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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB

PLAINTIFFS' OPPOSITION TO DEFENDANT AIRTRAN'S MOTION FOR APPOINTMENT OF A NEUTRAL ECONOMIC EXPERT

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I. INTRODUCTION

Last July, at the request of AirTran, Plaintiffs stipulated to an exhaustive class certification schedule in which Plaintiffs devoted substantial time and resources in addressing arguments raised by Defendants' four class certification experts. As the parties completed class certification discovery and briefing in accordance with the schedule, AirTran never once raised the prospect of appointing an independent expert. AirTran now seeks to exploit the existing schedule uncertainty necessitated by Delta's discovery of additional documents and force Plaintiffs to devote additional resources to class certification through the appointment of an independent expert.

Plaintiffs oppose AirTran's motion. The parties' arguments on class certification have been exhaustively addressed through discovery and briefing. Class certification discovery and briefing were completed months ago, and the appointment of an additional expert will likely lead to unnecessary delay and expense. Further, the disputed issues raised by AirTran can be resolved as a matter of law, or based on the record already before the Court, without the need for an additional expert. For example, contrary to Defendants' expert opinions, contemporaneous documents and executive testimony demonstrate that first bag fees had no effect on base fares. An independent expert is not needed to interpret this unambiguous evidence. *See, e.g.*, R. Anderson (Delta CEO) Tr. 102:5-6, Pls.'

Class Cert. Reply at 7 & Ex. 30 ("I don't think [first bag fees] had any impact on average[] fares."). Moreover, as discussed on pages 19-25 of Plaintiffs' Class Certification Reply Memorandum, any alleged effect of the Defendants' first bag fees on base fares is irrelevant as a matter of law, rendering the appointment of an independent expert superfluous.

Finally, this Court and other courts routinely decide class certification in price fixing cases without the assistance of an independent expert, including in airline price-fixing cases.[1] Compared to these other decisions, this case entails a strikingly simple class certification determination, and Plaintiffs respectfully submit that this Court has the capability to render an informed decision without the additional time, effort, and expense an independent expert would require.

II. LEGAL STANDARD

The Court has broad discretion in deciding whether to appoint a neutral expert witness. FED. R. EVID. 706. "[C]ourt-appointed experts are rarely used, being limited to unusual cases involving the convergence of several special circumstances." J. Cecil & T. Willging, Fed. Judicial Ctr., *Court-Appointed Experts* 67 (1993), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/

[1] *See, e.g., Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2009 WL 856306 (N.D. Ga. Feb. 9, 2009); *In re Nw. Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

experts.pdf/$file/experts.pdf ("FJC, *Court-Appointed Experts*").[2] The Court does not bear an affirmative obligation to appoint an independent expert, regardless of the circumstances. *Quiet Tech. DC-8, Inc. v. Hurel Dubois IK Ltd.*, 326 F.3d 1333, 1348 (11th Cir. 2003). Courts "should consider whether there are adequate alternatives to such an appointment, such as directing the parties to clarify, simplify, and narrow the differences between them." MANUAL FOR COMPLEX LITIGATION § 11.51 (4th ed. 2004) ("FJC, MANUAL FOR COMPLEX LITIG."). The Manual for Complex Litigation recognizes several problems with appointing an expert, namely: "increas[ing] the already high cost of complex litigation"; the difficulty in finding "[t]ruly neutral experts"; the possibility of the expert wielding undue influence; and delays to the resolution of the case. *Id.*§ 11.51 at 111-12.

According to a study by the Federal Judicial Center, courts frequently decline to appoint a neutral expert because of: the infrequency of cases requiring extraordinary assistance; respect for the adversarial system; difficulty in identifying a suitable neutral expert; concerns over compensation for the expert; and lack of early recognition that appointment is needed. FJC, *Court-Appointed Experts* 18-22. Courts are more likely to appoint an expert in the unusual situation where there is a "failure by the parties to provide a basis for a reasoned resolution

[2] *Accord* FED. R. EVID. 706 advisory committee's note (describing appointments as "relatively infrequent").

of a technical issue, combined with a perceived need by the court to protect poorly represented parties." *Id.* at 20.

The denial of a motion to appoint an independent expert is an abuse of discretion only if the court fails to provide an explanation of its decision or if its refusal to appoint an expert "resulted from a discernible extra-legal bias or prejudice or was otherwise without any reasonable basis in law or fact." *Quiet Tech.*, 326 F.3d at 1349 n.14. Thus, when a trial court has issued a reasoned opinion, the Eleventh Circuit has consistently affirmed denials of motions for appointment of a neutral expert pursuant to Rule 706.[3]

III. ARGUMENT

AirTran's motion for appointment of a neutral expert should be denied because the parties have thoroughly addressed class certification issues through extensive fact discovery, expert discovery, and briefing. Appointment of an additional expert will also cause unnecessary delay and expense. Further, the disputed issues raised by AirTran in its brief can readily be resolved by the Court as a matter of law or fact without resort to the appointment of an additional expert.

[3] *See, e.g.*, *Ryan v. Aina*, 222 F. App'x. 801, 805 (11th Cir. 2006) (motion was untimely and appointment of expert would have prejudiced the other parties); *Quiet Tech.*, 326 F.3d at 1349 (party lacked diligence in pursuing the issue); *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999) (expert would have addressed issues "not in need of additional evidentiary support"); *Young v. City of Augusta, Ga. ex. rel DeVaney*, 59 F.3d 1160, 1170 (11th Cir. 1995) (testimony would have been "superfluous").

A. The Parties Have Exhaustively and Fully Addressed the Issues

The parties have thoroughly addressed the issues relevant to class certification through extensive fact discovery, expert discovery and briefing. An independent expert is not needed to supplement or explain this existing record. Indeed, the parties have retained five economic experts to offer opinions related to class certification. Each expert was deposed at least twice on class certification issues, and each expert submitted two rounds of class certification expert reports.[4] The parties' briefs on class certification total almost 165 pages, and the parties' class certification expert reports total almost 500 pages. In the briefing and expert reports, the parties fully identified and explained the issues about which they disagreed, and the reasons for their disagreements. Critically, Plaintiffs' sole expert was subjected to approximately 17 hours of questioning about his class certification expert opinions during two depositions spanning three days.

In light of the extensive analysis conducted by the parties and their experts, Plaintiffs do not believe that the appointment of an additional expert will provide any significant assistance to the Court. This Court frequently resolves disagreements between expert witnesses, and nothing about the issues or expert opinions in this case suggests that the Court needs assistance in resolving the class

[4] In addition, some of the class certification experts submitted merits reports and sat for merits depositions on issues that are also relevant to class certification.

certification motion outside the standard adversarial process.[5] This is not a case in which the parties were poorly represented and "fail[ed] to provide a basis for a reasoned resolution of a technical issue," or in which the experts were not adequately subjected to cross-examination. FJC, *Court-Appointed Experts* at 20.

Moreover, the appointment of an additional expert at this stage of the litigation would likely lead to unnecessary delays, and increase the parties' already substantial expert expenses.[6] AirTran proposes that the parties meet and confer on a method for selecting a neutral expert, that the parties report to the Court on their respective proposals, that the expert be selected in accordance with procedures to be decided by the Court, that the appointed expert analyze the reports of the parties' experts and prepare a written report, that the parties respond to the appointed expert's report, and that the appointed expert potentially testify at a hearing on class certification. AirTran Mem. in Support of Mot. for Appt. ("AirTran Mem.") at 11-12.[7] Such a process would be time-consuming, and would likely cause substantial delays in the resolution of Plaintiffs' motion for class certification. The testifying expert economists retained by Defendants charge up to

[5] Courts often decline to appoint experts out of respect for the adversarial process. FJC, *Court-Appointed Experts* at 20-21.

[6] *See also* FJC, *Court-Appointed Experts* at 57 ("[P]ractical problems in providing compensation can thwart the appointment of an expert.").

[7] Presumably, Defendants will also seek a deposition of the appointed expert.

$1,250 an hour, and the added expense of an appointed expert would drive up what are already substantial expert expenses in this case.

A significant portion of the expenses and delays could likely have been avoided if AirTran had made its request sooner. AirTran waited to file its motion until five months after the close of fact discovery and until months after Plaintiffs' motion for class certification was fully briefed.[8] The appointed expert's report and deposition could have been integrated into the schedule for the reports and depositions of the parties' experts, which likely could have streamlined and focused expert discovery. *Cf. Ryan*, 222 F. App'x. at 805 (affirming denial of Rule 706 motion where trial court found motion was untimely).

In its motion, AirTran does not provide any suggestions for locating a neutral economic expert who can testify to issues in the airline industry who does not have ties to any airline. Finding a truly "neutral" expert may be difficult or impossible, as all experts will have experiences and views that will affect their opinions.[9]

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[8] When AirTran negotiated for additional expert depositions, reports, and time to file briefs and reports, AirTran never suggested that it would seek appointment of a neutral expert.

[9] *See* FJC, MANUAL FOR COMPLEX LITIG. § 11.51 at 112; Thomas Crowley, *Help Me Mr. Wizard! Can We Really Have 'Neutral' Rule 706 Experts?*, 1998 DET. C.L. MICH. ST. U. L. REV. 917, 961-68 (1998) (explaining that science is not value neutral and that court-appointed experts cannot be truly "neutral").

B. The Disputed Issues Raised by AirTran Can Be Resolved Without an Additional Expert

In its brief, AirTran raises three disputed economic issues purportedly justifying the appointment of a neutral expert. But each of these issues can be resolved as a matter of law, and/or are adequately addressed in the existing record before the Court.

1. Base Fares Are Not Relevant to Class Certification, and Therefore Do Not Require a Court-Appointed Expert

AirTran questions whether a class can be certified based on alleged overcharges to passengers on first bag fees alone, or whether the Court must also examine changes in base fares that occurred during the years after the imposition of first bag fees. AirTran Mem. at 3-4. For several reasons, this question can be resolved without resort to an appointed expert.

First, as discussed on pages 19-25 of Plaintiffs' Class Certification Reply Memorandum (Dkt. #269), any alleged effect of the Defendants' first bag fees on base fares is irrelevant as a matter of law. If Defendants conspired to impose a first bag fee, they cannot offset first bag fee charges with alleged reductions in base fares, as a first bag fee is charged separate and apart from the price of a ticket. Accordingly, granting AirTran's motion would simply lead to wasted time and resources.

Second, as discussed on pages 7-10 of Plaintiffs' Class Certification Reply Memorandum, Defendants' contemporaneous records demonstrate that base fares were not lowered in response to the imposition of bag fees, and therefore are not relevant to class certification. For example, in an analysis of fare differences attributable to the imposition of a first bag fee conducted by AirTran in August 2009, an AirTran analyst found an *increase* in AirTran's airfares relative to Southwest Airline, which does not have a first bag fee, after AirTran introduced its first bag fee. Pls.' Class Cert. Reply at 7-8 & Ex. 31. In another internal AirTran analysis, the bag fees were described as "almost pure profit." Pls.' Class Cert. Reply at 10 & Ex. 42. Similarly, when Delta and AirTran each projected the likely revenue impact of first bag fees, they anticipated a loss of market share because the bag fee was a price increase, and their analyses did not anticipate any decline in revenue related to base fare reductions. Pls.' Class Cert. Reply at 8-10 & Exs. 19, 40, 41. Further, Delta's CEO, Richard Anderson, testified: "I don't think [first bag fees] had any impact on average[] fares." Pls.' Class Cert. Reply at 7 & Ex. 30; *see also id.* at 7-9 & n.3-n.4 & Exs. 32-39 (statements by AirTran and Delta executives suggesting that first bag fees were not accompanied by a reduction to base fares).

Third, the five experts retained by the parties have offered detailed opinions regarding the effect of first bag fees on base fares, including analysis of the

opposing side's expert opinions. Plaintiffs' expert analyzed airline fare data, and – consistent with Defendants' contemporaneous documents and executive testimony – found no correlation between Defendants' first bag fees and a reduction in base fares. Pls.' Class Cert. Reply at 11. Two of the Defendants' experts have opined that, under economic theory, an increase in bag fees would cause a decrease in base fares under certain "plausible" conditions. Pls.' Class Cert. Reply at 14. But their opinions ignore the allegation of collusion, and the fact that coordinated action would have been unnecessary if Defendants intended to reduce base fares at the same time they imposed bag fees. While none of Defendants' experts contends that there was an immediate fare reduction after Defendants' imposition of first bag fees on December 5, 2008, Defendants' two empirical experts assert that AirTran and Delta's airfares were lower in 2009 than in 2008 compared to airlines that did not charge a first bag fee. But as explained by Plaintiffs' expert, their findings of a correlation are based on flawed analyses, and they fail to demonstrate causation. Pls.' Class Cert. Reply at 11-14.

Moreover, in seeking to demonstrate whether base fares were affected, both the Plaintiffs' and the Defendants' experts rely on similar methodologies and common evidence. The predominance requirement of class certification requires

only that the issues "'are subject to generalized proof,'"[10] and both Plaintiffs and Defendants rely on generalized proof to demonstrate whether first bag fees affected base fares.

Thus, if the Court agrees with Plaintiffs' legal analysis, with Plaintiffs' interpretation of the contemporaneous record (including admissions by some of Defendants' executives), *or* with Plaintiffs' expert analysis finding no correlation between fees and a decline in base fares, an appointed expert is unnecessary to resolve the base fare issue.

2. Even if Base Fares Were Relevant, an Additional Expert Is Unnecessary Because the Existing Experts Have Calculated Alleged Fare Reductions

Assuming base fares are relevant, AirTran contends that an additional expert is needed to determine whether average base fare reductions can be used as an offset to Plaintiffs' damages, or whether variations in base fare impact would require an individualized inquiry in determining impact. AirTran Mem. at 5-6.

Defendants' own experts admit that any theoretical base fare reduction would be less than the amount of the first bag fee, such that any passenger who paid a fee and a fare would have suffered impact, and therefore individualized inquiry is unnecessary. Pls.' Class Cert. Reply at 27; *see also In re Terazosin*

[10] *Brenner v. Future Graphics, LLC*, 258 F.R.D. 561, 568 (N.D. Ga. 2007) (quoting *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997)).

Hydrochloride Antitrust Litig., 220 F.R.D. 672, 699 (S.D. Fla. 2004) ("Assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such individual damages allocation issues are insufficient to defeat class certification."). Even if the law required consideration of the variations in base fare reductions, such variations could be calculated using common evidence. Pls.' Class Cert. Reply at 28 & Ex. 29 (citing Singer Reply Report ¶¶ 77-91).

Thus, Defendants' base-fare arguments are issues that can be resolved as a matter of law or on the record already before the Court, and they do not require appointment of an additional expert.

3. Alleged Offsetting Benefits from Unrelated Travel Are Not Relevant as a Matter of Law

Finally, Defendants contend that alleged base fare reductions on flights on which Plaintiffs did not pay a first bag fee must be included as offsets to the first bag fee overcharge. As discussed above, however, base fare offsets are not relevant as a matter of law, and alleged base fare offsets on unrelated travel (*i.e.*, flights on which class members did not pay a first bag fee) are similarly irrelevant.[11] Further, the empirical data analyzed by Plaintiffs' expert indicates

[11] "Defendants' core concern here is that, without inclusion of its offsetting benefits arguments, the overcharge damage theory may result in a windfall to Plaintiffs. The courts have rejected similar concerns, recognizing that this risk 'inheres in *Hanover Shoe*.'" *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297,

that there were no offsetting base fare reductions caused by the imposition of first bag fees.

AirTran asserts in its brief that a named class representative – Stephen Powell – benefitted from the bag fee because he received an "actual base fare reduction on a single trip [that] substantially exceeded the FBF he paid on that trip." AirTran Mem. at 7. But this assertion is contradicted by AirTran's own sworn interrogatory response. *See* AirTran's Responses to Pls.' Third Interrogatories No. 4 (Nov. 4, 2010). Mr. Powell traveled on a sale fare, and also paid a $15 first bag fee. *Id.* Absent AirTran's imposition of a first bag fee, AirTran admits that a sale fare likely would have still been available to Mr. Powell, and his total payment therefore would have been lower in the absence of the bag fee. *Id.* ("[T]he likelihood that [a] $44.38 sale fare would have been available [to Mr. Powell] absent the unbundling of the first bag fee is two-thirds (67%)").[12]

Because the issues raised by AirTran can be resolved as a matter of law, or have been adequately addressed through extensive fact discovery, expert discovery, and briefing, appointment of an additional expert is not necessary. Even

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317 (E.D. Mich. 2001) (quoting *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283, 287 (D. Minn. 1996)).

[12] AirTran's expert has not offered an independent opinion on the impact of the bag fee on Mr. Powell, and instead relies on AirTran's analysis. Merits Reply Report of Dr. Gaier ¶ 20 & n.25.

if the Court resolves the threshold legal and factual issues in favor of Defendants, and determines that additional assistance is necessary, the Court "should consider whether there are adequate alternatives to . . . appointment [of an additional expert], such as directing the parties to clarify, simplify, and narrow the differences between them." FJC, MANUAL FOR COMPLEX LITIG. § 11.51 at p. 111.

IV. CONCLUSION

Plaintiffs respectfully submit that Defendants have had ample opportunity to present their arguments through their briefs and their four class certification experts. This issue has been fully briefed for months, and, like the scores of other courts who have independently decided class certification motions in complex antitrust cases, this Court is well-equipped to address this issue without the expense or delay of the appointment of an additional expert. Accordingly, AirTran's motion for appointment of a neutral economic expert should be denied.

[*Signature appears on the following page.*]

This 12th day of May, 2011.

/s/ Elizabeth L. Fite

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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.

This 12th day of May, 2011.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification to all counsel of record who have appeared in this matter.

This 12th day of May, 2011.

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