural fairness. It also will avoid a multiplicity of litigation while fostering judicial economy.
30. As described below, DHL's contract and the "U.S. Fees" document incorporated into it are uniformly applicable to all class plaintiffs.

31. Basic contract law across the nation governing the enforcement of DHL's contract is not diverse, non-uniform, or confusing.

32. The damages issues here are not complex or burdensome.

33. The interests of justice will be well served by resolving this dispute in the context of a class action.

34. Jim Ball knows of no other pending action against DHL seeking recovery for any class plaintiffs based on the facts and circumstances alleged in this Complaint.

Factual Allegations

35. At all relevant times, DHL was in the business of picking up and delivering items and packages for a fee.

36. DHL has shipped numerous items and packages for Jim Ball and the members of the class.

37. DHL offers its customers various service levels, which are differentiated by the expected delivery times.

38. As are relevant here, DHL offers: (a) several "Next Day" service levels (10:30 a.m., 12:00 p.m., and 3:00 p.m.); (b) a "2nd Day" service level for delivery by 5:00 p.m. on the second day; and (c) an exclusively "ground" service with delivery times that vary from one to six business days based on the distance from the origin location. These categories of service are described in DHL's Retail Tariff or Rate Guide.

39. Regardless of the service level/delivery time chosen by the customer, DHL reserves the right to transport each shipment however it chooses, *i.e.*, by air, road, or any other means.

40. DHL's contract incorporates DHL's "U.S. Fees" document, which is attached hereto as exhibit A. (Page 35 of DHL's current Retail Rate Guide, which contains the same relevant language, is attached as exhibit B.)

41. DHL's U.S. Fees document, at page 2, states that "*Air Express shipments are assessed a fuel surcharge which is indexed to the USGC kerosene-type jet fuel index. Ground shipments are assessed a fuel surcharge which is indexed to the US Dept. of Energy's on-highway diesel fuel index*" (emphasis added).

42. DHL's current "Jet Fuel Surcharge" is 29%. Its current diesel fuel, or ground, surcharge is 9.3%.

43. Upon information and belief, at all times relevant to this Complaint, DHL's jet fuel surcharge has been substantially higher than its ground fuel surcharge.

44. For example, in 2005, DHL's jet fuel surcharge ranged from 15-22%, while its ground fuel surcharge ranged from 3-5.3%. In 2006, DHL's jet fuel surcharge ranged from 13.5-19%, while its ground fuel surcharge ranged from 3.3-5.3%. In 2007, DHL's jet fuel surcharge ranged from approximately 10.5-19.5%, while its ground fuel surcharge ranged from approximately 3.5-5.3%. Finally, in 2008 (to date), DHL's jet fuel surcharge ranged from 20.5-36.5%, while its ground fuel surcharge ranged from 6-10.5%.

45. Pursuant to DHL's contract with its customers, all shipments that DHL transports solely *by ground* are subject to the lower diesel or ground fuel surcharge, not the *jet fuel* surcharge that is applicable to shipments that travel, at least in part, by air.

46. Upon information and belief, for many of its customers who select a next day or second day service, DHL is able to and does transport the shipment solely by ground within the required time frame.

47. In particular, DHL does this on shipments between cities that it can reach by truck – overnight – through its regional truck hubs. DHL also does this for shipments that never leave a metropolitan area. For these at-issue next day or second day shipments – *transported solely by ground* – DHL applies its *higher jet fuel surcharge* in violation of the parties' contract.

48. Upon information and belief, DHL has breached its contract in this manner on a substantial percentage of shipments delivered for Jim Ball and the members of the class.

49. Upon information and belief, DHL's breaches began in or about 2003 or 2004, and have systematically continued since then.

50. Upon information and belief, in 2004, DHL began adding to and expanding its network of regional truck (ground) hubs across the United States. In this way, DHL expanded its ability to transport shorter-distance packages, including next day and second day packages, solely by ground, without the need for airplane trips through DHL's Wilmington, Ohio air hub.

51. Upon information and belief, to exemplify DHL's practices: a next day package sent from Buffalo to Cleveland *does not travel by air*; instead, it travels by truck from Buffalo to DHL's Erie, Pennsylvania truck hub and, from there, by truck to Cleveland. So too for packages sent from Buffalo to Pittsburgh. DHL charges its *jet fuel* surcharge in these situations.

52. Similarly, upon information and belief, a next day package from Washington, D.C. to Lorton, Virginia *will not travel by air*; instead, it will travel by truck from Washington to DHL's Allentown, Pennsylvania truck hub and, from there, by truck to Virginia. DHL charges its *jet fuel* surcharge in these situations.

53. And finally, upon information and belief, *local* next day packages sent within one metropolitan area and/or to a neighboring city or town *will not travel by air*; instead, they will travel by truck. DHL charges its *jet fuel* surcharge in these situations too.

54. Upon information and belief, Jim Ball and the members of the class have paid DHL invoices that improperly included these jet fuel surcharges.

55. DHL is dishonoring the terms of the contract to which DHL itself agreed.

56. Some of DHL's breaches have occurred in interstate deliveries, and others have occurred in intrastate deliveries.

57. Jim Ball has used DHL and DHL's predecessor since about 1998.

58. As often as several times a week, Jim Ball has sent business documents via DHL's next day services to several cities and towns within a 200-mile radius of Jim Ball, *i.e.*,

across Western New York and Western Pennsylvania. DHL has transported them solely by ground transportation, yet imposed its higher jet fuel surcharge in violation of DHL's contractual terms.

59. After Jim Ball learned about DHL's breaches, it notified DHL and commenced this lawsuit.

60. Upon information and belief, some of the conduct at issue in this Complaint was done by Airborne Express, Inc., which was bought and then merged into DHL in 2003 or 2004. DHL, as the successor corporation, remains liable for this conduct.

61. Upon information and belief, some of the conduct at issue in this Complaint may have been done on DHL's behalf by its agents operating as resellers of DHL services. DHL, as the principal, remains liable for this conduct as well.

Count I

Breach of Contract

62. Jim Ball, for itself and the members of the class, repeats and realleges each allegation of numbered paragraphs 1 through 61 of this Complaint as part of this First Cause of Action.

63. Upon information and belief, at all times relevant to this Complaint and/or from time to time during the time period relevant to this Complaint, a contract or contracts existed to govern the relationship between DHL and the members of the class, including Jim Ball.

64. Upon information and belief, the members of the class, including Jim Ball, have performed any conditions required of them under DHL's contract. Conditions precedent to the commencement of this action, if any, have been performed, waived, or excused.

65. Upon information and belief, DHL has breached its contract, as set forth above, by imposing jet fuel surcharges for packages that were transported solely by ground transportation.

66. The members of the class, including Jim Ball, have suffered damages as a result of DHL's breaches.

67. The members of the class, including Jim Ball, have sustained substantial damages directly related to DHL's breaches. DHL is, therefore, liable to Jim Ball and the members of the plaintiffs for the amount of improper jet fuel surcharges that DHL invoiced and that they paid.

68. Damages in this case will be substantial, which total, at this time, is unknown, but can be expected to exceed tens of millions of dollars over the period relevant to the Complaint.

Jury Demand

69. Jim Ball, for itself and the members of the class, demands a jury on all issues and matters triable by a jury.

Relief Requested

WHEREFORE, class plaintiffs demand judgment against DHL as follows:

- a) For damages, in an amount to be determined at trial, plus interest;
- b) For attorneys' fees and costs of suit; and
- c) For award of such other and further relief as this Court deems just and proper.

Dated: Buffalo, New York
October 14, 2008

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