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

IN RE DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	)	CIVIL ACTION NO. 1:09-md-2089-TCB ALL CASES **FILED UNDER SEAL**

Unsealed 11/10/2014

MEMORANDUM OF AIRTRAN AIRWAYS, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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August 31, 2012

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Table of Abbreviations

ACS	Airport Customer Service
AirTran	AirTran Airways, Inc.
American	American Airlines, Inc.
CAC	Consolidated Amended Class Action Complaint, *In re Delta/AirTran Baggage Fee Litig.*, No. 1:09-md-2089-TCB (N.D. Ga.) [Dkt. 53]
CASM	Cost per available seat mile
CLT	Corporate Leadership Team
Continental	Continental Airlines, Inc.
Delta	Delta Air Lines, Inc.
DOT Report	U.S. Dep't of Transp., CC-2009-039, *Aviation Industry Performance: A Review of the Aviation Industry in 2008* (2009)
Dick Report	Expert Report of Dr. Andrew Dick, January 7, 2011
GAO	Government Accountability Office
GAO Report	U.S. Gov't Accountability Office, GAO -1-785, *Commercial Aviation: Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees* (2010)
LCC	Low-cost carrier
Legacy Carriers	In 2008: Delta, Continental, Northwest, American, US Airways and United
MTD Order	August 2, 2010 Order of Hon. Timothy C. Batten, Sr. denying in part and granting in part Defendants' motions to dismiss [Dkt. 136]
Northwest	Northwest Airlines, Inc.
RM	Revenue Management

RPM	Revenue Passenger Miles
Share Shift	Shift in market share as passengers shift from one airline to another
United	United Air Lines, Inc.
US Airways	US Airways, Inc.
WN	Southwest Airlines Co.

Table of Witnesses

NAME	AFFILIATION
Almeida, Stephen	Delta's manager of design and development for ACS training
Anderson, Richard	Delta's Chief Executive Officer
Bastian, Edward	Delta's President
Bewley, Jason	AirTran's Director of Corporate Finance
Boeckhaus, Gerry	Delta's former manager for ramp and deicing operations
Burman, Amanda	Delta's former manager for ACS performance management and measurement
Cannon, Fred	AirTran's Director of Reservations
Clausen, Scott	AirTran's Manager of Financial Analysis
Dailey, Paul	Delta's Managing Director of Domestic Pricing
Dick, Dr. Andrew	Expert economist for AirTran
Elledge, Pamela	Delta's Senior Vice President Global Sales in 2008, Vice President Sales and Distribution in 2007
Esposito, Joe	Delta's Managing Director, Domestic Network and Schedule Planning
Fasano, Scott	AirTran's former Director of Customer Service Standards
Fornaro, Robert	AirTran's Chief Executive Officer
Gorman, Stephen	Delta's Executive Vice President and Chief Operating Officer (in 2008 Executive Vice President of Operations)
Grimmett, Gail	Delta's Senior Vice President for New York
Haak, Arne	AirTran's Senior Vice President & Chief Financial Officer

Hauenstein, Glen	Delta's Executive Vice President of Revenue Management
Healy, Kevin	AirTran's Senior Vice President for Marketing and Planning
Horton, Tom	American Airlines, Chief Financial Officer & Executive Vice President-Finance
Klein, Matthew	AirTran's Senior Director of Pricing and Distribution
Mateer, Craig	Owner of BAGS, Inc., a vendor for Northwest Airlines
Phillips, Eric	Delta's Director of Domestic Inventory Management
Rary, Pat	BAGS, Inc. employee, vendor for Northwest; formerly Delta's manager of baggage
Ringler, Mike	Delta's station manager in Knoxville
Rossano, Michael	Delta's station manager in Miami
Smith, Jack	AirTran's Senior Vice President for Customer Service
Steenland, Doug	Northwest, President and Chief Executive Officer in 2008
Tague, John	United Airlines, Chief Operating Officer
Terryberry, Kathy	AirTran's station manager in Buffalo
Tilton, Glenn	United Airlines, Chairman, President and Chief Executive Officer
West, Gil	Delta's Senior Vice President of Airport Customer Service and Technical Operations
Zessin, Mark	Delta's general manager at JFK for baggage operations

Preliminary Statement

AirTran Airways, Inc. ("AirTran") and Delta Air Lines, Inc. ("Delta") each made independent decisions in 2008 to start charging customers an unbundled fee for their first checked bags. When the Court denied defendants' motion to dismiss, it expressed skepticism about plaintiffs' case, noting that the "complaint has its weaknesses." (MTD Opinion at 30.) Plaintiffs have been given every opportunity prove that the bag fee decisions were the product of an agreement between AirTran and Delta, which is essential to a section 1 antitrust claim. After AirTran and Delta have produced more than forty million pages of documents, and after sixty-seven depositions, Plaintiffs still have what they started with: the unilateral, spontaneous answer by AirTran CEO Robert Fornaro to a financial analyst's question about first bag fees during AirTran's October 23, 2008 earnings call, followed shortly by Delta's adoption of a first bag fee as part of harmonizing its fees after merging with Northwest.[1] There is no evidence that AirTran and Delta agreed to adopt first bag fees, and no evidence that decision-makers at AirTran and Delta communicated with each other about bag fees, either directly or indirectly.

[1] In fact, Plaintiffs have *less* than what they alleged before discovery. Plaintiffs have abandoned their claim that AirTran and Delta conspired to reduce capacity (Consent Order and Stip. at 2 (June 18, 2012) [Dkt. 335]).

Lacking any evidence of an agreement, plaintiffs focus on AirTran's earnings call and Delta's actions thereafter. AirTran's prepared remarks did not mention first bag fees, but an analyst asked an unprompted question whether AirTran intended to charge first bag fees. His question reflected Wall Street's view that first bag fees were an important new source of revenue for airlines facing difficult economic conditions. Fornaro answered that AirTran had "the programming in place to initiate a first bag fee" but "at this point, I think we prefer to be a follower in a situation rather than a leader right now."[2] Those statements had no effect on Delta. Internally, Delta's Revenue Management ("RM") group opposed first bag fees and its Airport Customer Service ("ACS") group favored them, both before and after AirTran's earnings call. Delta documents show that Delta's decision-makers made their decision before AirTran's call.

Even if Delta had considered AirTran's statements, "it is well settled that two competitors may lawfully observe each other's public statements and decisions without running afoul of the antitrust laws." (MTD Opinion at 32). The Supreme Court has held that "[c]onscious parallelism, a common reaction of firms in a concentrated market [that] recognize[e] their shared economic interests and their

[2] EX14, at 5.

interdependence with respect to price and output decisions is not in itself unlawful." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007) (internal quotations omitted). If an antitrust conspiracy could be formed when companies react to public statements of their competitors, then competitors could virtually never make business decisions confident in their compliance with the antitrust laws. Once a company's plans are publicly reported in newspapers, trade press, or SEC filings, a competitor would risk crushing treble damage liability if it makes business decisions about the same subject. Plaintiffs' expert, Dr. Singer, illustrates how extreme Plaintiffs' position is—he opines that once Delta knew of Fornaro's public comment, Delta was prohibited from unbundling first bag fees for some period of time that he cannot define.[3] For good reason, courts have not found actions like those here sufficient to establish a violation of section 1 of the Sherman Act.

Plaintiffs make much of the timing of Delta's bag fee announcement two weeks after AirTran's earning call. But that is a product of the coincidence that AirTran held its earnings call six days before the DOJ announced its approval of Delta's pending merger with Northwest. When Fornaro answered the analyst's

[3] EX96, Singer 11/23/10 Dep. 668:16-24, 674:22-675:8; *see also* EX95, Singer 11/22/10 Dep. 437:25-438:24.

question concerning a potential new source of revenue for AirTran, there is not the slightest evidence he anticipated that the DOJ's announcement about Delta and Northwest was so imminent. And there is nothing suspicious—or pretextual—about Delta's legitimate business decision to harmonize the fee structure of the newly merged airlines.

Far from the product of an agreement, the decisions by AirTran and Delta followed a trend in the airline industry to unbundle the charges for ancillary services. In the months preceding their decisions, all of the other legacy carriers had adopted $15 first bag fees in rapid succession. Indeed, United Airlines and US Airways had announced exactly the same first bag fee on the very same day. Northwest adopted a first bag fee in July. By November 2008, most of the other airlines had adopted first bag fees, yet no one claims that those decisions were anything other than independent. Public disclosures by the other airlines showed that first bag fees were profitable and led to little "share shift" of passengers towards airlines without first bag fees. In short, while Plaintiffs contend that first bag fees were not in the independent economic interests of AirTran and Delta, other airlines facing the same economic conditions independently concluded—and publicly stated—that first bag fees were profitable. The evidence shows that AirTran and Delta independently reached the same conclusion. After years of

discovery, there is no evidence that AirTran and Delta conspired when they, like most of their competitors, adopted first bag fees. Plaintiffs' antitrust claim must be dismissed.

Statement of Facts

A. AirTran and Delta

AirTran is a low-cost airline formerly headquartered in Orlando, FL, with a hub at Hartsfield-Jackson International Airport in Atlanta, Georgia.[4] Delta, one of the world's largest airlines, also has a hub in Atlanta and is headquartered there.[5] Plaintiffs contend that they are each other's largest competitors, but the reality is different. Just over 50% of AirTran passengers flew on routes where Delta was not a significant competitor.[6] While Delta and AirTran both have hubs in Atlanta, Delta also has hubs in New York Kennedy, New York LaGuardia, Cincinnati, Salt Lake City, Los Angeles, Minneapolis, Detroit and Memphis, where it competes with many other airlines.[7] Delta earns about 40% of its revenue from international routes not served by AirTran.[8] In all, less than 5% of Delta's revenue is from

[4] CAC ¶ 14; *see also* AirTran Airways History, *available at* http://www.airtranairways.com/about-us/history.aspx.
[5] CAC ¶ 13.
[6] EX65-A, Gaier Report ¶ 25.
[7] EX82, Hauenstein 9/30/10 Dep. 38:4-41:25; EX27, Dick Report Ex. 13.
[8] EX82, Hauenstein 9/30/10 Dep. 82:16-83:3.

routes where it competes with AirTran.[9] Therefore, while Delta's pricing or fee decisions may be important for AirTran, such decisions by AirTran are far less important for Delta.[10]

B. Widespread Unbundling of Airline Fees for Ancillary Services.

The decisions by AirTran and Delta in 2008 to unbundle first bag fees followed an industry trend that had begun many years before. According to a 2010 report by the Government Accountability Office ("GAO"), charges for ancillary services "have existed in the airline industry for many years."[11] Airlines explained that "they are able to keep fares lower than if fares were inclusive of checked baggage and other services as they had been in the past."[12] In addition, "customers that value the [additional] service can pay for it while customers that do not want to pay for the service don't purchase it."[13] Thus, unbundling offered "a method of generating revenue while maintaining fare-based competition."[14] Not surprisingly,

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[9] EX27, Dick Report Ex. 13b.
[10] EX73, Elledge Dep. 17:9-18, 39:24-41:16 (Delta focused its competitive strategy and analysis primarily on the legacy carriers "comparable in size and scope to Delta" such as "United, American, USAir, [and] Continental" rather than on AirTran or other carriers).
[11] EX29, at 4.
[12] *Id*. at 13.
[13] *Id*.; *see also* EX82, Hauenstein 9/30/10 Dep. 88:12-89:7.
[14] EX29, at 11.

"[l]ike prices for other products and services sold in a competitive market, fees for these unbundled services are also influenced by what competitors charge."[15]

The trend began in approximately 2002. America West began charging a meal fee in January 2003, and over the next several years other airlines began charging unbundled fees for meals, call center booking, airport ticketing, online travel agency booking, curbside check-in, beverages, pillows/blankets, seat choice, and priority boarding. In 2006 and 2007, Allegiant, Spirit, Skybus and Virgin America began charging fees for different numbers of checked bags, including some for first bags.[16]

In 2008, skyrocketing fuel prices and decreased demand for travel led to extraordinary challenges, [17] and Airlines responded by seeking opportunities to cut costs and increase revenues. To cut costs, they reduced capacity by decreasing the number and frequency of flights, which reduced the number of scheduled flights to the lowest levels in nine years.[18] Many airlines sought additional revenues by unbundling the charge for checked bags. In the first few months of 2008,

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[15] *Id*. at 14.
[16] EX27, Dick Report ¶ 49 & Exs. 3, 5, 6.
[17] *See id.* ¶¶ 47-48, 59-61 & Ex. 3; EX30, at 1. The industry as a whole lost $5.8 billion in 2008, including $4.4 billion during the first three quarters. EX30, at 2.
[18] *Id*. at 4.

American, Delta, United, US Airways, Northwest, Continental, Virgin America, Allegiant, and Spirit all announced fees for a second checked bag. AirTran followed in May.[19] No one claims that there was any conspiracy among the airlines to adopt second bag fees.

On May 21, 2008, American was the first legacy carrier to announce a first bag fee.[20] (Spirit and Skybus had begun charging first bag fees in 2007.)[21] American did so even though it faced significant competition at its hubs from airlines that did not charge first bag fees.[22] Three weeks later, on June 12, 2008, United adopted a first bag fee of $15.[23] US Airways matched the very same day with the same $15 fee.[24] Three weeks after that, on July 9, 2008, Northwest followed suit, becoming the fourth legacy carrier to announce a $15 first bag fee.[25] By September 2008, Republic Airways, Continental Airlines, and Frontier Airlines

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[19] EX85, Healy 6/3/10 Dep. 48:11-12; EX27, Dick Report Ex. 6.
[20] EX1.
[21] EX27, Dick Report Ex. 6.
[22] EX27, *Id*. ¶ 70.
[23] EX27, *Id*. Ex. 6; EX45.
[24] EX45.
[25] EX31. By this time, Northwest had agreed to merge with Delta, but the merger was still subject to antitrust review by the Department of Justice. Northwest made its pricing decisions independent of Delta. EX67, Anderson 5/3/12 Dep. 193:19-194:7.

had announced first bag fees.[26] By that time, all of the legacy carriers had adopted a first bag fee, except Delta, even though many faced competition from carriers without the fee at one of their hubs.[27] Notably, no one claims that the other airlines colluded when they all adopted $15 first bag fees.

Because of the economic pressure on the airlines, Wall Street analysts became interested in whether airlines were going to pursue the revenue generated by unbundling first bag fees. Analysts scrutinized airlines' quarterly filings and questioned airlines, including AirTran, during earnings calls about revenue from unbundled charges, such as first bag fees.[28] By the third quarter of 2008, many Wall Street analysts and investors had become critical of airlines, including AirTran, that had not adopted the fees.[29] By October, the airlines that had previously adopted first bag fees publicly reported significant revenues from the fees, with little or no shift of passengers away from airlines charging the fees.[30]

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[26] EX27, Dick Report Ex. 6.
[27] *Id*. ¶ 70.
[28] *See* EX76, Fornaro DOJ Dep. 179:12-20; EX77, Fornaro 11/18/10 Dep. 23:13-16; EX32; EX33, at 13-14; EX34, at 5.
[29] EX77, Fornaro 11/18/10 Dep. 44:3-45:6; EX76, Fornaro DOJ Dep. 195:22-196:4, 202:18-21; EX82, Hauenstein 9/30/10 Dep. 132:6-20.
[30] *See, e.g.*, EX43 (Northwest Airlines): "The airline's—our first and second checked bag fees are performing exceptionally well, and based on the most recent data available the bag fee initiatives are generating an incremental $150 million to

The other airlines with first bag fees faced the same economic pressures as AirTran and Delta—higher fuel prices and declining demand—and by October, all of them reported that first bag fees were profitable.

C. Airtran's October 23, 2008 Earnings Call.

On October 23, 2008, AirTran released its quarterly SEC report and held its earnings call with analysts. Management began with prepared remarks about its financial performance and the reasons it had lost $107 million in the quarter. AirTran's prepared remarks contained no mention of first bag fees.[31] After the prepared remarks, UBS analyst Kevin Crissey asked the first question: "First check bag fee, you don't have one, do you? And will you?"[32] AirTran's CEO Robert Fornaro responded:

> Kevin, good question. Let me tell you what we've done on the first bag fee. We have the programming in place to initiate a first bag fee. And at this point, we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights hasn't done it. And I think, we don't think we want to be in a position to be out there alone with a competitor who we compete on, has two-thirds of our nonstop flights and probably 80 to 90% of our revenue is not doing the same thing. So I'm not saying we won't do it. But at this

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$200 million in additional revenues on an annualized basis."; *see also* EX27, Dick Report ¶¶ 79-82; EX41; EX42.

[31] EX14.

[32] *Id*. at 5.

> point, I think we prefer to be a follower in a situation rather than a leader right now.[33]

Crissey then asked: "But if they [Delta] were, you'd consider it? It's not a matter of practice?"[34] Fornaro responded: "We would strongly consider it, yes."[35] Fornaro testified that he was trying to show investors that AirTran was "on the ball" and had the technology to "act."[36] Fornaro's response to Crissey gave no indications about the amount or timing of a first bag fee that AirTran might consider implementing. Fornaro addressed a question of keen interest to investors with the type of information that SEC regulations and policy strongly encourage companies to provide.[37]

D. AirTran's Decision to Adopt a First Bag Fee.

After American's first bag fee announcement on May 21, 2008, AirTran personnel met a number of times to discuss whether to unbundle first bag fees.[38] Northwest's announcement in July 2008 led to discussions within AirTran about its

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] EX76, Fornaro DOJ Dep. 180:22-181:3.
[37] *See* EX76, Fornaro DOJ Dep. 179:12-20; EX32; EX33, at 15; EX34, at 6-7, 18; 17 C.F.R. § 229.303(a)(3)(ii) (2011); SEC Release 33-6835, 54 Fed. Reg. 22,427 (May 24, 1989); 17 C.F.R. § 229.305(b)(1); SEC Release 33-7881, 65 Fed. Reg. 51,716, 51,723 (Aug. 24, 2000).
[38] EX2; EX3; EX4.

technological capability to charge a first bag fee.[39] AirTran hired a vendor to make the computer programming changes that would be necessary to implement a first bag fee.[40] Fornaro wanted the technology to be completed so AirTran would be able to choose whether to adopt a first bag fee at some point in the future.[41]

Although AirTran was preparing its programming, its executives were reluctant to adopt new fees before other airlines, particularly Delta.[42] AirTran management was concerned that its brand image as a low cost carrier would be harmed if it charged a fee when Delta did not.[43] AirTran executives testified that they would not seriously consider a first bag fee unless Delta initiated one.[44] Thus, although the programming was in place by the time of its October 23 earnings call, AirTran was still undecided whether to adopt first bag fees.[45]

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[39] *See* EX5; EX6; EX7; EX8.
[40] EX87, Klein Dep. 135:13-136:1; EX5; EX7; EX8; EX9.
[41] EX77, Fornaro 11/18/2010 Dep. 55:13-22, 60:23-61:4.
[42] EX87, Klein Dep. 92:1-13; EX76, Fornaro DOJ Dep. 44:21-45:14; EX77, Fornaro 11/18/2010 Dep. 23:17-27:9, 28:1-4, 35:8-14; EX10; EX11; EX12.
[43] EX87, Klein Dep. 91:18-92:13; EX86, Healy 11/19/10 Dep. 37:18-38:5, 88:22-89:22, 115:8-116:11.
[44] EX87, Klein Dep. 92:1-13; EX76, Fornaro DOJ Dep. 44:21-45:14; EX77, Fornaro 11/18/2010 Dep. 26:18-19.
[45] EX77, Fornaro 11/18/2010 Dep. 55:23-56:4; EX86, Healy 11/19/10 Dep. 109:14-110:7, 112:25-113:5, 121:20-122:3; EX72, Cannon Dep. 49:23-50:8.

When the newly merged Delta/Northwest publicly announced its first bag fee on November 5, AirTran had not yet made its decision. Shortly thereafter, Kevin Healy (AirTran's Senior Vice President, Marketing and Planning) forwarded the Delta announcement within AirTran, asking how much "lead time" was needed to implement first bag fees.[46] According to Healy, this email was a "readiness assessment" to determine whether AirTran could move forward with making a decision,[47] and contemporaneous documents confirm that Healy was not yet sure whether AirTran should follow Delta and adopt the fees.[48] After Delta's announcement, AirTran prepared two valuation analyses, which came to similar results. One showed three possible annual revenue estimates from first bag fees: conservative ($63.5 million); high end ($101.4 million); and reasonable ($82.4 million).[49] The author, Matthew Klein, referred to the revenue potential as "staggering," but cautioned that he had not considered the possible share shift AirTran might gain if it did not impose a first bag fee.[50] Although unable to quantify it, Klein speculated that AirTran might earn $3 to $4 million per month in

[46] EX17.
[47] EX84, Healy DOJ Dep. 219:19-21; EX15; EX16; EX17.
[48] EX15; EX16; EX86, Healy 11/19/10 Dep. 124:20-125:1.
[49] EX19.
[50] *Id*.

revenue from additional passengers if it did not charge the fees.[51] Klein's analysis led to a spirited discussion among AirTran management about whether to adopt a first bag fee.[52] Fornaro asked AirTran's senior officers to develop a recommendation.[53]

On November 7, 2008, several AirTran employees met with Healy to discuss whether to adopt a first bag fee, but they continued to disagree.[54] Just after the conference call, the Senior Vice President for Customer Service, a bag fee advocate, sent an email stating, "[W]e are just finishing a 1st bag call, [I] have never seen so many marketing and sales people afraid to charge for a product."[55]

After the November 7 meeting ended, Healy met privately with Klein to review again the logic behind the first bag fee decision.[56] After their meeting, Healy told Klein to "go ahead and start outlining the process of what the fee level would be, when we would do it, when we would publish it, when it would take

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[51] *Id*.
[52] EX20; EX13; EX21; EX22; EX24.
[53] EX76, Fornaro DOJ Dep. 213:4-13; EX81, Haak Dep. 69:22-70:1.
[54] EX23; EX87, Klein Dep. 206:13-20; EX98, Smith DOJ Dep. 128:20-129:13; EX86, Healy 11/19/10 Dep. 122:4-123:11.
[55] EX25; *see also* EX24 EX87, Klein Dep. 206:13-20; EX98, Smith DOJ Dep. 128:20-129:13; EX86, Healy 11/19/10 Dep. 122:4-123:11.
[56] EX86, Healy 11/19/10 Dep. 123:5-7.

effect."[57] Healy then met with Fornaro to tell him that Healy thought AirTran should adopt the fee, and told Fornaro, "let's just get everybody started and we can talk again on Monday."[58] Healy thought that, "much like the space shuttle, at any point before you say go, you can stop the count down" on implementing first bag fees.[59]

The following Monday, November 10, Healy and Fornaro met again and decided to announce a first bag fee.[60] AirTran issued a press release two days later on November 12.[61] It is undisputed that AirTran management did not communicate with anyone from Delta as it made its decision in November 2008.

Early in 2009, AirTran hired a consultant to evaluate whether its decision to adopt a first bag fee had been correct. The analysis compared routes where airlines that had adopted first bag fees competed directly with those that had not. The assessment concluded that first bag fees had in fact led to little or no share shift and recommended that AirTran "continue charging the $15 fee."[62]

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[57] *Id*. at 123:7-11, 124:17-18; *see also* EX84, Healy DOJ Dep. 233:4-9.
[58] EX86, Healy 11/19/10 Dep. 126:4-6; EX77, Fornaro 11/18/10 Dep. 85:21-86:17.
[59] EX86, Healy 11/19/10 Dep. 124:21-125:2; *see also* EX84, Healy DOJ Dep. 233:4-9.
[60] *See* EX77, Fornaro 11/18/10 Dep. 85:25-86:17.
[61] EX26.
[62] EX42, at 9-10.

E. Delta's Decision to Adopt a First Bag Fee.

Discovery shows that Delta established a "fee team" in early 2008 to review all of Delta's fees, including baggage fees, and to determine whether adjustments should be made.[63] According to Richard Anderson (Delta's CEO), "there was a lot of debate" among Delta's management about whether to implement a first bag fee.[64] The ACS group favored a first bag fee because Delta had successfully implemented second bag fees, and the revenue from first bag fees would be credited to the ACS budget.[65] ACS supported first bag fees before AirTran's October 23 earnings call, as reflected in its September 29, 2008 proposed budget for the December quarter of 2008, and continued to support them afterward.[66]

On the other side, Delta's RM group opposed first bag fees. They were concerned that the fee could result in customer dissatisfaction and an unfavorable share shift away from Delta.[67] They preferred increasing base fares rather than

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[63] EX68, Bastian DOJ Dep. 38:25-39:24, 40:6-42:5; EX66, Anderson 10/6/10 Dep. 47:12-48:24.
[64] EX66, Anderson 10/6/10 Dep. 47:19.
[65] *Id.* at 47:19-48:24; EX83, Hauenstein 5/10/12 Dep. 20:23-22:2; EX82, Hauenstein 9/30/10 Dep. 53:19-22, 62:19-63:6, 99:6-101:5.
[66] EX48; EX100, West 5/11/12 Dep. 76:6-14; EX78, Gorman 12/10/10 Dep. 20:5-22:6, 41:7-43:22, 68:14-69:9; EX80, Grimmett Dep. 106:25-107:11.
[67] EX66, Anderson 10/6/10 Dep. 47:19-48:24; EX83, Hauenstein 5/10/12 Dep. 20:23-22:2; EX82, Hauenstein 9/30/10 Dep. 62:19-63:11, 99:6-101:5; EX80, Grimmet Dep. 102:10-20.

adding fees.[68] RM opposed first bag fees before AirTran's October 23 earnings call, and continued to oppose them after the call.[69]

Delta's CEO Anderson originally felt that checking a first bag was part of the bargain included in the ticket price.[70] Steve Gorman (Delta's then-Executive Vice President of Operations) and Anderson agreed not to initiate a first bag fee during the peak summer travel season because of potential operational challenges, along with their belief that the fees could upset Delta customers.[71] Delta decided to monitor other airlines and reevaluate its position at the end of the summer.[72]

The executive decision-makers at Delta changed their views as other airlines reported the profitability of first bag fees. By late September 2008, Anderson was persuaded by other airlines' experience that the fees would be profitable for Delta.[73] On Friday, September 26, 2008, he, along with Bastian, Hauenstein, Gorman and other Delta senior managers received a draft budget that contained

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[68] EX50.
[69] EX82, Hauenstein 9/30/10 Dep. 99:20-101:5, 118:5-11, 123:3-19.
[70] EX66, Anderson 10/6/10 Dep. 42:24-43:3.
[71] EX44; EX67, Anderson 5/3/12 Dep. 161:2-22.
[72] EX66, Anderson 10/6/10 Dep. 51:10-25, 66:11-17; EX67, Anderson 5/3/12 Dep. 161:2-13; EX56, at 4; EX57, at 3.
[73] EX66, Anderson 10/6/10 Dep. 66:18-68:1; EX67, Anderson 5/3/12 Dep. 226:22-227:16.

ACS's formal recommendation to begin charging first bag fees.[74] This was to be discussed at Delta's Corporate Leadership Team ("CLT") meeting on the following Monday.[75] On Sunday afternoon, Anderson emailed Bastian (only): "We need to think about implementing the [first bag] fee post merger. A lot of revenue involved."[76] Bastian replied: "Think we prob should do but as part of integrating two companies. Glen has different thoughts so should have disc at right time," to which Anderson replied, "Agree."[77]

Delta had planned to harmonize the divergent fee structures of Delta and Northwest promptly after the merger closed. On October 21, Gil West (ACS), who was leading the fee integration along with Gail Grimmett (RM), emailed Anderson statingthat "Gail and I have coordinated the post closing fee structure. The one loose end is the first bag fee. Gail has been analyzing the impact the first bag fee would have on [passenger] revenue. We'll set up a review with you."[78] Anderson forwarded the email to Gorman (but not Hauenstein) the next day (but still before

[74] EX48; EX79, Gorman 5/10/12 Dep. 89:20-92:2; EX58, at 10.
[75] EX47.
[76] *Id.*
[77] *Id.*
[78] EX49.

AirTran's earnings call), saying only "We need to do it." Gorman responded, "It is on Monday CLT agenda."[79]

Thus, while Delta executives were aware of AirTran's October 23 earnings call, Fornaro's remarks did not play into Delta's decision. Delta's leadership had "effectively decided" before Fornaro's remarks that the airline "needed to impose the first bag fee," and to implement the fee upon merging with Northwest.[80]

Delta's practice, however, was for management "to prepare advocacy pieces and debate hard" about company decisions.[81] Delta's RM team created a Value Proposition presentation to advocate against first bag fees.[82] The presentation estimated the financial impact at different levels of potential share shift, along with the probability that different airlines at each hub would match Delta's fees.[83] In an early version, AirTran's "[p]robability to [m]atch" was "50%."[84] This number was

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[79] *Id*.
[80] EX67, Anderson 5/3/12 Dep. 207:5-208:7, 215:2-11 ("I had no understanding [about whether AirTran wanted to charge a first bag fee], and it wasn't relevant anyway because Ed and I had already decided that we were going to have a … first bag fee at [post-merger] Delta."); EX47.
[81] EX66, Anderson 10/6/10 Dep. 47:25-48:2.
[82] *Id*. at 56:16-20; EX90, Phillips 5/17/12 Dep. 21:5-8; EX54.
[83] *E.g*., EX52; EX53, at 4; EX54.
[84] EX52, at 7.

"a coin toss" because Delta "had no idea" what AirTran would do.[85] Based on its assumptions, the presentation concluded that the "[t]otal revenue impact of first bag fee [is] most likely negative," and recommended against a first bag fee.[86]

The RM group revised AirTran's "probability to match" Delta's first bag fees upward after AirTran's October 23 earnings call, [87] which made the estimated revenue impact slightly positive. [88] However, the RM team still recommended against first bag fees.[89]

Delta's CLT met on October 27, 2008 and discussed the first bag fee decision. During this meeting the RM team gave its Value Proposition presentation.[90] However, Delta's leadership did not discuss Fornaro's earnings call statement or AirTran's probable reaction, and did not believe that reaction to be material.[91] Anderson, Bastian, and Gorman all spoke in favor of the first bag fee

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[85] EX82, Hauenstein 9/30/10 Dep. 104:9-24.
[86] EX52, at 15-16.
[87] EX53, at 4; EX54, at 4; EX89, Phillips 12/7/10 Dep. 20:22-21:1; EX82, Hauenstein 9/30/10 Dep. 120:23-121:22, 124:23-125:15.
[88] EX54, at 16, 19.
[89] EX90, Phillips 5/17/12 Dep. 29:14-22; EX82, Hauenstein 9/30/10 Dep. 130:10-25; EX54, at 19.
[90] EX66, Anderson 10/6/10 Dep. 56:21-23; EX69, Bastian 9/17/10 Dep. 43:17-22.
[91] EX66, Anderson 10/6/10 Dep. 68:5-15, 70:6-8, 94:13-14, 104:7-105:5; EX67, Anderson 5/3/12 Dep. 230:8-12; EX68, Bastian DOJ Dep. 77:6-15; EX69, Bastian 9/17/10 Dep. 89:15-17, 105:3-5; EX99, West DOJ Dep. 185:9-186:4.

for revenue reasons. For example, Anderson highlighted that the fee would be worth several hundred million dollars to the combined Delta-Northwest entity;[92] Bastian pointed out investors would be "outraged" if Delta gave up the expected revenue;[93] and Gorman testified that "[t]here wasn't anything [Revenue Management] was going to have in [the Value Proposition presentations] that would change [his] view" in favor of adopting a first bag fee.[94] The Delta leadership also confirmed they would not implement the first bag fee until after the merger when they harmonized all the Delta and Northwest fees.[95]

The DOJ cleared the Delta/Northwest merger on October 29, 2008.[96] Shortly thereafter, Delta held its first post-merger CLT meeting with the Northwest executives.[97] Northwest informed Delta that there had been little or no share shift from first bag fees, and the combined entity risked losing about $200 million if

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[92] *See* EX55.
[93] EX69, Bastian 9/17/10 Dep. 47:17-48:5; EX82, Hauenstein 9/30/10 Dep. 132:6-20.
[94] EX78, Gorman 12/10/10 Dep. 78:13-14; *see also id.* at 61:8-15; EX82, Hauenstein 9/30/10 Dep. 131:25-132:1.
[95] EX66, Anderson 10/6/10 Dep. 60:2-61:5; *see also* EX88, Phillips DOJ Dep. 238:15-239:4.
[96] EX66, Anderson 10/6/10 Dep. 85:15-17.
[97] EX88, Phillips DOJ Dep. 354:3-355:4, 368:5-9; EX66, Anderson 10/6/10 Dep. 90:2-4.

first bag fees were terminated.[98] Northwest's experience confirmed the views that Delta's decision-makers already held.[99] As a result, the CLT formalized the decision to unify the fee schedules for Delta and Northwest, including adoption of a first bag fee.[100] On November 5, 2008, Delta announced it would charge $15 for the first checked bag.[101] Delta's management did not communicate with anyone from AirTran, directly or indirectly, during its decision-making.

F. The Absence of "Private Communications" Between AirTran and Delta Decision-Makers.

Unable otherwise to prove an agreement, Plaintiffs and their expert refer vaguely to "[p]rivate [c]ommunications" between AirTran and Delta concerning first bag fees.[102] Plaintiffs' expert described them as "pivotal" to his opinion that there was a conspiracy.[103] The so-called "[p]rivate [c]ommunications" initially were attributed to high level joint efforts with respect to the Atlanta airport. (See, e.g. Complaint ¶ 31.) But this contention was contradicted by the facts and

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[98] EX43; EX51; EX69, Bastian 9/17/10 Dep. 46:17-47:3; EX66, Anderson 10/6/10 Dep. 62:4-8.
[99] EX66, Anderson 10/6/10 Dep. 66:11-17, 91:18-92:10; EX69, Bastian 9/17/10 Dep. 46:17-47:22; EX82, Hauenstein 9/30/10 Dep. 132:6-20.
[100] EX66, Anderson 10/6/10 Dep. 60:25-61:5, 90:2-11; *see also* EX59.
[101] EX60.
[102] EX46, Singer Am. Merits Report at 55.
[103] EX46-A, Singer Am. Merits Rebuttal Report at ¶ 44.

abandoned. Plaintiffs now rely on efforts by Scott Fasano (AirTran's Director of Customer Service Standards) to contact Delta over the span of a few days in July and August 2008. Fasano's contacts were inconsequential. Neither Fasano or anyone he contacted had any decision making authority over first bag fees, the contacts ended several months before AirTran and Delta made their decisions, and Delta's executive decision-makers never learned of those contacts.[104]

Fasano was responsible for policies and procedures for baggage handling, system baggage service, and customer service and group operations and had no responsibility for pricing decisions.[105] In late July 2008, Fasano emailed Gerry Boeckhaus and Amanda Burman (neither of whom had any responsibility for first bag fee decisions), asking when Delta was going to adopt first bag fees.[106] Unbeknownst to Fasano, both had left Delta and never received Fasano's emails.[107]

Fasano also said he communicated with three Delta station managers in July 2008. Station managers are responsible for supervising the airline's local

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[104] EX82, Hauenstein Dep. 105:22-25; EX69, Bastian 9/17/10 Dep. 136:23-137:13.
[105] EX75, Fasano Dep. 18:6-9; EX74, Fasano DOJ Dep. 28:7-11.
[106] EX75, Fasano Dep. 128:11-130:4, 133:13-135:17; EX74, Fasano DOJ Dep. 61:4-65:12; EX62; EX63.
[107] EX70, Boeckhaus Dep. 21:24-22:5, 42:8-45:22, 47:6-11; EX74, Fasano DOJ Dep. 62:15-22, 65:1-12; EX71, Burman Dep. 8:16-17; EX61.

operations at an airport, but play no role in setting prices or fees.[108] In one communication, Fasano emailed with Kathy Terryberry, AirTran's station manager in Buffalo.[109] Terryberry relayed a conversation she had with a manager at Comair, Delta's regional carrier. She asked the Comair manager, "[Y]ou'll probably charge for the first bag here soon, right?" The manager responded: "No-No we consider it included in the price."[110] Fasano also said he called Mike Rossano, the Delta station manager in Miami.[111] According to Fasano, Rossano stated that airlines were all watching each other concerning "fares, capacity, cuts, flight reductions, new cities, bag fees, the whole gamut."[112] Rossano recalled no discussion of bag fees.[113] Fasano also said he spoke to Mike Ringler, the Delta station manager in Knoxville, Tennessee, in late July 2008.[114] Ringler denied having the conversation.[115] Fasano said they "generally" discussed bag fees, and

[108] *See, e.g.*, EX92, Ringler Dep. 9:9-11:3, 64:12-65:1; EX93, Rossano Dep. 16:6-12, 22:16-21, 25:6-16.
[109] EX65.
[110] *Id*.
[111] EX75, Fasano Dep. 98:5-19; EX93, Rossano Dep. 12:15-21.
[112] EX74, Fasano DOJ Dep. 47:19-49:2.
[113] EX93, Rossano Dep. 76:13-80:13.
[114] EX75, Fasano Dep. 109:9-110:5, 111:3-112:2.
[115] EX92, Ringler Dep. 58:12-59:12.

Ringler stated that airlines were "looking out [sic] what the other guy's doing, again, fares, capacity, the impact of fuel, those types of things."[116]

A few days later, Fasano said that he had a "cup of coffee" with a former colleague from Delta "who is still embedded in the team amongst the Northwest crew."[117] Fasano was referring to Mike Rary, an employee of a *vendor* for *Northwest* called BAGS, Inc. He also spoke to Craig Mateer, the owner of BAGS, Inc.[118] Rary does not recall any conversation with Fasano, and neither he nor Mateer were in any position to know Delta's plans.[119] Upon learning of Fasano's claimed "cup of coffee" contact, on August 5, Healy "immediately" reprimanded Fasano.[120] "In no uncertain terms … [Healy] made it very clear that [he] can't do this."[121] Fasano had no further communications with anyone from Delta.[122]

Argument

I. THE STANDARD FOR GRANTING SUMMARY JUDGMENT.

Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

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[116] EX74, Fasano DOJ Dep. 49:14-16.
[117] EX64.
[118] EX75, Fasano Dep. 124:5-15, 125:3-6.
[119] EX91, Rary Dep. 55:15-17, 77:8-79:15, 80:9-11, 99:17-100:3.
[120] EX84, Healy DOJ Dep. 187:5-22.
[121] *Id*. at 187:14-18; EX75, Fasano Dep. 161:14-163:15.
[122] EX75, Fasano Dep. 162:22-163:12.

Civ. P. 56(a); *see also Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 607 F.3d 742, 745 (11th Cir. 2010). A court must grant summary judgment "when there is 'a complete failure of proof concerning an essential element of the nonmoving party's case.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The moving party "bears the burden of identifying 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (quoting *Celotex*, 477 U.S. at 323). The movant may carry this burden by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.[123]

Plaintiffs' sole remaining claim is for price fixing under Section 1 of the Sherman Act, which prohibits a "contract, combination … or conspiracy, in

[123] In antitrust cases, "summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003) (affirming grant of summary judgment); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101,104 (2d Cir. 2002) (per curiam) (affirming grant of summary judgment).

restraint of trade or commerce." 15 U.S.C. § 1.[124] For Section 1 claims, "[i]t is fundamental that a plaintiff establish an *agreement* between two or more persons to restrain trade; unilateral conduct is not prohibited." *Aquatherm Indus. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). "'To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) (quoting *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991)). "Although this meeting of the minds need not be formal, it must transpire." *Williamson Oil*, 346 F.3d at 1299 n.10.

To prove agreement, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove… "a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney*

[124] Plaintiffs have abandoned their claim that AirTran and Delta conspired to reduce capacity, Consent Order and Stip. at 2 (June 18, 2012) [Dkt. 335], and therefore that claim should be dismissed with prejudice.

& Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)).[125] "[D]irect evidence must be 'explicit and requires no inferences to establish the proposition or conclusion being asserted.'" *Holiday Wholesale Grocery Co. v. Philip Morris Cos.*, 231 F. Supp. 2d 1253, 1273 (N.D. Ga. 2002) (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)).

Because they have no direct evidence of conspiracy, plaintiffs try to prove an agreement solely with circumstantial evidence. The Eleventh Circuit has cautioned that "such evidence is by its nature ambiguous." *Williamson Oil*, 346 F.3d at 1300. Courts "have become attuned to the economic costs associated with using circumstantial evidence to distinguish between altogether lawful, independent, consciously parallel decision-making within an oligopoly on the one hand, and illegal, collusive price fixing on the other." *Id.* The "Supreme Court has required that inferences of a price fixing conspiracy drawn from circumstantial evidence be reasonable." *Id.* Antitrust law "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "Evidence that does not support

[125] To have an agreement there must be evidence that one party "sought" an agreement and that the other party "communicated its acquiescence." It is insufficient to show that a party merely suggested a price and the other party charged that price. *Monsanto*, 465 U.S. at 764 n.9.

the existence of a price fixing conspiracy any more strongly than it supports conscious parallelism is insufficient to survive a defendant's summary judgment motion." *Williamson Oil*, 346 F.3d at 1300. In circumstantial evidence cases, the Eleventh Circuit has articulated a three-step approach for summary judgment:

- 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 tend to exclude the possibility that the alleged conspirators acted independently.
- 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.

Williamson Oil, 346 F.3d at 1301. The plaintiffs' evidence, taken as a whole, must tend to "'exclude the possibility that the alleged conspirators acted independently.'" *Id.* at 1300 (quoting *Matsushita*, 475 U.S. at 587-88).

II. THE CONTEMPERANEOUS FIRST BAG FEE DECISIONS OF AIRTRAN AND DELTA DO NOT ESTABLISH COLLUSION.

There is no direct evidence of a price fixing agreement nor is there a "pattern" of parallel conduct as required by the first step of the *Williamson* analysis in the absence of such direct evidence. *Id.* at 1301. When all reasonable inferences are drawn in plaintiffs' favor, the evidence shows at most that AirTran

and Delta each made a decision in their own economic interest while aware of the actions and public pronouncements of each other and of other airlines.

Mere parallel actions are insufficient to establish a conspiracy as a matter of law. In its Order on the Motion to Dismiss, this Court said that "it is well settled that two competitors may lawfully observe each other's public statements and decisions without running afoul of the antitrust laws." (MTD Opinion at 32.) "Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might … [set] their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group v. Brown & Williamson*, 509 U.S. 209, 227 (1993); *see also Williamson Oil*, 346 F.3d at 1299; *Harcros*, 158 F.3d at 570. Both the Supreme Court and the Eleventh Circuit have recognized that "oligopolies… often feature coordinated pricing and related behaviors" and that "the distinctive characteristic of oligopoly is recognized interdependence among the leading firms: the profit-maximizing choice of price and output for one depends on the choices made by others." *Williamson Oil*, 346 F.3d at 1299 (internal quotations omitted); *Brooke Group*, 509 U.S. at 227.

For example, in *Williamson Oil*, the Eleventh Circuit affirmed summary judgment despite evidence that major tobacco competitors followed each other's public price announcements to increase prices twelve times. *Williamson Oil*, 346 F.3d at 1294. The competitors maintained a reduced spread between premium and discount prices established by Philip Morris because they feared that Philip Morris would respond by lowering the price of discount cigarettes if competitors tried to increase that spread. *Id*. at 1307. The Eleventh Circuit explained that reacting to and anticipating the reaction of competitors was consistent with competitors' independent decision-making: "The only viable way for RJR and B&W to increase their revenues was to raise prices in a manner that would not provoke a competitive response from PM [Philip Morris], which is precisely the action that the class labels a signal of conspiracy. Put simply, this action is no more indicative of collusion than it is of lawful, rational pricing behavior." *Id.* at 1307.[126]

[126] Courts have held repeatedly that responses to competitors' announcements do not establish collusion. *See, e.g.*, *Baby Food*, 166 F.3d at 126-27 (concluding that a defendant's reluctance to enter competitors' markets was not due to a "truce" as plaintiffs alleged, but because that defendant exercised its independent business judgment to avoid a price war with major competitors); *In re Citric Acid Litig.*, 191 F.3d 1090, 1100-01 (9th Cir. 1999) (competitors' decisions not to expand capacity in order to avoid a price war were in their self-interest and reflected independent business judgments); *Blomkest Fertilizer v. Potash Corp.*, 203 F.3d 1028, 1034-35 (8th Cir. 2000) (en banc); *see also In re Immucor, Inc. Sec. Litig.*,

The degree of parallel behavior in this case is far less than that found insufficient in *Williamson Oil.* Having abandoned their claim of a pattern of coordination that included capacity,[127] plaintiffs are now left with a single instance of parallel conduct – AirTran and Delta each made one decision to adopt the $15 first bag fee. That parallel conduct ended in July 2009, when they began charging different amounts for first bag fees.[128] Plaintiffs cannot meet even the first prong of the *Williamson* test.

Plaintiffs' evidence shows no more than a single parallel decision by each competitor while aware of the actions and public pronouncements of each other and of other airlines. AirTran decided that it would not consider first bag fees unless Delta adopted them for two reasons: first, Delta competed on most of AirTran's routes; and second, AirTran did not want to bear the brunt of anticipated negative publicity, or undermine its brand image as a low cost carrier, by charging

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No. 09-CV-2351-TWT, 2011 WL 2619092, at *5 (N.D. Ga. June 30, 2011) (raising prices by the same amount as the major competitor soon after the competitors' pricing announcement and receiving the competitors' unpublished price list "at most amounts to conscious parallelism").

[127] *See, e.g.*, Consent Order and Stip. at 2 (June 18, 2012) [Dkt. 335].

[128] EX27, at Ex. 6.

fees that legacy carrier Delta did not.[129] After Delta announced first bag fees, AirTran knew that it must act quickly, if at all, if it were to avoid a separate round of negative publicity.[130] AirTran performed two financial analyses, both concluding that the revenue potential would be "staggering."[131] AirTran estimated that the revenues from first bag fees would greatly exceed the revenues it might earn from Delta customers shifting to an AirTran without a first bag fee.[132] Likewise, Delta's senior management concluded that first bag fees would generate significant revenues without meaningful loss of passenger traffic.[133] Some, but not all, factions within Delta considered AirTran's possible response in assessing possible revenue diversion, but that factor ultimately made no difference to the conclusions drawn by any of them.[134]

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[129] EX87, Klein Dep. 91:18-92:13, 136:3-137:1; EX86, Healy 11/19/10 Dep. 37:18-38:24, 88:22-90:22, 115:8-116:11.
[130] EX86, Healy 11/19/10 Dep. 124:8-125:2; EX76, Fornaro DOJ Dep. 213:20-214:18, 217:10-218:7.
[131] EX19; *see also* EX87, Klein Dep. 208:11-17; EX24.
[132] EX19; EX87, Klein Dep. 208:11-17.
[133] EX51; EX66, Anderson 10/6/10 Dep. 91:18-92:10; EX69, Bastian 9/17/10 Dep. 46:17-47:8; EX82, Hauenstein 9/30/10 Dep. 132:6-20.
[134] EX66, Anderson 10/6/10 Dep. 68:5-15, 69:23-70:8, 94:13-14, 104:7-105:5; EX67, Anderson 5/3/12 Dep. 230:8-12; EX68, Bastian DOJ Dep. 77:6-15; EX82, Hauenstein 9/30/10 Dep. 127:8-12, 133:17-134:13; EX99, West DOJ Dep. 185:9-186:4; s*ee also* EX69, Bastian 9/17/10 Dep. 89:15-17, 105:3-5.

The decisions of AirTran and Delta were rational for independent actors in the airline industry. Airlines had been unbundling charges for years, and most other airlines adopted first bag fees months before Delta and AirTran.[135] The profitability of first bag fees was confirmed by the other airlines' public statements before AirTran and Delta made their decisions.[136] It is economically sensible and entirely lawful for firms to make profit-maximizing decisions that consider the past and predicted actions of their competitors. *Brooke Group*, 509 U.S. at 227; *Williamson Oil*, 346 F.3d at 1307.

III. THERE IS NO "PLUS FACTOR" EVIDENCE THAT WOULD TEND TO EXCLUDE THE POSSIBILITY THAT AIRTRAN AND DELTA ACTED INDEPENDENTLY.

Because there is no direct evidence of agreement, plaintiffs try to draw inferences from circumstantial evidence and expert speculation. Even if Plaintiffs could meet the first step of the *Williamson* test and prove a pattern of parallel conduct (which they cannot), they must also be able to prove the existence of "plus factors" that "remove their evidence from the realm of equipoise and render that

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[135] *See supra* at 7-9.

[136] *See* EX27, Dick Report ¶¶ 78-81; EX41, at 3; EX42, at 3; EX43, at 3; *see also* EX42, at 9-10 (2009 study prepared for AirTran recommending that it continue to have first bag fees because there was no measurable share shift to airlines without the fees).

evidence more probative of conspiracy than of conscious parallelism." *Williamson Oil*, 346 F.3d at 1301.

> [It] is well settled in this circuit that evidence of conscious parallelism [alone] does not permit an inference of conspiracy unless the plaintiff [either] establishes that . . . each defendant engaging in the parallel action acted contrary to its economic self-interest or offers other 'plus factors' tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.

Harcros, 158 F.2d at 570-71 (internal quotations and citation omitted); *see also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). "Plus factors" are not a substitute for the agreement that plaintiffs must prove; rather, they are an analytical tool to assess whether the plaintiffs can prove that there was an actual agreement. Thus, even in a case where a clear pattern of parallel pricing exists, the plus factor evidence must tend to exclude the possibility that the alleged conspirators acted independently. *Williamson Oil*, 346 F.3d at 1301-04; *Citric Acid*, 191 F.3d at 1096-97; *see also* MTD Opinion at 23 & n.8.

Evidence cannot be considered as a "plus factor" proving a conspiracy if it requires the jury to speculate and make its finding a "guess or mere possibility;" if the jury would have to engage in "fallacious reasoning;" or if plaintiffs' theory is "economically senseless." *Williamson Oil*, 346 F.3d at 1302. Even if plaintiffs submit sufficient plus factor evidence, defendants may rebut the inference of

collusion by presenting evidence showing that no reasonable jury could conclude there was an agreement. *Williamson Oil*, 346 F.3d at 1301; *Todorov*, 921 F.2d at 1456 n.30. Plaintiffs rely on several plus factors, but none are probative.

A. Price Signaling

Plaintiffs' Section 1 claim rests primarily on their contention that AirTran signaled Delta about first bag fees. Courts have rarely found antitrust liability based on signaling, even in combination with other plus factors. *See, e.g.*, *Williamson Oil*, 346 F.3d at 1294, 1305-10 (rejecting claims of collusion through price signaling where competitors announced prices and had eleven parallel price increases); *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003) (granting summary judgment over claims that airlines had engaged in price signaling through interviews in the trade press). That is because the public "dissemination of price information is not in itself a *per se* violation of the Sherman Act." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975). A legitimate business rationale for communicating prices is an effective defense to an allegation of signaling. *See, e.g., Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1169 (6th Cir. 1995) (banks had a legitimate reasons to publicize bounced check fees to potential and actual customers).

Plaintiffs rely primarily on Fornaro's answer to an analyst's unprompted question during the October 23, 2008 earnings call. When the analyst asked if AirTran would adopt a first bag fee, Fornaro said that AirTran had the technology ready but that, "I think we prefer to be a follower in a situation rather than a leader right now" and that AirTran would "strongly consider" a bag fee"[137] Plaintiffs contend this statement was an invitation to Delta to collude, but the evidence proves otherwise. This Court said in its Opinion on AirTran's Motion to Dismiss that "the fact that some of the alleged collusive communications came in response to questions may weaken the probative value of those statements." (MTD Opinion at 31.) Fornaro's response was not part of his prepared remarks. He had no idea what was going on within Delta and no intention of signaling Delta. Delta did not respond to AirTran, and those at Delta interested in AirTran's possible response were still guessing about the probability that AirTran would follow Delta.[138] *See Hall*, 296 F. Supp. 2d at 672 (granting summary judgment where "defendants

[137] EX14, at 5.

[138] *Id*. at 1-4 (AirTran's prepared remarks contained no mention of first bag fees); EX76, Fornaro DOJ Dep. 172:12-14, 180:22-181:3, 196:19-197:1, 202:14-15; EX84, Healy DOJ Dep. 211:7-10, 217:6-7, 13-15; EX67, Anderson 5/3/12 Dep. 207:5-208:7, 215:2-11; EX68, Bastian DOJ Dep. 51:24-52:2 ("Q. At the time did you perceive it as something that was directed at Delta? A. No, I thought he was answering a question."); EX82, Hauenstein 9/30/10 Dep. 104:9-24, 125:9-10; EX53; EX54.

neither intended to communicate anything specific to their competitors nor did they interpret such articles to be specific communications by their competitors").

Fornaro had legitimate reasons to answer the analyst's question, which undermines any claim of signaling. *Wallace*, 55 F.3d at 1169-70. He was responding to a question of keen interest to investors—whether airlines would pursue a potential source of additional revenue.[139] In the brief moment he had to form an answer, he wanted to comfort investors that AirTran was proactively managed (in spite of $107 million in losses it was announcing) and had developed the technical capability to implement a bag fee if it so chose, while explaining why it had not so far.[140] SEC regulations require companies to disclose material information in their SEC filings, including "known trends" that may have a material effect on "net sales or revenues," 17 C.F.R. § 229.303(a)(3)(ii) (2011), forward-looking information "reasonably likely to have a material effect" on the company's financial condition, SEC Release 33-6835, 54 Fed. Reg. 22,427 (May 24, 1989), and risk exposures and the "strategies" to "manage those exposures." 17 C.F.R. § 229.305(b)(1). The SEC encourages public companies to have earnings calls to provide additional commentary to investors. SEC Release

[139] *See* EX76, Fornaro DOJ Dep. 179:12-20; EX32; EX33; EX34, at 6-7, 18.
[140] EX76, Fornaro DOJ Dep. 180:22-181:20; EX14, at 5.

33-7881, 65 Fed. Reg. 51,716, 51,723 (Aug. 24, 2000). Fornaro was providing the type of disclosures that SEC regulations and policy strongly promote.

Further, Fornaro provided only general information. He said that AirTran would not make any decision until a major competitor acted, a statement that was self evident from AirTran's actions before October 23 and necessary for a small low cost carrier concerned with protecting its brand image against a legacy network competitor. Such public statements are insufficient to establish collusion. *Brooke Group*, 509 U.S. at 227; *Williamson Oil*, 346 F.3d at 1309. Fornaro did not say that AirTran would adopt a first bag fee if Delta did, only that it would "strongly consider it."[141] Companies commonly give the non-committal answer that they are "considering" options, and Fornaro's addition of the single word "strongly" to his spontaneous answer hardly converts a legitimate public disclosure into an invitation. His answer was truthful, as shown by AirTran's financial analyses and internal deliberations after Delta's announcement.[142] He gave no indications about the amount or timing of a first bag fee, nor could he because those decisions had not been made.

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[141] EX14, at 5.

[142] *See supra* notes 44-58 and accompanying text.

But even if, in spite of the legitimate reasons for answering the analyst as he did, Mr. Fornaro's answer were construed as an invitation to Delta, it would not be enough to establish a Sherman Act agreement. Delta never responded to Mr. Fornaro, either publicly or privately, and a one-sided conversation is outside the reach of section 1. *Monsanto*, 465 U.S. at 764 n.9 (To have an agreement there must be evidence that one party "sought" an agreement and that the other party "communicated its acquiescence." It is insufficient to show that a party merely suggested a price and the other party charged that price.)

Courts have rejected efforts to prove collusion in the face of significantly more numerous, direct and multi-party public statements by competitors. Before affirming summary judgment for the defendants in *Williamson Oil*, the Eleventh Circuit carefully examined each of several public statements made by the major tobacco companies to the trade press and at analysts' meetings regarding their future pricing strategies. The plaintiffs alleged that these public statements, both individually and together, tended to establish collusion. The court parsed each statement and concluded that they did not constitute an impermissible public dialog about future pricing, and did not "tend to establish that a price fixing conspiracy was afoot." 346 F.3d at 1310. "Because none of appellees' largely ambiguous statements and actions come close to meeting the mark, it is unhelpful to the class

to consider those actions in concert." *Id.*[143] While *Williamson Oil* involved multiple, forward-looking public statements by several competitors with clear expressions of their pricing strategies, here there is only one ambiguous comment that cannot reasonably be characterized as a public dialogue.[144]

Moreover, Delta decision making was not affected by AirTran's earnings call and, regardless, the antitrust laws would not have prohibited Delta from considering Fornaro's statements. Having heard AirTran's statement, Delta was not "thereby immobilized and precluded from acting in a normal fashion as its interests might dictate." *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963); *see also United States v. Gen. Motors Corp.*, No. 38219, 1974 WL 926, at *21 (E.D. Mich. Sept. 26, 1974) ("The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an

[143] *See also Hall*, 296 F. Supp. 2d 652 (granting summary judgment to airlines for statements in trade press interviews).

[144] For example, Philip Morris publicly announced that it would "forgo any further price increases on premium brands for the foreseeable future." 346 F.3d at 1306. B&W stated that his company "may be one of those who started the price war in the U.S., but we have no wish to escalate it." *Id.* at 1307. Other public statements included: (1) a statement to stock analysts that "our company fully intends to pursue options other than price for our [discount] brands," (2) a statement on an earnings call that the company was "willing to accept modest market share losses as the cost of improving earnings," and (3) a statement that "[w]e plan no increases in 1995 . . . If the competitive environment changes significantly, however, we will respond immediately and appropriately." *Id.* at 1308-09, 1312 n.15.

economic reality to which all other competitors must react."); *see also Monsanto*, 465 U.S. at 764 n.9 (to prove an agreement, one party must "have sought" the agreement and the other must have "communicated its acquiescence.")

B. No Actions Taken Against Economic Self-Interest.

Plaintiffs also argue that AirTran and Delta acted against their individual economic interests when they adopted first bag fees. The Eleventh Circuit has cautioned that "we must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil*, 346 F.3d at 1310; *see also Citric Acid*, 191 F.3d at 1101 ("business judgments should be not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute"). Accordingly, courts have been careful to draw such conclusions, and have done so where the defendants made decisions that were clearly less profitable than other available alternatives, and there was significant additional evidence of collusion. *E.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) (defendants purchased corn syrup from one another when they could manufacture their own at a lower cost, witnesses exercised their Fifth Amendment rights, and there was other evidence of collusion).

There is no question that AirTran initiated first bag fees in its own economic interest. Delta had publicly announced its fee, so AirTran only had to consider whether matching or not matching Delta's action would be more profitable. AirTran's pricing director, Matt Klein, performed a financial analysis estimating additional revenues from first bag fees as $63.5 to $101.4 million.[145] Klein also estimated the share shift could be $3 to $4 million a month, significantly less than predicted revenues from bag fees.[146] Moreover, Healy found no evidence in the public traffic data of Southwest and other carriers that they were obtaining a share advantage from not having bag fees.[147] AirTran reached the reasonable business judgment that it would earn more revenues with first bag fees than without. Its judgment was confirmed by a consultant a few months later who found no measurable share shift to airlines without the fees and recommended that AirTran continue to charge them.[148]

Likewise, Delta determined that first bag fees were in its economic interest without regard to what AirTran would do in response. After seeing the experience

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[145] EX19. Jason Bewley, who worked for CFO Arne Haak, prepared a similar analysis estimating revenues of $94 to $145 million. *See* EX24.
[146] EX19.
[147] EX86, Healy 11/19/10 Dep. 87:15-21, 111:19-112:14, 123:18-23.
[148] EX42, at 9-10.

of other airlines, its CEO concluded "we need to do it" because of the potential revenue.[149] That was confirmed when Delta saw it would lose about $200 million of revenue that Northwest expected if it eliminated Northwest's pre-existing first bag fee.[150] Long before deciding to adopt a first bag fee, Delta made the legitimate business decision to harmonize the Delta and Northwest structure for *all* fees promptly after the merger.[151] Although Plaintiffs alleged that fee harmonization was a pretext, discovery has revealed no evidence to support that claim.[152]

Plaintiffs likely will point to the Value Proposition analysis, which predicted that the first bag fees would be profitable to Delta only if AirTran also adopted one. But Delta's CEO concluded that the share shift assumptions in the Value Proposition were too high, and consequently the net first bag fee revenue estimates were too low.[153] The fact that one group in Delta recommended against first bag fees does not create a question of fact about whether Delta's decision makers believed they were in Delta's interest. *See Holiday Wholesale*, 231 F. Supp. 2d at

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[149] EX49.
[150] EX43; EX51; EX66, Anderson 10/6/10 Dep. 91:18-92:10; EX69, Bastian 9/17/10 Dep. 46:17-47:8; EX82, Hauenstein 9/30/10 Dep. 132:6-20; EX54, at 17.
[151] *See supra* notes 76-79 and accompanying text.
[152] CAC ¶ 62.
[153] EX66, Anderson 10/6/10 Dep. 72:6-73:19.

1312 (CEO raised prices to determine competitors' response despite a staff recommendation against it).

Plaintiffs also contend that first bag fees were against defendants' economic interests because rational competitors do not raise prices in the face of declining demand. But the other legacy carriers were facing the same economic conditions and independently concluded that unbundling first bag fees was profitable.[154] By November, AirTran was losing substantial sums and made the economically rational determination that it needed additional revenue.[155] Further, AirTran and the other airlines concluded that first bag fees would allow them to keep base fares lower, so customers could choose whether to pay more for services.[156] Conduct that is a response to "the economic state of the airline industry" is not against airlines' economic interests. *Hall*, 296 F. Supp. 2d at 671 (granting summary judgment for airlines' simultaneous reduction of travel agent commissions).

Plaintiffs argue that first bag fees were in the interests of AirTran and Delta only if both adopted the fees, but it is economically rational—and lawful—for companies in an oligopolistic market to make independent decisions based on the

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[154] EX30, at 11-12; EX27, Dick Report ¶¶ 70-71 & Ex. 6,; EX1; EX45; EX31.
[155] EX27, Dick Report ¶¶ 62-84 & Ex. 4; EX76, Fornaro DOJ Dep. at 56:22-61:3; EX14.
[156] EX29, at 13.

predicted responses of competitors. *Brooke Group*, 509 U.S. at 227; *Williamson Oil*, 346 F.3d at 1299. In the real world, AirTran, Delta and other airlines all made independent decisions that first bag fees were profitable, even when competing against major airlines without the fees.[157] The evidence simply does not support plaintiffs' contention that first bag fees were not in defendants' economic interests. *See Williamson Oil*, 346 F.3d at 1302 ("'if [appellants'] theory is economically senseless…summary judgment should be granted'" (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69 (1992))).

C. Private Communications.

Plaintiffs and their expert refer vaguely to "private communications" to support their claim of conspiracy.[158] They now invoke only efforts by AirTran customer service employee Scott Fasano to communicate with Delta about first bag fees in July and early August 2008. These efforts failed to result in any meaningful communication between defendants, and they do not tend to exclude the possibility that the AirTran and Delta decision makers acted independently.

Sharing price information, by itself, does not establish an agreement, because gathering competitors' price information can be consistent with

[157] EX27, Dick Report ¶ 70.
[158] *See, e.g.*, EX46, Singer Am. Merits Report ¶¶ 2, 20, 23, 24, 32, 48, 106-09.

competitive behavior. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *Williamson Oil*, 346 F.3d. at 1305-06, 1313. Plaintiff must also show that defendants agreed to fix prices. *Gypsum*, 438 U.S. at 443-44 n.20; *Wallace*, 55 F.3d at 1169-70; *Stephen Jay Photography v. Olan Mills, Inc.*, 903 F.2d 988, 996 (4th Cir. 1990); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir. 1985); *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 174-75 (2d Cir. 1984). This Court dismissed antitrust claims where defendants exchanged price information and raised prices because such "synchronous actions" can be the product of "'a rational independent calculus by each member of the oligopoly, as opposed to collusion.'" *Immucor*, 2011 WL 2619092, at *5 (quoting *Williamson Oil*, 346 F.3d at 1299).

A price fixing agreement cannot reasonably be inferred from Fasano's efforts. Two of the people he tried to email had already left Delta's employment.[159] Two other contacts had no connection to Delta—they worked for *a vendor* of *Northwest*.[160] The only people he may have reached were a station manager of Comair (Delta's regional commuter airline) and two Delta station

[159] EX70, Boeckhaus Dep. 21:24-22:5, 42:8-45:22, 47:6-11; EX74, Fasano DOJ Dep. 62:15-22, 65:1-12; EX71, Burman Dep. 8:16-17; EX61.
[160] EX64; EX75, Fasano 12/1/10 Dep. 106:16-20.

managers.[161] But these individuals had no responsibility for pricing decisions. Rather, they were responsible for the airline's operations at those airports, and thus were in no position to know Delta's plans for first bag fees.[162] In any event, "[e]vidence of sporadic exchanges of shop talk among [employees] who lack pricing authority is insufficient to survive summary judgment." *Baby Food*, 166 F.3d at 125; *Krehl v. Baskin-Robbins Ice Cream Co*., 664 F.2d 1348, 1357 (9th Cir. 1982) (a dozen instances of "shop talk" by persons with "no direct pricing responsibilities" were insufficient to create an inference of conspiracy).

Nor did those limited communications have any impact on defendants' decisions. Fasano's efforts spanned only a few days and stopped in early August, months before AirTran and Delta made their decisions.[163] *In re Flat Glass Antitrust Litig*., 385 F.3d 350, 369 (3d Cir. 2004) (information exchanges considered relevant because they occurred suspiciously close in time to the price increases). There is no evidence that any communications with the station

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[161] EX75, Fasano 12/1/10 Dep. 97:11-98:19, 108:2-12; EX93, Rossano Dep. 12:15-21, 75:9-80:13; EX92, Ringler Dep. 38:13-39:9, 58:12-59:19. Fasano's alleged contact with the Comair station manager was indirect, through AirTran's Buffalo station manager. EX65.

[162] *See, e.g.*, EX92, Ringler Dep. 9:9-11:3, 64:12-65:1; EX93, Rossano Dep. 16:6-12, 25:6-16.

[163] EX84, Healy DOJ Dep. 187:5-188:12; EX75, Fasano Dep. 162:22-163:4.

managers reached Delta's decision-makers.[164] Courts have found evidence of communications to be wanting where the competitor "did not act on any information obtained" through those employee communications. *Baby Food*, 166 F.3d at 125-26 ("to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions."); *see also Blomkest Fertilizer*, 203 F.3d at 1034 (affirming summary judgment where there were 12 instances of information sharing but no evidence that they led to price increases). Fasano's efforts to communicate with Delta are insufficient to infer collusion.

D. Plaintiffs' Economist Does Not Offer Probative Evidence of an Illegal Agreement.

Plaintiffs inevitably will be forced to fall back on the conclusory opinions of their expert, Dr. Hal J. Singer, that "Plaintiffs' claims are meritorious" and that AirTran's and Delta's actions were "consistent with Plaintiffs' allegations of conspiracy."[165] Economic analysis, is, at best, a poor tool to determine whether a collusive agreement exists,[166] and in any event, Plaintiffs may not offer Dr.

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[164] EX82, Hauenstein 9/30/10 Dep. 105:22-25; EX69, Bastian 9/17/10 Dep. 136:23-137:13.

[165] EX46, Singer Am. Merits Report ¶¶ 1, 23.

[166] Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 Antitrust L.J. 719, 788 (2004) ("economic tools are insufficiently precise for *economic analysis* to lead to

Singer's legal conclusions. *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (where the trial court allowed such testimony, the appellate court stated it was "a legal conclusion, and therefore should not have been admitted"); *accord Cooper v. Pacific Life Ins. Co.*, No. CV203-131, 2007 WL 430730, at *1 (S.D. Ga. Feb. 6, 2007) ("otherwise admissible expert testimony may be excluded if it constitutes a legal conclusion or otherwise tell[s] the jury what conclusion to reach, as this in no way assists the trier of fact." (internal quotation marks and citation omitted). Dr. Singer also explicitly makes credibility judgments about witness testimony and documents,[167] which is impermissible. *Snowden v. Singletary*, 135 F.3d 732, 739 (11th Cir. 1998) ("Witness credibility is the sole province of the jury."); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) ("expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony").

Moreover, Dr. Singer's opinion is based on facts and data that are unsupported by, and indeed contradicted by, the record. He offers a "game theory" analysis that is based almost entirely on inaccurate estimates of share shift from

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a definitive determination as to the existence, or non-existence, of a collusive agreement").

[167] *E.g.*, EX46, Singer Am. Merits Report ¶ 65; EX97, Singer 3/11/11 Dep. 22:3-23:8; *see also id.* at 9:16-11:2, 75:11-77:1, 83:20-85:6; EX46 ¶¶ 63, 68.

airlines with first bag fees to those without.[168] Also, his game theory analysis does not properly account for the loss of approximately $200 million of Northwest bag fee revenue that the combined entity would suffer if Delta were to decide to end Northwest's existing first bag fee after the merger.[169] Dr. Singer said that the so-called private communications were "pivotal" to his opinions about the existence of a conspiracy.[170] But as shown above, they do not support a claim of conspiracy, and Dr. Singer's opinion collapses along with plaintiffs' argument. Finally, Dr. Singer assumes that unbundling first bag fees resulted in a net fare increase for passengers,[171] when the record shows that in fact fares were falling by *more than the first bag fee*.[172] Because Dr. Singer's assumptions on critical facts are wrong, his conclusions that a conspiracy existed are unreliable and inadmissible.

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[168] *See* EX66, Anderson 10/6/10 Dep. 66:15-17, 73:7-19, 84:2-13; *see also* EX42, at 9-10 (March 2009 study shows that there was little or no share shift caused by the adoption of first bag fees).

[169] EX28, Dick Rebuttal Report ¶¶ 11-13; EX43; EX51; EX69, Bastian 9/17/10 Dep. 46:17-47:3; EX66, Anderson 10/6/10 Dep. 62:4-8.

[170] EX46-A, Singer Am. Merits Rebuttal Report at ¶ 44.

[171] *See, e.g.*, EX46, Singer Am. Merits Report at ¶ 77.

[172] *See* EX27-A. AirTran's removal of its $15 fuel charge at the same time it implemented the first bag fee decreased total fares more than bag fees increased them. The fuel charge was *per segment* for *all passengers*, and bag fees were per trip (rather than per segment) and for bag checkers only.

Beyond that, Dr. Singer's opinion about the existence of "conspiracy" fails to distinguish between lawful consciously parallel conduct and illegal collusion.[173] Conduct such as raising prices in anticipation a competitor will follow is still an independent action—and common in oligopolistic markets—even when that anticipation is based on the public actions or statements of one's competitors.[174] Dr. Singer labels both "collusion," which is a legal error that leads him to an erroneous conclusion that an illegal conspiracy must exist.

IV. PLAINTIFFS' RELIANCE ON A TRUTHFUL YET AMBIGUOUS ANSWER TO AN ANALYST QUESTION DURING AN EARNINGS CALL IS PRECLUDED BY FEDERAL SECURITIES LAWS.

In its opinion on the motion to dismiss, the Court noted that "at [that] early stage," implied preclusion was not yet appropriate.[175] Since that time, discovery has shown that Fornaro's statement during AirTran's earnings call was a truthful, forward-looking response to an unprompted question by an analyst about a subject

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[173] EX28, Dick Rebuttal Report ¶¶ 40-44 (citing EX35, Singer Merits Report at ¶¶ 39, 53, 60); EX95, Singer Dep. 11/22/10 Dep. 437:22-438:13; EX96, Singer 11/23/10 Dep. 674:21-675:8; EX94, Singer 8/11/10 Dep. 321:9-25.

[174] *Brooke Group*, 509 U.S. at 227; *Williamson Oil*, 346 F.3d at 1307.

[175] MTD Opinion at 36.

of importance to investors.[176] AirTran should not be punished under the antitrust laws for providing information encouraged by the comprehensive securities laws.

The Supreme Court has confirmed that when antitrust and securities laws are "clearly incompatible," the antitrust laws must yield. *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007). The Court laid out a four-factor test to determine when a regulatory scheme will preclude application of antitrust laws:

> 1. The practices at issue "lie squarely within an area of financial market activity that the securities law seeks to regulate";
>
> 2. The agency that oversees the program has "regulatory authority under the securities law to supervise the activities in question";
>
> 3. That agency "exercise[s] that authority"; and
>
> 4. The conflict gives rise to "a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct."

Id. at 275-76. All four factors are met here, "warrant[ing] an implication of preclusion" and mandating summary judgment. *Id.*

The first two factors are satisfied because Plaintiffs' claims focus on Fornaro's statements made during a public quarterly earnings call. The SEC has unquestioned authority to regulate public company disclosure practices and has "considerable power to forbid, permit, encourage, discourage, tolerate, limit, [or]

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[176] EX14; EX76, Fornaro DOJ Dep. 179:12-20; EX77, Fornaro 11/18/10 Dep. 23:13-16; EX32; EX33, at 13-14; EX34, at 5.

otherwise regulate virtually every aspect of the [disclosure] practices." *Credit Suisse*, 551 U.S. at 276. Quarterly earnings calls are recognized by the SEC as an extension of the formal reports that public companies are required to file with the SEC.[177] The SEC requires that such disclosures are accurate, material and not misleading. *See, e.g.*, 17 C.F.R. § 240.12b-20. The securities laws also contain safe harbor provisions to encourage companies to disclose forward-looking information like that given by Fornaro. *See* Securities Act of 1933 § 27A, 15 U.S.C. § 77z-2; Securities Exchange Act of 1934 § 21E, 15 U.S.C. § 78u-5.

The third factor is met because the SEC "continuously exercised its legal authority to regulate conduct of the general kind now at issue." *Credit Suisse*, 551 U.S. at 277. The SEC defines in detail what a public company may or may not say in a public disclosure, and it brings actions against violators of these rules. *See, e.g.*, *SEC v. Dell Inc.*, No. 1:10-cv-1245 (D.D.C. filed July 22, 2010).

Fourth, Plaintiffs' private antitrust claims would constrain public companies from fully and accurately providing forward-looking information in response to investor's questions out of fear that a competitor's reaction might create crippling

[177] Regulation FD, 17 C.F.R. § 243.100–243.103, Regulations S-K, 17 C.F.R. Part 229, and various releases govern AirTran's disclosure obligations; 65 Fed. Reg. at 51,723-24 (recognizing and encouraging earnings calls as an "alternative [method] of public disclosure.").

antitrust liability. Further, plaintiffs seek undefined injunctive relief, which presumably includes an injunction governing the public disclosures that defendants could make in future earnings calls.[178] There is no "practical way to confine" this antitrust suit so that it "challenge[s] only activity of the kind the [plaintiffs] seek to target" without inhibiting other conduct that is permitted—and indeed encouraged—under the SEC's laws. *Credit Suisse*, 551 U.S. at 282; *see also Elec. Trading Grp., LLC v. Banc of Am. Secs.*, 588 F.3d 128, 137 (2d Cir. 2009).

Conclusion

For foregoing reasons, defendant AirTran Airways, Inc. respectfully requests that its motion for summary judgment be granted.

Respectfully submitted,

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[178] CAC at 42 (Prayer for Relief).

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August 31, 2012

L.R. 7.1D CERTIFICATION AS TO FONT AND POINT SELECTION

The undersigned counsel hereby certifies that this AIRTRAN AIRWAYS, INC.'S MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT THEREOF, AND ACCOMPANYING ATTACHMENTS has been prepared with Times New Roman, 14 point, which is one of the font and point selections approved by the Court in L.R. 5.1C.

/s/ Alden L. Atkins
Alden L. Atkins

CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of August, 2012, I filed the foregoing AIRTRAN AIRWAYS, INC.'S MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT THEREOF, AND ACCOMPANYING ATTACHMENTS, under seal, with the Clerk of Court and caused the same to be delivered via email to the following attorneys of record:

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