

**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

FILED UNDER SEAL

Unsealed 11/10/2014

**DELTA AIR LINES, INC.'S STATEMENT OF UNDISPUTED FACTS
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Delta Air Lines, Inc. ("Delta"), pursuant to Federal Rule of Civil Procedure 56 and N.D. Ga. L.R. 56, hereby submits its Statement of Undisputed Facts in Support of Its Motion for Summary Judgment. Accompanying this Statement of Facts and filed contemporaneously herewith is Delta's Appendix of Exhibits Cited in Support of Its Motion for Summary Judgment, which contains the materials cited in: (1) this Statement of Facts and (2) Delta's Memorandum in Support of Its Motion for Summary Judgment.

In support of its Motion for Summary Judgment, Delta states the following material facts as to which there is no genuine dispute:

(1) In the period leading up to the consummation of the Delta/Northwest merger in October 2008, there was a growing trend in the airline industry toward the “unbundling” of air transportation services – charging separately for some optional services that had previously been included in the price of the ticket for all travelers, whether they used the services or not.¹

(2) As part of this trend, many airlines began separately charging for food, seat assignments, in-flight entertainment, and other services. In 2008, this trend expanded to checked baggage, as airlines began to charge separately for second and then first checked bags.²

(3) The trend in unbundled pricing for baggage was due, in part to the dramatic increase and volatility of fuel prices in 2007-2008.³

¹ Ex. 1, Expert Report of Dennis W. Carlton (Jan. 7, 2011) ¶¶ 8-11; Ex. 2, Expert Report of Andrew Dick (Jan. 7, 2011) ¶¶ 46, 49-50; Ex. 3, Expert Report of Daniel M. Kasper (Sept. 24, 2010) ¶¶ 22-25; Ex. 6, Bastian 9/17/2010 Dep. 178:14-179:8; Ex. 13, Gorman 12/10/2010 Dep. 108:10-15.

² Ex. 3, Kasper Report ¶¶ 22-25; Ex. 1, Carlton Report ¶ 11; Ex. 2, Dick Report ¶ 49 & Ex. 5.

³ Ex. 31, U.S. Government Accountability Office, “Commercial Aviation: Consumers Could Benefit from Better Information About Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees,” GAO-10-785, July 2010, at 3 (“The U.S. passenger airline industry incurred nearly \$4.4 billion in operating losses during calendar years 2008 and 2009. Volatile jet fuel prices—the airlines’ biggest operating expense in 2008—was the chief contributor to airline losses in 2008.”).

(4) By the first half of 2008, virtually every major domestic airline had adopted fees for second checked bags. Delta itself announced a \$25 second bag fee on April 9, 2008. It went into effect the same day as the second bag fee of three other legacy carriers. Two days after Delta's announcement, AirTran announced a \$10 second bag fee.

TABLE 1 - AIRLINE ADOPTION OF SECOND BAG FEES⁴

Announcement Date	Effective Date	Type	Carrier	Fee at Airport
3/6/2007	6/20/2007	Second Bag	Spirit	\$10
July 2007	July 2007	Second Bag	Allegiant	\$5
8/8/2007	8/8/2007	Second Bag	Virgin	\$10
2/5/2008	5/5/2008	Second Bag	United	\$25
2/6/2008	2/20/2008	Second Bag Change	Spirit	\$20
2/26/2008	5/5/2008	Second Bag	US Airways	\$25
3/28/2008	5/5/2008	Second Bag	Northwest	\$25
4/4/2008	5/5/2008	Second Bag	Continental	\$25
4/9/2008	5/5/2008	Second Bag	Delta	\$25
4/11/2008	5/15/2008	Second Bag	AirTran	\$10
4/22/2008	6/1/2008	Second Bag	JetBlue	\$20
4/28/2008	5/12/2008	Second Bag	American	\$25
4/24/2008	7/1/2008	Second Bag	Alaska	\$25
5/1/2008	5/1/2008	Second Bag	USA 3000	\$25
5/23/2008	6/10/2008	Second Bag	Frontier	\$25
5/23/2008	6/16/2008	Second Bag	Midwest	\$20
7/29/2008	8/5/2008	Second Bag Change	Delta	\$50
8/12/2008	8/14/2008	Second Bag Change	AirTran	\$25
9/3/2008	10/21/2008	Second Bag Change	Midwest	\$25
11/5/2008	12/5/2008	Second Bag Change	Delta	\$25

⁴ Ex. 1, Carlton Report ¶ 21 & p. 14, Table 1; Ex. 2, Dick Report ¶ 50 & Ex. 6.

(5) On May 21, 2008, American became the first major airline to begin charging a fee for a *first* checked bag.⁵

(6) Following American's announcement, Delta's senior executives began discussing whether Delta should do the same.⁶

(7) "R Cooper" is the internal Delta e-mail address of Delta CEO Richard Anderson.⁷

(8) Steve Gorman, Delta's Chief Operating Officer – with responsibilities that include supervision of Delta's Airport Customer Service ("ACS") department⁸ – recommended on May 27, 2008 that Delta not "initiate a first bag fee now and . . . not reconsider it until after the summer peak."⁹

⁵ Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report ¶ 50 & Ex. 6.

⁶ Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12); Ex. 4, Anderson 10/6/2010 Dep. 43:17-44:21; Ex. 6, Bastian 9/17/2010 Dep. 111:5-20; Ex. 7, Bastian DOJ Dep. 25:14-26:5.

⁷ Ex. 4, Anderson 10/6/2010 Dep. 20:22-25.

⁸ Ex. 13, Gorman 12/10/2010 Dep. 5:17-6:25, 21:16-18. During 2008, all baggage fees collected by Delta were attributed to the budget of Delta's Airport Customer Service department. *Id.* at 21:16-21; Ex. 4, Anderson 10/6/2010 Dep. 48:17-22.

⁹ Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12).

(9) Gorman's recommendation was based largely on concerns about the operational impact of adopting a first bag fee during the peak summer travel season.¹⁰

(10) CEO Richard Anderson agreed with Gorman's recommendation, stating that at that time he believed one free checked bag was "part of the basic bargain" when a customer purchased a ticket.¹¹

(11) Delta's President Ed Bastian likewise agreed with the decision to wait and watch how the new first bag fee impacted other airlines over the summer.¹²

(12) On June 12, 2008, US Airways and United announced their adoption of a first bag fee.¹³

(13) United's and US Airways' adoption of first bag fees led to further discussion and more formal analysis of whether to adopt a first bag fee at Delta.¹⁴

¹⁰ *Id.* See also Ex. 33, at DLBAG-9552 (May 21, 2008 e-mail from Steve Gorman to Gil West: "[G]ood point that charges for first bag will likely result in nearly everyone carrying on a big roller bag"); Ex. __, Gorman 12/10/2010 Dep. 13:18-16:23; 39:12-22.

¹¹ Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12); Ex. 4, Anderson 10/6/2010 Dep. 42:24-43:21, 106:22-107:4. See also Ex. 34, at DLBAG-6756 (Gorman 5/10/2012 Dep. Ex. 3).

¹² Ex. 6, Bastian 9/17/2010 Dep. 111:5-114:16; Ex. 7, Bastian DOJ Dep. 25:14-28:11.

¹³ Ex. 35, at DLBF-2415; Ex. 36, at DLBF-17878-79.

¹⁴ Ex. 5, Anderson 5/3/2012 Dep. 163:10-20; Ex. 6; Bastian 9/17/2010 Dep.

(14) On June 16, 2008, Delta's ACS group presented a written analysis of the first bag fee to Delta's Corporate Leadership Team ("CLT").¹⁵

(15) The CLT is a group of Delta's most senior executives which serves as an advisory group to Delta's CEO.¹⁶

(16) Delta CEO Richard Anderson had final authority for making a decision on the first bag fee.¹⁷

(17) As reflected in the April 14, 2008 press release announcing the Delta/Northwest merger, Richard Anderson would be the CEO of the post-merger combined carrier.¹⁸

(18) Delta ACS's presentation to the CLT in June 2008 estimated that adoption of a first bag fee would generate over \$220 million annually for pre-merger Delta (assuming, conservatively, that only 60% of passengers checking a bag would continue to do so after adoption of the fee).¹⁹

115:6-118:22.

¹⁵ Ex. 37, at DLBF-35301 (Bastian DOJ Dep. Ex. 2).

¹⁶ Ex. 5, Anderson 5/3/2012 Dep. 207:16-22, 238:2-19; Ex. 7, Bastian DOJ Dep. 11:24-12:19; Ex. 14, Gorman 5/10/2012 Dep. 44:10-21, 45:15-25.

¹⁷ Ex. 5, Anderson 5/3/2012 Dep. 238:2-19; Ex. 7, Bastian DOJ Dep. 12:8-11.

¹⁸ Ex. 38, Apr. 14, 2008 Delta Press Release.

¹⁹ Ex. 37 at DLBF-35301 (Bastian DOJ Dep. Ex. 2) (June 16, 2008 "CLT Baggage Service Review"); Ex. 13, Gorman 12/10/2010 Dep. 52:13-18; Ex. 28, West DOJ Dep. 48:4-49:1, 54:2-10.

(19) Far more passengers continued to check a bag after the adoption of the fee than ACS had estimated in June 2008.²⁰

(20) Delta ACS's presentation to the CLT in June 2008 recommended that Delta should "not adopt [a] first bag fee at this time," but "continue to monitor [other airlines] through [the] end of the summer and re-evaluate."²¹

(21) This approach would allow Delta to observe the operational and financial impact of the fee on other carriers, as well as avoid the potential risk of disruption at the airport from implementing this new fee during the peak summer travel season.²²

(22) Delta's wait-and-see strategy was not unique. On June 18, 2008, Continental was publicly reported to be "watching how the \$15 fee on a first checked bag works at other airlines before deciding whether to ask passengers to pay up." Continental's CEO was reported to believe that the fee could "raise a lot

²⁰ Ex. 28, West DOJ Dep. 237:5-14; Ex. 39, at DLBF-63972-73 (May 14, 2009 e-mail from Erik Snell to Gil West: "If you assume that the behavior change [for a potential International Second Bag fee] is consistent with what we believe is happening with Domestic First Bag (10% change) . . .").

²¹ Ex. 37, at DLBF-35301 (Bastian DOJ Dep. Ex. 2).

²² Ex. 6, Bastian 9/17/2010 Dep. 113:6-115:12; 117:22-118:7, 124:10-18; Ex. 7, Bastian DOJ Dep. 26:3-5, 29:4-31:11, 56:8-57:11; Ex. 13, Gorman 12/10/2010 Dep. 22:3-6, 39:12-22; Ex. 28, West DOJ Dep. 52:1-53:3, 58:5-22; 61:8-64:21, 83:14-84:5; *see also* Ex. 40, at DLBAG-39194 (West 5/11/2012 Dep. Ex. 4) (June 13, 2008 e-mail from Gil West to Gail Grimmett: "At \$250M/yr, I suspect the pressure to match will be strong after the summer."); Ex. 41, at DLBAG-15476.

of money but might cause delays in boarding the plane,” and that the airline was “studying whether passengers prefer airlines that do not charge the fee.”²³

(23) Public earnings call statements by Delta’s rival airlines during July 2008 included the following:

American (July 16, 2008): “The first bag fee is still ramping up but we expect this and our other fee increases to drive several hundreds of millions of dollars of new revenue to the Company. . . . [We] don’t think there’s been any operational issue related to it.”²⁴

United (July 22, 2008): “We are creating significant incremental revenue by unbundling our products. Last quarter, we announced our new second checked bag fee, in June we announced that we will be charging for the first checked bag. . . . We estimate that the potential revenue from the new baggage service handling fees will be about \$275 million annually in 2009.”²⁵

US Airways (July 22, 2008): “During the quarter we implemented an a la carte pricing model which includes the first and second bag charge, new choice seat option and sale of beverages [O]ur initial results are very encouraging. We are increasing our estimate of the annual benefits of this program by \$100 million to [\$]400 million to \$500 million per year. . . . So far the implementation has gone smoothly in terms of operational and customer impact. . . . [W]e certainly can’t see any difference in market share or bookings between carriers that have matched and carriers that haven’t matched.”²⁶

²³ Ex. 42, at DLTAPE-2921; Ex.2, Dick Report ¶¶ 52-53, 77, 87, 92.

²⁴ Ex. 43, at DLTAPE-515, 527.

²⁵ Ex. 44, at DLTAPE-154, 156.

²⁶ Ex. 45, at DLTAPE-263, 264, 272.

(24) On July 9, 2008, Northwest announced its adoption of a \$15 first bag fee, and publicly reported that it expected the fee (along with other new or revised fees) to generate between \$250 and \$300 million in additional annual revenue.²⁷

(25) Northwest's adoption of a first bag fee was of particular importance to Delta because of the proposed Delta-Northwest merger, which had been announced on April 14, 2008.²⁸

(26) Delta was planned to be the surviving entity post-merger.²⁹

(27) Following the merger's announcement, and while the DOJ conducted its regulatory review of the proposed merger, Delta and Northwest commenced a massive effort to prepare for the post-merger integration of the two airlines. Delta planned to merge the two companies into a single carrier with a unified schedule and operations, common pricing, marketing strategy, route planning, and airport customer service as soon as possible after the merger closed.³⁰

²⁷ Ex. 46, at DLTAPE-1758 (July 9, 2008 Northwest Airlines Press Release); Ex. 47, at DLTAPE-374 (July 23, 2008 Northwest Airlines Q2 2008 Earnings Call Transcript: "Northwest has matched other carriers by introducing a fee for all checked baggage [and other fees] which, in the aggregate, we estimate will drive between 250 and 300 million in annual revenue improvement.").

²⁸ Ex. 38, Apr. 14, 2008 Delta Press Release; Ex. 6, Bastian 9/17/2010 Dep. 125:4-12.

²⁹ Ex. 38, Apr. 14, 2008 Delta Press Release.

³⁰ Ex. 38, Apr. 14, 2008 Delta Press Release; Ex. 48, at DLBAG-7195-205 (May 6, 2008 e-mail attaching Delta/Northwest integration planning documents,

(28) To achieve this goal, Delta’s senior executives recognized that, as part of the post-merger integration, Delta would have to harmonize all of the fares, fees, and customer service policies of the two carriers, including fees charged for checked baggage.³¹

including May 5, 2008 Memorandum from Northwest CEO Doug Steenland and Delta CEO Richard Anderson: “We recognize that the successful integration of two large, complex companies is a monumental task.”); Ex. 49, at DLBAG-994-1065, at 1000, 1008 (May 16, 2008 “Integration Planning” presentation slides regarding “Airport Customer Service . . . day 1 Goals . . . Fee / rule harmonization with effective date” and “Single Operating Certificate”); Ex. 50, at DLTAPE-478 (July 16, 2008 Delta Air Lines Q2 Earnings Call Transcript: “As Richard mentioned, our guiding principle in the integration will be to focus on activities that generate a return on their investment, thereby conserving cash and providing value to our shareholders. Our initial priorities will be to . . . move to a single operating certificate for the two airlines”); Ex. 51, DLBF-82420-29, at 82426 (Oct. 9, 2008 merger update: “The FAA accepted our plan for . . . a transition to a Single Operating Certificate”); Ex. 52, at DLBAG-30922 (Oct. 15, 2008 Delta Press Release: “Acceptance by the [FAA] of the plans the airlines submitted for the transition to a Single Operating Certificate. This significant milestone lays the groundwork for a smooth integration of the companies’ operations”); Ex. 4, Anderson 10/6/2010 Dep. 85:8-13, 97:14-98:17; Ex. 6, Bastian 9/17/2010 Dep. 127:13-128:1; Ex. 13, Gorman 12/10/2010 Dep. 25:24-26:15; Ex. 119, Jad Mouawad, *Delta-Northwest Merger’s Long and Complex Path*, N.Y. Times, May 18, 2011.

³¹ Ex. 49, at DLBAG-1025 (“Day 1 Goals: . . . Rule and fee harmonization”); Ex. 53, at DLBAG-2158 (Sept. 18, 2008 “Critical Milestones” merger timeline showing “Harmonized fees and fares” shortly after merger close); Ex. 54, at DLBF-82433 (Oct. 8, 2008 “Critical Milestones” merger timeline showing same); Ex. 55, DLBF-82431 (Oct. 16, 2008 “Critical Milestones” merger timeline showing same); Ex. 4, Anderson 10/6/2010 Dep. 60:1-19, 87:17-88:6; Ex. 7, Bastian DOJ Dep. 18:23-19:3, 38:12-39:12, 40:20-41:6, 44:13-20; Ex. 6, Bastian 9/17/2010 Dep. 127:13-128:4; Ex. 13, Gorman 12/10/2010 Dep. 100:16-102:12,

(29) After Northwest announced its adoption of a first bag fee, Delta's executives knew that Delta would have to decide whether to adopt a first bag fee, or eliminate Northwest's fee.³²

(30) Northwest's first bag fee announcement sparked interest in the investment community about Delta's plans for a first bag fee.³³

(31) In anticipation of inquiries about Delta's plans for a first bag fee, Delta prepared responses to make clear that until regulatory approval of the merger was obtained the fee decisions of the two carriers remained "completely separate" and that Delta "[c]ustomers can still check a first bag at no charge," but that "we [Delta] have to continue to look at everything given \$140 fuel, etc."³⁴

123:12-124:19; Ex. 16, Hauenstein 9/30/2010 Dep. 12:6-25, 47:12-18; Ex. 15, Grimmatt 9/28/2010 Dep. 101:17-21; Ex. 27, West 5/11/2012 Dep. 36:12-37:4; Ex. 28, West DOJ Dep. 35:1-12, 74:8-12, 75:8-77:16, 86:14-18; Ex. 1, Carlton Report ¶¶ 5, 25.

³² Ex. 4, Anderson 10/6/2010 Dep. 60:1-61:5, 66:11-14, 84:18-86:3; Ex. 6, Bastian 9/17/2010 Dep. 127:21-128:4; Ex. 7, Bastian DOJ Dep. 38:12-17, 40:20-41:6, 44:13-20; Ex. 13, Gorman 12/10/2010 Dep. 123:12-124:19; Ex. 16, Hauenstein 9/30/2010 Dep. 61:3-62:15; Ex. 28, West DOJ Dep. 75:8-77:16, 85:16-21; Ex. 15, Grimmatt 9/28/2010 Dep. 101:17-21.

³³ Ex. 50, at DLTAPE-487 (Delta Q2 2008 Earnings Call, Kevin Crissey, UBS Analyst: "Okay, and finally if I could, in terms of the first bag fee, I think Northwest has it and you don't and where is that heading?").

³⁴ Ex. 46, at DLTAPE-1757.

(32) When an analyst asked about Northwest's first bag fee on Delta's July 16, 2008 second quarter public earnings call, Delta President Ed Bastian explained that Delta would "continue to study" the adoption of a first bag fee, but had no plans to implement it "at this point."³⁵

(33) On September 5, 2008, Continental announced it was adopting a first bag fee. Continental stated publicly that it had not experienced any significant market share gain from not charging the fee, and concluded that adoption of the fee was the "right competitive move":

Continental Chairman and CEO Lawrence Kellner said this summer his airline was watching how the fee worked at other airlines - whether it caused delays in boarding - and whether customers would rather pay a fare increase than face a bunch of fees. "My general view is if those people need a product, how do we put that in an all-inclusive fare?" he said at the time. But in the nearly three months since American's fee took effect and other carriers began matching it, it hasn't seemed to sway customers. . . . Continental spokeswoman Julie King said Friday. "So we feel it's the right competitive move" to charge for a first checked bag.³⁶

(34) Continental's decision left Delta as the only major legacy carrier without a first bag fee.

³⁵ Ex. 50, at DLTAPE-487.

³⁶ Ex. 56, at DLBF-21565.

TABLE 2 - AIRLINE ADOPTION OF FIRST BAG FEES³⁷

Announcement Date	Effective Date	Type	Carrier	Fee
3/6/2007	6/20/2007	First Bag	Spirit	\$5
July 2007	July 2007	First Bag	Allegiant	\$3
2/6/2008	2/20/2008	First Bag Change	Spirit	\$20
5/21/2008	6/15/2008	First Bag	American	\$15
6/12/2008	8/18/2008	First Bag	United	\$15
6/12/2008	7/9/2008	First Bag	US Airways	\$15
7/9/2008	8/28/2008	First Bag	Northwest	\$15
7/30/2008	10/1/2008	First Bag	Hawaiian	\$15
August 2008	10/21/2008	First Bag	Midwest	\$15
9/4/2008	10/1/2008	First Bag	Sun Country	\$12
9/5/2008	10/7/2008	First Bag	Continental	\$15
9/12/2008	11/1/2008	First Bag	Frontier	\$15
11/5/2008	12/5/2008	First Bag	Delta	\$15
11/12/2008	12/5/2008	First Bag	AirTran	\$15
3/19/2009	5/5/2009	First Bag	Virgin America	\$15
4/22/2009	7/7/2009	First Bag	Alaska Airlines	\$15
July-Sept 2009	July-Sept 2009	First Bag	USA 3000	\$12

(35) Although generally considered to be a legacy carrier, Alaska Airlines is much smaller than the major legacy carriers.³⁸

(36) In September 2008, Gail Grimmatt was Senior Vice President Revenue Management, and reported to Glen Hauenstein, Executive Vice President Network Planning & Revenue Management.³⁹

(37) Gil West at all relevant times has been Senior Vice President Delta ACS, reporting directly to Steve Gorman.⁴⁰

³⁷ Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report Ex. 6.

³⁸ Ex. 1, Carlton Report at p. 13 n.31; Ex. 6, Bastian 9/17/2010 Dep. 68:24-69:2.

³⁹ Ex. 57, at DLBF-82386; Ex. 15, Grimmatt 9/28/2010 Dep. 19:16-20:4.

⁴⁰ Ex.58, at DLBF-82396; Ex. 28, West DOJ Dep. 5:15-18, 22:12-13.

(38) On September 2, 2008, three days prior to Continental's announcement, Delta CEO Richard Anderson instructed the two senior executives leading the Revenue Management and ACS Departments – Gail Grimmatt and Gil West – to develop a proposal for the combined entity's comprehensive post-merger fee structure, without input from Northwest, so that the harmonized fees for “new Delta” could be announced as quickly as possible upon the merger's close.⁴¹

⁴¹ Ex. 59, at DLTAPE-4040 (Anderson 5/3/2012 Dep. Ex. 42); Ex. 60, at DLBF-36512-13 (West DOJ Dep. Ex. 8) (“Last week, Gail met with Richard [Anderson] and she was informed that Richard wants to meet . . . to discuss the fee structure of the combined entity. Rather than waiting for the consummated merger date, he wants to determine the fee structure beforehand.”); Ex. 61, at DLBF-82417 (Sept. 2, 2008 “Delta-Northwest Merger Summary of Decisions from Corporate Day 1”: “Delta to determine Day 1 related policies and fees”); Ex. 62, at DLTAPE-8353 (Sept. 4, 2008 e-mail from Janet Halpin to Eric Phillips: “the objective of course is to identify where there are differences between DL/NW for harmonization for ‘day 1’”); Ex. 63, at DLTAPE-6856 (Nov. 14, 2008 e-mail from Gil West to Laura Liu (former Northwest employee): “RA [Richard Anderson] gave Gail and I clear direction to determine the aligned fees, get CLT approval and press-on as soon as we closed, which we did.”); Ex. 64, at DLBAG-11283-89 (Nov. 10, 2008 e-mail from Eric Phillips to Mark Zessin regarding “Fee Revenue Matrix” for “combined entity” and discussing “fees for skis / golf / fishing poles / etc.”); Ex. 5, Anderson 5/3/2012 Dep. 198:3-18; Ex. 13, Gorman 12/10/2010 Dep. 141:8-23; Ex. 27, West 5/11/2012 Dep. 36:5-37:10; Ex. 28, West DOJ Dep. 35:1-7, 86:14-87:8, 122:1-5; Ex. 15, Grimmatt 9/28/2010 Dep. 128:5-129:17, 131:5-13, 138:23-140:11.

(39) The two departments worked to plan the harmonization of dozens of different fees and policies,⁴² and reached agreement on all of them except one – whether to adopt Northwest’s first bag fee.⁴³

(40) On the Revenue Management side, Grimmett and her supervisor Glen Hauenstein firmly opposed the fee.⁴⁴

(41) At the time, unlike ACS, Revenue Management did not receive credit in its budget for bag fee revenues. Revenue Management was otherwise responsible for passenger revenues. Any passenger diversion to other airlines as a result of implementing a bag fee would count against Revenue Management’s budget without any offsetting benefit from bag fee revenues.⁴⁵

⁴² Ex. 28, West DOJ Dep. 35:1-36:7, 116:2-120:2, 122:1-125:2, 129:18-3, 142:14-149:18; Ex. 5, Anderson 5/3/2012 Dep. 209:19-210:6 (“There’s a myriad of fees, literally dozens and dozens of them, and we needed to go line by line by line and make sure that we had a fee structure that wouldn’t confuse our customers upon closing the merger.”).

⁴³ Ex. 65, DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49) (Oct. 21, 2008 e-mail from Gil West to Richard Anderson: “Gail [Grimmett] and I have coordinated the post merger fee structure. The one loose end is the first bag fee.”); *see also* Ex. 28, West DOJ Dep. 116:2-117:21, 131:8-12, 140:22-142:5, 149:6-18, 153:21-154:2; Ex. 15, Grimmett 9/28/2010 Dep. 136:2-137:5; Ex. 16, Hauenstein 9/30/2010 Dep. 62:19-63:11; Ex. 13, Gorman 12/10/2010 Dep. 40:18-20; Ex.28, West DOJ Dep. 35:3-36:11, 154:3-14, 155:14-156:5, 175:22-177:4.

⁴⁴ Ex.15, Grimmett 9/28/2010 Dep. 90:7-91:6, 98:15-24, 102:6-20, 124:18-125:25, 128:5-134:4, 137:6-138:18, 153:16-22, 209:16-210:3; Ex. 16, Hauenstein 9/30/2010 Dep. 62:19-63:11, 78:8-79:5, 128:13-15.

⁴⁵ Ex. 13, Gorman 12/10/2010 Dep. 43:15-22; Ex. 7, Bastian DOJ Dep. 19:7-

(42) Hauenstein and others in Revenue Management had concerns that potential revenue gains from a first bag fee would be offset by lower fare revenue because they believed charging the fee would result in lower fares.⁴⁶

(43) They were also concerned that adoption of the fee could eliminate potential market share gains for Delta at the expense of legacy carriers already charging the fee and risk potential market share loss to low fare carriers (e.g., Southwest, AirTran and JetBlue) that did not charge the fee.⁴⁷

13; Ex. 16, Hauenstein 9/30/2010 Dep. 78:12-79:5, 99:3-17, 111:23-112:13, 115:24-116:7; Ex. 15, Grimmatt 9/28/2010 Dep. 131:14-133:23.

⁴⁶ Ex. 16, Hauenstein 9/30/2010 Dep. 50:3-25 (“[W]hen you put in fees, there is a corresponding sensitivity to revenue and, actually, it has a depressing impact over time on fares. And I think you have to decide whether or not as an -- in an economic model that that's going to be part of a consumer's decision process.”), 63:2-6 (“[W]hen these fees were in ACS's budget, they were not looking at the passenger revenue line item implications of what these fees might do to customer demand and passenger revenues and average ticket fares.”); Ex 15, Grimmatt 9/28/2010 Dep. 176:23-177:5 (“Q. Did you have a view about whether that would lead to lower fares? Lead Delta to lower its fares or change the inventory? A. Revenue management believed that it could harm the fare environment, yes.”).

⁴⁷ Ex. 16, Hauenstein 9/30/2010 Dep. 78:8-79:5, 99:3-101:14, 108:12-109:7, 111:23-112:3; 115:24-116:7; Ex. 15, Grimmatt 9/28/2010 Dep. 125:21-128:4, 150:10-151:11, 154:4-12, 181:9-18; Ex. 20, Phillips 12/7/2010 Dep. 10:7-19; Ex. 21, Phillips 5/17/2012 Dep. 20:8-22; Ex. 66, at DLTAPE-5135 (Hauenstein 5/10/2012 Dep. Ex. 1); Ex.67, at DLBAG-6556 (Hauenstein 5/10/2012 Dep. Ex. 2); Ex. 68, at DLTAPE-3457; Ex. 69, at DLBAG-10944 (Sept. 26, 2008 e-mail in which Revenue Management requesting checked bag data from ACS to assess “the amount of revenue we may be risking if we implemented the fee and FL did not”).

(44) On the ACS side, Steve Gorman and Gil West rejected these concerns. They expected the first bag fee would generate hundreds of millions of dollars in revenue – about \$250 million for Delta and over \$200 million from Northwest.⁴⁸

(45) Based on their observations of other carriers' experience over the summer, Gorman and West were satisfied that the first bag fee would not have any significant adverse impact on either Delta's market share or operations.⁴⁹

(46) Gorman and West believed that the first bag fee would be "pure profit."⁵⁰

(47) Gorman and West rejected Revenue Management's view that there was any significant risk of "share shift" to competitors if Delta were to adopt the fee.⁵¹

⁴⁸ Ex. 13, Gorman 12/10/2010 Dep. 40:13-48:10; Ex. 28, West DOJ Dep. 116:2-121:15, 134:9-137:3; Ex. 70, DLBF-36431 (West DOJ Dep. Ex. 10) (ACS estimating on Sept. 22, 2008 \$225 million Delta and \$215 million Northwest annual first bag fee revenue, respectively); Ex. 71, DLBAG-11721 (ACS estimated in September 2008 \$265 million annual revenue for Delta's first bag fee).

⁴⁹ Ex. 13, Gorman 5/10/2012 Dep. 20:6-22:9, 38:9-39:3, 51:15-52:6; Ex.27, West 5/11/2012 Dep. 21:5-23:2, 45:3-22.

⁵⁰ Ex. 13, Gorman 12/10/2010 Dep. 20:9-22:6, 28:4-8, 29:19-21; 40:13-48:10, 61:13-17, 82:7-19; Ex. 14, Gorman 5/10/2012 Dep. 30:17-32:22, 35:22-36:6; Ex. 28, West DOJ Dep. 118:10-15, 222:3-230:5, 234:2-4.

⁵¹ Ex.14, Gorman 5/10/2012 Dep. 77:11-78:7; Ex. 13, Gorman 12/10/2010 Dep. 53:1-57:9, 68:4-69:4; Ex. 28, West DOJ Dep. 35:1-36:11, 118:1-12, 149:9-

(48) Public statements from other airlines confirmed Gorman's and West's view that bag fees were not causing share shift.⁵²

(49) Gorman and West did not believe that many customers – and certainly not Delta's key business customers – purchased a ticket based on whether an airline charged a first bag fee.⁵³

(50) The increase in the number of carry-on bags during the summer of 2008 indicated to Gorman and West that customers thought Delta already charged the fee (even though it did not).⁵⁴

15, 157:7-163:7, 168:16-169:15; Ex. 27, West 5/11/2012 Dep. 45:3-22, 92:5-93:12; Ex. 15, Grimmitt 9/28/2010 Dep. 131:14-132:4, 134:5-18, 190:8-21.

⁵² See *infra* at ¶ 69 and accompanying footnotes; Ex. 72, at DLBF-21981-82 (Sept. 16, 2008 Wall Street Journal (Scott McCartney): “So far, baggage fees and other charges are significantly improving the usually dismal finances of the industry. Passengers are paying them, if begrudgingly, and aren't shifting in large numbers to the few airlines that don't charge fees like Southwest Airlines Co. . . . ‘The concept of charging for what people use or don't use is something that will probably continue,’ said a spokesman for [American Airlines] when asked about fees and surcharges. Says a spokesman for US Airways Group Inc.: ‘We have no plans to change any of these.’”); Ex. 73, at DLBF-115309 (Oct. 22, 2008 e-mail from Pam Elledge to Glen Hauenstein et al. forwarding article in The Beat: “Air Fees Cause No Share Shift, But Why? . . . [F]ees are working. Not only are they expected to generate hundreds of millions in incremental revenue for those carriers that levy them, but also fees are not pushing travelers to those carriers that don't.”).

⁵³ Ex. 13, Gorman 12/10/2010 Dep. 53:1-54:9; Ex. 14, Gorman 5/10/2012 Dep. 60:7-19; Ex. 28, West DOJ Dep. 36:8-37:22, 108:13-109:6, 118:1-12, 121:1-12.

⁵⁴ Ex.13, Gorman 12/10/2010 Dep. 68:3-72:4; Ex. 28, West DOJ Dep. 36:8-19; 95:2-22, 106:14-112:20, 218:2-220:18, 244:2-246:11, 250:6-251:10; Ex. 74,

(51) By early October 2008, Gil West described himself as “on a mission” to implement the first bag fee.⁵⁵

(52) In budget documents distributed to Delta’s most senior executives in September 2008, ACS formally proposed the fee as a way to help close Delta’s 2008 revenue shortfall.⁵⁶

(53) During a dinner with Delta employees in September 2008, Steve Gorman told Delta personnel that “as we merge with Northwest other items will have to be reviewed, like 1st bag fee,” and commented that there is “a substantial amount of revenue” involved.⁵⁷

(54) While the leaders of ACS believed strongly that adopting the first bag fee was in Delta’s best interest, they recognized that Revenue Management’s

DLBAG-2817 (Nov. 5, 2008 e-mail from Gil West to Alan Martin regarding “1 bag charge”: “[W]e realized most customer[s] actually thought we were already charging for the first bag (we were not getting credit for not charging).”).

⁵⁵ Ex. 75, at DLBAG-39341 (Oct. 8, 2008 e-mail from Gil West to Neel Shah in response to Shah’s comment that “We are going to need all the revenue we can get in 2009,” West replied: “Amen. I’m on a mission.”).

⁵⁶ Ex. 76, at DLTAPE-3528 (Sept. 19, 2008 “Unit Cost Outlook” showing “Domestic first bag fee” among “gap closure opportunities” identified by Delta ACS); Ex. 77, at DLTAPE-17713 (Gorman 5/10/2012 Dep. Ex. 16) (Sept. 29, 2008 “December Quarter Action Plan” reflecting “Division Commitments” for “gap closure” included “First Bag Fee (\$15)” from Delta ACS). *See also* Ex. 78, at DLBF-83344 (Sept. 10, 2008 “ACS Financial Update” showing “1st Bag Fee” as “Potential Initiatives to Close Gap” to forecast).

⁵⁷ Ex. 79, at DLTAPE-3584.

opposition to the fee would have to be either changed or overruled by Delta's top executives – CEO Richard Anderson and President Ed Bastian.⁵⁸

(55) On Sunday, September 28, 2008 – the day before Delta's senior executives met to discuss the company's plan for mitigating fourth quarter 2008 losses projected to exceed \$250 million (including ACS's proposal to adopt a first bag fee)⁵⁹ – Anderson sent an e-mail to Bastian titled "First Bag Fee" stating: "We need to think about implementing the fee post merger. A lot of revenue involved." Bastian responded: "Think we prob[ably] should do but as part of integrating [the] two companies." Anderson replied simply: "Agree."⁶⁰

(56) According to both Anderson and Bastian, this e-mail reflected the fact that Anderson and Bastian "had already made the decision we were going to impose a first bag fee on Sunday, September 28, 2008."⁶¹

(57) As a matter of corporate governance, Richard Anderson's decision that Delta would adopt a first bag fee was dispositive of the matter.⁶²

⁵⁸ Ex. 14, Gorman 5/10/2012 Dep. 44:10-45:25, 79:4-12; Ex. 28, West DOJ Dep. 143:8-145:4; Ex. 27, West 5/11/2012 Dep. 88:1-91:7.

⁵⁹ Ex. 77, at DLTAPE-17713 (Gorman 5/10/2012 Dep. Ex. 16).

⁶⁰ Ex. 80, at DLTAPE-3069 (Anderson 5/3/2012 Dep. Ex. 48).

⁶¹ Ex. 5, Anderson 5/3/2012 Dep. 226:8-227:16; *see also id.* 207:16-22; Ex. 29, Bastian Declaration ¶ 5.

⁶² Ex. 5, Anderson 5/3/2012 Dep. 229:17-230:23, 238:2-19.

(58) Around October 8, 2008, Delta learned that DOJ Staff was not going to oppose the Delta/Northwest merger, making closure of the merger imminent.⁶³

(59) While Delta learned on or about October 8, 2008 that DOJ Staff had recommended against challenging the merger, a final decision still had to be made by DOJ front-office personnel.⁶⁴

(60) On October 15, 2008, Ed Bastian foreshadowed to investors Delta's adoption of a first bag fee as part of closing the merger and aligning the two carriers' "fee-based revenues":

We've probably been a little less aggressive in a couple of areas than some of our competitors, and we're still looking at that as we move forward. On the fee-based revenues, everyone is in a very different place across the industry, and *as we merge with Northwest we'll have another opportunity to look again with respect to where the fee-based revenues align.*⁶⁵

(61) On October 21, 2008 Delta CEO Richard Anderson e-mailed Gil West and Gail Grimmett about their progress in coming up with a joint recommendation

⁶³ Ex. 4, Anderson 10/6/2010 Dep. 60:6-9; Ex. 6, Bastian 9/17/2010 Dep. 130:25-131:21; *see also* Ex. 53, at DLBAG-2158 (Sept. 18, 2008 "Critical Milestones" merger timeline showing "DOJ staff rec[ommendation]" to occur in early October).

⁶⁴ Ex. 55, at DLBF-82431 (Oct. 8, 2008 merger timeline showing "DOJ front office decision" expected in late October); Ex. 81, Oct. 29, 2008 DOJ Press Release.

⁶⁵ Ex. 82, at DLBF-38191 (Delta Air Lines Q3 2008 Earnings Call Transcript).

for a post-merger fee structure. West responded, stating that: “Gail and I have coordinated the post merger fee structure. The one loose end is the first bag fee.”⁶⁶

(62) On October 22, 2008, Anderson forwarded that exchange only to Steve Gorman, Delta’s Chief Operating Officer, reiterating his conclusion expressed previously to Delta’s President Ed Bastian that Delta needed to adopt the first bag fee: “We need to do it.”⁶⁷

(63) Richard Anderson testified that “do it” meant “adopt the bag fee.”⁶⁸

(64) Delta’s President, Ed Bastian, and its Chief Operating Officer, Steve Gorman, also decided before AirTran’s October 23, 2008 earnings call that Delta should adopt a first bag fee as a part of its post-merger integration with Northwest.⁶⁹

⁶⁶ Ex. 65, at DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49).

⁶⁷ Ex. 65, at DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49).

⁶⁸ Ex. 5, Anderson 5/3/2012 Dep. 228:24-229:11.

⁶⁹ Ex. 5, Anderson 5/3/2012 Dep. 227:13-16, 229:17-230:12, 233:15-234:4; Ex. 7, Bastian DOJ Dep. 58:15-20; Ex. 6, Bastian 9/17/2010 Dep. 45:9-48:5; Ex. 13, Gorman 12/10/2010 Dep. 39:5-41:4; Ex. 14, Gorman 5/10/2012 Dep. 22:23-23:14. Anderson testified that “Steve [Gorman], Ed [Bastian] myself, Mike Campbell really operate . . . as a little . . . super executive team at the company.” Ex.5, Anderson 5/3/2012 Dep. 238:20-239:7.

(65) Richard Anderson's decision that Delta should adopt a first bag fee as a part of its post-merger integration with Northwest had nothing to do with whether AirTran would match any action by Delta.⁷⁰

(66) By the time of Delta's decision to adopt a first bag fee, every other major legacy carrier had adopted the bag fee.⁷¹

(67) Northwest was already charging the fee, so the combined carrier would have to forego hundreds of millions in projected annual revenue Northwest was already generating if that fee was abandoned.⁷²

(68) Based on other airlines' public reports and data, Delta's top executives – CEO Richard Anderson and President Ed Bastian – did not see any evidence of share shift or disruption to the operations of the carriers who had already adopted the fee, believed customers appeared generally to have accepted the fee, and in the face of volatile fuel costs and economic uncertainty, determined

⁷⁰ Ex. 4, Anderson 10/6/2010 Dep. 69:23-70:16, 81:4-21, 82:22-83:2; Ex. 5, Anderson 5/3/2012 Dep. 215:6-16, 229:17-230:12.

⁷¹ Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report Ex. 6.

⁷² Ex. 7, Bastian DOJ Dep. 42:6-14; Ex. 83, at DLBF-35102 (Gorman 12/10/2010 Dep. Ex. 5) (noting Revenue Management's Value Proposition omitted approximately \$215 million in first bag fees Northwest was already earning); Ex. 13, Gorman 12/10/2010 Dep. 67:20-24; Ex. 46, at DLTAPE-1758 (July 9, 2008 Northwest Press Release announcing \$250 and \$300 million in expected revenues from ancillary fee initiatives, including the first bag fee).

that Delta simply could not afford to forego the approximately \$500 million in revenue for the post-merger company.⁷³

(69) Public statements by legacy carriers which had already adopted first bag fees confirmed Anderson's and Bastian's views that first bag fees were generating substantial incremental revenue, with minimal operational impact (and in some respects, an operational benefit):

United Airlines (October 21, 2008): "Q. (*David Jannes, Pro Media*) . . . Regarding the fees, . . . you had mentioned some very moderate friction that you're seeing and I'm wondering if specifically on the first bag fee, if that has translated to a loss of passengers to those competitors that do not charge first bag fees? A. (*John Tague, President of United Airlines*) . . . [W]e can't see anything measurable. Granted, it's hard to discern some of these changes but nothing measurable and nothing that would have caused us to have made the decision differently."⁷⁴

Northwest Airlines (October 22, 2008): "[W]e continue to see strong ancillary revenue growth. The airline's – our first and second checked bag fees are performing exceptionally well, and based on the most recent data available the bag fee initiatives are generating an incremental \$150 million to \$200 million in additional revenues on an annualized basis."⁷⁵

⁷³ Ex. 4, Anderson 10/6/2010 Dep. 66:14-67:10, 72:8-12, 104:24-105:5; Ex. 7, Bastian DOJ Dep. 56:8-57:14, 58:15-59:14, 61:25-63:2, 75:9-12.

⁷⁴ Ex. 84, at DLTAPE-903 (United Airlines Q3 2008 Earnings Call Transcript).

⁷⁵ Ex. 85, at DLTAPE-852 (Northwest Airlines Q3 2008 Earnings Call Transcript).

US Airways (October 23, 2008): “On the revenue side, we continue to be pleased with the impact of our a la carte pricing model we implemented back in the second quarter. . . . We are on target to realize the annual benefit of \$400 million to \$500 million per year we previously announced. . . . [I]t’s remark[able], just having fewer bags in the system how much that has helped improve the mishandled baggage ratio. In our perspective we have fewer bags . . . and now with fewer bags flowing through the system we not only lose fewer bags, it helps us run a much better operation. . . [W]e really haven’t seen much impact [in markets where US is head to head with Southwest versus markets with other carriers who are putting in the ancillary revenue initiatives]. . . . So we’re really excited about it. We haven’t seen, as Scott indicated, any sort of discernible booking away.”⁷⁶

(70) Although the top executives of Delta had decided before the AirTran earnings call that post-merger Delta should charge a first bag fee, consistent with Delta’s management process,⁷⁷ they believed that Glen Hauenstein should have the opportunity to advocate his position before the CLT.⁷⁸

(71) On October 21, 2008, the “one loose end” remaining from ACS and Revenue Management’s effort to propose a combined fee schedule for the merged

⁷⁶ Ex. 86, at DLTAPE-750, 753-54, 758 (US Airways Q3 2008 Earnings Call Transcript).

⁷⁷ Ex. 6, Bastian 9/17/2010 Dep. 45:9-16; Ex. 7, Bastian DOJ Dep. 11:24-12:11, 58:15-20, 61:6-24; Ex. 4, Anderson 10/6/2010 Dep. 10:12-25; Ex.29, Bastian Declaration ¶ 5.

⁷⁸ Ex. 80, at DLTAPE-3069 (Anderson 5/3/2012 Dep. Ex. 48) (Sept. 28, 2008 e-mail from Bastian to Anderson: “Glen has different thoughts so should have disc[ussion] at right time.”) Ex. 7, Bastian DOJ Dep. 11:6-17, 16:25-17:5, 20:9-13, 45:9-16, 61:13-22, 63:7-64:8; Ex. 4, Anderson 10/6/2010 Dep. 47:16-48:7, 75:4-9, 88:16-19; Ex. 29, Bastian Declaration ¶ 6.

company was placed on the agenda for the next meeting of Delta's CLT, scheduled for Monday, October 27, 2008.⁷⁹

(72) The October 27 CLT meeting began with ACS and Revenue Management presenting their respective positions. Revenue Management, which long opposed the first bag fee, presented the Value Proposition power point slides to advocate against the adoption of the fee.⁸⁰

(73) A basic assumption of the Revenue Management presentation was that adoption of a bag fee could reduce Delta market share by: (1) ending market share gains to Delta from legacy carriers that did charge the fee; and (2) producing

⁷⁹ Ex. 87, at DLBAG-9899 (Oct. 21, 2008 e-mail from Gil West to R. Cooper (Richard Anderson): "Gail and I have coordinated the post closing fee structure. The one loose end is the first bag fee. . . . We'll set up a review with you."); Ex. 88, at DLBAG-9901 (Oct. 21, 2008: Gil West asked Bridget Carey, Steve Gorman's assistant, to place the first bag fee discussion on the agenda of the next CLT meeting); Ex. 89, at DLBAG-6181 (Oct. 21, 2008: Bridget Carey e-mailed Barbara Presley, Richard Anderson's assistant, asking her to add the fee discussion to the CLT meeting agenda for Monday, October 27, 2008); Ex. 90, at DLBAG-6888 (Oct. 22, 2008: Barbara Presley e-mailed Richard Anderson a draft agenda for the Monday, October 27, 2008 CLT meeting, which included the fee discussion); Ex. 91, at DLTAPE-3087 (Oct. 22, 2008 (Eastern time): Richard Anderson personally approved the agenda).

⁸⁰ Ex. 4, Anderson 10/6/2010 Dep. 55:19-56:17; Ex.7, Bastian DOJ Dep. 69:12-71:10; Ex. 15, Grimmett 9/28/2010 Dep. 137:6-138:12, 150:10-151:16, 165:2-7, 165:24-25, 175:13-14, 177:14-22, 180:15-17; Ex. 16, Hauenstein 9/17/2010 Dep. 99:3-101:5, 108:10-109:7, 111:23-112:3, 114:3-16, 115:2-116:7.

market share losses from Delta to carriers that did not charge the fee.⁸¹

(74) The Value Proposition presentation did not attempt to estimate market share or revenues that might be lost if Delta adopted the fee, but calculated the revenues associated with each point of market share and then arrayed the revenues associated with various levels of hypothetical share loss as a sensitivity analysis.⁸²

(75) The main point of the Value Proposition analysis, as explained by its sponsor, Glen Hauenstein, was to counter the view of the leaders of ACS that first bag fee revenues would be “pure profit.”⁸³

(76) Advocating for the opposing view, Gorman and West rejected the basic premise of the Value Proposition presentation, arguing that the decision whether to check a bag is not a point of purchase decision and has no bearing on most customers’ choice of carrier.⁸⁴

(77) Gorman and West reiterated their long-standing support for the first

⁸¹ Ex. 96, DLBF-35101-20 (Gorman 12/10/2010 Dep. Ex. 5).

⁸² Ex.97, DLBF-35111-12 (Gorman 12/10/2010 Dep. Ex. 5) (Oct. 27, 2008 “Value Proposition” showing ranges of “Value of potential share shift” and stating that “4-5 point loss of share in ATL markets offsets estimated bag fee revenue [of \$265 million]”).

⁸³ Ex. 16, Hauenstein 9/30/2010 Dep. 99:3-101:5, 108:10-109:7, 111:23-112:3, 115:2-116:7; *see also* Ex.20, Phillips 12/7/2010 Dep. 10:7-11:10; Ex. 21, Phillips 5/17/2012 Dep. 20:8-22.

⁸⁴ *See supra* ¶¶ 44-50 and accompanying footnotes.

bag fee which they believed constituted “pure profit.”⁸⁵

(78) President Ed Bastian then spoke and, consistent with the view he expressed to Richard Anderson privately in September, strongly advocated that Delta adopt the fee.⁸⁶

(79) Bastian explained that the expected first bag fee revenues (from both Delta and Northwest) were too substantial to forego, especially in light of worsening economic conditions.⁸⁷

(80) Bastian also observed that Delta faced imminent cash obligations, such as the funding of the company’s employee pension plan, and that the first bag

⁸⁵ Ex. 13, Gorman 12/10/2010 Dep. 51:9-10; Ex. 28, West DOJ Dep. 118:19-21, 178:18-180:21; Ex. 92, DLBAG-9554 (June 2, 2008 e-mail from West to Gorman commenting on first bag fee analysis in draft June 16, 2008 CLT presentation: “Big \$\$\$”).

⁸⁶ Ex. 7, Bastian DOJ Dep. 71:9-72:25; Ex. 4, Anderson 10/6/2010 Dep. 87:9-13.

⁸⁷ Ex. 7, Bastian DOJ Dep. 71:9-72:1, Ex. 6, Bastian 9/17/2010 Dep. 48:6-15. Bastian reiterated this view to Hauenstein after the October 27th CLT meeting, confirming his rejection of Hauenstein’s concerns about “share shift.” Ex. 93, DLTAPE-1276 (October 31, 2008: Ed Bastian instructed Eric Phillips not to postpone adoption of the fee because “time is money” and “losing a week of new fees could be millions.” Hauenstein responded privately to Bastian to reiterate his concerns about losing share to AirTran if Delta implemented the bag fee before AirTran: “I thought we kind of agreed that for [Delta] it is a wash. I know you really believe in it but [Northwest] where the real money is already has it. I can assur[e] you that we would be facing more [AirTran] sales this week if we did the bag fee.” Bastian replied: “We may disagree but the fees are real and large. It’s a question if we have dilution due to customer satisfaction.”); Ex. 29, Bastian Declaration ¶¶ 7-8.

fee would help generate needed cash flow.⁸⁸

(81) Bastian also expressed the view that Delta could only benefit from not having a first bag fee if it could successfully market itself as a “no-fee” or “low-fee” airline – something he did not believe Delta could do credibly.⁸⁹

(82) Delta’s CEO Richard Anderson said he agreed with Bastian that Delta should adopt a first bag fee.⁹⁰

(83) Anderson explained that although he had not favored adopting a first bag fee in May and June of 2008, he had observed that the first bag fee had become the industry norm over the summer, that consumers had come to accept the fee, and that carriers charging the fee were earning substantial ancillary revenue with no adverse effect on operations or market share.⁹¹

(84) Anderson’s and Bastian’s views about the first bag fee in October 2008 have been proven correct – first bag fees have generated hundreds of millions in annual revenues with no material “share shift” to carriers without the fee.⁹²

(85) Once Anderson and Bastian spoke in favor of the fee at the October

⁸⁸ Ex. 7, Bastian DOJ Dep. 72:1-15, 73:1-74:2.

⁸⁹ Ex. 7, Bastian DOJ Dep. 72:16-25, 81:10-18.

⁹⁰ Ex. 4, Anderson 10/6/2010 Dep. 87:6-21; Ex. 7, Bastian DOJ Dep. 74:3-6.

⁹¹ Ex. 4, Anderson 10/6/2010 Dep. 66:11-68:1, 71:23-72:15, 76:2-77:19; Ex. 7, Bastian DOJ Dep. 74:3-21.

⁹² Ex. 29, Bastian Declaration ¶¶ 10-11.

27, 2008 CLT meeting, the group reached a consensus that charging the fee was the right course.⁹³

(86) On October 27, 2008, Steve Gorman e-mailed Gil West after the CLT meeting regarding the first bag fee. He noted, “We got there” and that “Glen [Hauenstein] is fine.” West responded, “Thanks. It’s the right decision in my view. The execution will be a bit challenging but well worth it.”⁹⁴

(87) Anderson decided not to formalize the decision on a post-merger fee structure until after the merger so that Delta could assess how other fees might be adjusted to account for a first bag fee (e.g., reduce its second bag fee), and obtain the input from Northwest executives.⁹⁵

(88) Every Delta executive who attended the October 27, 2008 CLT meeting and was deposed on this subject has testified that the AirTran earnings call statement had no effect on his or her views about whether Delta should adopt the fee.⁹⁶

⁹³ Ex. 28, West DOJ Dep. 182:1-16; Ex. 15, Grimmatt 9/28/2010 Dep. 217:2-21.

⁹⁴ Ex. 94, at DLBAG-9935.

⁹⁵ Ex. 4, Anderson 10/6/2010 Dep. 60:1-61:5, 62:3-11, 87:17-88:6, Ex. 6, Bastian 9/17/2010 Dep. 43:23-45:8, 128:15-129:1, 130:24-131:2; Ex. 7, Bastian DOJ Dep. 39:8-12, 75:13-76:5.

⁹⁶ Ex. 4, Anderson 10/6/2010 Dep. 94:1-14; Ex. 7, Bastian DOJ Dep. 76:13-77:15, 85:19-25; Ex. 16, Hauenstein 9/30/2010 Dep. 127:8-12, 133:8-16; Ex.15,

(89) To the extent that AirTran was mentioned at all during the October 27, 2008 CLT meeting, it was in passing, and no one remembers any discussion of AirTran CEO Robert Fornaro's October 23, 2008 earnings call statement.⁹⁷

(90) Richard Anderson testified that Fornaro's statement "didn't have any bearing on [Delta's] decision to put in place a first bag fee,"⁹⁸ because "[i]t didn't matter whether AirTran matched or not. It was irrelevant to the decision that [Delta] took."⁹⁹

(91) An October 30, 2008 e-mail from Eric Phillips recounting Richard Anderson's reasons for adopting the fee expressed during the October 27, 2008 CLT meeting makes no mention of AirTran.¹⁰⁰

(92) Like Anderson, Bastian testified that the decision to adopt a first bag fee "didn't have anything to do with what AirTran was or wasn't going to do," and that Fornaro's statement thus had "no impact whatsoever."¹⁰¹

Grimmett 9/28/2010 Dep. 214:18-20; Ex. 28, West DOJ Dep. 184:11-187:12, 190:17-191:15; Ex. 22, Phillips DOJ Dep. 306:22-307:16.

⁹⁷ Ex. 6, Bastian 9/17/2010 Dep. 102:7-104:13; Ex. 4, Anderson 10/6/2010 Dep. 70:17-71:4.

⁹⁸ Ex. 4, Anderson 10/6/2010 Dep. 94:1-14.

⁹⁹ Ex. 4, Anderson 10/6/2010 Dep. 68:8-15, 69:23-70:16, 81:6-21, 83:1-2, 104:811.

¹⁰⁰ Ex. 95, at DLBAG-5727.

¹⁰¹ Ex. 7, Bastian DOJ Dep. 24:11-16, 50:4-51:16, 76:15-77:15, 85:19-25.

(93) Bastian believed well before Fornaro's statement that AirTran would adopt a first bag fee regardless of what Delta did because of AirTran's well-known financial problems.¹⁰²

(94) Steve Gorman's view was likewise unaffected by Fornaro's statement because of his view that charging the first bag fee created no significant risk of passenger loss.¹⁰³

(95) Revenue Management's views were also unaffected by Fornaro's statement. That department's executives advocated against the fee both before *and* after the AirTran earnings call.¹⁰⁴

¹⁰² Ex. 6, Bastian 9/17/2010 Dep. 89:15-17, 101:12-102:3, 104:24-105:12.

¹⁰³ Ex. 13, Gorman 12/10/12 Dep. 60:7-19; Ex. 13, Gorman 12/10/2010 Dep. 44:11-45:5; Ex. 28, West DOJ Dep. 87:9-16, 115:11-19, 171:5-13, 173:6-174:19, 185:9-188:6.

¹⁰⁴ In drafts of the Value Proposition slides, the probability of an AirTran match was changed from 50% to 75% and then 90% after the Fornaro statement. Ex. 26, Springer DOJ Dep. 117:5-118:11; Ex. 22, Phillips DOJ Dep. 190:4-193:10, 204:8-205:4, 232:8-234:6; Ex. 96, at DLBF-35499 (Phillips DOJ Dep. Ex. 15); Ex. 94, at DLBF-35515 (Phillips DOJ Dep. Ex. 17); Ex. 98, at DLBF-35539 (Phillips DOJ Dep. Ex. 19). That change, however, did not affect Revenue Management's recommendation against the first bag fee. Ex. 17, Hauenstein 5/10/2012 Dep. 42:21-43:5; Ex.16, Hauenstein 9/30/2010 Dep. 128:13-15; Ex. 15, Grimmitt 9/28/2010 Dep. 134:2-4.

(96) Two days after the CLT meeting, on October 29, 2008, the DOJ issued a press release stating that it would not oppose the Delta-Northwest merger.¹⁰⁵

(97) Later that day, Delta and Northwest consummated their merger.¹⁰⁶

(98) After the merger closed, former Northwest employees confirmed that Northwest was earning about a half a million dollars a day from first bag fees, and that the fees had not resulted in significant customer backlash.¹⁰⁷

¹⁰⁵ Ex. 81, Oct. 29, 2008 DOJ Press Release; *see also* Ex. 99, at DLBF-23688-732.

¹⁰⁶ Ex. 5, Anderson 5/3/2012 Dep. 231:6-15; Ex.100, Oct. 29, 2008 Delta Press Release.

¹⁰⁷ Ex. 4, Anderson 10/6/2010 Dep. 61:22-62:11, 76:19-77:20; Ex. 101, at DLBAG-3336 (Oct. 31, 2008 e-mail from Chad Czuprynski (ACS) to Theresa Keaveny (ACS) and Matt Brawner (ACS, Finance) that the “NWA baggage folks” told him the first bag fee was generating “\$400K/day.”); Ex. 102, at DLBAG-132078 (Nov. 3, 2008, Northwest Operations Senior Staff Meeting: “NW Bag Fees are about \$0.5 [million] per day. We are discussing with DL what the harmonized policy should be. Since the fees started we are handling 18% fewer bags per enplanement.”); Ex. 103, at DLBAG-9914-15; Ex. 104, at DLBAG-2555-60 (Oct. 31, 2008 Mark Zessin forwarded to Gil West a Northwest “Bag Fee Study” observing: “It might be helpful at the CLT.” The study measured customer reaction to Northwest’s adoption of a first bag fee and shows that 84% of summer leisure passengers “paid fee no problem,” and only 2% were “upset” by having to pay the fee.”); Ex. 105, at DLBAG-14096 (Nov. 17, 2008 e-mail from Nick Costentino (Northwest) to Chad Czuprynski (Delta): “I believe we’ve seen about a 20% reduction in the # of bags checked per passenger since the inception of 1st bag fee”).

(99) The following Monday, November 3, 2008, Delta's new CLT, which now included new members from the former Northwest, met for the first time.¹⁰⁸

(100) At the meeting, the harmonized fee structure for the combined entity was finalized.¹⁰⁹

(101) Delta adopted Northwest's \$15 first bag fee and simultaneously reduced its second bag fee from \$50 to \$25 (which had been Northwest's pre-merger second bag fee).¹¹⁰

(102) The CLT simultaneously harmonized numerous other fees covering overweight luggage, unaccompanied minors, surfboards, golf clubs, antlers, etc.¹¹¹

(103) Two days later, on November 5, 2008, Delta issued a press release announcing the alignment of Delta and Northwest fees.¹¹²

¹⁰⁸ Ex. 13, Gorman 12/10/2010 Dep. 127:63-128:24; Ex. 4, Anderson 10/6/2010 Dep. 62:9-11; Ex. 7, Bastian DOJ Dep. 75:13-76:12; Ex. 106, at DLBF-35582 (Anderson 10/6/2010 Dep. Ex. 19) (Richard Anderson of copy of "Fee Revenue Update – Combined Entity Structure" presentation with handwritten note indicating date of presentation as November 3, 2008).

¹⁰⁹ Ex. 4, Anderson 10/6/2010 Dep. 60:25-61:5; Ex. 13, Gorman 12/10/2010 Dep. 123:23-125:15; Ex.106, at DLBF-35581-86 (Anderson 10/6/2010 Dep. Ex. 19); Ex. 107, at DLBF-3504-09.

¹¹⁰ Ex. 108, at DLBF-3586.

¹¹¹ Ex. 107, at DLBF-3504-09; Ex.109, at DLBF-3932-37; Ex. 106, at DLBF-35584 (Anderson 10/6/2010 Dep. Ex. 19).

¹¹² Ex. 110, at DLBF-7454-55.

(104) While AirTran announced its adoption of a first bag fee on November 12, 2008, AirTran did not decide to adopt the fee until after Delta's November 5, 2008 announcement.¹¹³

(105) Delta executives deposed in this case have uniformly testified there have been no communications with AirTran about first bag fees.¹¹⁴

(106) Former AirTran employee Scott Fasano attempted to send e-mails on July 31, 2008 to two people he believed were Delta employees. Unbeknownst to Mr. Fasano, they were no longer employed at Delta when he sent them the e-mails, and thus never received the e-mails.¹¹⁵

(107) Mike Ringler (Delta Station Manager in Knoxville, TN) and Mike Rossano (Delta Station Manager in Miami, FL) testified that they had no

¹¹³ Ex. 111, at AIRTRAN-8340; Ex. 112, at AIRTRAN-64714 (Healy 11/19/2010 Dep. Ex. 22); Ex. 113, at AIRTRAN-64935 (Fornaro 11/18/2010 Dep. Ex. 22); Ex.12, Fornaro 11/18/2010 Dep. 85:17-86:17; Ex. 18, Healy 11/19/2010 Dep. 122:4-126:6.

¹¹⁴ Ex. 4, Anderson 10/6/2010 Dep. 95:4-11; Ex. 6, Bastian 9/17/2010 Dep. 123:2-21, 190:5-191:10; Ex. 13, Gorman 12/10/2010 Dep. 147:21-148:1, 150:12-17; Ex. 16, Hauenstein 9/30/2010 Dep. 105:22-25; Ex. 15, Grimmatt 9/28/2010 Dep. 38:25-39:15, 42:12-44:17, 118:18-120:19; Ex. 28, West DOJ Dep. 191:2-15; Ex. 20, Phillips 12/7/2010 Dep. 45:6-10, 47:4-17.

¹¹⁵ Ex. 114, at AIRTRAN-12346 (Fasano 12/1/2010 Dep. Ex. 25); Ex. 115, at AIRTRAN-12360 (Fasano 12/1/2010 Dep. Ex. 26); Ex. 8, Boeckhaus 11/24/2010 Dep. 21:24-22:5; Ex. 9, Burman 12/4/2010 Dep. 8:14-17.

discussions about first bag fees with Scott Fasano.¹¹⁶

(108) Ringler and Rossano testified that no information about Delta's or AirTran's plans or analysis to adopt a first bag fee was ever exchanged with Scott Fasano.¹¹⁷

(109) Scott Fasano testified that he did not recall discussing first bag fees with either Ringler or Rossano.¹¹⁸

(110) Scott Fasano testified that the e-mails he wrote to his superiors regarding his conversations with Ringler and Rossano reflected his "opinions" and not "information" learned from either Delta employee.¹¹⁹

(111) Fasano testified that in the e-mails he wrote to his superiors regarding his conversations with Ringler and Rossano he had "embellished" and was "lying" about the information received in those conversations.¹²⁰

(112) Moreover, neither Mr. Ringler nor Mr. Rossano was in a position to

¹¹⁶ Ex. 24, Ringler 11/12/2010 Dep. 9:4-14, 37:22-39:9, 58:8-59:19; Ex. 25, Rossano 11/5/2010 Dep. 12:15-21, 75:1-80:17, 88:2-12.

¹¹⁷ Ex. 24, Ringler 11/12/2010 Dep. 66:4-8, 70:13-73:23; Ex. 25, Rossano 11/5/2010 Dep. 68:6-69:14, 75:1-80:17, 81:13-24, 87:15-88:20.

¹¹⁸ Ex. 11, Fasano 12/1/2010 Dep. 98:5-99:12, 109:9-110:15; Ex.10, Fasano DOJ Dep. 46:7-19, 49:17-22, 66:17-69:10.

¹¹⁹ Ex. 11, Fasano 12/1/2010 Dep. 116:22-119:3, 187:8-18; Ex. 10, Fasano DOJ Dep. 66:17-69:10.

¹²⁰ Ex. 11, Fasano 12/1/2010 Dep. 116:22-119:3, 187:8-18; Ex. 10, Fasano DOJ Dep. 66:17-69:10; Ex. 116, AIRTRAN00028755 (Fasano 12/2/2010 Dep. Ex. 14).

provide any information about Delta's bag fee deliberations had Mr. Fasano asked them for it. Both employees were airport station managers, far removed both organizationally and geographically from the Delta executives involved in Delta's analysis or decision about whether to adopt a first bag fee. Neither had any role in that process, nor did they have any knowledge about Delta's plans or deliberations.¹²¹

(113) With respect to the conversation Scott Fasano allegedly had with "one of [his] former colleagues . . . embedded in the team amongst the Northwest crew," that person (Patrick Rary) had not worked for Delta for nearly three years at the time of the alleged conversation.¹²²

(114) Scott Fasano testified that he simply "made up" the information supposedly learned from Rary.¹²³

(115) Patrick Rary testified that he did not have any conversation with Fasano concerning first bag fees.¹²⁴

¹²¹ Ex. 24, Ringer 11/12/2010 Dep. 9:4-14, 64:12-65:20; Ex. 25, Rossano 11/5/2010 Dep. 12:15-21, 22:16-21, 25:10-16, 40:8-41:8, 51:6-52:2, 57:10-18, 65:11-25, 81:13-24, 91:17-92:10.

¹²² Ex. 23, Rary 11/4/2010 Dep. 23:8-17.

¹²³ Ex. 10, Fasano DOJ Dep. 79:13-83:15; Ex. 11, Fasano 12/2/2010 Dep. 146:24-151:7, 163:20-25.

¹²⁴ Ex. 23, Rary 11/9/2010 Dep. 53:17-55:17, 77:8-82:22, 87:1-11.

(116) Patrick Rary was not in any position to convey any information about Delta's first bag fee deliberations, and had no knowledge of Delta's plans.¹²⁵

(117) During 2009, Delta capacity went up on AirTran routes – at the same time that capacity was reduced everywhere else across Delta's system.¹²⁶

(118) Delta's and AirTran's joint gate-lease negotiations with Hartsfield-Jackson International Airport in 2008 and 2009 were the same type of negotiations that occur between airport landlords and their airline lessees at every major airport in the country, and Delta's and AirTran's discussions never involved anything other than their negotiations with the airport.¹²⁷

¹²⁵ Ex. 23, Rary 11/9/2010 Dep. 65:18-67:4, 99:17-100:3.

¹²⁶ Ex. 30, Kasper Declaration ¶ 4 (“For the full year 2009, Delta capacity (seats) on nonstop routes to/from Atlanta overlapping with AirTran grew year-over-year by 2.9%, while Delta's capacity on the rest of its domestic system decreased by 9.2%.”) & Exhibit 1 (Surrebuttal Report of Daniel M. Kasper ¶ 7); Ex. 19, Kasper 12/15/2010 Dep. 18:5-18.

¹²⁷ Ex. 4, Anderson 10/6/2010 Dep. 23:4-15, 26:2-28:9, 35:21-25, 40:10-24.

Dated: August 31, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

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