LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

1100 PEACHTREE STREET, NE

SUITE 800

ATLANTA, GEORGIA 30309-4516

(404) 681-3450

FACSIMILE: (404) 681-1046

David H. Flint

E-Mail: dflint@swfllp.com

Direct Dial: (404) 954-9843

August 30, 2011

**CONFIDENTIAL**

Via E-mail to julee_smilley@gand.uscourts.gov; alice_snedeker@gand.uscourts.gov

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

RE: *In re Delta/AirTran Baggage Fee Antitrust Litigation*, No. 1:09-md-2089

Dear Judge Batten:

Plaintiffs write this reply in response to AirTran's August 23, 2011 letter to the Court ("AirTran Letter") regarding Plaintiffs' request that AirTran be compelled to produce ongoing communications with DOJ, and that Plaintiffs be allowed limited discovery related to late-produced DOJ communications, including documents from the files of two new custodians.

1. AirTran Failed to Produce DOJ Correspondence as Agreed

AirTran agreed to produce "[d]ocuments relating to [its] decision to implement . . . a first bag fee." AirTran Response to Pls.' First Requests for Production, No. 2 (Feb. 9, 2010), Ex. 2. AirTran now argues that this request is "obviously" limited to "internal AirTran documents." AirTran Letter at 4 n.2. But the request contains no such limitation. *See* Ex. 2.

Plaintiffs also requested documents related to any government investigation of first bag fees, and AirTran objected only "to the extent it requires AirTran to speculate on what documents not produced to the Department of Justice in connection with its checked baggage fee investigation might be deemed to relate to that investigation." AirTran Response to Pls.' First

Requests for Production, No. 1 (Feb. 9, 2010), Ex. 2. The documents at issue are correspondence between AirTran and DOJ about the investigation. Such correspondence is clearly related to DOJ's bag fee investigation, does not "require[] AirTran to speculate," and therefore is not within the scope of AirTran's objection.

The parties conferred about AirTran's objection on March 24, 2010. On that call, Plaintiffs' counsel explained that the request encompassed communications between DOJ and AirTran about DOJ's bag fee investigation, and AirTran confirmed that it would produce such documents. The parties memorialized this call in an e-mail, stating that AirTran would produce responsive communications sent "to other entities" and responsive "documents received from the DOJ." E-mail from R. Fones to D. Kotchen (Mar. 26, 2010), Ex. 3.[1]

AirTran later confirmed that it had produced all "communications with the DOJ in its files regarding the DOJ's bag fee investigation." E-mail from M. Sachdev to D. Low (Nov. 30, 2010), Ex. 4.. AirTran attempts to spin this false discovery certification (*see* Fed. R. Civ. P. 26(g)) by interpreting the e-mail as only confirming that "AirTran had already produced all *responsive* communications." AirTran Letter at 4 n.3 (emphasis added). But AirTran's e-mail contained no such limitation (and these communications are responsive, as described above). *See* Ex. 4.

2. A Limited Reopening of Discovery Is Appropriate to Address Issues Raised in AirTran's Belated Production

The Court should reopen discovery on a limited basis. AirTran failed to produce numerous DOJ communications until May 20, 2011 in violation of the Court's Order to produce such documents by June 30, 2010, and to produce all documents by December 15, 2010. If AirTran had timely produced the documents, Plaintiffs would have sought the requested discovery before the close of discovery.

---

[1] AirTran contends that "other entities" refers to "entities other than DOJ" rather than "entities other than AirTran." E-mail from R. Fones to D. Kotchen (Mar. 26, 2010), Ex. 3. But AirTran's interpretation is directly contrary to the parties' oral agreement, and is grammatically inaccurate, as there is no prior reference to DOJ in the parties' e-mail. *Id.* Moreover, AirTran failed to timely produce all of its "documents received from the DOJ," for which AirTran offers no excuse.

In opposing Plaintiffs' request, AirTran argues that production of documents after the close of discovery does not require reopening discovery, citing *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1577 (11th Cir. 1985). In *American Key*, however, the court granted leave for plaintiff to take two depositions after the close of discovery based on the production of "two new documents . . . related to relevant issues," even though the court had previously granted multiple discovery extensions, and even though the timing of the production of the documents did not violate any court order. *Id.*[2] Unlike the defendants in *American Key*, AirTran's late production of documents violates a Court Order. Further, reopening discovery on a limited basis will not prejudice defendants here, as discovery is ongoing with respect to Delta.[3]

AirTran argues that Plaintiffs previously could have sought out discovery related to Mr. Mr. Cannon and Ms. Ritter's knowledge of AirTran's first bag fee decision-making. But the importance of Mr. Cannon or Ms. Ritter[4] was not demonstrated until Plaintiffs received the late-produced documents from AirTran.[5]

---

[2] The *American Key* Court denied a request to take numerous other depositions where the plaintiff had not previously taken *any* depositions despite the opportunity to do so, there was prejudice to defendants from allowing indefinite discovery, and plaintiff offered "no explanation" for not pursuing the depositions earlier. 762 F.2d at 1576-77.

[3] AirTran cites several factors that are relevant to reopening discovery in the Sixth Circuit. AirTran Letter at 3. But these factors weigh in favor of reopening discovery here, as: Plaintiffs did not learn of the issue until AirTran's late production of documents on May 20, 2011; Plaintiffs were not dilatory, but promptly conferred with AirTran about the issue and then promptly raised the issue with the Court; and AirTran was not responsive to prior discovery requests for the late-produced documents.

[4] During his deposition, Kevin Healy identified all of the attendees at the November 7, 2008 meeting except Mr. Cannon, Ms. Ritter, and one other individual. *Compare* K. Healy Depo. Tr. 122:4-123:4, Ex. B to AirTran Letter, *with* Ex. 6 at AIRTRAN 3930285 (listing attendees).

[5] Courts have previously rejected attempts to excuse non-production of documents based on the possibility that plaintiffs "could have" obtained the information from some other source "but failed to do so." *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 233-34 (S.D. Fla. 1989), *aff'd* 12 F.3d 1045 (11th Cir. 1994) (rejecting as "unseemly" defendant's attempt to "divert attention from its own wrongdoing by pointing the finger at Plaintiff").

AirTran suggests that Plaintiffs are required to explain specifically what they expect to obtain from additional discovery, citing *American Key*. AirTran Letter at 6. In *American Key*, the Court ordered plaintiff to submit a discovery plan where plaintiff was requesting numerous depositions despite having taken no depositions before the close of discovery, discovery had previously been extended multiple times, and an additional extension would prejudice defendants. 762 F.2d at 1577. Here, Plaintiffs' requests are clearly targeted at obtaining information about AirTran's first bag fee decision making from two additional custodians who observed or participated in the decision-making. Obtaining such information from these two custodians is especially important in light of the incompleteness of AirTran's e-mail archives[6] and in light of inconsistencies in AirTran's representations about AirTran's first bag fee decision-making process, including the November 7, 2008 meetings.[7] AirTran complains about the burden of producing documents from two additional custodians. But Plaintiffs agreed to the original limited custodian list based on AirTran's agreement to add additional relevant custodians upon Plaintiffs' request.

3. AirTran Should Be Ordered to Produce Its Correspondence with DOJ

AirTran argues that they should not be required to produce ongoing communications with DOJ. AirTran continues to rely on *In re Urethane Antitrust Litigation*, No. 04-MD-1616-JWL, 2010 WL 5287675, at *7 (D. Kan. Dec. 17, 2010), attached as Ex. 17, despite its factual dissimilarities to the present case, including the clear relevance of the DOJ communications to the issues in this case, unlike in *Urethane*.

AirTran also asserts that the documents are confidential, but this Court has previously rejected the argument that correspondence and other documents related to a DOJ CID are shielded from disclosure in discovery. *See In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 560-61 (N.D. Ga. 1992).

---

[6] *See* AirTran Barracuda Archiver E-mails by Date, Ex. 18 (listing numerous dates on which AirTran's archiver failed to preserve any e-mails).

[7] *Compare, e.g.*, K. Healy Depo. Tr. 126:4, Ex. B to AirTran Letter ("[On November 7, 2008] I recommended we should do it, [Mr. Fornaro] agreed"), *with* R. Fornaro Depo. Tr. 85:22-23, Ex. 19 ("I think [on November 7, 2008] we decided to . . . let it sit over the weekend"), *and* AirTran Response to CID, Ex. 6 at AIRTRAN 3930285 (referring to AirTran's decision to impose a first bag fee as "Mr. Healy's decision" made on November 7, 2008).

4. Plaintiffs' Possess Evidence of Agreement

AirTran asserts that Plaintiffs do not have any evidence of an agreement between AirTran and Delta to impose a first bag fee. This assertion is false. In 2008, neither AirTran nor Delta wanted to impose a first bag fee before the other.[8] AirTran executives suggested that this standoff could be resolved by communicating AirTran's desire to impose a first bag fee to Delta both through private communications and through an answer to a question about first bag fees on an earnings call.[9] Prior to AirTran's October 23, 2008 earnings call, the two departments responsible for analyzing and recommending a first bag fee for Delta viewed the first bag fee as unprofitable and not worth implementing.[10] Then, on AirTran's October 23, 2008 earnings call, Robert Fornaro expressed AirTran's desire to impose a first bag fee if Delta acted first. Delta changed its analysis based on Mr. Fornaro's statements, concluding that the fee would be profitable because AirTran was almost certain to follow.[11] Because it now expected the fee to generate profits, Delta then imposed the fee, followed shortly thereafter by AirTran, with both airlines' fees effective on the same date and in the same amount.

---

[8] DLBAG 9726, E-mail from G. West to S. Gorman (Sept. 5, 2008), Ex. 20 ("I assume we still want to hold until Airtran moves?"); AIRTRAN 5021, E-mail from S. Fasano to J. Smith (July 31, 2008), Ex. 21 ("DL is carefully watching us and waiting for a move on first bag.").

[9] AIRTRAN 5021, E-mail from R. Fornaro (July 31, 2008), Ex. 21 ("They should hear through the grapevine that we are doing the programming to launch this efforts."); *id.*, E-mail from K. Healy to R. Fornaro et al. ("I was hoping we'd be asked on the [earnings call]. We've all but given it to the AJC, we'll push it out there.").

[10] *See* Value Proposition v.4 (Oct. 22, 2008), Ex. 22 (recommending against bag fee as revenue negative); DLBAG 11053, E-mail from G. West to M. Zessin (Oct. 23, 2008), Ex. 23 ("Sounds like it's about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee.").

[11] Value Proposition v. 6 (Oct. 24, 2008), Ex. 24 (finding fee would likely be revenue positive).

## CONCLUSION

For the foregoing reasons, Plaintiffs request for limited additional discovery should be granted, AirTran should be ordered to produce DOJ communications and produce documents from the files of Mr. Cannon and Ms. Ritter, and Plaintiffs should be allowed to take limited follow-up discovery related to the DOJ communications and the files of these two custodians.

Sincerely,

David H. Flint

DHF/cb
Enclosures
cc: Bert Rein, Esq.
Roger Fones, Esq.
Scott Gant, Esq.
Randall Allen, Esq.

K:\7691\1\Correspondence\Batten Ltr 8-30-11.doc