App. No. ___

In The

Supreme Court of the United States

Avery Insurance Group, Inc., *et al*.,

Petitioners,

v.

Delta Airlines, Inc., *et al.*,

Respondents.

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioners Avery Insurance Group, Inc.,[*] Martin Siegel, Stephen Powell, Henryk J. Jachimowicz, Laura Greeberg Gale, and Carla Dahl, on behalf of themselves and others similarly situated, respectfully request that the time to file a petition for a writ of certiorari be extended sixty days from September 6, 2018 to and including November 5, 2018. The U.S. Court of Appeals for the Eleventh Circuit issued its judgment on March 9, 20108. App. A, *infra*. On June 8, 2018, the full court denied

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[*] Avery Insurance Group, Inc. certifies that it is not a publicly held or traded corporation, that it has no parent corporation, and that no corporation owns 10% or more of its stock.

petitioners' timely request for rehearing en banc. App. B, *infra*. Absent an extension, the petition therefore would be due on September 6, 2018. This Application is being filed at least 10 days before that date. *See* S. Ct. R. 13.5.

Background

In late October 2008, respondent AirTran was asked during an earnings call whether it would follow a nascent industry trend of charging passengers for the first checked bag. AirTran's CEO, Robert Fornaro, stated that "we have elected not to do it, primarily because our largest competitor in Atlanta," which everyone recognized to be respondent Delta, "hasn't done it." Order 20 (attached as App. C). He further stated that AirTran would "prefer to be a follower in a situation rather than a leader right now." *Id*. But, he stated, if Delta were to impose such a fee, "[w]e would strongly consider it, yes." *Id*. Four days later, Delta decided to adopt a $15 first bag fee, effective December 5, 2008. *Id.* 22-23. A week after Delta's announcement, AirTran imposed the same fee, effective the same date. *Id*. 26. The new fees have imposed hundreds of millions of dollars annually in higher costs on the flying public. *Id*. 12, 14.

After the Government opened an antitrust investigation into respondents' joint imposition of identical fees (which remains ongoing), consumers filed multiple antitrust actions, which were consolidated into this multidistrict litigation. The district court certified a class action, the appeal of which the Eleventh Circuit accepted under Fed. R. Civ. P. 23(f). While that appeal was pending, the district court entered summary judgment in respondents' favor.

The district court explained that the Eleventh Circuit applies "a three-step approach to summary judgment in the price-fixing context." Order 57.

> "First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that tends to exclude the possibility that the alleged conspirators acted independently. The existence of such a plus factor generates an inference of illegal price fixing. Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy."

Id. 58 (quoting *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003)).

There was no dispute that the first step was satisfied. Order 63-64. Moving to the second step, the district court accepted that an invitation to collude is a plus factor. Order 67 (citing, *e.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939)); *id*. 69. The court also did not dispute that a reasonable jury could conclude that AirTran's statements amounted to an invitation for joint action. But it believed that "courts must 'be careful not to permit inferences of antitrust conspiracy when to do so would create a significant irrational dislocation in the market or would result in significant anticompetitive effects.'" *Id.* 71 (citation omitted). The court concluded that prohibiting a company from addressing how it would respond to price leading by a competitor would have that effect. *Id*.

Accordingly, the district court adopted the principle of law that so long as an invitation to collude is extended in a public earnings call, rather than privately, the invitation cannot be a plus factor if the statements concern "a topic that was of

interest to the . . . industry," such as how a company would respond to potential pricing moves by a competitor. Order 71-72.

The district court then rejected petitioners' other asserted plus factors and entered summary judgment in the respondents' favor. Order 75-94.

On March 9, 2018, the Eleventh Circuit summarily affirmed for the reasons stated in the district court's summary judgment opinion. *See* App. A. On March 20, 2018, the court of appeals granted petitioners' motion for an extension of time for filing their petition for rehearing en banc. On June 8, 2018, the full court denied that timely filed petition for rehearing en banc.

Reasons For Granting An Extension Of Time

The time to file a petition for a writ of certiorari should be extended for sixty days for three reasons:

1. Additional time is necessary for counsel to study the relevant law and the massive record in this case, in order to prepare a petition for this Court's review. The press of other matters, including recent deadline for filings in the D.C. Circuit and upcoming deadlines for multiple oppositions to certiorari in this Court in mid-September, will make preparation of the petition difficult absent an extension of time.

2. No prejudice will result from granting this request for an extension. Whether the extension is granted or not, the petition will be considered and, if granted, the case decided in the upcoming Term.

3. While further research is required to fully elucidate the basis for that review, this petition raises significant issues regarding the circumstances in which what

would otherwise constitute an invitation to collude sufficient to avoid summary judgment is nonetheless insulated from antitrust review because made through a public earnings call.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this case should be extended for sixty days to and including November 5, 2018.

Respectfully submitted,

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