

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

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IN RE DELTA/AIRTRAN	)	CIVIL ACTION NO.
BAGGAGE FEE	)	1:09-md-2089-TCB
ANTITRUST LITIGATION	)	ALL CASES
	)	<b>FILED UNDER SEAL</b>

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Unsealed 11/10/2014

**STATEMENT OF UNDISPUTED FACTS  
OF DEFENDANT AIRTRAN AIRWAYS, INC.**

**A. AirTran and Delta**

1. AirTran Airways, Inc. (“AirTran”) is a low-cost airline formerly headquartered in Orlando, FL, with a hub at Hartsfield-Jackson International Airport in Atlanta, Georgia. (CAC ¶ 14; AirTran Airways History, *available at* <http://www.airtranairways.com/about-us/history.aspx>).
2. Delta Air Lines, Inc. (“Delta”) is one of the world’s largest airlines and is also headquartered in Atlanta. (CAC ¶ 13).
3. Prior to its merger with Northwest, Delta had hubs in New York’s John F. Kennedy and LaGuardia airports, Cincinnati, Salt Lake City, Atlanta, and Los Angeles. As a result of the merger, Detroit, Minneapolis, and

- Memphis were added as hubs for the combined entity. (EX82, Hauenstein 9/30/10 Dep. 38:4-41:25).
4. Delta earns approximately 40% of its revenue from international routes not served by AirTran. (EX82, Hauenstein 9/30/10 Dep. 82:16-83:3).
  5. Less than 5% of Delta's revenue is generated from routes where it competes with AirTran. (EX27, at Ex. 13b; EX82, Hauenstein 9/30/10 Dep. 82:16-83:22).
  6. Delta focuses its competitive strategy and analysis primarily on the legacy carriers "comparable in size and scope to Delta" such as "United, American, USAir, [and] Continental." (EX73, Elledge Dep. 17:9-18, 39:24-41:16).
  7. Just over 50% of AirTran passengers fly on routes where Delta is not a significant competitor. (EX65-A, ¶ 25).

**B. The Industry Trend to Unbundle Fees for Ancillary Services.**

8. Airlines began to unbundle charges for products and services in 2002 when fuel prices increased. (EX27, ¶ 49 & Exs. 3, 5, 6).
9. Airlines have moved toward unbundled fees because it allows them to generate revenue while keeping fares lower than when airfares included all of the products and services. (EX 29, at 11, 13). Unbundling also

- allows customers to choose whether to pay for additional products or services. (EX29, at 13; EX82, Hauenstein 9/30/2010 Dep. 88:12-89:7).
10. America West began charging a meal fee in January 2003. Over the next several years, other airlines began charging unbundled fees for meals, call center booking, airport ticketing, online travel agency booking, curbside check-in, beverages, pillows/blankets, seat choice, online ticketing and priority boarding. (EX27, at Ex. 5).
  11. In 2006 and 2007, Allegiant, Spirit, Skybus, and Virgin America began charging fees for checked bags. (EX27, at Ex. 6).
  12. In 2008, the cost of jet fuel increased from \$1.65 per gallon in January 2007 to \$2.60 per gallon a year later. By July 2008, jet fuel reached \$3.89 per gallon. Fuel accounted for 37% of the airline industry's operating costs and replaced labor as the industry's largest expense. (EX30, at 1-2; EX27, ¶¶ 47-48, 59-61 & Ex. 3).
  13. Unprecedented fuel prices in the first three quarters of 2008 followed by a worsening global economic recession dramatically impacted the airline industry, with \$5.8 billion in operating losses for 2008, including \$4.4 billion during the first three quarters of 2008. (EX30, at 2).

14. In the first few months of 2008, American, Delta, United US Airways, Northwest, Continental, Virgin America, Allegiant and Spirit all announced fees for a second checked bag. (EX27, at Ex. 6).
15. AirTran announced a fee for second checked bags for travel beginning in May 2008. (EX85, Healy 6/3/10 Dep. 48:11-12; EX27, at Ex. 6).
16. On May 21, 2008, American Airlines was the first legacy carrier to announce a first bag fee. Its fee was \$15. (EX1; EX27, at Ex. 6).
17. United Airlines announced a first bag fee of \$15 on June 12, 2008. (EX27, at Ex. 6; EX45).
18. US Airways announced a \$15 first bag fee on June 12, 2008. (EX27, at Ex. 6; EX45).
19. On July 9, 2008, Northwest Airlines announced a \$15 first bag fee. (EX31; EX27, at 6). Although Northwest had agreed to merge with Delta, the merger was subject to approval by DOJ. Northwest made its decision independently of Delta. (EX67, Anderson 5/3/12 Dep. 193:19-194:7; EX100, West 5/11/2012 Dep. 37:5-10).
20. Republic Airways announced a first bag fee of \$15 on September 3, 2008. (EX27, at Ex. 6).

21. Continental Airlines announced a first bag fee of \$15 on September 5, 2008. (EX27, at Ex. 6).
22. Frontier Airlines announced a \$15 first bag fee on September 12, 2008. (EX27, at Ex. 6).
23. By October 2008, Delta was the only legacy carrier that had not adopted a first bag fee. (EX27, at Ex. 6).
24. When American announced its first bag fee, it faced competition from United at Chicago O'Hare airport and from JetBlue at John. F. Kennedy airport in New York, neither of which charged first bag fees at the time of American's announcement. (EX27, at 26-27; EX82, Hauenstein 9/30/10 Dep. 39:9-41:25).
25. Other airlines with first bag fees compete at many hubs with Southwest and other airlines, which do not have a first bag fee. (EX27, at 26-27; EX82, Hauenstein 9/30/10 Dep. 39:9-41:25, 104:25-105:7, 111:14-20; EX69, Bastian Dep. 95:15-17).
26. Because of the financial pressure on airlines due to the rising jet fuel costs and the economic downturn, Wall Street analysts began to scrutinize airlines' quarterly filings to determine if they were charging fees for ancillary services, such as first bag fees. Analysts questioned

airlines during earnings calls about revenue from unbundled charges, including first bag fees. (EX76, Fornaro DOJ Dep. 179:12-20 (“It was a question a lot of investors were asking us, okay?”); EX77, Fornaro 11/18/10 Dep. 23:13-16 (preparing for earnings call question on first bag fee “based on some questions we are receiving from analysts related to current events”); EX33, at 15-16 (Delta Airlines) (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?”); Chris Cuomo, Goldman Sachs Analyst: “Obviously you and many other carriers have instituted a number of additional fees and charges. Have you put a target out there or sort of all in bucket that you’re seeking to achieve?”); EX34, at 6-7, 18 (Mike Linenberg, Merrill Lynch Analyst: “I think when I look at your other revenue guidance it is \$700 million, and I guess—or the non-passenger, and that’s cargo and other. You were \$741 million in this last quarter. When we think about some of the ancillary revenue fees, are they hitting that line item and is that number actually somewhat of a conservative forecast or are there some one timers in this third quarter that bulk that up?”); Chris Cuomo, Goldman Sachs Analyst: “Just basically what’s your view on the sustainability of the numerous

additional fees the industry is charging—the baggage fees, the change fees? We have a slowing economy—we have substantially lower fuel prices. What’s your view on that looking in ’09?’’)).

27. By the third quarter of 2008, other airlines that had adopted first bag fees reported increased revenues generated by first bag fees, with little or no share shift of passengers away from airlines charging the fees (EX27, ¶¶ 78-82):

- a. American Airlines (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.” With respect to the operation impact of the first bag fee, the “operating guys are telling [us] . . . that it has gone off reasonably well at this point. We haven’t had any issues that have really risen up. . . . [We] don’t think there’s been any operational issue related to it.” (EX36, at 4, 15);
- b. United Airlines (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.” (EX37, at 6-7);
- c. 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." (EX38, at 4, 6, 13);

- d. 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. . . ." (EX39, at 3, 7-8, 12);
- e. United Airlines (October 21, 2008): "Q. (David Jannes, Media, 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) . . . Yes, we 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."; "We continue to pursue new revenue streams and during the quarter increased our second bag fee to \$50. We are seeing benefit from putting more choice in the hands of our customers, both financially and in our customer satisfaction metrics."; "In September we announced that we would increase the fee for second check bag[s] from 25 to \$50. We believe that these unbundling initiatives are resettling the value proposition for both non-elite and elites, giving price sensitive customers new relevant options to purchase...the value they want while reinforcing our elite Frequent Flier travelers with the value we place on their loyalty. Combined, we expect these new revenue streams to generate well

over \$1 billion in 2009, a \$400 million increase relative to 2008.” (EX40, at 3, 6, 17);

- f. American Airlines (October 15, 2008): “And in other revenue, we’ve seen substantial increases from the fees we put in place in June including the first bag fee. So for other revenue, we saw an increase of over \$70 million or 14% versus last year.” (EX41, at 4);
  - g. Northwest Airlines (October 22, 2008): “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.” (EX43, at 3).
28. By the fall of 2008, Wall Street analysts had become critical of airlines that had not adopted first bag fees. (EX76, Fornaro DOJ Dep. 179:12-18; EX77, Fornaro 11/18/10 Dep. 23:5-16, 44:3-45:3; EX82, Hauenstein 9/30/10 Dep. 68:2-5, 127:20-25, 132:17-20).

**C. AirTran’s October 23, 2008 Earnings Call.**

29. Quarterly earnings calls are a recognized adjunct to the formal reports that public companies file with the SEC. (65 Fed. Reg. 51,716, 51,723 (Aug. 24, 2000)).
30. AirTran held a quarterly earnings call with analysts on October 23, 2008, in conjunction with its quarterly SEC filings. (EX14).
31. AirTran’s prepared remarks for the quarterly earnings call did not mention first bag fees. (EX14).

32. AirTran's executives did not anticipate a question about first bag fees for the October 23, 2008 earnings call, and they had not prepared an answer to such a question in advance. (EX67, Anderson 5/3/12 Dep. 172:8-173:14; EX86, Healy 11/19/10 Dep. 84:7-23).
33. AirTran management began the October 23, 2008 earnings call with prepared remarks about the company's financial performance and the reasons it had lost \$107 million in the quarter. (EX14).
34. After AirTran's prepared remarks, UBS analyst Kevin Crissey asked, "First check bag fee, you don't have one, do you? And will you?"

AirTran CEO Robert Fornaro responded:

Kevin, good question. Let me tell you what we've done on the first bag fee. We have the programming in place to initiate a first bag fee. And at this point, we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights hasn't done it. And I think, we don't think we want to be in a position to be out there alone with a competitor who we compete on, has two-thirds of our nonstop flights and probably 80 to 90% of our revenue is not doing the same thing. So I'm not saying we won't do it. But at this point, I think we prefer to be a follower in a situation rather than a leader right now.

Crissey then asked: "But if they [Delta] were, you'd consider it? It's not a matter of practice?" Fornaro responded: "We would strongly consider it, yes." (EX14).

35. Neither AirTran nor Delta considered the earnings call as a vehicle to signal one another about their business plans or other sensitive information. (EX80, Grimmatt 9/28/10 Dep. 45:22-46:14; EX76, Fornaro DOJ Dep. 195:3-197:13; EX77, Fornaro 11/18/10 Dep. 25:5-9; EX84, Healy DOJ Dep. 218:2-9; EX68, Bastian DOJ Dep. 51:24-52:2).

**D. AirTran's First Bag Fee Decision.**

36. AirTran personnel began to meet in late May 2008 to begin discussions concerning whether AirTran should adopt a first bag fee. (EX2; EX3; EX4).
37. AirTran had further discussions about adopting a first bag fee in July 2008 after Northwest Airlines announced a first bag fee. (EX5; EX6; EX7; EX8).
38. AirTran wanted to have the technology in place and completed so that it would have the ability to adopt a first bag fee if it chose to do so. AirTran hired a vendor to make programming changes to its computer systems that would permit AirTran to charge a first bag fee if it chose to adopt one. (EX75, Fornaro 12/1/10 Dep. 55:13-22; EX87, Klein Dep. 135:13-136:1; EX7; EX8; EX9).

39. AirTran executives were generally reluctant to begin charging new fees to passengers before other airlines, including Delta, due to concern that AirTran's brand image as a low cost carrier would be harmed. (EX87, Klein Dep. 92:1-13; EX76, Fornaro DOJ Dep. 44:21-45:14; EX77, Fornaro 11/18/10 Dep. 23:17-27:9; EX86, Healy 11/19/10 Dep. 37:18-38:5, 88:22-90:22, 115:8-116:11; EX10; EX11; EX12).
40. AirTran executives determined that they would not seriously consider adopting a first bag fee unless and until Delta did. (EX87, Klein Dep. 92:1-13; EX76, Fornaro DOJ Dep. 44:21-45:14; EX77, Fornaro 11/18/10 Dep. 26:18-19).
41. After Delta's announcement on November 5, 2008 that it had adopted a first bag fee, AirTran's Senior Vice President for Marketing and Planning, Kevin Healy, asked how much "lead time" AirTran would need to implement first bag fees. (EX17).
42. When Delta announced its first bag fee, Healy was not sure whether AirTran would adopt a first bag fee. (EX15 (responding "[n]ot sure yet" to the question, "Do we take the plunge right away or do we test whether [first bag fees] provide[] any advantage in ATL?"); EX16 (responding to a question about adopting a first bag fee after Delta's announcement,

stating: “Not yet. At this point we can reiterate what we said on the earnings call. We have the technology, we certainly need to evaluate it. We will likely announce next week one way or the other.”); EX86, Healy 11/19/10 Dep. 124:20-125:1).

43. At Healy’s request, Matthew Klein (AirTran’s Senior Director of Pricing and Distribution) prepared a first bag fee valuation analysis that showed three possible annual valuations for potential revenue from first bag fees: conservative (\$63.5 million); high end (\$101.4 million); and reasonable (\$82.4 million). Klein also stated that not imposing a first bag fee could move \$3 to \$4 million per month of lost local Atlanta traffic back to AirTran. (EX18; EX19).
44. Jason Bewley (AirTran’s Director of Corporate Finance) performed an additional analysis containing three alternative annual valuations for potential revenue from first bag fee: conservative (\$98.6 million); optimistic (\$147.9 million); and likely (\$121.2 million). (EX24).
45. The valuations led to discussion among AirTran management about whether to adopt a first bag fee. Fornaro asked AirTran’s senior officers to develop a recommendation for him. (EX13; EX20; EX21; EX22; EX76, Fornaro DOJ Dep. 213:4-13; EX81, Haak Dep. 69:22-70:1).

46. A group of AirTran employees met on November 7, 2008, to discuss whether AirTran should adopt a first bag fee. During the meeting, AirTran employees continued to disagree about first bag fees. (EX23; EX24; EX25; EX87, Klein Dep. 206:13-20; EX98, Smith DOJ Dep. 128:20-129:13; EX86, Healy 11/19/10 Dep. 122:4-123:11).
47. After the November 7 meeting, Healy met with Klein to review whether AirTran should adopt a first bag fee. At the end of their meeting, Healy instructed Klein to begin outlining the business rules for a first bag fee. (EX86, Healy 11/19/10 Dep. 123:5-11, 124:17-18).
48. After his meeting with Klein, Healy met with Fornaro to recommend to him that AirTran adopt a first bag fee. (*Id.* at 124:21-125:2; EX84, Healy DOJ Dep. 233:4-9).
49. Healy and Fornaro met again on November 10, 2008. At that meeting, they made a final decision for AirTran to adopt a first bag fee. (EX77, Fornaro 11/18/10 Dep. 85:25-86:17).
50. AirTran announced its adoption of a first bag fee on November 12, 2008. The fee was \$15, starting with flights on December 5, 2008. (EX26).
51. In December 2008, the same month that AirTran implemented its \$15 first bag fee, AirTran removed its \$15 per segment fuel charge. This

removal of the fuel charge more than offset any increase in fares potentially caused by the implementation of first bag fees because the fuel charge had been per segment for all passengers whereas the bag fees were per trip (rather than per segment) and for bag checkers only. (EX26; EX27, ¶ 125; EX27-A).

52. Early in 2009, AirTran hired a consultant to evaluate whether its decision to adopt a first bag fee had been correct. The consultant's analysis compared routes where airlines that had adopted first bag fees competed directly with those that had not. The assessment concluded that first bag fees had in fact led to little or no share shift and recommended that AirTran "continue charging the \$15 fee." (EX42).

**E. Delta's First Bag Fee Decision.**

53. Delta established a fee team in early 2008 to review all of Delta's fees, including baggage fees, and to determine whether adjustments should be made to those fees. (EX68, Bastian DOJ Dep. 38:25-39:24; EX66, Anderson 10/6/10 Dep. 47:12-48:24).
54. Delta entered into an agreement to merge with Northwest. The merger was subject to, among other things, review by the Department of Justice.

- (EX66, Anderson 10/6/10 Dep. 9:25-10:3, 11:18-12:5, 60:12; EX67, Anderson 5/3/12 Dep. 193:22-194:7).
55. Delta and Northwest operated independently, and made independent pricing decisions, prior to the consummation of the merger. . (EX66, Anderson 10/6/10 Dep. 60:1-19; EX67, Anderson 5/3/12 Dep. 193:11-18; EX68, Bastian DOJ Dep. 38:6-20).
56. During the summer of 2008, Delta was preparing to harmonize its fee structure with Northwest as part of its post-merger integration. (EX66, Anderson 10/6/10 Dep. 60:1-19, 87:17-88:6; EX69, Bastian 9/17/10 Dep. 127:13-128:4; EX78, Gorman 12/10/10 Dep. 100:16-102:12, 123:12-124:19). The fee team assumed responsibility for proposing a single fee structure for the combined entity. (EX67, Anderson 5/3/12 Dep. 209:19-210:6; EX49).
57. After other airlines began to implement first bag fees, Delta management began to debate whether to adopt a first bag fee. The Airport Customer Service (“ACS”) group at Delta favored introducing a first bag fee because Delta had already successfully implemented second bag fees, and the revenue from first bag fees would appear as a credit on the ACS budget. The Revenue Management (“RM”) group opposed first bag fees

due to concern that a first bag fee could result in customer dissatisfaction and an unfavorable share shift away from Delta. (EX66, Anderson 10/6/10 Dep. 47:19-48:24; EX83, Hauenstein 5/10/12 Dep. 20:23-22:2; EX82, Hauenstein 9/30/10 Dep. 62:19-63:11, 99:6-101:5; EX80, Grimmett 9/28/10 Dep. 102:10-20).

58. During the summer of 2008, Richard Anderson (Delta's CEO) and Stephen Gorman (Delta's Executive Vice President of Operations) agreed not to adopt a first bag fee because of potential operational challenges and concerns that the fee might lead to customer dissatisfaction. Delta instead elected to monitor other airlines and reevaluate its position on first bag fees at the end of the summer. (EX44; EX66, Anderson 10/6/10 Dep. 51:10-25, 66:11-17; EX67, Anderson 5/3/12 Dep. 161:2-22; EX56, at 4; EX57, at 3).
59. In late September 2008, the ACS group circulated a draft budget to Delta's Corporate Leadership Team ("CLT"). The draft budget contained ACS's formal recommendation to begin charging first bag fees, along with the anticipated revenue from those bag fees. (EX 47; EX48; EX58).

60. After receiving ACS's draft budget, Anderson emailed Ed Bastian (Delta's President) stating: "We need to think about implementing the [first bag] fee post merger. A lot of revenue involved." Bastian replied, "Think we prob should do but as part of integrating two companies. Glen has different thoughts so should have disc at right time." Anderson then responded, "Agree." (EX47).
61. By late September 2008, other airlines reported that first bag fees were profitable and they had no discernible drop in customer satisfaction. (EX36; EX37; EX38; EX40). Delta's executives were aware of those announcements. (EX78, Gorman 12/10/10 Dep. 29:2-21; EX66, Anderson 10/6/10 Dep. 66:18-67:3, 104:24-105:5).
62. As a result of the ACS draft budget and the reports of other airlines' favorable experience with first bag fees, Delta's executives changed their views about adopting a first bag fee. (EX66, Anderson 10/6/10 Dep. 66:18-68:1; EX67, Anderson 5/3/12 Dep. 226:22-227:17).
63. On October 21, 2008, Anderson emailed West and Grimmett to ask "Where are we on the overall fee structure upon closing? As I recall you had the lead for a comprehensive strategy covering all fees. Can we have a review?" West responded, copying Gorman and Glen Hauenstein

- (Delta's Executive Vice President of Revenue Management), "Gail and I have coordinated the post closing fee structure. The one loose end is the first bag fee. Gail has been analyzing the impact of the first bag fee on [passenger] revenue. We'll set up a review with you." Anderson emailed Gorman the next day, stating, "We need to do it." Gorman responded, "It is on Monday CLT agenda." (EX49).
64. Delta executives decided before AirTran's October 23, 2008 earnings call that Delta would adopt a first bag fee. They decided that the fee would be implemented when Delta harmonized the fee structures of Delta and Northwest after they merged. (EX67, Anderson 5/3/12 Dep. 207:5-208:7; 215:2-11; EX47).
65. Delta company practice was for management to prepare advocacy pieces and debate business decisions such as adopting a first bag fee. (EX66, Anderson 10/6/10 Dep. 47:25-48:2).
66. Delta's RM team prepared a slide deck called the Value Proposition about first bag fees. The Value Proposition presentation was prepared by RM to advocate against adoption of a first bag fee. The presentation estimated the financial impact of first bag fees at different levels of potential share shift, along with the probability that different airlines at

- each of Delta's hubs would match Delta's fees. (EX66, Anderson 10/6/10 Dep. 56:12-20; EX 90, Phillips 5/17/12 Dep. 21:5-8; EX52; EX53; EX54).
67. In an early version of the Value Proposition presentation, AirTran's probability to match if Delta adopted first bag fees was estimated at 50%. (EX52). This number was a "coin toss" because Delta "had no idea" what AirTran was planning to do. (EX82, Hauenstein 9/30/10 Dep. 104:9-24). The presentation concluded that the revenue impact of first bag fees was likely negative for Delta, and it recommended against the adoption of a first bag fee. (EX52).
68. After AirTran's October 2008 earnings call, the RM group revised its presentation to increase AirTran's probability to match Delta's first bag fees. One draft estimated that the probability of AirTran would match as 75%. (EX53). Glen Hauenstein changed that estimate to 90%. (EX54).
69. The final version of the Value Proposition estimated that, if Delta adopted a first bag fee, the best case would be \$153 million in additional revenue, the "mid-range estimate" would be \$26 million in additional revenue, and the "worst case" would be a loss of \$343 million. It concluded that "Total revenue impact of first bag fee slightly positive".

- (EX54, at 16). Nevertheless, RM continued to recommend against the adoption of a first bag fee. (EX54, at 19; EX90, Phillips 5/17/12 Dep. 29:14-22; EX82, Hauenstein 9/30/10 Dep. 130:10-25).
70. Delta's CLT met on October 27, 2008, and discussed first bag fees, among other topics. (EX69, Bastian 9/17/10 Dep. 43:17-22; EX66, Anderson 10/6/10 Dep. 56:21-23). The RM group gave its Value Proposition presentation. Fornaro's earnings call statements were not considered by Delta executives at the meeting, nor were they considered relevant. (EX66, Anderson 10/6/10 Dep. 68:5-15, 70:6-8, 94:13-14, 104:7-105:5; EX67, Anderson 5/3/12 Dep. 230:8-12; EX68, Bastian DOJ Dep. 77:6-15; EX69, Bastian 9/17/10 Dep. 89:15-17, 105:3-5; EX99, West DOJ Dep. 185:9-186:4).
71. At the CLT meeting, Anderson, Gorman, and Bastian all spoke in favor of adopting a first bag fee. Anderson discussed the fact that Delta was the only legacy carrier without a first bag fee, and stated that adopting a first bag fee is "vitally important to profitability" because it was worth several hundred million dollars to the combined Delta-Northwest entity. (EX55).

72. Bastian favored first bag fees because he believed it would be a net revenue generator for the company and were more certain than the potential revenue from share shifts. (EX69, Bastian 9/17/10 Dep. 47:17-48:5; EX82, Hauenstein 9/30/10 Dep. 132:6-20 (“Ed [Bastian] had a very impassioned and ... factual [defense of the first bag fees because] essentially a bird in the hand was worth two in the bush and that we knew that the bag fee revenues were collectible [from NWA’s experience]. And the risk of taking them out of the combined entity post-merger was too great because you didn’t really know share shift and customer preference. They were more nebulous over time, bag fees were a certainty and that if we did not charge the bag fees, then our owners would be outraged because Wall Street firmly believed that bag fees were incredibly accretive to the airline industry.”)).
73. Gorman was in favor of first bag fees, and “there wasn’t anything [Revenue Management] was going to have in [the Value Proposition presentations] that would change [his] view.” (EX78, Gorman 12/10/10 Dep. 78:13-14; *see also id.* at 61:8-15 (Gorman’s “strong position” was that the first bag fees would be profit, not revenue); EX82, Hauenstein 9/30/10 Dep. 131:25 (“Steve Gorman came out in favor of a bag fee.”)).

74. Delta's management decided that Delta should not implement the fee until after the closing of the merger with Northwest, when Delta intended to harmonize all of the fees of the combined airline. (EX66, Anderson 10/6/10 Dep. 60:2-61:5; EX88, Phillips DOJ Dep. 238:15-239:4).
75. The DOJ cleared the Delta/Northwest merger on October 29, 2008. Delta and Northwest merged that day. (EX66, Anderson 10/6/10 Dep. 85:15-17; News Release, Delta and Northwest Merge, Creating Premier Global Airline (Oct. 29, 2008), *available at* <http://news.delta.com/index.php?s=43&item=216>).
76. In the first CLT meeting after the merger, Northwest executives confirmed that first bag fees had been profitable for Northwest, with little or no share shift. They projected that Northwest would earn approximately \$200 to 300 million in first bag fee revenues annually, which would be lost if first bag fees were terminated for the combined airline. (EX88, Phillips DOJ Dep. 368:5-9; EX66, Anderson 10/6/10 Dep. 62:4-8, 90:2-4; EX51; EX 69, Bastian 9/17/10 Dep. 46:17-47:3).
77. Northwest's estimates of first bag fee revenue confirmed the views that Delta's executives already held favoring first bag fees. The CLT formalized the decision to unify the Delta and Northwest fee schedules,

- including adopting a first bag fee. (EX88, Phillips DOJ Dep. 368:5-369:13; EX66, Anderson 10/6/10 Dep. 66:11-17, 91:18-92:10; EX69, Bastian 9/17/10 Dep. 46:17-47:22; EX82, Hauenstein 9/30/10 Dep. 132:6-20).
78. On November 5, 2008, Delta announced that it would begin charging \$15 for the first checked bag starting December 5, 2008. In the same press release, Delta announced it was eliminating certain fuel surcharges, reducing phone reservation charges, eliminating its curbside check-in fee, and reducing its second bag fee from \$50 to \$25. (EX60).
79. Although both Delta and AirTran initially adopted a \$15 first bag fee, the amount of the fee for each airline has diverged over time. (EX27, at Ex. 6). On July 21, 2009, Delta increased its first bag fee to \$20 for customers checking bag at the airport. (*Id.*). On January 5, 2010, Delta again increased its first bag fee to \$23 for bags checked online and \$25 for bags checked at the airport. (*Id.*). On August 17, 2010, AirTran increased its first bag fee to \$20. (*Id.*).

**F. Scott Fasano's Attempts to Communicate with Delta.**

80. In 2008, Scott Fasano was AirTran's Director of Customer Service Standards. He was responsible for policies and procedures for baggage

handling, customer service and group operations, and system baggage service. He had no responsibility for AirTran's pricing decisions. (EX75, Fasano 12/1/10 Dep. 18:6-9; EX77, Fornaro 11/18/10 Dep. 28:7-11).

81. In late July 2008, Fasano exchanged emails with Kathy Terryberry, AirTran's station manager in Buffalo. (EX65). In those emails, Terryberry said she spoke to the manager of Comair, Delta's regional commuter airline, and asked, "[Y]ou'll probably charge for the first bag here soon, right?" (*Id.*). According to Terryberry, Comair's manager responded, "No-No we consider it included in the price." (*Id.*). The Comair station manager had no responsibility for making pricing decisions for Delta and was not in a position to know Delta's plans. (EX92, Ringler Dep. 9:9-11:3, 64:12-65:1; EX93, Rossano Dep. 16:6-12, 22:16-21, 25:6-16).
82. Fasano had a telephone conversation in late July 2008 with Mike Rossano, Delta's station manager in Miami. (EX75, Fasano 12/1/10 Dep. 98:5-19; EX93, Rossano Dep. 12:15-21). Fasano testified that they mostly discussed the difficulties involved in collecting fees for remote airline check-in. (EX75, Fasano 12/1/10 Dep. 101:5-8). Fasano testified

- that Rossano said that the airlines were all watching each other “before they make a move, in all aspect of business, fares, capacity, cuts, flight reductions, new cities, bag fees, the whole gamut.” (EX74, Fasano DOJ Dep. 49:14-16).
83. Rossano recalled only one conversation with Fasano sometime after 2005, but he was not sure of the date. (EX93, Rossano Dep. 75:12-22). He stated that Fasano called him for a reference for Bags to Go. He testified that they did not discuss first bag fees. (*Id.* at 76:21-77:4).
84. As a station manager, Rossano had no authority over Delta’s pricing decisions and did not know Delta’s plans regarding first bag fees. (*Id.* at 16:6-12, 22:16-21, 25:6-16, 91:17-92:10).
85. Fasano testified that he called Mike Ringler, a Delta station manager in Knoxville, Tennessee, in late July 2008. (EX75, Fasano 12/1/10 Dep. 109:9-110:5, 111:3-112:2). According to Fasano, Ringler said that the airlines were all “looking out what the other guy’s doing, again, fares, capacity, the impact of fuel, those types of things. (EX74, Fasano DOJ Dep. 49:14-16).

86. Ringler denied having the conversation. He testified that from May 2005 until 2009, he had no written or verbal conversations with Fasano. (EX92, Ringler Dep. 58:12-59:12).
87. As station manager, Ringler did not participate in Delta's decision to implement first bag fee. (EX91, Ringler Dep. 19:3-20:25, 28:4-29:12). He retired in September 2008, and he does not recall any conversations with anyone within Delta about whether Delta would charge a first bag fee. (*Id.* at 64:12-66:8).
88. Fasano spoke in July 2008 with Craig Mateer. Mateer was the owner of BAGS, Inc., which was a third party vendor for Northwest. Mateer had no connection to Delta. (EX101, Mateer Dep. 8:15-23, 76:1-4, 80:22-81:13).
89. Fasano stated that he told Mateer "that AirTran was considering launching first bag fees and I needed him to be ready." (EX75, Fasano 12/1/10 Dep. 124:7-12).
90. Fasano testified he also had a conversation in August 2008 with Pat Rary, another employee at BAGS, Inc. (*Id.* at 145:2-18). As an employee for a third party vendor to Northwest, Rary had no connection to Delta. (EX91, Rary Dep. 36:2-11, 40:9-41:22, 99:17-100:3)

91. Fasano summarized his conversation with Rary in an email in July 2008. (EX64). In the email, he wrote that Delta's "functionality is ready to go live," that Delta "wants us to jump first," and that Delta felt pressure to announce soon because oil prices are declining. (*Id.*). At his deposition, Fasano testified that he had only a general conversation with Rary about airlines watching one another. (EX74, Fasano DOJ Dep. 82:19-84:20).
92. Rary does not recall having any conversations with Fasano. (EX91, Rary Dep. 55:15-17, 77:8-79:15, 80:9-11). He does not recall airlines imposing first bag fees or BAGS, Inc. collecting those fees. (*Id.* at 65:12-67:4). He did not discuss first bag fees with anyone at Delta or AirTran, nor did he know Delta's plans for first bag fees. (*Id.* at 99:17-100:3).
93. Fasano sent emails in late July 2008 to Gerry Boeckhaus and Amanda Burman asking whether Delta was planning to adopt a first bag fee. (EX75, Fasano 12/1/10 Dep. 128:11-130:4, 133:13-135:17; EX74, Fasano DOJ Dep. 61:4-65:12; EX62; EX63). Both Boeckhaus and Burman had been employees at Delta with no responsibility over the first bag fee decision. Unbeknownst to Fasano, both had previously left Delta and did not receive Fasano's emails. (EX70, Boeckhaus Dep. 21:24-

22:5, 42:8-45:22, 47:6-11; EX74, Fasano DOJ Dep. 62:15-22, 65:1-12; EX71, Burman Dep. 8:16-17; EX61).

94. On August 5, 2008, after learning of Fasano's activities, Kevin Healy "immediately" called Fasano to reprimand him. (EX84, Healy DOJ Dep. 187:5-22; EX75, Fasano 12/1/10 Dep. 161:14-163:15). He made it clear to Fasano that it was not appropriate to engage in that type of behavior. (EX84, Healy DOJ Dep. 187:5-22).
95. After the reprimand, Fasano did not attempt to have further communications with Delta. (EX75, Fasano 12/1/10 Dep. 162:22-163:12).

96. Neither Fasano nor anyone he contacted outside AirTran had any decision-making authority over first bag fees, and Delta's executive decision-makers never learned of those contacts. (EX82, Hauenstein 9/30/10 Dep. 105:22-25; EX69, Bastian 9/17/10 Dep. 136:23-137:13.)

Respectfully submitted,

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August 31, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2012, I filed the foregoing STATEMENT OF UNDISPUTED FACTS OF DEFENDANT AIRTRAN AIRWAYS, INC., under seal, with the Clerk of Court and caused the same to be delivered via email to the following attorneys of record:

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