IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ANSLEY WALK CONDOMINIUM ASSOCIATION, INC., Individually and on Behalf of a Class of Similarly Situated Persons, Plaintiff, v. THE ATLANTA DEVELOPMENT AUTHORITY d/b/a INVEST ATLANTA, a Public Body Corporate Politic of the State of Georgia and an Instrumentality of the City of Atlanta, ATLANTA BELTLINE, INC., and THE CITY OF ATLANTA, Defendants.	)	Civil Action No. 2017CV296875

ORDER DENYING CLASS CERTIFICATION

Before the Court is Plaintiffs' Motion to Certify Class ("Motion"), which has been fully briefed. The Court heard oral argument on March 16, 2021.

Having considered the arguments of counsel, the briefing, and all other matters of record at the time this Motion was heard, and for good cause shown, the Court hereby DENIES the Motion. In accordance with O.C.G.A § 9-11-23(f)(3), the Court sets forth the following findings of fact and conclusions of law upon which its determination is based:

I. FINDINGS OF FACT

A. The Atlanta Development Authority's Acquisition of the Subject Property

1. The subject property in this case is a 3.46-mile stretch of real property that comprises part of the Atlanta BeltLine (the "Property.") (Class Action First Amended Complaint ("Complaint") ¶ 7) The Property was previously a railroad corridor operated by Norfolk Southern Railway Company ("NSR"). (*Id.*)

2. In 2008, all of NSR's former interests in the Property were transferred to Defendant The Atlanta Development Authority ("ADA"), although NSR reserved for itself an easement over the Property for railroad purposes. (Complaint ¶ 32)[1] ADA acquired the Property for purposes of developing the Atlanta BeltLine, a transportation and economic development initiative involving, among other things, multi-use trails for pedestrian/bicycle traffic and fixed rail routes and modern streetcars within the City of Atlanta. (Complaint ¶ 17) Defendant Atlanta BeltLine, Inc. ("ABI") is the implementation agent for the Atlanta BeltLine. (Affidavit of Dave Pierce ("Pierce Aff."), attached as Exhibit 4 to Defendants' Opposition to Plaintiffs' Motion ("Opp."), at ¶ 3)

3. The Property includes part of the Atlanta BeltLine's Eastside Trail and part of the Atlanta BeltLine's Northeast Trail. (Pierce Aff. ¶ 21) Construction began on the 2.25-mile section of the Eastside Trail running from Irwin Street to 10th Street and Monroe Drive in October 2010. This section of the Eastside Trail was opened to the public on October 15, 2012. (Pierce Aff. ¶ 6) At that time, the Eastside Trail contained a 14-foot wide concrete trail and 30 acres of landscaped greenspace. (*Id.*)

B. ADA and ABI Entered Into Various Property-Rights Agreements with Adjacent Property Owners

4. Following the acquisition of the property by ADA and in connection with developing and operating the Atlanta BeltLine, ADA and ABI entered into at least sixty (60) different agreements with adjacent property owners to resolve any potential issues that might relate to property rights with respect to the Property and/or the adjacent property owners' land. (Pierce

[1] In 2004, NSR conveyed by deed its interest in the Property to entities unrelated to this matter (the "Mason Entities"). When NSR conveyed the Property to the Mason Entities, it reserved to itself an easement for railroad purposes over the Property. In 2007, the Mason Entities conveyed by deed their interests in the Property to NE Corridor Partners, LLC. In 2008, NE Corridor Partners, LLC conveyed by deed its interest in the Property to ADA. (*See* Complaint ¶ 32)

Aff. ¶ 4; Attachments 1 through 8) These agreements include boundary line agreements, license agreements, access agreements, limited warranty deeds, and a variety of easement agreements, including easements granted by certain of the putative class members to ADA and ABI and vice versa. (*Id.* ¶ 5)

5. Many of these agreements appear to acknowledge ADA and/or ABI's ownership of the Property and/or right to use the Property for purposes of the Atlanta BeltLine. (*See generally* Pierce Aff. Attachments 1 through 8) In particular, certain putative class members signed boundary line agreements that appear to quitclaim any interest that the putative class member may have held in the Property to ADA. (*Id.* Attachments 2 and 3) For example, putative class member 712 Ponce de Leon, LLC entered into a boundary line agreement with ADA and ABI, which states that the eastern boundary of the Property "shall constitute the dividing line between the properties of the parties, and each Property Owner quitclaims to the other such areas respectively adjoining said line as are required to establish the same as boundary." (Pierce Aff. Attachment 2)

6. Putative class members Web Ltd., Highland Park Limited Partnership, Roberts & Shefrin LLC, and Highland Park II, LLC entered into other boundary line agreements with ADA and ABI pertaining to the properties at 820 Ralph McGill Boulevard NE, 691 John Wesley Dobbs Avenue NE, 1510 Piedmont Avenue NE, 660 Irwin Street NE, 145 Sampson Street NE, and 151 Sampson Street NE. (Pierce Aff. Attachment 3) Like 712 Ponce de Leon, LLC, these additional putative class members appear to have conveyed to ABI and ADA by quitclaim any ownership interest they may have previously had in the Property. (*See id.* (identifying the dividing line between the parties' properties and stating that each party "quit-claim to the other such areas respectively adjoining said line as are required to establish the same as a boundary."))

7. Other putative class members signed easement agreements with ABI and ADA, which allowed ABI and ADA to access the putative class member's property in connection with constructing the Atlanta BeltLine. (Pierce Aff. ¶ 7) For example, former named plaintiff Jodaco, Inc. ("Jodaco") signed an easement agreement dated December 21, 2010, granting ABI a permanent easement through Jodaco's property "for the construction of the Atlanta BeltLine Eastside Trail and for the installation, replacement, maintenance, repair, monitoring, and use of a system of transit, pedestrian, paths and non-motorized bicycle trailways for the Atlanta BeltLine Project." (*Id.* Attachment 1) Jodaco's corporate representative testified at his deposition that he signed this easement agreement because he "wanted the BeltLine built." (Deposition of Jodaco ("Jodaco Depo."), Opp. Exhibit 5, 47:11) These easement agreements may be relevant to, among other things, the issue of whether the putative class members consented to ADA and ABI's use of the Property for purposes of developing and operating the Atlanta BeltLine.

8. Other agreements between putative class members and ADA/ABI also appear to confirm ADA and/or ABI's ownership of the Property:

- "[ADA] is the owner of certain real property adjacent to Grantee's Property and located within the Atlanta Beltline corridor." (Pierce Aff. Attachment 6 (Grading, Drainage, and Construction Easement Agreement with putative class member SWHR PBL, LLC))

- "ADA is the owner of certain property (the 'Corridor Property') abutting the Jamestown Property to the east." (Pierce Aff. Attachment 7 (Reciprocal Easement Agreement with putative class member Jamestown Ponce City Market, L.P.))

- "Grantee's use of the Easement Area pursuant to this Agreement shall not unreasonably interfere with [ADA and ABI]'s property, including the Atlanta BeltLine multiuse trail." (Pierce Aff. Attachment 8 at ABI_002891 (Temporary Construction Easement Agreement with putative class member Telephone Factory, LLC))

- "Grantee acknowledges that the current wooden fence installed by the Grantee was installed on [ABI's] Property and the Grantee hereby consents to allow [ABI] to remove and replace the encroaching fence with a fence [...] installed as a part of

the Atlanta BeltLine Eastside Trail Project." (Pierce Aff. Attachment 8 at ABI_001974 (Access Agreement with putative class member The Factory Lofts Condominium Association, Inc.))

9. In addition, certain property-rights agreements contain indemnification provisions that would appear to obligate certain putative class members to indemnify Defendants for claims such as the ones being pursued in this case. For example, putative class member Nugrape Lofts Condominium Association, Inc. entered into an access agreement with ADA and ABI whereby it agreed to "indemnify and hold harmless [ADA], the City of Atlanta, and ABI…from any and all suits, actions, liens, proceedings, debts, damages, liabilities, injuries, obligations, losses, demands, claims and expenses, whether arising before or after the expiration or termination of this Agreement and in any manner directly or indirectly attributable to [Nugrape Lofts Condominium Association, Inc.]." (Pierce Aff. Attachment 5)

10. The indemnification language in the various agreements is different. For example, putative class member The Factory Lofts Condominium Association, Inc. ("Factory Lofts"), which also entered into an access agreement with ADA and ABI, agreed to a more limited indemnification provision whereby Factory Lofts only agreed to indemnify ABI (not ADA or the City of Atlanta) and only agreed to indemnification with respect to Factory Lofts' use of the subject access area. (*See* Pierce Aff. Attachment 8 at ABI_001974 (stating that "[Factory Lofts] agrees to indemnify and hold harmless ABI [. . .] from any direct or indirect use of the Access Area by [Factory Lofts]")

11. The above examples are only a representative sample of the various property-rights agreements that have been entered into between ABI, ADA and putative class members. (Pierce Aff. ¶ 20) Most of these agreements involve the Atlanta BeltLine's Eastside Trail. (*Id.* ¶ 21) However, the Property in this case also includes part of the Atlanta BeltLine's Northeast Trail

(extending from the southern end of Piedmont Park through the Ansley Park neighborhood). (*Id.*) Unlike the Eastside Trail, the Northeast Trail is only partially open to the public (beginning in early 2013). It currently has no lighting, no pavement, and limited points of access. (*Id.* ¶ 22) ABI considers the Northeast Trail to be an "Interim Trail" and plans additional construction over the Northeast Trail over the next few years. (*Id.*) The different statuses of the two trail sections may impact various issues in this case, including the statute of limitations, prescriptive title, and damages, among other issues.

12. Certain putative class members who did not enter into property-rights agreements with Defendants nevertheless were notified by letter and/or email of ABI and/or ADA's planned use of the Property for purposes of developing the Atlanta BeltLine beginning in or around 2008. (*See, e.g.,* Opp. Exhibits 9, 12, 13, and 15 (letters and emails to Plaintiffs from 2008 through 2011 indicating that Property had been acquired for use as the Atlanta BeltLine)) The communications between the putative class members and Defendants may be relevant to, among other things, the issue of whether the putative class members consented to ADA and ABI's use of the Property for purposes of developing and operating the Atlanta BeltLine.

C. Plaintiffs' Allegations

13. Plaintiffs filed their original complaint on October 20, 2017.[2] In their complaint, Plaintiffs contend that Defendants improperly took their land to develop the Atlanta BeltLine.

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[2] After filing the Complaint, Plaintiffs' counsel sent hundreds of letters to the putative class members over the span of six months in connection with seeking their participation in this case as named Plaintiffs. (Opp. Exhibit 6) However, only four plaintiffs joined this case. Although Jodaco initially joined this case, it later withdrew once it learned the purpose of the case was to seek damages from Defendants for inverse condemnation and trespass, because it did not agree with Plaintiffs' claims. (Jodaco Depo. 9:23-25) Indeed, Jodaco testified that it believes that the Atlanta BeltLine "is the best thing that ever happened to that area of Atlanta, to my property, to people who live in the neighborhood." (*Id.* 39:3-6) Jodaco further testified that it did not want to be a plaintiff in this case any longer because it did not want to "hinder the City of Atlanta and the

(Complaint ¶¶ 45-56)[3] Plaintiffs further contend that Defendants' ongoing implementation of the Atlanta BeltLine constitutes an interference with Plaintiffs' property rights and that Plaintiffs have not been compensated for this unauthorized interference. (*Id.*) In particular, Plaintiffs allege that "Defendants have not compensated Plaintiffs for the unauthorized use of and taking of their land to develop the Atlanta BeltLine" and that "Plaintiffs have not sanctioned, permitted, or authorized Defendants' repeated interference with Plaintiffs' property rights." (*Id.* ¶ 36 and ¶ 54) Based upon these allegations, Plaintiffs assert claims for inverse condemnation and trespass, seeking compensatory and other damages. (*Id.* ¶¶ 45-56) Plaintiffs also seek to certify their claims as a class action. (*Id.* ¶¶ 40-44)

14. As an initial matter, Plaintiffs' claims rest upon their alleged ownership of the Property. Plaintiffs' argument as to why they own the Property involves several prerequisites, beginning with various deeds created in the 1800s. (Complaint ¶¶ 27-36) Those deeds allegedly granted the railroad an interest in the Property. (*Id.* ¶ 28) Plaintiffs refer to these deeds as "source conveyance instruments" and claim that each of these deeds conveyed a railroad-purpose easement (rather than fee simple title or some other property interest) to the railroad company. (*Id.* ¶ 29; Motion at 10)

15. Plaintiffs have identified 13 different source deeds pertaining to different portions of the Property, which Plaintiffs have identified by the following grantor names: 1) Plaster; 2) Gardner, Tr.; 3) Belknap; 4) Rice and Mitchell; 5) Pylant; 6) Ezzard; 7) Fowler and Wallace; 8)

BeltLine." (*Id.* 10:18-19) In addition, Jodaco testified that it has benefited significantly from the Atlanta BeltLine and wanted to continue receiving those benefits. (*Id.*)

[3] Plaintiffs filed their amended their complaint on December 21, 2017. In addition to naming ADA and ABI as defendants, Plaintiffs have named the City of Atlanta as a defendant under the theory that ADA and ABI are agents of the City of Atlanta. (Complaint ¶¶ 9-26)

Walker; 9) Gardner, N.E.; 10) Liddell; 11) Thresher; 12) Fowler, Blackmon, et al.; and 13) Dorsey. (Affidavit of Michael J. Smith ("Smith Aff."), Motion Exhibit 2, Attachment 13)

16. Of these 13 source deeds, Plaintiffs have only been able to locate 11 of them. (*Id.*) The Fowler, Blackmon, et al. deed and the Dorsey deed were not produced in this case and were not attached to Plaintiffs' Motion. Plaintiffs claim that they will try to obtain the missing deeds through discovery requests to the railroad, although they admit that these missing deeds may never be found. (Plaintiffs' Reply in Support of Motion ("Reply") at 8-9)[4]

17. In addition to the railroad's chain of title, Plaintiffs' ownership theory also relies on their own chains of title. Specifically, Plaintiffs allege they are "the successors in interest to the land adjacent to the railroad purpose easements, and thereby are the successors in interest to the fee title to the centerline of the Subject Property pursuant to the centerline presumption under Georgia law." (Complaint ¶ 30)

18. Plaintiffs claim that the putative class consists of 76 property owners. (Motion at 2; Smith Aff. Attachment 13) However, the record does not include the deeds that allegedly establish the putative class members' chain of title to the land adjacent to the Property.[5] (*See generally*

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[4] In connection with trying to satisfy O.C.G.A. § 9-11-23, Plaintiffs claim that the deeds can be divided into between four to six "groups." (Motion at 15; Smith Aff. Attachments 7 and 13; Reply Exhibit 9; Hr'g Tr., March 16, 2021, 14:1-5) However, Plaintiffs have not explained the criteria they contend can be used to divide the source deeds into such groups, and have only attempted to transcribe three of the 13 deeds. (Reply Exhibit 9) The deeds that have not been transcribed appear to be either barely legible or not legible at all. (Smith Aff. Attachment 7)

[5] Plaintiffs have not introduced any deeds pertaining to the land adjacent to the Property. (*See generally* Motion) Defendants introduced deeds pertaining to 13 putative class members' properties in connection with demonstrating that the centerline presumption would be rebutted for various class members. (Opp. Exhibits 16-17) These deeds either do not make any reference to a railroad right-of-way as a boundary, describe the Atlanta BeltLine as a boundary, or otherwise reference ADA as the adjacent property owner. (*Id.*) Plaintiffs did not address the specific language of these deeds in their Reply. (*See generally* Reply)

Motion) Plaintiffs have not attempted to show that the deeds that allegedly establish the putative class members' chain of title to the land adjacent to the Property—and allegedly establish title to the Property under the "centerline presumption"—are similar, or can be analyzed collectively. At oral argument, Plaintiffs admitted that they had not reviewed these deeds, stating that they would be "surprised" if the deeds did not support Plaintiffs' theory of ownership. (Hr'g Tr. 90:18-91:2)

19. Finally, Plaintiffs' ownership theory relies on the March 7, 2017 "Termination of Railroad Easement" signed by NSR and ADA.[6] (Complaint ¶¶ 33-34) Plaintiffs claim this agreement abandoned all railroad-purpose easements over the Property, thereby triggering a reversion of the Property to them as the fee owners. (*Id.*)

20. While Plaintiffs do not specify the amount of damages they seek for their inverse condemnation and trespass claims, in discovery they averred that they are seeking essentially "the market value of the land [they] lost plus any damages to [their] remaining property that is next to the BeltLine." (Opp. Exhibit 2) Plaintiffs' counsel's letters to putative class members also stated that "substantial recoveries are possible here given the high land values surrounding the BeltLine." (Opp. Exhibit 6)

21. Plaintiffs claim that the putative class members own a variety of residential and commercial properties adjacent to the Atlanta BeltLine. (Smith Aff. Attachment 13)

D. Proposed Class Definition

22. Plaintiffs claim that this case should be certified as a class action. Plaintiffs seek to certify the following putative class: "The people and entities who, on March 7, 2017, owned

[6] NSR and ADA entered into an August 24, 2020 "Corrective Transfer of Railroad Easement and Termination of Interest," which Defendants claim establishes that NSR's easement rights were transferred to ADA and which is the subject of Defendants' pending Motion for Summary Judgment. (Opp. Exhibit 3)

interests in lands constituting part of the railroad corridor or right-of-way on which a rail line formerly was operated by Norfolk Southern Railroad ("NSR") from milepost 633.10 to milepost 636.56 in Fulton County, Georgia, and who seek to recover just and adequate compensation for a taking by Defendants of their interests and rights to use, possess, control, and enjoy the railroad corridor lands having been abandoned by NSR on March 7, 2017, and who contend that Defendants are liable for the taking of and trespass upon their lands and interests." (Motion at 1)

23. For the reasons set forth in more detail below, class certification is inappropriate because, among other reasons, Plaintiffs fail to satisfy the predominance and superiority requirements of O.C.G.A. § 9-11-23(b)(3).

II. CONCLUSIONS OF LAW

A. Statutory Requirements

24. As an initial matter, class actions are an exception to the rule that litigation must be pursued by the individual party who has been harmed. Accordingly, they are only permitted when all of the requirements of O.C.G.A. § 9–11–23 are met. *Georgia-Pac. Consumer Prod., LP v. Ratner*, 295 Ga. 524, 525–26 (2014). Importantly, Plaintiffs bear the burden of proving "with evidence" that class certification is appropriate. *Id.*

25. Under Georgia law, class certification is only appropriate if Plaintiffs demonstrate that all six of the following requirements are met in order to pursue an action on a classwide basis: (1) numerosity - the class is so numerous as to make it impracticable to bring all members before the court; (2) commonality - there are common questions of law or fact; (3) typicality - the claims of the class representatives are typical of the claims of the class members; (4) adequacy of representation - the class representatives will adequately represent the interests of the class; (5) predominance - the class members' common questions of law or fact predominate over individual

questions; and, (6) superiority - the class action device is superior to other methods of adjudication. *See* O.C.G.A. §§ 9-11-23(a), (b)(3).[7]

26. To satisfy the requirements of O.C.G.A. § 9–11–23, it is not enough for the plaintiffs simply to allege that they have been satisfied. *Ratner*, 295 Ga. at 526. Rather, the plaintiffs must come forward with specific evidence demonstrating that the statutory requirements are satisfied. *Id.*

27. When the determination of whether each putative class member has a right to recover requires a case-by-case evaluation, common questions do not predominate. *Rollins, Inc. v. Warren,* 288 Ga. App. 184, 187 (2007).

28. Certification is only proper if the trial court is satisfied, after a rigorous analysis, that the prerequisites of O.C.G.A. § 9–11–23 have been satisfied. *MCG Health, Inc. v. Perry*, 326 Ga. App. 833, 836 (2014). The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs' causes of action. *Id.* The trial court must analyze how the law would apply to the applicable facts to determine whether the putative class members' claims actually could be adjudicated on a collective basis at a trial of the

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[7] Plaintiffs' Motion seeks alternative certification under O.C.G.A. § 9-11-23(b)(1)(A), which states that an action may be maintained as a class action if the prerequisites of O.C.G.A. § 9-11-23(a) are satisfied, and, in addition, the prosecution of separate actions by or against individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." O.C.G.A. § 9-11-23(b)(1)(A). However, federal courts have held that certification under the equivalent subsection of Federal Rule 23(b)(1)(A) is not appropriate in a damages action. *See, e.g., In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987). Plaintiffs appear to have conceded that class certification is not appropriate under O.C.G.A. § 9-11-23(b)(1)(A), by failing to cite to any authority supporting the certification of a class under this subsection and by failing to argue that a class should be certified under this subsection at the March 16, 2021 class certification hearing. (Reply at 46; *see generally* Hr'g Tr.) The Court therefore finds that Plaintiffs have not satisfied their burden of showing that certification under O.C.G.A. § 9-11-23(b)(1)(A) is appropriate.

case. *Ratner*, 295 Ga. at 528. Whether to certify a class is a matter committed to the discretion of the trial court, but any exercise of that discretion must comport with the statutory requirements. *Premier Paving GP, Inc. v. IOU Cent., Inc.*, 852 S.E.2d 586, 588 (Ga. Ct. App. 2020).

B. Predominance and Superiority

29. Here, Plaintiffs have not satisfied the predominance and superiority requirements of O.C.G.A. § 9–11–23(b)(3) because Defendants' liability for inverse condemnation and trespass cannot be established without engaging in multiple individualized, case-by-case determinations. *See R.S.W. v. Emory Healthcare, Inc.*, 290 Ga. App. 284, 287 (2008) ("[w]here the resolution of individual questions plays such an integral part in the determination of liability, a class action suit is inappropriate"); *John E. King & Assocs. v. Toler*, 296 Ga. App. 577, 582 (2009) (because plaintiffs did not meet predominance requirement, plaintiffs could not show that a class action was superior to other available methods for the fair and efficient adjudication of the controversy).

30. As an initial matter, and as Plaintiffs admit, the 13 different railroad source deeds must each be reviewed and analyzed on an individual basis to determine whether the original grantor intended to convey a railroad-purpose easement, fee simple title, or some other property interest to the railroad company. (Hr'g Tr. 10:24-11:1, 19:19-23); *Jackson v. Rogers*, 205 Ga. 581, 586–87 (1949) ("the crucial test in determining whether a conveyance grants an easement in, or conveys title to, land, is the intention of the parties, but in arriving at the intention many elements enter into the question."). Plaintiffs have not addressed the language in these 13 deeds and have not even presented two of these deeds, thereby failing to meet their burden to demonstrate that the 13 railroad source deeds can be analyzed collectively. (Reply Exhibit 9; Hr'g Tr. 90:18-91:2; 13:18-14:5)

31. In addition, the deeds for the properties adjacent to the Property must be reviewed and analyzed on an individual basis to determine whether the putative class members can establish title to the Property under the centerline presumption. To determine whether any, some, or all putative class members can succeed on their claims, the jury must analyze the putative class members' deeds to determine, first, whether the individual putative class member owns property adjacent to the Property, and second, to determine whether language of those deeds rebuts the centerline presumption by indicating that the grantor did not intend to grant title to the Property. *See McRae v. SSI Dev., LLC*, 283 Ga. 92, 93 (2008) ("The law in this State is clear that a person must establish ownership of property on the strength of her own title.")

32. To establish ownership of the Property, Plaintiffs rely on the centerline presumption, which is a rule of construction that applies to the interpretation of deeds. Complaint ¶ 30; *Descendants of Bulloch, Bussey & Co. v. Fowler*, 267 Ga. 79, 81 (1996). When a deed grants property bounded by a railroad right-of-way and the grantor owns the fee in that right-of-way, the centerline presumption creates a rebuttable presumption that, that in the absence of express intent to the contrary, the deed conveys title to the centerline of the railroad right-of-way. *Id.*; *see also Fambro v. Davis*, 256 Ga. 326, 327 (1986) ("Whenever a railroad is abandoned, the presumption is that the fee is in the adjacent landowners and that their right extends to the center line, unless the contrary appears.") (emphasis added).

33. Accordingly, the centerline presumption is deed and property-specific, and may be insufficient to establish ownership over a railroad right-of-way depending on the language of the individual property-specific deeds at issue. *See Fambro,* 256 Ga. 327-328 (analyzing conveyance language to determine whether centerline presumption should be rebutted); *see also Valenzuela v. Union Pac. R.R. Co.*, 2017 WL 679095, at *13 (D. Ariz. Feb. 21, 2017), *vacated in part* (Mar. 3,

2017), *opinion reinstated*, 2017 WL 1398593 (D. Ariz. Apr. 19, 2017) (the centerline presumption is "deed and property-specific, and requires certain conditions to apply. It readily recognizes that the lack of a grantor's fee interest, language in the deed, or circumstances surrounding the conveyance may render the presumption inapplicable."); 11 C.J.S. Boundaries § 80 ("[p]articular language used may be such as to exclude the right of way from a conveyance").

34. Whether the centerline presumption is sufficient to establish ownership of the Property would therefore require an individualized analysis for each putative class member. *Id.*; *see also In re SFPP Right-of-Way Claims*, 2017 WL 2378363, at *15 (C.D. Cal. May 23, 2017) ("the [centerline] presumption does not allow class-treatment of ownership because the presumption requires individualized reference to the conveyance itself"). Not only have Plaintiffs not shown how this could be accomplished on a class-wide basis, they have not even presented the deeds that allegedly establish the chain of title for the putative class members. (H'rg Tr. 12:6-7 (stating that Plaintiffs will present the deeds of adjoining landowners "during the merits stage.")) This predominating individual issue also makes class certification inappropriate. *See Valenzuela*, 2017 WL 679095, at *8 ("it is likely that many class members will face unique facts that call into question the applicability of the centerline presumption"); *In re SFPP Right-of-Way Claims*, 2017 WL 2378363, at *16 ("even if the Court were to apply the [centerline] presumption class-wide, the presumption would remain rebuttable. Therefore, Defendants could contest its application to individual class members. Individual issues would inevitably predominate").

35. Indeed, at oral argument, Plaintiffs offered no evidence regarding the procedure for adjudicating the centerline presumption class-wide. Plaintiffs merely speculated—without providing any evidence regarding the deeds at issue—that they would be "surprised" if individual adjudications did not reach the same outcome for many of the putative class members. *See In re*

SFPP Right-of-Way Claims, 2017 WL 2378363, at *16 ("Plaintiffs cannot use the centerline presumption to overcome the need for individualized inquiries"). Speculation regarding undisclosed and unidentified evidence does not meet Plaintiffs' burden to satisfy the predominance requirement. *See Ratner*, 295 Ga. at 526 (to satisfy elements of class certification, plaintiffs must come forward with specific evidence demonstrating that statutory requirements are satisfied).

36. Because Plaintiffs have not demonstrated that putative class members' ownership of the Property can be established using common class-wide proof, they have not satisfied the predominance requirement, thereby preventing a class action from being the superior method to adjudicate Plaintiffs' claims. *See Tanner v. Brasher*, 254 Ga. 41, 44 (1985) (class certification requirements not met when there were individual issues regarding "the validity of the claim of right and chain of title for each alleged class member").

37. There are also approximately 60 property-rights agreements between the putative class members and Defendants that must be individually reviewed and analyzed to determine their impact on the putative class members' claims. (Pierce Aff. Attachments 1 through 8) These agreements address each putative class member's (and Defendants') rights with respect to the Property at issue in this case. Each must be reviewed to determine, among other things, whether property rights were conveyed between the parties and whether the putative class members agreed to contractual provisions that bar their claims for inverse condemnation or trespass.

38. For example, some putative class members signed boundary line agreements that appear to convey any interest that the putative class member may have held in the Property to ADA. (Pierce Aff. Attachments 2 and 3)

39. Other property-rights agreements between putative class members and Defendants may bar certain putative class members from asserting inverse condemnation or trespass claims based on estoppel, waiver, acquiescence, and/or consent. For example, putative class member Jodaco's grant of a permanent easement to ABI over Jodaco's property for the construction and use of the Property for purposes of the Atlanta BeltLine appears to be inconsistent with the claims the Plaintiffs are asserting against Defendants for inverse condemnation and trespass. (Pierce Aff. Attachment 1)

40. In addition, other putative class members' inverse condemnation and trespass claims may be barred by their written acknowledgments that ADA and/or ABI own the Property. (*See generally* Pierce Aff. Attachment 8) Even if these individual putative class members could establish their ownership of the Property, inverse condemnation and trespass claims are not viable if the property owner consented to Defendants' use of the property. *See McElmurray v. Augusta-Richmond Cty.*, 274 Ga. App. 605, 607 (2005) ("an inverse condemnation claim does not lie where, as here, a property owner consents to the action of the government that resulted in the alleged taking or damaging of the property"); *Scott v. Leder*, 164 Ga. App. 334 (1982) (owner's consent defeats a claim for trespass).

41. Indeed, while the Complaint alleges that "Plaintiffs have not sanctioned, permitted, or authorized Defendants' repeated interference with Plaintiffs' property rights," it appears that numerous individual putative class members have in fact authorized Defendants to use the Property as the Atlanta BeltLine transportation corridor. (Complaint ¶ 54) Plaintiffs make no attempt to show that the issue of consent is not a predominating individual issue.

42. Plaintiffs have the burden of demonstrating that common questions will predominate over individual questions and that a class action is superior to other available methods

for the fair and efficient adjudication of the controversy. O.C.G.A. § 9-11-23(b)(3). Plaintiffs have not carried their burden because adjudicating the putative class members' claims would require the jury to analyze, among other individual issues, 13 different railroad source deeds (to determine whether the railroad originally acquired the Property adjacent to each putative class member's property in fee simple), all of the deeds for the adjacent properties (to determine whether each putative class member can claim title to the Property based on the centerline presumption or if the centerline presumption should be rebutted), and dozens of distinct contracts (to determine whether any of the provisions in those contracts bar the putative class members' claims for inverse condemnation and trespass, regardless of whether the putative class member can prove that it holds title to the Property). *See MCG Health, Inc. v. Perry*, 326 Ga. App. 833, 836 (2014) (class certification requirements not met when the resolution of various issues would depend on the analysis of multiple contractual provisions within a universe of at least 35 contracts); *Rollins,* 288 Ga. App. at 187 ("When the determination of whether each putative class member has a right to recover requires a case-by-case evaluation, common questions do not predominate.")

43. Moreover, other issues relating to waiver, acquiescence, estoppel, consent, Defendants' prescriptive rights, and/or the statute of limitations must be addressed on an individual basis, particularly because the Property is in different stages of development and because certain putative class members were notified of Defendants' planned use of the Property as the Atlanta BeltLine transportation corridor beginning in or around 2008. (*See, e.g.,* Opp. Exhibit 13 (2008 email to Plaintiff Robert Smith referring to the Property as the "Beltline parcel.")) These communications may identify the timing and the substance of the notices provided to putative class members (as well as the putative class members' response), thereby demonstrating various individual defenses specific to each putative class member and preventing Plaintiffs from

satisfying the predominance requirement. *See Rite Aid of Georgia, Inc. v. Peacock*, 315 Ga. App. 573, 577 (2012) ("Georgia appellate courts have refused to condone the certification of a class when the circumstances surrounding a member's actual response to the defendant's allegedly wrongful act could vary widely."); *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("we regard the law as settled that affirmative defenses should be considered in making class certification decisions"); *Castano v. American Tobacco Co.,* 84 F.3d 734, 744 (5th Cir.1996) (explaining that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.")

44. For example, the analysis of whether Robert Smith waived his inverse condemnation or trespass claims against Defendants may be different than the analysis of whether Foah waived these claims. Robert Smith's property is adjacent to the undeveloped Northeast Trail, whereas Foah's property is adjacent to the developed Eastside Trail, which was constructed in or around 2012. (Pierce Aff. ¶¶ 6, 21-22) Whereas it appears that Robert Smith was generally put on notice that the Atlanta BeltLine would at some point be developed over the Property in or around 2008, Foah was notified specifically in 2011 that the construction of the Atlanta BeltLine adjacent to Foah's property was imminent and would occur on "property owned by the Atlanta BeltLine." (Opp. Exhibits 13 and 15) Thus, the general notice regarding the planned use of the Property as the Atlanta BeltLine that Robert Smith received may be insufficient to demonstrate that Robert Smith knowingly waived his claims, whereas the specific notice regarding imminent construction that Foah received may sufficiently demonstrate that Foah knowingly waived its claims.

45. The Court need not decide the merits of Defendants' substantive defenses on these points. It is sufficient to note at this juncture that the different factual scenarios between putative

class members with respect to deeds, property-rights agreements, and other issues impacting property rights raise numerous individualized legal questions that prevent Plaintiffs from satisfying the predominance and superiority requirements of O.C.G.A. § 9-11-23(b)(3). *See Aetna Cas. & Sur. Co. v. Cantrell*, 197 Ga. App. 672, 673 (1990) (a class action is not authorized where the issue presented must be resolved on a contract-by-contract basis); *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 869 (2010) (class certification requirements not met when issue of whether putative class members consented to defendants' actions needed to be decided on a case-by-case basis). Indeed, Plaintiffs have not submitted a trial plan or otherwise shown that this case can be tried as a class action without devolving into a series of individual trials for each putative class member. (*See generally* Motion and Reply)

46. In addition, even if Plaintiffs could establish liability, the issue of damages would be highly individualized and would require mini-trials for each putative class member to adjudicate the myriad of property-specific factors impacting an appraisal analysis. (Reply at 15 (stating that "damages are likely to be all over the map given the fact that each property will be individually valued")); *see also Atkins v. United States*, 2016 WL 3878466, at *4 (E.D. Mo. July 18, 2016) ("the appraisers would be required to consider numerous variables unique to each individual property. Indeed, '[e]very tract of land is recognized as having a unique value[.]' [. . .] Determining which variables apply to each property would require highly individualized proof.") The putative class members include both single-family and multi-family residential properties as well as a wide variety of commercial properties. (Smith Aff. Attachment 13) In addition, the Property extends through different neighborhoods with different property values, including Inman Park, Midtown, and Ansley Park. (*Id.*) Thus, the highest and best use analysis for purposes of appraising the fair market value of the Property may very well be different for each putative class

member. Likewise, the comparable sales analysis would vary widely. An individualized analysis would also be required to determine the damages (if any) to the remainder with respect to each putative class member. (Opp. Exhibit 2 (stating that Plaintiffs are seeking the market value of the land they lost plus any damages to their remaining property that is next to the BeltLine)).

47. The issue of whether the Atlanta BeltLine granted special benefits to the putative class members (which may reduce the damages amounts) would also be highly individualized because the Atlanta BeltLine has impacted adjacent properties differently. *See Williams v. State Highway Dep't*, 124 Ga. App. 645, 646 (1971) ("Benefits are special which add anything to the convenience, accessibility and use of the property"). For example, a commercial development with retail stores and restaurants such as Ponce City Market (owned by putative class member Jamestown Ponce City Market, L.P.) may derive substantial benefits from additional customers who use the Atlanta BeltLine to access its property, whereas a condominium development (such as Ansley Walk Condominium Association, Inc.) may value privacy and may believe its property has been damaged by increased foot traffic generated by the Atlanta BeltLine. These individualized damages issues are another reason why common issues do not predominate. *See Winfrey v. Sw. Cmty. Hosp., Inc.*, 184 Ga. App. 383, 383 (1987) (individualized damages issues prevented plaintiffs from satisfying predominance requirement).

48. The significant damages sought by each putative class member further demonstrates that a class action would not be the superior method to adjudicate Plaintiffs' claims, because Plaintiffs do not lack the financial incentive to bring individual actions. (Opp. Exhibit 6 (letter from Plaintiffs' counsel stating that "substantial recoveries are possible here given the high land values surrounding the BeltLine")); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small

recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.")

49. The Court finds persuasive the approximately thirty (30) state and federal court decisions cited by Defendants which denied class certification in cases involving alleged ownership rights in railroad corridors or other rights-of-way. While the facts of those cases differed somewhat from those present here, the reasoning of those cases applies equally here: property rights in railroad corridors must necessarily be determined on a property-by-property basis, thereby preventing plaintiffs from satisfying the predominance requirement. (*See* Opp. Exhibit 1); *In re Worldcom, Inc.*, 2005 WL 1208527, at *2 (S.D.N.Y. May 20, 2005) ("The reason so many courts have denied class certification in these circumstances is obvious: the rights of the individual landowners here implicated vary radically from landowner to landowner and often require resort to complicated and hoary documents to make any kind of determination.")

50. Plaintiffs have not cited any state or federal court decisions outside the Court of Federal Claims wherein claims alleging ownership in a railroad corridor were certified as a class action. (*See generally* Motion and Reply) The Court of Federal Claims class certification decisions cited by Plaintiffs (at pages 3 through 5 of Plaintiffs' Motion) are unpersuasive for a number of reasons. First, in nearly all of those cases, class certification was not contested. Rather, the parties agreed to it. (Motion Exhibit 1) Uncontested class certification decisions generally are not persuasive authority because in those cases, no party developed a record as to individualized issues. *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 225 (E.D. La. 1998) ("in the cases cited by plaintiffs, no party developed a record as to individualized issues and state law complexities because class certification was not contested, and the parties agreed to settle. For these reasons, the Court does not find the settlement class cases compelling"). Second, even if

uncontested decisions were given equal weight to contested decisions, none of the cases cited by Plaintiffs involved individual issues like the ones in this case, including dozens of existing property-rights agreements between the putative class members and the defendants prior to the alleged taking date. Third, the Court of Federal Claims has an unusual opt-in class certification procedure which differs from the opt-out procedure used by state and federal courts throughout the country. (Motion Exhibit 1) Fourth, the Court of Federal Claims' decision in *Brown v. United States*, 126 Fed. Cl. 571 (2016)—a case where class certification was actually contested—supports the denial of class certification here because, like in *Brown*, the property rights at issue must be determined on an individual basis and cannot be determined collectively. *See Brown*, 126 Fed. Cl. at 583 n. 10 ("it is not possible to ascertain whether Norfolk Southern acquired an easement—or the scope of any such easement—in one fell swoop [. . .] Rather, an examination of each of the deeds and other documents relied upon by plaintiffs is necessary").

51. Considering all of the individualized issues concerning the putative class members' claims, Plaintiffs have not carried their burden of showing that the predominance and superiority requirements of O.C.G.A. § 9–11–23(b)(3) are satisfied in this case.

C. Adequacy

52. Plaintiffs also have not carried their burden of demonstrating that the adequacy requirement is satisfied under O.C.G.A. § 9–11–23(a)(4), because the relief they seek conflicts with putative class members' interests.

53. Certain putative class members' agreements to indemnify Defendants may present a conflict of interest between Plaintiffs and one or more putative class members who may be required to indemnify Defendants with respect to the claims asserted in this case. For example, putative class member Nugrape Lofts Condominium Association, Inc. ("Nugrape") agreed to

indemnify and hold harmless Defendants from "any and all suits, actions, liens, proceedings, debts, damages, liabilities, injuries, obligations, losses, demands, claims and expenses [..] in any manner directly or indirectly attributable to [Nugrape]." (Pierce Aff. Attachment 5) Defendants could potentially exercise their rights under this broad indemnification provision to require Nugrape to pay Defendants' defense costs and damages attributable to Nugrape's claims in this case. Thus, Nugrape and the other putative class members who agreed to indemnify Defendants have an interest in this case not proceeding as a class action because a class action could trigger their indemnification obligations under their existing agreements with Defendants.

54. In addition, putative class member Jodaco testified that it did not want to be a plaintiff in this case any longer because it did not want to "hinder the City of Atlanta and the BeltLine." (Jodaco Depo. 10:18-19) Jodaco testified that it has benefited significantly from the Atlanta BeltLine and wanted to continue receiving those benefits. (*Id.*) Thus, Jodaco has an interest in Defendants not being held liable for a large monetary judgment, which could impact the Atlanta BeltLine's operations. Plaintiffs' claims are directly adverse to Jodaco's stated interest (and likely the interests of other putative class members who want to continue receiving benefits from the Atlanta BeltLine). These conflicts of interest prevent Plaintiffs from satisfying the adequacy requirement. *See Jones v. Douglas Cty.*, 262 Ga. 317, 323 (1992) (where evidence showed that certain proposed class members would oppose the relief sought by the named plaintiffs, there was "an apparent conflict between [the named plaintiffs] and the interests of the other members of the proposed class," and the named plaintiffs did not satisfy the adequacy requirement for class certification).

55. Based on the above, Plaintiffs have not carried their burden of showing that the adequacy requirement of O.C.G.A. § 9–11–23(a)(4) is satisfied in this case.

D. Ascertainability

56. An implicit requirement of O.C.G.A. § 9–11–23 is that a class must be presently ascertainable based on objective criteria that do not require the court to delve into the merits of the plaintiffs' claims. *See Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947 (11th Cir. 2015) ("In order to establish ascertainability, the plaintiff must propose an administratively feasible method by which class members can be identified"); *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 732 (2010) (recognizing requirement that a class must be readily ascertainable). A class is not ascertainable if the court must conduct individualized mini-hearings to determine if a particular person is part of the proposed class. *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) ("[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate.")

57. Here, the proposed class is not readily ascertainable for at least two reasons. First, the proposed class definition would require the Court to make individualized merits determinations regarding land ownership to determine class membership. Specifically, the proposed class members are the "people and entities who, on March 7, 2017, owned interests in lands constituting part of the railroad corridor or right-of-way." (Motion at 1) Thus, the Court must determine who owned any portion of the Property, which would require extensive individual deed analysis to determine who is a member of the class. Second, Plaintiffs' class definition would require the Court to determine which putative class members "contend that Defendants are liable for the taking of and trespass upon their lands and interests." (Motion at 1) But the Court has no objective way to determine which putative class members—if any—"contend" that Defendants are liable for a taking and a trespass. In order to make this determination, the Court would need to inquire as to each putative class member and may need witness testimony from each putative class member.

That individualized inquiry is contrary to the ascertainability requirement under O.C.G.A. § 9–11–23.

58. Accordingly, Plaintiffs have not met their burden to show that the proposed class is readily ascertainable.

E. Numerosity

59. Plaintiffs also have not carried their burden to show numerosity. While numerosity is not ordinarily a particularly difficult element to satisfy, Plaintiffs have not satisfied this element here because the record does not reflect the presence of numerous other claimants who believe that their land has been taken by Defendants and that Defendants are trespassing over their land. *See Landor Condo. Consultants, Inc. v. Bankers First Fed. Sav. & Loan Ass'n*, 204 Ga. App. 212, 213 (1992) ("The record does not reflect the presence of numerous other claimants with similar claims"); *Jones*, 262 Ga. at 323 (class certification denied when Plaintiffs "produced no evidence that any other lot owners shared their dissatisfaction"); *Amajac, Ltd. of Georgia v. Northlake Mall*, 59 F.R.D. 169, 174 (N.D. Ga. 1973) (where it did not appear that any tenants of shopping center other than plaintiff complained of defendants' actions, case was not maintainable as a class action on behalf of all tenants).

60. Plaintiffs' counsel sent hundreds of solicitation letters over the span of six months to the putative class members in connection with seeking their participation in this case. (Opp. Exhibit 6) However, only four plaintiffs joined, and the only unnamed putative class member who has been deposed (Jodaco) testified that it does not agree with Plaintiffs' claims. (Jodaco Depo. 9:23-25) Plaintiffs have not presented any evidence that anybody other than the named Plaintiffs agrees with Plaintiffs' inverse condemnation and trespass claims.

61. In addition, each individual Plaintiff seeks significant monetary damages, further demonstrating that joinder would be practicable. Unlike class actions properly certified under O.C.G.A. § 9-11-23, Plaintiffs here do not lack an economic incentive to assert individual claims. (*See* Opp. Exhibit 6 (letter from Plaintiffs' counsel stating that "substantial recoveries are possible here given the high land values surrounding the BeltLine"); (Hr'g Tr. 56:8-9 (noting that Property was part of a $66 million purchase from the Mason Entities in 2007, a fact that Plaintiffs did not dispute)). Indeed, the significant property values in this area of Atlanta are more than enough economic incentive for Plaintiffs to assert individual claims. Thus, any others who believe they have claims would be sufficiently motivated to pursue them on an individual basis. There is no reason why joinder in this case would be impracticable.

62. Accordingly, Plaintiffs have not met their burden to demonstrate that the class is so numerous that joinder of all members is impracticable under O.C.G.A. § 9–11–23(a)(1).[8]

III. CONCLUSION

Based on the above, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Certify Class is **DENIED.**[9]

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[8] Because Plaintiffs cannot satisfy the requirement of predominance of O.C.G.A. § 9-11-23(b)(3) (among others), thereby making class certification inappropriate, the Court need not reach the question of whether Plaintiffs can satisfy the commonality and typicality requirements.

[9] This Order does not prevent putative class members from bringing individual actions against Defendants, since Plaintiffs' filing of the Complaint tolled any time remaining for the unnamed putative class members to bring the claims asserted in the Complaint under the applicable statute of limitations. *See State v. Private Truck Council of Am., Inc.*, 258 Ga. 531, 533 (1988) ("[W]hen a class action is filed, the statute of limitations for the action is tolled for all asserted members of the class during the pendency of the action. The tolling of the statute of limitations permits class members to rely on the class action to protect their rights without concern that the statute of limitations on their individual claims will have run should class certification ultimately be denied.")

SO ORDERED, this 26th day of April, 2021.

The Honorable Henry M. Newkirk
Judge, Superior Court of Fulton County

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