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August 5, 2011

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

Judge Timothy C. Batten, Sr.
18 Greenville Street
Newnan, GA 30263

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

Dear Judge Batten:

Plaintiffs write regarding AirTran's belated production of its communications with the Department of Justice ("DOJ") related to the first bag fee investigation, and to request: (1) that discovery be re-opened against AirTran for the limited purpose of issuing targeted follow-up discovery related to the late-produced documents; (2) that AirTran be ordered to search the files of two custodians whose relevance was demonstrated by the new documents; and (3) that AirTran be ordered to produce ongoing communications with the DOJ related to the bag fee investigation.

I. Factual Background

Plaintiffs issued their first set of document requests to AirTran on February 9, 2010, including requests for documents related to AirTran's decision to charge a first bag fee, and documents related to any government investigation of first bag fees. Pls.' First Requests for Production, No. 1, 2 (Feb. 9, 2010), Ex. 1. AirTran agreed to produce "[d]ocuments relating to [its] decision to implement . . . a first bag fee," "communications to other entities" related to any government bag fee or capacity investigation, and "documents received from the DOJ Antitrust Division" in connection with the bag fee investigation. *See* AirTran Response to Pls.' First Requests for Production, No. 2 (Feb. 9, 2010), Ex. 2; E-mail from R. Fones to D. Kotchen (Mar. 26, 2010), Ex. 3.

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.

August 5, 2011

Page 2

This Court ordered that AirTran produce these documents by June 30, 2010.¹ AirTran made their “final production” of documents responsive to those requests on July 2, 2010.² After reviewing AirTran’s production of documents, Plaintiffs observed that AirTran had produced very few communications with DOJ. Plaintiffs asked AirTran to confirm that AirTran had produced all of its communications with DOJ, pointing out that the documents may be relevant to an upcoming deposition. Email from D. Low to M. Sachdev (Nov. 26, 2010), Ex. 4. AirTran responded that “AirTran has no communications with the DOJ in its files regarding the DOJ’s bag fee investigation that have not already been produced to Plaintiffs.” E-mail from M. Sachdev to D. Low (Nov. 30, 2010), Ex. 4. Fact discovery closed December 15, 2010, and AirTran did not produce any additional DOJ communications.

In recent months, AirTran’s co-Defendant, Delta, has exchanged a number of letters with DOJ regarding Delta’s failure to preserve documents and regarding Delta’s recent revelation that it possessed a number of relevant backup tapes and unsearched hard drives. On May 12, 2011, Plaintiffs asked Delta to confirm that it would produce to Plaintiffs its ongoing correspondence with DOJ regarding backup tapes. At the same time, Plaintiffs asked AirTran to confirm that its production of DOJ communications was up-to-date, and that AirTran would agree to produce future correspondence with DOJ. E-mail from D. Kotchen to B. Rein and R. Allen (May 12, 2011), Ex. 5. In response, AirTran agreed to produce its correspondence with DOJ to date, but would not agree to produce ongoing communications.

On May 20, 2011, AirTran produced 125 pages of communications with the DOJ related to first bag fees. To Plaintiffs’ consternation and surprise, the correspondence was not new correspondence that had occurred after AirTran’s November 30, 2010 representation that it had produced all DOJ communications regarding its bag fee investigation, but instead consisted entirely of communications prior to that date.

¹ See Hr’g Tr. 4:7-9 (May 13, 2010), Dkt. #96 (ordering Defendants to produce documents responsive to Plaintiffs’ pending document requests by June 30, 2010); Pls.’ First Request for Production to AirTran, No. 2 (Feb. 9, 2010), Ex. 2 (requesting documents relating to AirTran’s decision to implement a first bag fee).

² E-mail from M. Sachdev to D. Kotchen (June 30, 2010), Ex. 7; Letter from M. Sachdev to D. Kotchen (July 2, 2010), Ex. 8.

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.

August 5, 2011

Page 3

For example, AirTran's May 20, 2011 production included a July 7, 2009 narrative response to DOJ's interrogatory that AirTran "[d]escribe the steps taken by your company to implement a fee for the first checked bag, including the dates such steps were completed." AIRTRAN 3930284, Ex. 6. AirTran's response identified key meetings about first bag fees, the individuals in attendance at those meetings, the revenue analyses relied on by AirTran's decision-makers, and a timeline of AirTran's efforts to develop the technology to implement the fee.

Because AirTran did not timely produce this document during the discovery period, Plaintiffs were not able to ask witnesses about it at depositions, and expended resources trying to obtain through discovery the same information that was summarized in AirTran's July 7, 2009 narrative.³

Plaintiffs have informed AirTran that they intend to seek to re-open discovery against AirTran for the limited purpose of following up on issues related to the newly produced documents. AirTran stated that it would oppose Plaintiffs' request. AirTran explained that the documents were not produced earlier because AirTran only searched the files of the relevant custodians – presumably AirTran counsel – for: the CID; documents produced to DOJ in response to the CID; and deposition transcripts and exhibits related to the bag fee investigation. Letter from M. Sachdev to D. Kotchen ¶ 1 (June 23, 2011), Ex. 9. When searching for other types of DOJ communications, AirTran inexplicably limited its search to a different group of custodians – those business persons identified by AirTran as the most likely to have documents responsive to Plaintiffs' first set of document requests in general. *Id.* AirTran stated that the existence of additional DOJ communications "was plainly apparent from the CID itself," and that

³ For example, Plaintiffs had issued an interrogatory asking AirTran to provide a timeline of AirTran's technological ability to charge a first bag fee. Pls.' Fourth Interrogatories to AirTran, No. 2, Ex. 11. AirTran objected, stating that this information was equally accessible to Plaintiffs, and referring Plaintiffs to a range of over 60,000 pages of documents in its production – which did not include AirTran's July 7, 2009 narrative that included the information that Plaintiffs sought. AirTran Objections to Pls' Fourth Interrogatories, No. 4 (Dec. 13, 2010), Ex. 12. After the parties conferred, AirTran provided a limited response to the interrogatory, but provided significantly less responsive information than was provided in the July 7, 2009 narrative. *Compare* AIRTRAN 3930284-86, Ex. 6, *with* AirTran Supp. Response to Pls.' Fourth Interrogatories, No. 2 (Jan. 13, 2011), Ex. 13.

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.
August 5, 2011
Page 4

it was “clear that AirTran would likely have had incidental correspondence with DOJ concerning CID compliance and the investigation.” Letter from M. Sachdev to D. Kotchen at 3 (July 8, 2011), Ex. 10; Letter from M. Sachdev to D. Kotchen ¶ 1 (June 23, 2011), Ex. 9. Instead of taking responsibility for its actions, AirTran suggested that Plaintiffs were at fault for not requesting the documents prior to the close of discovery (apparently forgetting that Plaintiffs had, in fact, asked about the documents before discovery closed). Letter from M. Sachdev to D. Kotchen at 3 (July 8, 2011), Ex. 10.

Several of the documents produced by AirTran demonstrate the need for additional discovery. For example, AirTran’s narrative listed two individuals who attended a meeting at which the first bag fee decision was made whose files have not been searched by AirTran. Plaintiffs requested that AirTran voluntarily search the files of these individuals. AirTran refused.⁴

II. Argument

III. Discovery Should Be Re-Opened to Allow Plaintiffs to Explore Issues Raised by the Newly Produced Documents

A discovery schedule may be modified “for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). When a defendant fails to produce responsive documents prior to the close of discovery, good cause exists to re-open discovery. *See SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*, No. 1:04-CV-0641-JEC, 2008 WL 228032, at *1 (N.D. Ga. Jan. 25, 2008) (“[Because] defendant had failed to produce a number of documents that were responsive to discovery requests . . . the Court granted plaintiff’s motion to reopen discovery to allow plaintiff to explore the issues raised by the new documents.”).

AirTran has recently produced to Plaintiffs 125 pages of new documents, including a narrative of the key events in AirTran’s first bag fee decision-making process, the identification of certain documents that AirTran relied upon in making its first bag fee decision, and other key documents. AirTran had agreed to produce these documents, had been ordered to produce the

⁴ Plaintiffs conferred with AirTran about the issues raised in this letter by phone and in writing, but the parties could not reach agreement. *See, e.g.*, Email from D. Low to M. Sachdev (Aug. 4, 2011), Ex. 16.

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.

August 5, 2011

Page 5

documents by June 30, 2010, and had represented that it had done so.⁵ Before the close of discovery, Plaintiffs did not have an opportunity to question witnesses about these newly produced documents, issue follow-up discovery, or otherwise explore the issues raised by the new documents. Discovery should therefore be reopened to allow Plaintiffs to pursue discovery related to the newly produced documents. *SCQuARE Int'l*, 2008 WL 228032, at *1.⁶

IV. AirTran Should Be Required to Produce Responsive Documents from the Files of Fred Cannon and June Ritter

Plaintiffs request that AirTran be ordered to search the files of two individuals who were identified in the recently produced documents as having attended the meeting at which AirTran allegedly made its first bag fee decision, namely, Fred Cannon and June Ritter. *See* AIRTRAN 3930285, Ex. 6. The files of the other custodians who attended the meeting have already been searched.

When Plaintiffs originally agreed to the custodian list proposed by AirTran, AirTran agreed to search additional custodians at Plaintiffs' request. If AirTran had timely produced the DOJ communications, Plaintiffs would have requested that these custodians' files be searched, and AirTran would have been obligated to search them.

In opposing Plaintiffs' request that the files of Mr. Cannon and Ms. Ritter be searched, AirTran has not disputed the relevance of their files. *See* Letter from M. Sachdev to D. Kotchen ¶ 3 (June 23, 2011), Ex. 9. Instead, AirTran argues that Plaintiffs could have requested their files sooner, as AirTran previously produced some information about these individuals, including a meeting invitation for the relevant meeting. *Id.* But not all invitees attended the meeting, and

⁵ Plaintiffs are not currently seeking discovery sanctions from AirTran because the prejudice to Plaintiffs appears to be relatively modest, even though discovery sanctions are appropriate pursuant to FED. R. CIV. P. 26(g) and 37. AirTran falsely certified that its production of DOJ communications was complete, despite an admission that it was "plainly apparent" that additional responsive documents existed. AirTran also violated Orders to produce responsive documents by June 30, 2010 and to complete all discovery by December 15, 2010.

⁶ Plaintiffs will not know what additional discovery will be necessary until after AirTran completes its production of documents from the files of Mr. Cannon and Ms. Ritter, as requested below.

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.

August 5, 2011

Page 6

the new documents reflect that these two individuals actually attended. AIRTRAN 3930285, Ex. 6 (identifying which invitees did not attend). Moreover, the new documents identify the relevant meeting as the meeting at which AirTran made its first bag fee decision, *id.*, whereas previous AirTran testimony indicated that the decision was made after a subsequent meeting. *See* Fornaro Depo. Tr. 85:10-18 (Nov. 18, 2010), Ex. 14. Thus, the new documents more strongly suggest the relevance of these two custodians than previously-produced documents, and AirTran should be ordered to search their files.

V. AirTran Should Be Compelled to Produce Its Correspondence with the Department of Justice

Although AirTran agreed to produce prior correspondence with the DOJ related to its first bag fee investigation, AirTran has rejected Plaintiffs' request that AirTran produce future correspondence with DOJ. Because Plaintiffs' request is narrowly tailored and seeks relevant evidence, Plaintiffs request that the Court order Defendants to produce these documents.

Plaintiffs only seek correspondence related to DOJ's first bag fee investigation, and not correspondence related to other investigations. The volume of responsive documents will not be burdensome to produce. AirTran's recent production of DOJ communications was only 125 pages. Plaintiffs' request is reasonably calculated to lead to the discovery of admissible evidence – and, in fact, has led to the discovery of admissible evidence. For example, AirTran's recently produced documents include a chronological narrative description of AirTran's first bag fee decision-making process, and an identification of the individuals involved in that process – information at the heart of this lawsuit.

Having produced prior communications with DOJ regarding its bag fee investigation, AirTran cannot seriously challenge the relevancy and discoverability of these documents. However, rather than committing to produce future DOJ correspondence, AirTran suggests that production of ongoing correspondence should be addressed in the future based on the contents of each piece of correspondence. *See* E-mail from B. Rein to D. Kotchen (May 17, 2011), Ex. 15. But such a document-by-document approach is unwieldy and inefficient, as it would potentially lead to disputes over each piece of correspondence between DOJ and AirTran or Delta. This Court should not be burdened with these future disputes because AirTran has not articulated any defense or privilege that would justify it withholding future DOJ correspondence and in fact there is none. *See In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 559-60 (N.D. Ga. 1992) (compelling Delta and other airlines to produce documents responsive to a request for

LAW OFFICES

SCHREEDER, WHEELER & FLINT, LLP

Judge Timothy C. Batten, Sr.

August 5, 2011

Page 7

“[a]ll documents received from or produced by you to any governmental entity relating to civil investigative demands . . . or other document requests in connection with any governmental investigation of pricing in the domestic passenger air transportation industry.”).

In its August 2, 2011 letter to the Court, AirTran suggests that its refusal to produce DOJ communications is supported by *In re Urethane Antitrust Litigation*, No. 04-MD-1616-JWL, 2010 WL 5287675, at *7 (D. Kan. Dec. 17, 2010). In *Urethane*, however, the *defendants* in an antitrust case requested documents related to an investigation of a possible antitrust conspiracy involving *plaintiffs*. The defendants stated that they were not seeking to compel documents relating to details of the government investigation, and had narrowed their request to seek only documents related to the facts underlying the conspiracy. *Id.* As narrowed, the court granted the request in part, observing in *dicta* that defendants had not presented authority or argument supporting the relevance of their original, broader request. *Id.* By contrast, AirTran’s DOJ communications regarding DOJ’s bag fee investigation are directly relevant to this litigation, and Plaintiffs respectfully ask this Court to order AirTran to produce all such future communications.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs request: that discovery be reopened for targeted discovery to follow up on the newly produced AirTran documents; that AirTran be ordered to produce responsive documents from the files of Fred Cannon and June Ritter; and that AirTran be ordered to produce all correspondence with DOJ related to the first bag fee investigation.

Sincerely,

A handwritten signature in black ink that reads "David H. Flint". The signature is written in a cursive style with a large, looping initial "D".

David H. Flint

DHF/jwh

cc: Bert Rein, Esq.
Roger Fones, Esq.
Alden Atkins, Esq.
Scott Gant, Esq.
Randall Allen, Esq.