IN THE 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

MEMORANDUM OF DEFENDANT AIRTRAN AIRWAYS, INC. IN SUPPORT OF ITS MOTION FOR COURT APPOINTMENT OF A NEUTRAL ECONOMIC EXPERT

INTRODUCTION

At the November 8, 2010 status conference, the Court stated that it intended to set a hearing on class certification but did not address the scope and procedural aspects of the hearing.[1] For the reasons set forth herein, Defendant AirTran Airways, Inc. ("AirTran") believes that the Court's resolution of the economic issues related to class certification and other contested matters will be greatly facilitated by the appointment of a neutral economics expert with econometrics expertise. Although AirTran recognizes that considerations of judicial economy may make it desirable for the Court to defer the class certification hearing until summary judgment motions are before it, some time will be required to select and inform the expert and obtain the benefit of the expert's views on the disputed

[1] *See* Hearing Tr. (Nov. 8, 2010) at 74:11-21.

economic/econometric issues upon which resolution of class certification and other important issues in the case depend. AirTran believes that it is appropriate to avoid later delay by moving forward now with the appointment of a neutral, court-appointed economic expert.

As shown in the Parties' prior submissions, and as further explained below, the proposed expert testimony that has been gathered from the Parties' class certification experts through reports and depositions conflicts sharply on contested issues that may be dispositive on class certification, including: (i) the fact of injury; (ii) the typicality of the named Plaintiffs' claims; (iii) the ability of the named Plaintiffs to adequately protect the interests of the putative class; (iv) the predominance of individual over common issues necessary to resolution of class member claims; and (v) the manageability of the proposed class action. While class certification also raises a number of other important, contested legal issues, AirTran submits that the appointment of a neutral expert to assist the Court in evaluating the Parties' competing expert positions would be fair to the Parties and consistent with both Eleventh Circuit precedent and well-reasoned class certification decisions in other circuits.

ARGUMENT

I. There Are Critical Points Of Difference Between The Parties' Experts On The Fact And Amount Of Injury Which Bear Directly On The Rule 23 Prerequisites To Class Certification.

On November 5 and 12, 2008, respectively, Defendants Delta and AirTran announced that they would begin charging a separate "ancillary" $15 fee for a passenger's first checked bag, thereby "unbundling" the cost of checking baggage from the "base fare." Plaintiffs' and Defendants' class certification experts differ sharply on the economic impact of this unbundling on individual bag-checking passengers, an issue that bears directly on the propriety of class certification and, specifically, on whether common proof can be used to establish both the fact and amount of any injury suffered by putative class members. In particular, AirTran has identified three disputed economic issues that the Court must resolve:

A. Do Base Fares Matter?

Plaintiffs' expert, Dr. Hal Singer, contends that the economic injury to putative class members can be assessed reliably by ignoring base fares and considering only the cost of any first bag fees ("FBFs") that they paid.[2] By

[2] In his opening report, Dr. Singer opined that "proof of violation . . . subsumes proof of impact . . . . [because] absent the challenged conduct, all members of the class would have been spared a first bag fee." Singer Opening Report (June 30, 2010) ("Singer Opening Report") ¶¶ 7, 78. Although Dr. Singer's monolithic approach to damages fails to acknowledge that, prior to unbundling,

contrast, Defendants' experts Professor Marius Schwartz, Dr. Eric Gaier, and Dr. Darin Lee all contend that the economic impact of FBF unbundling can only be assessed by comparing the total price, including base fares and bag fees, that each putative class member paid for traveling on each route traveled with checked baggage and the total price that the same class member would have paid if the costs associated with bag checking had continued to be bundled into Defendants' base fares.[3]

If Dr. Singer is correct that economic injury may be measured with reference to the FBF alone and without regard to a class member's underlying base fare, then Plaintiffs have cleared a substantial Rule 23 hurdle. By contrast, if the Court determines, as Defendants' experts contend,[4] that any alleged economic injury

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first-bag checkers were not "spared" a fee because the costs of baggage handling were simply spread among all passengers, *see, e.g.*, Certification Report of Professor Marius Schwartz (Sept. 24, 2010) ("Schwartz Opening Report") ¶¶ 8(b), 34, Dr. Singer has adhered to his original approach. *See, e.g.*, Class Certification Reply Report of Dr. Hal Singer (Nov. 30, 2010) ("Singer Reply Report") ¶¶ 11, 15, 92, 95.

[3] *See, e.g.*, Schwartz Opening Report ¶¶ 8, 11, 20, 30-63; Report of Dr. Eric M. Gaier (Sept. 24, 2010) ("Gaier Opening Report") ¶¶ 14-16, 30-32, 38-55; Expert Report of Dr. Darin N. Lee (Sept. 24, 2010) ("Lee Opening Report") ¶¶ 7, 10-45; Surrebuttal Report of Dr. Darin N. Lee (Nov. 8, 2010) ("Lee Surrebuttal Report") ¶¶ 1-3, 8-17.

[4] It is worth noting that the United States Department of Transportation, in a recent formal rulemaking on consumer protection concluded: "It is the

must be calculated with reference to the net differences in a putative class member's overall, total trip cost by comparing the actual cost of the passenger's travel with the total cost of that travel in a "but for," bundled fare scenario, Plaintiffs' Rule 23 position becomes tenuous at best.

B. If Base Fares Matter, Can The Fact And Amount Of Individual Injury Be Determined Reliably Using Only A System-Wide, Average Base Fare Increase Or Reduction?

Defendants' experts contend that both economic theory and empirical analysis demonstrate that initiating FBFs caused Defendants' base fares, on average, to decrease.[5] By contrast, Dr. Singer contends that Defendants' unbundling of FBFs caused base fares, on average, to increase.[6] In the alternative, Dr. Singer contends that even if base fares decreased, on average, as a result of FBF unbundling, the fact of economic injury to individual putative class members can still be determined by deducting each Defendant's system-wide, average

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Department's view that carriers may continue to explore other ways to further unbundle fares, thus leading to base ticket prices staying flat or declining." Dep't of Transportation, Office of the Secretary, *Final Rule, "Enhancing Airline Passenger Protections,"* 14 C.F.R. Parts 244, 250, 253, 259, and 399, Dkt. No. DOT-OST-2010-0140, RIN No. 2105-AD92 (Apr. 19, 2011), at 97.

[5] *See* reports cited *supra* note 3.

[6] *See, e.g.,* Singer Reply Report ¶¶ 5, 9, 14, 48-50, 84.

decrease in base fares from the average FBF collected by Defendants during the class period.[7]

Defendants' experts have countered that a system-wide average base fare decrease masks significant variations in base fare impact among passengers that arise from route-dependent, date-dependent, and flight-dependent characteristics, some of which exceed the amount of the fee, and that Dr. Singer's proposed solution would necessarily and improperly sweep many plaintiffs who suffered no economic injury at all into the putative class.[8]

C. Should A Putative Class Member's Multiple Trips On AirTran Or Delta Be Aggregated?

Complicating the issue further is the question of whether a putative class member's multiple trips should be aggregated for the purpose of measuring harm. Dr. Singer sidesteps this question by arguing that the putative class can be limited to passengers who paid more in FBFs than they received in base fare reductions, assuming that all passengers received the Defendants' average, system-wide base

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[7] *See, e.g.,* Singer Reply Report ¶¶ 11, 12, 14, 93-94.

[8] *See, e.g.,* Schwartz Opening Report ¶¶ 49-57; Gaier Opening Report ¶¶ 16, 18, 56-69; Surreply Report of Eric M. Gaier (Dec. 8, 2010) ("Gaier Surreply Report") ¶¶ 56-61, 63-65; Lee Opening Report ¶¶ 7, 10, 46-54; Lee Surrebuttal Report ¶¶ 5, 33-41.

fare reduction.[9] Defendants' experts contend that the "fact of injury" calculation method proposed by Dr. Singer is unreliable because it fails to identify or measure the actual injury to any individual class member. Defendants' experts maintain that use of system-wide averages for passengers flying multiple trips, on multiple routes, at different times, with or without checking a bag will cause net beneficiaries of unbundling to be included in the proposed class.[10] In addition, one of Defendants' experts has demonstrated that Dr. Singer's method fails entirely to account for passengers like named class representative Stephen Powell, whose actual base fare reduction on a single trip substantially exceeded the FBF he paid on that trip.[11]

Resolution of this conflict is critical to Plaintiffs' class certification position. If Dr. Singer is correct that his methodology will effectively and reliably exclude all putative class members who benefited, on net, from the unbundling of the FBF, Plaintiffs may be able to overcome Defendants' objection that the putative class is over-inclusive and sweeps in numerous individuals who benefited from unbundling. If the Court determines that Defendants' experts have identified

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9 *See, e.g.*, Singer Reply Report ¶¶ 12, 93-94.

10 *See, e.g.*, Gaier Opening Report ¶¶ 16, 18, 56-69; Gaier Surreply Report ¶¶ 56-61; Lee Opening Report ¶¶ 7, 10, 46, 54; Lee Surrebuttal Report ¶¶ 1-3, 8-17.

11 *See e.g.*, Merits Reply Report of Dr. Eric Gaier (Feb. 4, 2011) ("Gaier Merits

significant defects in Dr. Singer's proposal, however, Plaintiffs' certification request must be rejected for failure to establish typicality, adequacy, predominance and manageability.

II. Fed. R. Evid. 706 Contemplates That The Court May Appoint A Neutral Expert In Cases Such As This.

To obtain class certification, Plaintiffs must persuade the Court that the proposed class satisfies Fed. R. Civ. P. 23(a) and (b), must do so by a preponderance of the evidence,[12] and must do so with respect to each element of their claim under Section 4 of the Clayton Act.[13] To meet this burden, Plaintiffs

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Reply Report") ¶¶ 18-21.

[12] *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009); *accord In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320–321 (rejecting "threshold showing" standard); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202–203 (2d Cir. 2008) (rejecting "some showing" standard); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir. 2004) (add parenthetical); *Gerber v. Delta Airlines*, MDL No. 1075, 1996 WL 557853 (N.D. Ga. 1996) ("It is not Delta's burden to prove that members of the proposed class have standing to sue, nor is it Delta's obligation to determine the class which plaintiff seeks to represent. Rather, plaintiff must establish that the requirements of Rule 23 have been met.").

[13] *Vega*, 564 F.3d at 1266 (court must look to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues) (internal citation omitted); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978) ("In order to make the findings required to certify a class action under Rule 23(b)(3) . . . one must initially identify the substantive law issues which will control the outcome of the litigation.").

may not rest on the allegations in the complaint,[14] speculation or unsupported argument.[15] Nor may the Court assume the correctness of Plaintiffs' theoretical model of proving injury and damages. Instead, the Court must resolve conflicting expert testimony that bears on the propriety of class certification.[16] The Court functions as the trier of fact and "can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied."[17] Indeed, it is firmly established in this Circuit that a class action cannot

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[14] *Vega*, 564 F.3d at 1266.

[15] *Id.* at 1267; *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006).

[16] *Hydrogen Peroxide*, 552 F.3d at 307, 323–325; *see also In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 272 (N.D. Ala. 2009).

[17] *Vega*, 564 F.3d at 1267 (internal citation omitted); *see also Cooper v. Southern Co.*, 390 F.3d 695, 712-713 (11th Cir. 2004) (approving a district court's searching inquiry into the commonality, typicality and predominance requirements of Rules 23(a) and (b)(3) and affirming orders denying class certification); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 2002 WL 32058462, *63 (N.D. Ga. 2002) (Rule 23's rigorous analysis requires "an examination of what the statistical evidence shows and does not show, and preliminary judgments regarding the credibility of the showing made by the plaintiff . . . are necessary"); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 (2d Cir. 2007) (remanding case with instructions to district court to resolve expert dispute that went "to a single question - whether injury-in-fact can be proved by common evidence"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (district court's failure to hold a hearing on class certification "frustrat[ed] the district court's responsibilities for taking a close look at relevant matters, . . . for conducting a rigorous analysis of such matters, . . . and for making findings that the requirements of Rule 23 have been satisfied" (internal citations omitted)).

be certified unless and until the district court applies a rigorous analysis and definitively resolves any disputed issues of fact that bear on whether plaintiffs have carried their burden under Rules 23(a) and (b).[18]

The appointment of a neutral economic expert who is proficient in econometrics will assist the Court with the resolution of class certification issues[19] and is particularly appropriate in a complex antitrust case such as this one, where the Parties' experts disagree sharply in their assessment and analysis of uncontested data and use complex, sophisticated econometric analyses of the relevant data to support their conflicting positions.[20] While how best to employ the

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[18] *Vega*, 564 F.3d at 1267. The Court's findings on class certification will not prejudice the merits, because findings made at the certification stage do not bind the ultimate fact-finder. *See In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d at 318; *accord In re Initial Pub. Offering Sec. Litig*., 471 F.3d 24, 41 (2d Cir. 2006) ("the determination as to a Rule 23 requirement is made only for purposes of class certification, and is not binding on the trier of facts, even if that trier is the class certification judge"); *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 594 (9th Cir. 2010) (en banc) ("It is important to note that the district court is not bound by these determinations as the litigation progresses.").

[19] *See* Fed. R. Evid. 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed."); Manual on Complex Litigation, 4th ed. (Federal Judicial Center 2004) § 11.51 ("Court-appointed experts serve a number of purposes: to advise the judge on technical issues, to provide the jury with background information to aid comprehension, or to offer a neutral opinion on disputed technical issues."); *see also Allison v. McGhan Med. Corp*., 184 F.3d 1300, 1311 (11th Cir. 1999); *State of N.Y. v. Kraft General Foods, Inc*., 926 F. Supp. 321 n.4 (S.D.N.Y. 1995).

[20] *See, e.g., In re High Fructose Corn Syrup Antitrust Litig*., 295 F.3d 651, 665

expert is within the Court's discretion, AirTran recommends that the expert prepare a report analyzing the Parties' conflicting positions and that the Court permit the Parties to respond to that report prior to the hearing on class certification. Thereafter, the Court can assess whether witness presentations at the hearing would assist the Court in determining, as it must, whether the adjudication of the fact of and amount of injury to any putative plaintiff: (1) will require the Court to engage in individualized determinations, as AirTran and Delta contend; or (2) can be assessed by common evidence, as Plaintiffs contend.[21]

CONCLUSION

For the reasons set forth herein, the Court should decide now to appoint a neutral economic expert under Fed. R. Evid. 706 to assist the Court in evaluating

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(7th Cir. 2002) ("Turning to the . . . inferences drawn from [uncontested statistical evidence], we recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts.").

[21] *See, e.g., Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010) ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," and "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants"); *Monroe v. City of Charlottesville*, 579 F.3d 380, 384 (4th Cir. 2009) ("When deciding a motion for class certification, a district court does not accept the plaintiff's allegations in the complaint as true; rather, an evidentiary hearing is typically held on the certification issue.").

the experts' conflicting testimony and should initiate the appointment process. If the Court agrees, AirTran further proposes that the Court direct the Parties to meet and confer on a method for selecting a neutral expert and make a timely report to the Court on areas of agreement or disagreement.

Dated: April 25, 2011

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CERTIFICATION UNDER L.R. 7.1D

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned hereby certifies that the above and foregoing is a computer document prepared in times new roman (14 point) font in accordance with Local Rule 5.1B.

Dated: April 25, 2011

/s/Michael V. Sachdev
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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, I provided, via electronic mail, Defendant AirTran Airways, Inc.'s Notice of Motion for Court Appointment of a Neutral Economic Expert and the Memorandum in support thereof to the following attorneys of record:

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