

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE: DELTA/AIRTRAN BAGGAGE
FEE ANTITRUST LITIGATION

Civil Action No.
1:09-md-2089-TCB

ALL CASES

**DEFENDANT DELTA AIR LINES, INC.’S RESPONSE TO
AIRTRAN AIRWAYS INC.’S MOTION FOR
COURT APPOINTMENT OF A NEUTRAL ECONOMIC EXPERT**

A Court-appointed expert is unnecessary for several reasons, including the fact that: (1) Plaintiffs’ motion for class certification should be denied for threshold reasons not implicated by the issues referenced in AirTran’s motion; and (2) there is no conflict between Dr. Singer and Defendants’ experts with respect to two of the three issues for which AirTran seeks a neutral expert.

Because the appointment of a neutral expert is unnecessary and would waste resources, AirTran’s Motion (Dkt. 284) should be denied.

1. Dispositive Threshold Issues

As explained in Delta’s Opposition to Plaintiffs’ motion for class certification, class certification should be denied for several reasons that are

unrelated to the issues about which AirTran seeks a neutral expert. For instance, class certification is inappropriate because members of the proposed class are not readily identifiable. As evidenced by the experiences of even the named Plaintiffs in this case, determining who actually paid a first bag fee to Defendants – *i.e.*, the *payor* of the first bag fee, and not merely the *passenger* – is a highly individualized and fact intensive inquiry. Because identification of members of the proposed class is not feasible using common evidence, class certification should be denied. *See* Delta’s Opposition to Plaintiffs’ Motion for Class Certification (Dkt. 221) at 27-33 (hereinafter “Delta Class Cert Opp’n”). The facts related to this issue are not reasonably in dispute and there is no economic analysis required to resolve the issue.¹

¹ In their Class Certification Reply brief, Plaintiffs claim that they are only “required to identify a class that is identifiable by reference to objective criteria – *e.g.*, persons who directly paid first bag fees to Defendants.” *See* Plfs’ Class Cert Reply (Dkt. 269) at 5. However, Plaintiffs have neither proposed any method for identifying those individuals using common evidence, nor identified any so-called “objective criteria” that could be used to identify the payors of first bag fees who are the proposed class members, as opposed to the passenger (who in many instances will not have directly paid a first bag fee to Defendants). Indeed, in their Class Certification Reply brief, Plaintiffs do not dispute that there is no data available that identifies who actually paid a first bag fee to Delta, and therefore no data available to identify putative class members. *Compare* Delta Class Cert Opp’n at 27-30 with Plfs’ Class Cert Reply at 5, 42-43; *see also* Aug. 11, 2010 Deposition of Dr. Hal J. Singer at 176:10-177:12, attached hereto as Exhibit 1.

In addition, many members of the proposed class were reimbursed for first bag fees they paid. A bag fee payor reimbursed for payment of a first bag fee has suffered no injury, and cannot establish liability or damages. But determining whether the payor of a particular bag fee was reimbursed requires specific information about each transaction that can be obtained only from each Plaintiff or potential class member, or from third-parties, as demonstrated by discovery in this case. *See* Delta Class Cert Opp'n at 20-25; *see also* Delta's Memo in Support of Its Motion for Summary Judgment as to the Claim Asserted by Plaintiff Henryk Jachimowicz (Dkt. 230) at 5-10. Again, this highly individualized and fact intensive inquiry would not be aided by the appointment of a neutral expert and renders class certification inappropriate.

Because the foregoing issues preclude class certification but clearly do not require a court-appointed expert, AirTran's motion should be denied.²

2. Consideration of the Effect on Base Fares

AirTran contends a neutral expert is necessary to address "three disputed economic issues." AirTran Memo at 3. The first of these supposed "disputed

² AirTran mistakenly conflates the payor of a first bag fee and the passenger, who in many circumstances are not the same person, as the evidence has shown in this case. *Compare* AirTran Memo (Dkt. 284-1) at 5 *with* Delta Class Cert Opp'n at 30-32.

economic issues” is whether “base fares matter.” *Id.* What AirTran is referring to is a disagreement about whether – assuming Delta and AirTran conspired to adopt a first bag fee – injury and damages for individual putative class members should be evaluated by looking only at the bag fees incurred or also looking at the effect on base fares from the adoption of Defendants’ bag fees. AirTran is correct that Delta’s and AirTran’s respective experts agree that the adoption of a first bag fee had the effect of lowering some base fares. AirTran is also correct that Plaintiffs’ expert, Dr. Singer, does not believe that Delta’s and AirTran’s adoption of a first bag fee had the effect of lowering base fares. *But* AirTran mistakenly contends that the question of whether it is appropriate to consider the effect of the first bag fee on base fares is a “disputed economic issue.”

To the contrary, Plaintiffs’ expert, Dr. Singer repeatedly testified that whether it is appropriate to consider the effect of the first bag fee on base fares is not a matter of economics. *See, e.g.,* Nov. 22, 2010 Deposition of Dr. Hal J. Singer at 355:19-356:14, attached hereto as Exhibit 2 (“So I think your question presumes, and I’m willing to play along, that the law does instruct us to look at the totality of expenditures by the customer that would include both the bag fee and the base fare.”); Plfs’ Class Cert Reply at Exhibit 45, Merits Expert Report of Dr.

Hal J. Singer at ¶ 4 (“I have been informed that the law does not require offsets to the payment of fixed fees to be considered even if such offsets occurred.”).³

Moreover, Dr. Singer expressly stated he was not offering an opinion about the propriety of considering the effect on base fares. *See, e.g., id.* at 510:22-511:2 (“I mean, the first question that we have to address is is the Court going to permit an assessment of a potential offset or are they – are is the Court instead going look at the baggage fee in isolation? Because this is a legal question, I can’t answer it . . . ”).

Given that there is no disagreement among the experts about the propriety of considering the effect on base fares, there is no need for the Court to appoint a neutral expert to address the question.⁴

³ In support of their Class Certification Reply brief filed with the Court on February 4, 2011, Plaintiffs attached Dr. Singer’s merits expert report. *See* Plfs’ Class Cert Reply (Dkt. 269) at Exhibit 45. On February 22, 2011, Plaintiffs transmitted to counsel for Defendants via e-mail an amended merits report, in which Dr. Singer withdrew certain of his opinions regarding the existence of a conspiracy. To date, Plaintiffs have failed to take any steps to inform the Court that Dr. Singer’s merits report filed on February 4, 2011 has effectively been withdrawn.

⁴ Plaintiffs’ Consolidated Amended Complaint (“CAC”) itself confirms the appropriateness of considering the effects of Defendants’ adoption of first bag fees on base fares, and not just the bag fee in isolation, because it repeatedly alleges that Defendants “reached an unlawful agreement . . . to increase *prices*” *See* CAC (Dkt. 53) at ¶ 2; *see also id.* at ¶¶ 28, 83. Indeed, as the Court recognized in its Order on Defendants’ Motions to Dismiss, “Plaintiffs have alleged that Delta and

3. Consideration of Flights on Which Putative Class Members Did Not Pay a First Bag Fee

AirTran contends that another “disputed economic issue” is whether – again assuming Delta and AirTran conspired to adopt a first bag fee – injury and damages for individual putative class members should be evaluated by looking only at the flights for which a bag fee was incurred or by also looking at flights paid for by that putative class member for which no bag fee was paid. *See* AirTran Memo at 6-7. Again, however, resolution of this issue does not require economic analysis.

As with the issue of whether it is appropriate to consider the effect on base fares, Dr. Singer opined and testified that whether it is appropriate to look only at the flights for which a bag fee was incurred or also flights for which no bag fee was paid is not a matter of economics. *See, e.g.*, Exhibit 2, Nov. 22, 2010 Singer Deposition at 505:25-506:23 (“I think – my position here is that I didn’t offer an

AirTran communicated with each other in public regarding how both airlines could ‘get *average prices* up’; ‘push *fare increases* and fee increases’; work ‘in conjunction’ to *increase prices . . .*’ Aug. 2, 2010 Order (Dkt. 136) at 27 (quoting Plaintiffs’ CAC) (emphasis added). Ignoring their own allegations, Plaintiffs incorrectly assert that “any alleged effect of the Defendants’ first bag fees on base fares is irrelevant as a matter of law.” Plfs’ Opposition (Dkt. 285) at 8; *see Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003) (evaluating “net economic benefit” to some proposed class members when evaluating propriety of class certification).

opinion as to whether or not they should be treated as [discrete] events, but what I did instead was offer different approaches under different legal interpretations, and I think that's as far as I'm willing to go at this stage."); *id.* at 504:9-505:18 ("Q. I just want you to explain what's illogical about counting both the harm and the benefits a specific class member received as a result of the challenged conduct. A. Right. It's only illogical to the extent the law considers each time a class member overpaid for a bag fee to be a [discrete] event. That is if you flew two times, once paying a bag fee, which, let's just assume was an [illicit] fee which wouldn't exist but for the conspiracy, there is a legal issue that I'm certainly not going to decide but the Court will decide as to whether or not you would forfeit that claim because you flew a second time without paying a bag and purportedly enjoyed a discount on the base fare.").

4. Actual Effects on Base Fares of Defendants' Adoption of First Bag Fees

The third "disputed economic issue" identified by AirTran – quantification of the effect on base fares of the adoption of a first bag fee by Defendants – is both disputed and a question of economics. AirTran Memo at 5-6; *see also* Delta Class

Cert Opp'n at 6-18.⁵ But Delta does not agree with AirTran that the appointment of a neutral expert to address this issue is necessary or warranted.

Instead, Delta believes the present record before the Court makes clear if this case were to proceed to trial as a class action there would be ample evidence that (1) the adoption of a first bag fee had the effect of lowering some base fares, (2) that “base fare effect” varied considerably by, for example, route and flight, and (3) the assessment of injury and damages of any specific proposed class member could not be performed entirely with class-wide evidence. *See* Delta Class Cert Opp'n at 6-18. Thus, the present record on this issue is already sufficient for the Court to conclude that class certification is inappropriate.

CONCLUSION

For the foregoing reasons, AirTran's Motion should be denied.

⁵ In their response to AirTran's Motion, Plaintiffs contend that “contemporaneous documents and executive testimony demonstrate that first bag fees had no effect on base fares.” Plfs’ Opposition (Dkt. 285) at 1-2. However, Plaintiffs continue to mischaracterize the testimony of Delta CEO Richard Anderson on that point, who did not testify that Delta’s first bag fee did not result in lower base fares, but that “we haven’t done that analysis.” *See* Delta Class Cert Opp'n at 15 n.9 and Exhibit 12, Anderson Dep. Tr. 102:5-7. Plaintiffs also mischaracterize the “contemporaneous documents,” as Delta would welcome the opportunity to explain if the Court conducts oral argument on Plaintiffs’ motion for class certification.

Dated: May 12, 2011

Respectfully submitted,⁶

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⁶ Pursuant to Local Rule 7.1D, counsel for Delta certifies that this Response was prepared with a font and point selection approved in Local Rule 5.1.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2011, I electronically filed the foregoing DEFENDANT DELTA AIR LINES, INC.'S RESPONSE TO AIRTRAN AIRWAYS INC.'S MOTION FOR COURT APPOINTMENT OF A NEUTRAL ECONOMIC EXPERT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to counsel of record.

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