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The Honorable Timothy C. Batten, Sr.
c/o Ms. Julee Smilley, Ms. Alice Snedeker
1788 Richard B. Russell Federal Building
75 Spring Street, SW
Atlanta, Georgia 30303-3309

Re: *In re: Delta/AirTran Baggage Fee Antitrust Litigation*,
No. 1:09-md-2089-TCB (N.D. Ga), ALL CASES

Dear Judge Batten:

AirTran respectfully submits this response to Plaintiffs' August 5, 2011 request to reopen discovery against AirTran Airways, Inc. ("AirTran"), which includes a request that AirTran produce its future correspondence with the Department of Justice ("DOJ"). For the reasons stated below, AirTran opposes Plaintiffs' request.

Notably absent from Plaintiffs' letter is any claim that the additional discovery Plaintiffs now seek is premised on any evidence – new or otherwise – of communications between AirTran and Delta Airlines, Inc. ("Delta") concerning first bag fees. We pointed out in our August 2, 2011 letter to the Court that Plaintiffs do not have evidence of an agreement, which is essential to a claim under Section 1 of the Sherman Act. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (the "crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express") (quotation omitted). Plaintiffs still do not have evidence of an agreement, and none of the new documents produced by AirTran (or Delta) reflects any communications between the carriers.

Nor do Plaintiffs have any basis to contend that the discovery they seek is likely to, or even intended to, uncover communications between AirTran and Delta. Plaintiffs have no basis to contend that the two new custodians they ask AirTran to search, Mr. Cannon and Ms. Ritter, had any communications or agreement with Delta. And Plaintiffs have no basis to contend that future correspondence between AirTran counsel and DOJ could disclose communications

between the airlines, or otherwise establish the missing element of an agreement. In fact, Plaintiffs are remarkably vague about exactly what discovery they are seeking from AirTran, how it is tied to something they did not know before, and what proof their requested new discovery is intended to develop. Instead, Plaintiffs seem to be using their request to reopen discovery against Delta as an excuse to reopen discovery of unspecified scope against AirTran as well.

As demonstrated below, Plaintiffs have failed to show the good cause required to reopen discovery against AirTran. Fed. R. Civ. P. 16(b)(4); *see also American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1577 (11th Cir. 1985) (affirming district court's refusal to allow a reopening of discovery where "the identity of the witnesses and the subject had been disclosed in earlier discovery responses"). Plaintiffs have known for 16 months that their two new proposed AirTran custodians attended the November 7, 2008 meeting at which AirTran management discussed whether and how to respond to Delta's public announcement to charge a first bag fee for the newly merged Delta/Northwest. And Plaintiffs have already obtained extensive discovery about that meeting from the custodians whose files were searched at their request. As for the materials submitted to the DOJ, AirTran produced the documents and transcripts it had produced to the DOJ and objected to producing other materials submitted to the DOJ. Plaintiffs did not challenge that objection and instead reached an agreement on the scope of the request that did not include counsel's correspondence to the DOJ. Notwithstanding that agreement, on May 12, 2011, long after discovery had ended, Plaintiffs again asked AirTran for its counsel's DOJ correspondence. Although AirTran could have stood on its objection, it voluntarily produced that material to avoid further discovery disputes. As demonstrated below, the narrative that Plaintiffs point to now was based on documents produced to Plaintiffs long ago, and not surprisingly the narrative reveals nothing that Plaintiffs did not already know from those documents. There is simply nothing new to justify the burden and expense of reopening discovery against AirTran, much less the unlimited discovery they seem to be seeking

I. Plaintiffs Have Not Shown Good Cause to Reopen Discovery Against AirTran.

As Plaintiffs acknowledge in their letter to the Court dated July 25, 2011 (at p. 9), the discovery schedule may be modified "*only* for good cause and with the judge's consent." *See* Fed. R. Civ. P. 16(b)(4) (emphasis added). The Eleventh Circuit's decision in *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1577 (11th Cir. 1985), explains why good cause has not been shown here. There, the district court had granted a motion to compel, and defendants completed their production after the discovery period had ended. The plaintiff then sought to reopen discovery based on information allegedly newly disclosed in the documents. The district court refused to

reopen discovery as to one defendant because "the identity of the witness and the subject had been disclosed in earlier discovery responses." *Id.* at 1576-77. The Eleventh Circuit held that the district court had "properly denied the requested discovery," stating that in deciding whether a party "was denied an effective opportunity to conduct discovery," the Court should be guided by "the difference between an opportunity to conduct discovery and a failure 'to make use of that opportunity.'" *Id*. at 1576-77, citing *Parrott v. Wilson*, 707 F.2d 1262, 1270 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S. Ct. 344, 78 L. Ed. 2d 311 (1983). *See also Audi AG v. D'Amato*, 469 F.3d 534, 541 (6th Cir. 2006) ("Factors that should be considered [in evaluating a request to reopen discovery] include *when the moving party learned of the issue that is the subject of discovery*, how the discovery would affect the ruling below, the length of the discovery period, *whether the moving party was dilatory*, and *whether the adverse party was responsive to prior discovery requests*.")(emphasis added).[1]

The Court should consider Plaintiffs' request to reopen discovery against AirTran separately from their request to reopen discovery against Delta. In *American Key*, the district court held that newly produced documents justified limited additional discovery against one defendant, but not the other, and the Eleventh Circuit affirmed. 762 F.2d at 1577. Reopening discovery against Delta does not justify reopening discovery against AirTran. Any additional discovery must be firmly tethered to "new subjects" disclosed in the new documents, *id.*, yet Plaintiffs have not identified any new subjects in the documents recently produced by Delta or in the single AirTran document on which they rely that would create new subjects for discovery of AirTran.

Plaintiffs claim that AirTran produced "belatedly" correspondence between AirTran counsel and DOJ. They point to only one document to justify their request – AirTran's Written Responses to CID Specification No. 5(**Pl.'s Exhibit 6**, AIRTRAN03930284-86) – which is a narrative written by counsel in response to a DOJ interrogatory ("the Narrative"). The Narrative would have been responsive to Request No. 1, but AirTran objected to producing anything more than the

[1] Plaintiffs argue (at p. 4 of their letter) that good cause exists when a party fails to produce documents before the close of discovery, citing *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc*.,1:04-cv-0641-JEC, 2008 WL 228032, at *1; 2008 U.S. Dist. LEXIS 5490, at *5 (N.D. Ga. Jan. 25, 2008). But in *American Key*, documents were produced after the close of discovery, and both the district court and the Eleventh Circuit held that their late production did not justify reopening discovery unless the late production revealed a "new subject." 762 F.2d at 1577. In any event, in SCQuARE, "[d]efendant concede[d] that its failure to produce these documents violated its discovery obligations." Here, by contrast, AirTran had no obligation to produce to Plaintiffs its outside counsel's correspondence to the DOJ, as demonstrated in Part I.A below.

documents AirTran had produced to the DOJ. AirTran's Objections and Responses to Plaintiffs First Request for Production, **Pl.'s Exhibit 2**, at 2. The parties later agreed to modify the scope of Request No. 1, but as modified the Request did not call for AirTran to produce its counsel's submissions to the DOJ, just the documents AirTran had received from the DOJ.[2] *See* March 26, 2010 E-mail from R. Fones to D. Kotchen, **Pl.'s Exhibit 3**, at 1 (setting forth the agreement). AirTran's commitment to produce to Plaintiffs documents it had provided to "other entities" does not alter that agreement; the phrase "other entities" refers to entities other than the DOJ. *Id*. Plaintiffs did not seek further modification of Request No. 1 during the discovery period.[3] Nevertheless, in May 2011 – after discovery had closed – when Plaintiffs pressed AirTran for all its prior communications with the DOJ, AirTran chose to produce the materials and avoid burdening the Court with a discovery dispute over documents that contain no new information, notwithstanding the modified scope of Plaintiffs' Request No. 1. AirTran's voluntary post-discovery production of these materials was not "belated."

More importantly, and regardless of whether AirTran's production was "belated," Plaintiffs present no valid purpose for reopening discovery against AirTran. The Narrative – which is the only document Plaintiffs cite – does not disclose any new subject or anything new at all. *See American Key Corp.*, 762 F.2d at 1576-78 (affirming district court's refusal to reopen discovery where the subject of late-produced documents "had been disclosed in earlier discovery

[2] Although Plaintiffs had previously asserted to AirTran that correspondence with DOJ was responsive to Request No. 1, May, 17, 2011 E-mail from D. Kotchen to R. Allen and B. Rein, **Pl.'s Exhibit 15**, Plaintiffs apparently now realize that the Narrative was not within the modified scope of Request No. 1. Now they tell the Court that the Narrative would also have been responsive to Request No. 2. *See* August 5, 2008 Letter from Plaintiffs to Court at 2, n.1. But Request No. 2 sought documents relating to AirTran's decision to implement a first bag fee, so obviously sought internal AirTran documents. With that understanding, the parties agreed to narrow Request No. 2 (and all of the other discovery requests) to the files of 10 AirTran custodians (later raised to 15). The Narrative did not appear in any of those 15 custodians' files.

[3] On November 26, 2010, while addressing potential spoliation issues with Delta, Plaintiffs asked AirTran counsel for "confirmation" that "AirTran has produced to Plaintiffs all of its communications with the DOJ regarding the DOJ's bag fee investigation, including but not limited to any communications between AirTran's attorneys and the DOJ regarding document preservation." November 26, 2010 E-mail from D. Low to M. Sachdev, **Pl.'s Exhibit 4**, at 1. Because the DOJ has never raised document preservation issues with AirTran, and because AirTran had produced all DOJ correspondence within the modified scope of Plaintiffs' Requests No. 1 and 2, AirTran told Plaintiffs that AirTran had already produced all responsive DOJ communications. *See* November 30, 2010 E-mail from M. Sachdev to D. Low, *id*., at 1.

responses") The Narrative is a two-page fact chronology that summarizes AirTran's bag fee decision process. **Pl.'s Exhibit 6,** AIRTRAN03930284-86. It was prepared by counsel, and not prepared (or even received) by any witness in this case. The Narrative is based on AirTran documents that were produced to the Plaintiffs on April 14, 2010. Plaintiffs deposed five AirTran witnesses and received approximately 110,000 documents from seven custodians who were involved in AirTran's bag fee decision process. Plaintiffs have obtained thorough discovery about that process.

Plaintiffs say (at pp. 5-6 of their letter) that the Narrative "reflect[s] that [Fred Cannon and June Ritter] actually attended" a meeting on November 7, 2008 when AirTran discussed implementing a first bag fee. There is nothing new here either. Plaintiffs have known about the meeting for more than a year. AirTran produced documents about the meeting,[4] Plaintiffs questioned three AirTran witnesses about the meeting,[5] and Plaintiffs received transcripts where DOJ attorneys questioned AirTran witnesses about the meeting.[6] Plaintiffs have also known for more than a year that Mr. Cannon and Ms. Ritter attended the meeting, because AirTran produced documents inviting them to the meeting.[7] Plaintiffs respond (at p. 5 of their letter) that "not all invitees attended the meeting," but AirTran even produced the e-mails in which Mr. Cannon and Ms. Ritter accepted the meeting invitation.[8] Inexplicably, when Plaintiffs questioned AirTran witnesses about the meeting, they did not ask who else attended.[9]

Significantly, Plaintiffs do not say what they hope to learn from Mr. Cannon and Ms. Ritter. They were not bag fee decision-makers, and Plaintiffs do not contend that either Mr. Cannon or

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[4] *See*, *e.g.*, AIRTRAN 00064934 (Mr. Smith to Kurt Brulisauer: "we are just finishing a 1st bag call, i have never seen so many marketing and sales people afraid to charge for a product."), **Exhibit A**.

[5] *See* Nov. 19, 2010 K. Healy Depo. Tr., **Exhibit B**, at 122:4-123:4; Nov. 15, 2010 J. Smith Depo. Tr., **Exhibit C**, at 90:18-92:22; Nov. 17, 2010 M. Klein Depo. Tr., **Exhibit D**, at 205:7-205:12.

[6] *See* July 16, 2009 K. Healy DOJ Depo. Tr., **Exhibit E**, at 240:6-246:10; Sept. 15, 2009 J. Smith DOJ Depo. Tr., **Exhibit F**, at 128:12-134:21

[7] *See* AIRTRAN 00002886 (Nov. 6, 2008 e-mail from A. Haak to K. Healy requesting that Ms. Ritter participate in the Nov. 7, 2008 meeting), **Exhibit G** (produced April 14, 2010); AIRTRAN 461945-46, 461947 (meeting invitations), **Exhibit H** (produced June 17, 2010).

[8] *See* AIRTRAN 00020351 (Mr. Cannon's acceptance of meeting invitation); AIRTRAN 00020355 (Ms. Ritter's acceptance of meeting invitation), **Exhibit I** (both produced April 14, 2010).

[9] *See* note 5, *supra*.

Ms. Ritter had *any* communication with Delta. Absent a clear explanation of what they hope to obtain, they have failed to show good cause.[10] *See American Key Corp.*, 762 F.2d at 1576-78 (affirming district court's refusal to reopen discovery where plaintiff did not submit a discovery plan showing how the discovery sought was to pursue subjects not previously revealed in discovery).

Finally, the burden and cost to AirTran of adding Mr. Cannon and Ms. Ritter as custodians would be significant. The documents Plaintiffs have requested will need to be collected onsite, processed by an outside vendor, filtered with search terms, and then reviewed by a team of attorneys for responsiveness and privilege. Based on AirTran's experience in this case, adding two new custodians will cost AirTran well in excess of $50,000. The Court should balance the benefits against the burdens of e-discovery. *Hill v. Emory Univ.*, 346 Fed. Appx. 390, 392 (11th Cir. 2009) ("District courts can limit discovery when 'the burden or expense of the proposed discovery outweighs its likely benefit'"), citing Fed. R. Civ. P. 26(b)(2)(C)(iii); *see also Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) ("District courts are properly encouraged to weigh the expected benefits and burdens posed by particular discovery requests (electronic and otherwise) to ensure that collateral discovery disputes do not displace trial on the merits as the primary focus of the parties' attention."), *citing* Fed. R. Civ. P. 26(b)(2)(B) & (C); The Sedona Conference, The Sedona Principles: Second Edition (2007); *and* Institute for the Advancement of the American Legal System, Navigating the Hazards of E-Discovery (2007). Here, Plaintiffs do not identify anything new they expect to discover, so the cost far outweighs any speculative benefit of searching these additional custodians.

[10] Plaintiffs also suggest that the Narrative is inconsistent with prior testimony. They say that the Narrative "identif[ies] the relevant meeting as the meeting at which AirTran made its first bag fee decision," while they assert that prior testimony suggested the decision was made after a subsequent meeting. August 5, 2008 Letter from Plaintiffs to the Court at 6. But the Narrative says that Mr. Healy and Mr. Fornaro came to the decision "on or shortly after November 7, 2008," which matches Mr. Fornaro's and Mr. Healy's testimony. *Compare* AirTran's Response to Specification No. 5, **Pl.'s Exhibit 6**, *to* Nov. 18. 2010 R. Fornaro Depo. Tr., **Exhibit J**, at 85:10-86:20 (On November 7, 2008, Mr. Healy recommended to Mr. Fornaro that AirTran adopt the first bag fee) and Nov. 19, 2010 K. Healy Depo. Tr., **Exhibit B**, at 122:4-126:6 (same). There is no inconsistency, and in any event Plaintiffs have fully explored the timing of the decision with the decision makers.

II. Plaintiffs Are Not Entitled to AirTran's Counsel's Future Correspondence with the DOJ.

Plaintiffs have also asked the Court to compel AirTran to produce, on a going-forward basis, its future correspondence with the DOJ. The Court should reject this request.

AirTran has produced to Plaintiffs all of the factual material that it produced to the DOJ. This is all Plaintiffs are entitled to under *In re Urethane*. Plaintiffs try to distinguish *In re Urethane,* but they overlook its important distinction between "investigation into a possible conspiracy" and "underlying actions" that would prove a conspiracy. *See In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL (D. Kan. Dec. 17, 2010). The only case cited by Plaintiffs is no different—it ordered defendants to produce the factual documents but did not order them to produce counsel's ongoing correspondence with DOJ. *See In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 559-560 (N.D. Ga. 1992). Plaintiffs have all the factual material, and they have no right to receive correspondence in a confidential government investigation.

Conclusion

For the foregoing reasons, AirTran respectfully requests that the Court deny Plaintiffs' requests for further discovery from AirTran and for future correspondence with the DOJ. If any further discovery against AirTran is allowed, AirTran respectfully requests that it be limited to new subjects or new information revealed in documents produced after the close of discovery.

Respectfully,

Michael V. Sachdev /lr

Michael V. Sachdev
Counsel for Defendant AirTran Airways, Inc

CC: All counsel (by e-mail)