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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB ALL CASES

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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I. INTRODUCTION

Plaintiffs challenge a single, *per se* unlawful conspiracy between Defendants to increase prices. *See* Consolidated Amended Complaint ("CAC") ¶ 83. Plaintiffs also challenge Defendants' invitations to collude that led to the unlawful conspiracy. *Id.* ¶¶ 90, 95. The allegations of an unlawful conspiracy include:

- Communications between Delta and AirTran concerning how both airlines could "get average prices up" (*id.* ¶ 34); "push[] fare increases and fee increases" (*id.* ¶ 37); work "in conjunction" to increase prices (*id.* ¶ 38); and impose a first bag fee (*id.* ¶ 55).
- Defendants both changed business practices following communications to each other. *See, e.g.*, *id.* ¶¶ 46-47, 52, 56-57.
- The simultaneous imposition of a significant price increase – a first bag fee – during a recession when it would have been counter to either Defendant's interest to increase prices unilaterally. *See, e.g.*, *id*. ¶¶ 56-57, 60.

These allegations – which must be accepted as true on a motion to dismiss – are sufficient for a jury to infer that Defendants conspired in violation of the antitrust laws. *See infra* Section III(A).

Delta answered each of Plaintiffs' initial complaints without moving to dismiss. Delta has since reversed course, and both Defendants now move to dismiss the CAC. Defendants advance five arguments in their motions, none of

which have merit.

First, Defendants argue that Plaintiffs' allegations do not plausibly support an inference that Defendants conspired. *See* Delta Mem. at 6-8; AirTran Mem. at 7-26. Defendants are mistaken. Courts have consistently found that *per se* unlawful conspiracies can be inferred when collusive communications among competitors precede changed/responsive business practices, such as new pricing practices. *See* pp. 12-16. Collusive communications can occur in speeches at industry conferences, on earnings calls, and in other public forums. *See*, pp. 13-14. That is precisely what happened here.

Second, AirTran argues that Plaintiffs' allegations do not plausibly support a violation of Sherman Act § 2, 15 U.S.C. § 2. *See* AirTran Mem. at 26-33. But invitations to collude violate Sherman Act § 2. *See United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984) (American Airlines' attempt to fix prices with its airline competitor constituted attempted monopolization in violation of Sherman Act § 2). Plaintiffs allege here that Defendants are each other's closest competitors, dominate the market(s) for flights to and from Atlanta, and invited each other to collude with a specific intent to increase prices. As in *American Airlines*, Plaintiffs satisfy the Sherman Act § 2 pleading standard.

Third, Defendants argue that securities laws immunize collusion from the antitrust laws when publicly-traded corporations collude through earnings calls and

at industry conferences. *See* AirTran Mem. at 33-39; Delta Mem. at 20-23. Consumers affected by Defendants' collusion – such as those who paid a first bag fee effectuated by that collusion – have no cause of action to recover under securities laws. Defendants nonetheless argue that these consumers cannot assert antitrust claims because the consumers challenge truthful "communications with investors" in public forums, and the securities laws mandate such truthful statements. Defendants misconstrue Plaintiffs' allegations. Plaintiffs do not challenge legitimate communications with investors. Rather, Plaintiffs allege Defendants used earnings calls and industry conferences to unlawfully communicate *with each other*. Securities laws do not apply to collusion between competitors. The antitrust laws do. *See* 15 U.S.C. § 1. [redacted].

Fourth, Defendants argue that the *Noerr Pennington* doctrine bars Plaintiffs' allegations concerning Defendants' joint negotiations with Hartsfield-Jackson Atlanta International Airport ("Hartsfield-Jackson"). *See* Delta Mem. at 19-20; AirTran Mem. at 25 n.8. Defendants are mistaken. *Noerr Pennington* does not apply to corporations' negotiations of economic terms with governmental entities. Moreover, Plaintiffs are not seeking to recover for the outcome of Defendants' joint negotiations – *i.e.*, gate fees that Defendants negotiated. Rather, Plaintiffs

allege that Defendants' coordination with Hartsfield-Jackson enabled them to cement and monitor compliance with their conspiracy to increase prices to consumers. *See* CAC ¶¶ 31, 59. *Noerr Pennington* therefore does not apply to Plaintiffs' allegations. *See infra* Section III(D).

Fifth, Defendants argue that Plaintiffs' claim for injunctive relief to prevent future invitations to collude is overbroad and improper because Plaintiffs allege Defendants have resumed compliance with the antitrust laws. Delta Mem. at 24-33; AirTran Mem. at 38-39. Again, Defendants are wrong and misconstrue Plaintiffs' allegations. Injunctive relief is necessary and can be narrowly tailored to prevent future invitations to collude – *e.g.*, preventing either Defendant from communicating that it will agree to increase prices or cut capacity if a competitor would also do the same. Any such injunction would mirror the Federal Trade Commission's relief in an analogous matter involving an invitation to collude on an earnings call. Decision & Order, *In re Valassis Commc'ns, Inc.*, No. C-4160, FTC File No. 051 0008 (Apr. 19, 2006), attached as Ex. A. Moreover, Plaintiffs do not allege that Defendants have resumed compliance with the antitrust laws.

Finally, Defendants' motions to dismiss share a fundamental flaw that renders their arguments improper as a matter of law: Defendants do not accept Plaintiffs' allegations as true as they are required to do upon a motion to dismiss. Instead, Defendants dispute facts, draw improper inferences from executives'

quotes, introduce new facts extraneous to the CAC, and – in the case of Delta – ignore that Plaintiffs challenge a single conspiracy to increase prices. This flaw infects each and every one of Defendants' arguments and requires denial of Defendants' motions.

II. STATEMENT OF FACTS

Plaintiffs challenge a single, *per se* unlawful conspiracy between Defendants. *See* CAC ¶¶ 1, 28, 58, 83. Defendants' conspiracy was reached in three ways: through (1) communications with each other on quarterly earnings calls;[1] (2) speeches and attendances at industry conferences; and (3) coordination in negotiating contracts with Hartsfield-Jackson. *Id.* ¶¶ 29-31.

AirTran first invited Delta to collude on its April 22, 2008 earnings call that Delta monitored. *Id.* ¶ 32. AirTran had rescheduled this call from a later date so that the call would occur one day prior to Delta's April 23, 2008 earnings call. *Id.* This gave Delta an opportunity to respond to AirTran's invitation to collude. *Id.*

During its April 22 earnings call, AirTran announced that it was "resetting its priorities to be highly profitable" and that it "strongly believe[d]" that AirTran and its competitors in the industry – *i.e.*, Delta – needed to reduce capacity in order "to get average prices up[.]" *Id.* ¶¶ 33-34. AirTran stated that Delta's elimination

[1] Notably, Delta admitted in its initial answer that it routinely monitors competitors' earnings calls. *See* Delta Answer ¶ 20, *Avery v. Delta Air Lines*, No. 09-1391, Dkt. #57 ("Delta admits…that Delta routinely monitors the analyst calls of its competitors").

of capacity was "long overdue" and announced that AirTran itself was revising its capacity growth plan: instead of growing ten percent in the fourth quarter of 2008, AirTran's capacity would remain flat (compared to 2007). *Id.* ¶¶ 34-35.

The following day – on April 23, 2008 – Delta held its first quarter earnings call. *Id.* ¶ 37. During this call, Delta emphasized that it was committed to eliminating capacity and "pushing fare increases and fee increases," and would monitor its competition to determine if "additional capacity reductions are warranted for the fall and winter seasons." *Id.* Delta used its earnings call to articulate a specific expectation about the level of capacity the industry – *i.e.*, AirTran – needed to cut so that Delta could work "in conjunction with other carriers" to "remedy the industry woes:"

> [Q:] If you priced the product such that you could be profitable, how much capacity would you actually need to take out?
>
> . . .
>
> [A:] Certainly, Bill. I think Delta can't do it alone. We have to do it in conjunction with the other carriers because certainly the capacity cuts that we can do on our own, while they will help us, will not remedy the industry's woes. So, as we look forward, we're hopeful that the other carriers act responsibly and look at the demand profiles as we move into the fall. And I would say if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we'd be in pretty [good] shape, given today's fuel environment.

Id. ¶ 38 (quoting Glen Hauenstein, Delta Exec. VP).

Delta's explicit invitation of a ten percent reduction in capacity in the fourth quarter (compared to 2007) was far below AirTran's announcement the day before that its fourth quarter capacity would remain flat compared to 2007. *Id.* ¶ 39.

Delta held its second quarter earnings call on July 16, 2008. *Id.* ¶ 42. By this time, AirTran had not sufficiently committed to capacity cuts that would satisfy Delta. *Id.* Until AirTran demonstrated this commitment, Delta planned to maintain an increased level of capacity in Atlanta – Delta's "core strength market." *Id.* Delta emphasized that it was "still in the planning process for '09" and would be willing to make further capacity cuts after it analyzed what capacity cuts the industry – *i.e.*, AirTran – make in the fall as they "come to the party." *Id.* ¶¶ 43-44. Delta believed that "the whole industry model has got to evolve much more quickly," particularly with regard to eliminating capacity for "low end traffic" to which certain industry participants – *i.e.*, AirTran – catered. *Id.* ¶ 43. Finally, with regard to any plan to implement a first bag fee in connection with its merger with Northwest (as Northwest had a first bag fee), Delta said that it had "no plans to implement it at this point[.]" *Id.* ¶ 45.

AirTran held its second quarter earnings call on July 29, 2008 – thirteen days after Delta's earnings call. *Id.* ¶ 46. AirTran's call served, effectively as a *mea culpa* to Delta for creating a market in Atlanta for low fares – *i.e.*, "low end traffic" in Delta's parlance – and an assurance that the fares will increase:

> [W]e created the market in Atlanta for low fare, for close-[in] reasonable fare. Quite frankly, those average prices need to come up. What that says is, when the prices come up, [the] market is going to contract. We have to find the right levels in Atlanta.

Id. ¶ 46 (quoting Robert Fornaro, AirTran CEO). Unlike its last earnings call – in which AirTran committed to keeping capacity flat in the fourth quarter of 2008 (a level that Delta did not believe was low enough) – AirTran responded to Delta's invitation to cut capacity and "accelerated the amount of capacity" it planned to remove from the market to "support price increases." *Id.* ¶ 47. Rather than keeping capacity flat in the last quarter of 2008 (as AirTran had committed on its April 22, 2008 call), it now planned "capacity to be down 7% to 8% in the September through December period." *Id.*

Also during this call, AirTran emphasized that its focus was "going to be almost entirely on the balance sheet" to ensure profitability and wanted to improve the performance of "new ancillary revenues initiatives," such as revenues earned from baggage fees. *Id.* ¶ 48.

After AirTran's second quarter earnings call in which it demonstrated to Delta a commitment to accelerate capacity cuts and increase prices in Atlanta, Delta no longer felt constrained by vigorous competition from AirTran. *Id.* ¶ 49. For example, after this call and by the time Delta held its third quarter earnings call – on October 15, 2008 – Delta decided to cut capacity in Atlanta and stated that it

was now willing to increase ancillary fees – *i.e.*, first bag fees – because "strategically going forward [a la carte] pricing is where we need to go as an industry[.]" *Id.* ¶ 52 (quoting Richard Anderson, Delta CEO). Collusion with AirTran had fundamentally changed Delta's business strategies. *Id.*

AirTran held its third quarter earnings call on October 23, 2008. *Id.* ¶ 53. On that call, AirTran assured Delta that – even though "the consumers got in their minds that airfares are through the roof" – it would nonetheless follow Delta's lead in implementing a first bag fee:

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

Id. ¶¶ 54-55 (quoting Robert Fornaro, AirTran CEO).

Less than two weeks after AirTran's third quarter earnings call, on November 5, 2008, Delta announced that it would begin charging passengers a $15 first bag fee, effective December 5, 2008. *Id.* ¶ 56. The next day – on November 6 – AirTran confirmed the agreement with a public statement that it would make an announcement regarding a new first bag fee policy the following week. *Id.* ¶ 57.

On November 12, 2008, AirTran announced that it would impose a $15 first bag fee, effective December 5, 2008 – which was the exact same fee as Delta's with the exact same effective date. *Id.*

III. ARGUMENT

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Factual allegations are considered in the light most favorable to the plaintiff. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, 551 U.S. at 93 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A motion to dismiss is futile if a plaintiff alleges "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555.

In moving to dismiss Plaintiffs' CAC, Defendants ignore these fundamental principles governing a Rule 12(b)(6) motion. They do not accept Plaintiffs' factual allegations as true. Instead, they provide their interpretation of quotes and facts in the CAC (often with extraneous facts not included in the CAC), ignore facts inconsistent with their own theories, and then make flawed legal arguments premised on faulty interpretations of the facts.

For the following reasons, Defendants' motions to dismiss should be denied in their entirety: (a) Plaintiffs' detailed factual allegations plausibly support a jury finding of a *per se* unlawful conspiracy; (b) Plaintiffs' detailed factual allegations plausibly support a jury finding of invitations to collude in violation of Sherman Act § 2; (c) the securities laws do not immunize collusion from the antitrust laws; (d) the *Noerr Pennington* doctrine does not bar Plaintiffs' allegations concerning Defendants' coordination with Hartsfield-Jackson; and (e) injunctive relief precluding invitations to collude is appropriate and necessary.

A. Plaintiffs' Factual Allegations Plausibly Support a Jury Finding of a *Per Se* Unlawful Conspiracy.

1. An Agreement Exists When There Is "A Unity of Purpose or a Common Design and Understanding."

To prevail on their Sherman Act § 1 claim, Plaintiffs must prove that Defendants conspired. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998). To prove a conspiracy, Plaintiffs must show that Defendants "demonstrate[d] 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Id.* (quoting *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991)).

Per se unlawful conspiracies rarely involve an explicit agreement among defendants. *Id.* Rather, "'most conspiracies are inferred from the behavior of the

alleged conspirators,' and from other circumstantial evidence[.]" *Id.* (quoting *Seagood*, 924 F.2d at 1573-74).[2]

2. Plaintiffs' Factual Allegations Meet the Eleventh Circuit Standard for Inferring a Conspiracy.

A "unity of purpose or a common design and understanding" can be inferred from at least three types of conduct specifically alleged by Plaintiffs – each of which is sufficient to infer a conspiracy: (a) collusive communications followed by responsive business practices; (b) collusive communications followed by actions that would have been against a corporation's economic self-interest if it had acted alone; and (c) pretextual reasons offered for the changed business practices.

a. Plaintiffs Allege that Defendants Changed Business Practices Following Their Collusive Communications

A conspiracy can be inferred when communications that foster collusion are followed by responsive business practices. *See, e.g.*, *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535 (11th Cir. 1987) (communications between a manufacturer and distributor followed by "corrective" pricing action sufficient for a jury to infer the existence of a conspiracy to fix resale prices); *United States v. Foley*, 598 F.2d 1323, 1331-32 (4th Cir. 1979) (one defendant's announcement regarding prices at an industry dinner followed by price increases

[2] *Accord United States v. Gold*, 743 F.2d 800, 824 (11th Cir. 1984) ("'The very nature of conspiracy frequently requires that the existence of an agreement be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.'").

by those in attendance at the dinner was sufficient to support a criminal conviction of a conspiracy); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-cv-3066, 2009 WL 856306, at *12-15 (N.D. Ga. Feb. 9, 2009) (Carnes, J.) (communications followed by parallel price increases sufficient for a jury to infer a conspiracy); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 892-95 (N.D. Ill. 2009) (defendants' statements in speeches at industry conferences regarding the industry "work[ing] together to keep the prices high" and maintaining "discipline" in cutting capacity followed by competitors cutting capacity supported an inference of a conspiracy); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008) ("[A] conspiracy to fix prices can be inferred from an invitation, followed by responsive assurances and conduct."); *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 691 (D. Minn. 1995) (denying Delta's and other defendants' motion for summary judgment because a jury could infer a conspiracy based on statements made at industry speeches, in press releases, and in other forums that preceded uniform pricing practices).

Collusive communications need not occur in smoke-filled rooms to be deemed collusive. Rather, collusive communications can include (among other things) speeches at industry conferences, announcements of future prices, statements on earnings calls, and other public information transfers. *See, e.g.*,

Analysis to Aid Public Comment, *In re Valassis Commc'ns, Inc.*, FTC File No. 051-0008, at 3, attached as Ex. B ("[I]t is clear that anticompetitive coordination also can be arranged through public signals and public communications, including speeches, press releases, trade association meetings and the like," including earnings calls); *Standard Iron Works*, 639 F. Supp. 2d at 892-95 (statements at industry conferences supported inference of a conspiracy); *In re Travel Agency Comm'n*, 898 F. Supp. at 690 (alleging that Delta and other defendants exchanged messages through public speeches, electronic communications, subtle press releases, and meetings).

Here, Plaintiffs allege with specificity that Defendants communicated to each other on earnings calls and at industry conferences (as well as when jointly negotiating with Hartsfield-Jackson) to reach an agreement. AirTran first invited Delta to collude on its April 22, 2008 earnings call, which AirTran rescheduled on April 21, 2008 to occur a day before Delta's earnings call to give Delta an opportunity to respond. CAC ¶ 32. AirTran's invitation to collude sparked a roughly six-month dialogue concerning each Defendant's own plans to increase prices and expectations as to what the other needed to do to increase prices. Defendants' statements were infused with a level of specificity concerning how to increase prices that can only be explained as signaling collusion. *See, e.g.*, ¶¶ 38, 55. These specific communications support a plausible inference of collusion.

Plaintiffs allege that Defendants made parallel changes to their business practices in response to their collusive communications. For example, Plaintiffs allege that Delta's business practices fundamentally changed after AirTran's July 29, 2008 earnings call, in which AirTran – after prompting from Delta – committed to increase prices in Atlanta through more aggressive capacity cuts and expressed a willingness to increase baggage fee revenues. *Id.* ¶¶ 46-49. Prior to this call, Delta had committed to keeping increased levels of capacity in Atlanta and did not plan to implement a first bag fee. *Id.* ¶¶ 42, 45. But after AirTran's July 29, 2008 call, Delta decided to cut capacity in Atlanta and impose a first bag fee. *Id.* ¶ 52. It was after this call that competition was restrained. *Id.* ¶ 49 ("[A]fter AirTran's second quarter earnings call in which it demonstrated to Delta a commitment to accelerate capacity cuts and increase prices in Atlanta, Delta no longer felt constrained by vigorous competition from AirTran."). Similarly, Plaintiffs allege that Defendants' collusive communications fundamentally changed AirTran's business practices. *Id.* ¶¶ 47, 57. These changed business practices – combined with preceding collusive communications – support a plausible inference of a conspiracy. *See supra* at 12-13 (citing cases).

b. Plaintiffs Allege that Defendants Implemented Business Practices Contrary to Individual Self-Interest Following Their Collusive Communications.

A conspiracy can also be inferred when collusive communications among competitors precede business practices that are counter to the competitors' individual economic interests if acting alone. *See, e.g.*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 805-06 (1946) (relying on evidence of price increases in the face of declining costs and a depressed economy to support an inference of conspiracy); *City of Tuscaloosa*, 158 F.3d at 572 (a "prominent 'plus factor'" in proving a conspiracy is showing that defendants did not act "in their legitimate economic self-interest"); *Boczar v. Manatee Hospitals & Health Systems, Inc.*, 993 F.2d 1514, 1517 (11th Cir. 1993) (a jury can infer an unlawful conspiracy if evidence exists that defendants acted in a manner inconsistent with "rational business objectives") (citation omitted); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 934-35 (N.D. Ill. 2009) ("[A]llegations which demonstrate that defendants acted against self-interest enhance the plausibility of the conspiracy.") (citing *Standard Iron Works*, 639 F. Supp. 2d at 896-97).

Plaintiffs allege that – following their collusive communications – both Defendants implemented business decisions counter to their own individual economic interests that can only be explained by collective action. CAC ¶ 60. By the fall of 2008, the country (including Atlanta) was experiencing the worst

recession since the Great Depression and demand for airline travel was declining as consumers were traveling less. *Id.* Moreover, the cost of oil had dropped substantially below January 2008 levels. *Id.* ¶ 51. As AirTran's CEO indicated (and Plaintiffs allege), imposing a price increase under these circumstances would not have occurred had AirTran and Delta been acting unilaterally.[3] Yet both Defendants implemented the same price increase – a $15 first bag fee – effective on the same day, December 5, 2008. Assuming that a price increase implemented during a severe recession with declining input costs was counter to each Defendant's economic interest – as Plaintiffs allege and, presumably, any credible economist would testify – a jury could reasonably infer this price increase was the result of a conspiracy. *See supra* at 16 (citing cases).

c. Plaintiffs Allege That Delta's Explanation for the First Bag Fee Was Pretextual.

Finally, a conspiracy can be inferred when defendants mask the true purpose of changed business practices – such as higher prices following communications between competitors – by providing pretextual reasons for the changed practices. *See, e.g., DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1989) ("'evidence of pretext, if believed by a jury, would disprove

[3] *See id.* ¶ 55 (Mr. Fornaro stating that AirTran had not imposed a first bag fee despite having the ability to do so because Delta "hasn't done it"); *id.* ¶ 26 (Mr. Fornaro stating that AirTran could not "unbundle[] the product" and "start putting out [] all the [ancillary] fees" because it did not operate in a "monopoly market," but instead competed with Delta on all routes "out of Atlanta"); *id.* ¶ 60.

the likelihood of independent action'") (quoting *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985)); *In re TFT-LCD Antitrust Litig.*, 586 F. Supp. 2d at 1116 ("[T]he complaint alleges that defendants offered pretextual reasons for price increases or output restrictions, which also supports an inference of concerted action.").

Plaintiffs allege that, in an effort to mask the true purpose of the first bag fee, Delta provided a pretextual reason for this price increase. CAC ¶¶ 62-63. Specifically, upon announcing that it would impose a $15 first bag fee, Delta issued a press release stating that the fee was being imposed to conform its pricing to Northwest's. *Id.* ¶ 62. But this explanation was simply a pretext for the true impetus of imposing the fee: Defendants' collusion. *Id.* Prior to AirTran's July 29, 2008 call, Delta previously rejected imposing a first bag fee to conform its prices to Northwest's even though Delta's acquisition of Northwest was well underway:

> [Q:] [I]n terms of the first bag fee, I think Northwest has it and you don't and where is that heading?
>
> [A]: We are, we will study it. We will continue to study it but we have no plans to implement it at this point.

Delta July 16, 2008 Earnings Call, p. 13 (Defs.' Appx. Ex. 32); CAC ¶ 45. But after AirTran's July 29, 2008 call, Delta signaled its willingness to impose a first bag fee, and then announced the first bag fee shortly after AirTran stated that it

would follow Delta's lead in imposing the fee. *Id.* ¶¶ 52, 56. Assuming Delta's explanation for the first bag fee was pretextual – as Plaintiffs allege – the announcement would support a jury inference that Defendants conspired. *See supra* at 17-18 (citing cases).

3. Defendants' Plausibility Arguments Are Fatally Flawed.

Defendants argue that the CAC should be dismissed because the CAC contains mere "labels and conclusions" and not specific facts from which a conspiracy can be plausibly inferred. *See* Delta Mem. at 6; AirTran Mem. at 7. Defendants' plausibility arguments are fatally flawed in two fundamental respects. First, both Defendants fail to accept Plaintiffs' allegations as true – as this Court must do on a Motion to Dismiss, *Erickson*, 551 U.S. at 94 – and simply provide their own interpretation of quotes and facts in the CAC (often with extraneous facts not included in the CAC), and ignore facts inconsistent with their theories. *But see In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368 (3d Cir. 2004) ("'[S]tatement of facts in defendants' brief combines a recital of the facts favorable to the defendants with an interpretation favorable to them of the remaining evidence; and that is the character of a trial brief rather than of a brief defending a grant of summary judgment.'") (citation omitted). Second, Defendants rely on case law inapposite to Plaintiffs' CAC – *i.e.*, Rule 12 cases in which complaints were dismissed for containing only conclusory allegations and Rule 56 cases in which plaintiffs failed

to present facts from which a conspiracy could plausibly be inferred. Assuming their allegations are true, Plaintiffs' CAC contains sufficient factual specificity for a fact finder to infer an unlawful conspiracy, rendering dismissal inappropriate as a matter of law.

Plaintiffs discuss these flaws below.

a. Delta's Flawed Analysis of Plaintiffs' Factual Allegations.

In challenging the plausibility of Plaintiffs' conspiracy allegations, Delta argues that Plaintiffs allege two separate and distinct conspiracies: one concerning a first bag fee and one concerning capacity. Delta Mem. at 6-18. Delta then provides its own interpretation of communications quoted in the CAC and concludes that Plaintiffs' allegations amount to nothing more than two competitors "observing each other's public statements and decisions." Delta Mem. at 14.

Delta misconstrues Plaintiffs' CAC. First, Plaintiffs do not allege two separate conspiracies, as Delta argues. Rather, Plaintiffs challenge a single agreement not to compete on price. CAC ¶¶ 1, 28, 58, 83. Even though Defendants' communications focused on both capacity cuts and implementing a first bag fee, the communications themselves had a singular objective: to increase prices. *See, e.g.*, *id.* ¶ 34 ("'There is a [strong correlation] at the end of the day [] to make – between capacity and pricing. Just raising prices, without reductions in capacity is not going to raise the average fare. And so, in order to support the price

increases, the capacity has to drop.'"). Price fixing conspiracies arise when competitors agree to capacity cuts and pricing terms. *See FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) ("'This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.'") (citation omitted); Federal Trade Commission Guide to Dealings with Competitors, "Price Fixing," at 1-2, attached as Ex. C (competitors can enter a price fixing agreement when discussing capacity or production). That is precisely what happened here.

In addition to ignoring Plaintiffs' challenge of a *single* conspiracy, Delta arrives at its "two conspiracy" theory by misrepresenting Plaintiffs' allegations. For example, Delta argues that AirTran's statement on its October 23, 2008 earnings call concerning a first bag fee and Defendants' subsequent adoption of the fee are the only facts concerning a "supposed bag fee conspiracy:"

> The only *facts* alleged as to the supposed bag fee conspiracy are (1) AirTran's public statement, (2) Delta's subsequent action to adopt a first bag fee, and (3) AirTran's adoption of a fee after Delta's action.

Delta Mem. at 8 (emphasis in original). This is false. Plaintiffs allege that Delta decided to implement a first bag fee after AirTran's July 29, 2008 earnings call. On this call, AirTran (a) committed to increase prices in Atlanta, (b) announced – in response to Delta – that it had "accelerated the amount of capacity" it would

remove, and (c) signaled that it hoped to improve performance of "new ancillary revenue[] initiatives," such as revenues earned from baggage fees. CAC ¶¶ 47-48. It was after this call – and before AirTran's October 23, 2008 assurance that it would follow Delta's lead on implementing a first bag fee – that Delta is alleged to have decided to implement a first bag fee. *See id.* ¶ 52 ("Delta's next earnings call occurred on October 15, 2008. Delta stated . . . that it was now willing to increase ancillary fees – *i.e.*, first bag fees – because 'strategically going forward [a la carte] pricing is where we need to go as an industry[.]'"). This decision by Delta was part and parcel of the changed business practices flowing from the price-related communications with AirTran. *See id.* ("Collusion with AirTran had fundamentally changed Delta's business strategies."). Delta's effort now to bifurcate the CAC into two distinct conspiracies is therefore completely at odds with Plaintiffs' allegations and overall theory of the case.

Second, Delta argues that Defendants' communications quoted in the CAC constituted nothing more than two competitors "monitor[ing] each other's behavior 'in order to make their own strategic decisions.'" Delta Mem. at 14 (quoting *Williamson Oil Co. v. Philip Morris, USA*, 346 F.3d 1287, 1305 (11th Cir. 2003)). A jury would almost certainly disagree. For example, one day after AirTran's initial effort to collude with Delta to increase prices, Delta stated the following as to what the "industry" needed to do to increase prices:

> [Q:] If you priced the product such that you could be profitable, how much capacity would you actually need to take out?
>
> . . .
>
> [A:] Certainly, Bill. I think Delta can't do it alone. We have to do it in conjunction with the other carriers because certainly the capacity cuts that we can do on our own, while they will help us, will not remedy the industry's woes. So, as we look forward, we're hopeful that the other carriers act responsibly and look at the demand profiles as we move into the fall. And I would say if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we'd be in pretty [good] shape, given today's fuel environment.

CAC ¶ 38 (quoting Glen Hauenstein, Delta Exec. VP). A jury would likely conclude that this statement by Delta was (1) aimed at AirTran, given the timing of the statement relative to the timing and substance of AirTran's earnings call the prior day and (2) much, much different than a competitor monitoring the activities of its rival. As with other statements in the CAC, Delta's response to AirTran has absolutely nothing to do with Delta "mak[ing] its own strategic decision," as Delta now argues.

Third, Delta argues that its statements on earnings calls and at conferences are not directed at AirTran because Delta often refers to the "industry" rather than specifically to AirTran. Delta Mem. at 13, 15-16. Again, a jury will likely disagree in light of the following:

- One day after AirTran's initial invitation to collude, Delta responded by stating that the "industry" needed to cut capacity by ten percent in order for

Delta to work "in conjunction with the other carriers" to increase prices. CAC ¶ 38.

- After AirTran initially announced that it would change it capacity plans starting in the fall of 2008 – but not enough to satisfy Delta – Delta stated that it would maintain increased levels of capacity in Atlanta and would consider additional capacity cuts only after the "industry starts to come to the party in the fall" of 2008. *Id.* ¶¶ 42, 44. AirTran then promptly announced that it was "accelerating" its own capacity cuts and would "be down 7% to 8% in the September through December [2008] period." *Id.* ¶ 47.
- Shortly after Delta stated that the "industry model" that catered to "lower end traffic" needed to change, AirTran apologized (in effect) for creating the market in Atlanta for low fares. *Id.* ¶¶ 43, 46.
- Delta and AirTran are each other's closest competitors, monitor each other's earnings calls, and attend the same industry conferences. *Id.* ¶¶ 20, 29, 30. A jury could infer that Delta's statements concerning the "industry" are directed to AirTran, particularly when the statements follow or are followed by AirTran's own actions and statements.

Moreover, Delta is sophisticated and almost certainly aware of the legal risk of directly referring to AirTran by name when discussing what the "industry"

needs to do to increase prices. In prior conspiracy cases involving Delta, Delta did not use direct communications with a competitor – by, for example, referring to a competitor by name – but nonetheless has been deemed to have communicated and conspired with its competition. For example, in *United States v. Airline Tariff Publishing Company*, the United States found that Delta Air Lines reached agreements on prices with competitors by signaling proposed pricing through an electronic fare dissemination system. Competitive Impact Statement, *United States v. Airline Tariff Publ'g Co.*, No. 92-2854, at 9-20 (D.D.C. Mar. 17, 1994), attached as Ex. D; *see also In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 691 (D. Minn. 1995) (denying summary judgment in antitrust case against Delta). In these cases, Delta's alleged indirect communications followed by changed business practices supported an inference of a conspiracy, which is exactly what Plaintiffs allege here.

b. AirTran Fails to Accept Plaintiffs' Allegations as True.

Even though it moves to dismiss the CAC under Rule 12(b)(6), AirTran nonetheless disputes all of Plaintiffs' factual allegations and then, based on facts it introduces extraneous to the CAC, argues that a conspiracy is implausible. *See* AirTran Mem. at 13-25. AirTran's approach is improper. Upon a motion to dismiss, AirTran must accept as true Plaintiffs' allegations. *Erickson*, 551 U.S. at 94.

Moreover, AirTran's new facts in no way detract from the plausibility of Plaintiffs' allegations and, in certain instances, even validate the accuracy of the allegations. For example, as opposed to inviting Delta to collude (as Plaintiffs allege), AirTran argues that it rescheduled its first quarter 2008 earnings call to occur one day before Delta's to respond to investor inquires about a new securities offering:

> [AirTran] re-schedul[ed] [its] April earnings call so that AirTran could respond to investor inquiries on the day it issued registration statements supporting $150 million of new securities.

AirTran Mem. at 15. A jury would almost certainly reject this explanation. AirTran's earnings call was held at 9:00 a.m. ET, and it appears that AirTran announced the filing of its registration statement at 5:05 p.m. ET. *See* Apr. 22, 2008 Transcript, cover page (referring to the earnings call "Event Time" as 9:00 a.m.), attached as Ex. E; AirTran Apr. 22, 2008 Press Release (announcing filing of registration statements and indicating a release time of 5:05 p.m.), attached as Ex. F. Moreover, the registration statement itself is 280 pages long. *See* Defs.' Appx. Ex. 16. To the extent that AirTran was indeed interested in fielding investor inquiries regarding the statement, it seems more logical to have kept AirTran's initial date for its earnings call – April 24, 2008 – rather than have the call at 9:00 a.m. on April 22, 2008 (one day before Delta's).

Plaintiffs will not detail here the fallacies of AirTran's facts. Because AirTran fails to accept Plaintiffs' allegations as true, its plausibility argument fails as a matter of law.

Finally, AirTran's argument that it could not have understood Delta's references to the "industry" to apply to AirTran fails for the same reasons as those addressed on pp. 23-25, above.

c. Defendants' Cases Are Inapposite.

The cases upon which Defendants rely do not merit dismissal of Plaintiffs' CAC. First, Defendants rely on cases in which complaints were dismissed upon a Rule 12 motion for lacking factual specificity from which a conspiracy could be inferred, including *Twombly* and *LTL Shipping*.[4] In *Twombly*, the Supreme Court upheld the dismissal of a complaint that challenged an alleged conspiracy between competitors for failing to provide any specifics concerning the conspiracy, such as identifying the time of, place of, or persons involved in the conspiracy:

[4] *See also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (allegations of conspiracy were "vague and conclusory" and did not allege specifically "when or with whom" defendant conspired) (cited in AirTran Mem. at 2, 9; Delta Mem. at 4, 17); *CIBA Vision Corp. v. De Spirito*, No. 1:09-cv-01343, 2010 WL 553233, at *7 (N.D. Ga. Feb. 10, 2010) ("[Counter-claimaint] has not described with whom Plaintiff is in a conspiracy or where or when these agreements were made.") (cited in AirTran Mem. at 9); *Appleton v. Intergraph Corp.*, 627 F. Supp. 2d 1342, 1352 (M.D. Ga. 2008) (plaintiff's allegations of agreement were "even more vague than those . . . in *Twombly*") (cited in Delta Mem. at 7); *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) ("The complaint . . . provides no details as to when, where, or by whom this alleged agreement was reached.") (cited in AirTran Mem. at 9).

> [T]he pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. . . . [T]he complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.

Twombly, 550 U.S. at 565 n.10, 568. Similarly, in *LTL Shipping*, this Court dismissed a complaint because the plaintiffs "at most allege[d] parallel pricing conduct, the sharing of surcharge price information publicly using websites, and the claim that opportunities arose at which the Defendants could have met and hatched a price-fixing conspiracy." *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *13 (N.D. Ga. Jan. 28, 2009). Plaintiffs in *LTL Shipping* did not allege "facts to show when [the alleged conspiracy] began and when each Defendant allegedly joined into it." *Id.* at *14 n.9. This Court concluded that plaintiffs failed to allege "enough facts for the Court to find that agreement was plausible." *Id.* at *18.

Twombly, *LTL Shipping Services*, and the other Rule 12 cases upon which Defendants rely simply do not support dismissing Plaintiffs' CAC. Plaintiffs' conspiracy allegations specifically detail how and when the alleged conspiracy was reached, who was involved in the alleged collusive communications, the content of the communications, the changed business practices following the collusive communications, and the pretext for price increases. In accordance with cases decided after *Twombly*, these allegations contain sufficient factual specificity for a

fact finder to infer an unlawful conspiracy, rendering dismissal inappropriate as a matter of law.[5] Indeed, in *Twombly*, the Supreme Court held that a complaint advancing antitrust claims simply requires sufficient factual specificity to suggest a conspiracy was reached:

> [W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage: it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Twombly, 550 U.S. at 556. Plaintiffs meet this standard.

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[5] *See, e.g.*, *In re Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1076-77 (D. Kan. 2009) (denying motion to dismiss for time period for which plaintiffs alleged specific meetings and communications); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) (denying motion to dismiss where the pleadings "put defendants on notice concerning the basic nature of their complaints . . . and the grounds upon which their claims exist."); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 372 (M.D. Pa. 2008) (denying motion to dismiss where plaintiffs alleged "direct discussions about the need to collaborate on price increases" at a conference one month before defendants increased prices); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 901 (N.D. Cal. 2008) (denying motion to dismiss where allegations included particular communications between defendants); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007) (finding that plaintiffs' allegations plausibly raised a suggestion of preceding agreement where they alleged specific public communications through which defendants reached a tacit agreement); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 790 (N.D. Cal. 2007) (holding that allegations of meetings between competitors that detailed who was present at meetings and how they were involved in fixing prices were sufficient to allege a conspiracy when coupled with parallel pricing).

Second, Defendants rely on cases decided upon summary judgment in which Plaintiffs did not present sufficient evidence from which a conspiracy could be inferred.[6] In *Williamson Oil Co. v. Philip Morris USA*, for example, the Eleventh Circuit upheld dismissal of a case involving an alleged unlawful conspiracy because plaintiffs failed "to present *some* evidence that '*tends to*' exclude lawful, synchronous behavior." 346 F.3d at 1302 (emphasis in original). For example, evidence that the defendants in *Williamson* acted contrary to individual economic self-interest would have been a "plus factor" that would support an inference of a conspiracy. *Id.* at 1301. But the *Williamson* plaintiffs provided no such evidence. Their evidence of a conspiracy included only: an announcement that one defendant did not intend to *increase* prices; a statement that "we have no wish to escalate [the price war] [b]ut we shall be ready to respond tactically where necessary"; a statement that "price cutting or discounting – while still a factor – will be less important than in the past . . . . And our company fully intends to pursue options other than price for our [discount] brands"; and similar statements from which the court found that no reasonable jury could infer agreement. *Id.*

[6] *See, e.g.*, *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302 (11th Cir. 2003) (cited in AirTran Mem. at 10, 20; Delta Mem. at 12, 14, 27-28); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (cited in AirTran Mem. at 11); *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., Inc.*, 203 F.3d 1028, 1037 (8th Cir. 2000) (cited in AirTran Mem. at 12, 23-24; Delta Mem. at 9).

Here, accepting Plaintiffs' allegations as true, *Williamson* and Defendants' other Rule 56 cases do not support dismissal of this case. Plaintiffs specifically allege (a) collusive communications followed by responsive business practices (see pp. 12-16, above); (b) collusive communications followed by business practices contrary to each Defendant's own economic interest (see pp. 16-17, above); and (c) pretextual explanations for the first bag fee (see pp. 17-19, above). In accordance with *City of Tuscaloosa*, these allegations merit a jury deciding whether in fact Defendants conspired. 158 F.3d at 569.

Third, Delta cites cases stating that price announcements in and of themselves may be lawful.[7] Here, however, Plaintiffs do not allege simple price announcements, but allege that Defendants signaled their willingness to cut capacity and increase prices if Defendants acted in concert.

B. Plaintiffs' Factual Allegations Plausibly Support an Invitation to Collude In Violation of Sherman Act § 2.

Plaintiffs allege that, by inviting Delta to collude, AirTran attempted to monopolize the relevant market in violation of Sherman Act § 2. *See* CAC ¶ 90. Invitations to collude constitute attempted monopolization. *See United States v.*

[7] *See United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963) (discussing distinction between price announcements and solicitations to act in concert in jury instructions) (cited in Delta Mem. at 9); *United States v. Gen. Motors Corp.*, No. 38219, 1974 WL 926, at *21 (E.D. Mich. Sept. 26, 1974) ("The government has not shown [at trial] that either defendant intended its pricing moves to be a signal of its willingness to take specific additional pricing actions.") (cited in Delta Mem. at 9).

American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984) (American Airlines' attempt to fix prices with its airline competitor constituted attempted monopolization in violation of Sherman Act § 2); Analysis of Agreement to Aid Public Comment, *In re Valassis Commc'ns, Inc.*, FTC File No. 051 0008, at 3, Ex. B ("Invitations to collude have been judged unlawful under Section 2 of the Sherman Act as acts of attempted monopolization[.]"); Areeda & Hovenkamp, Antitrust Law § 1419, attached as Ex. G ("An individual firm's solicitation might be attacked in two ways: as a violation of FTC Act § 5 or of Sherman Act § 2.").

AirTran seeks to dismiss Plaintiffs' attempted monopolization claim on the grounds that Plaintiffs' allegations do not meet the three elements of attempted monopolization.[8] AirTran Mem. at 26-33. First, AirTran argues that Plaintiffs have failed to allege that AirTran engaged in anticompetitive conduct. AirTran Mem. at 27-28. According to AirTran, its communications cannot be considered anticompetitive because they were simply part of AirTran's "efforts to bolster confidence in the investment community." *Id.* at 27. But that is not what Plaintiffs allege. Plaintiffs allege that AirTran invited Delta to collude to increase prices. *See, e.g.*, CAC ¶¶ 32-36, 46-48, 55, 91. AirTran fails to accept Plaintiffs' factual allegations as true, rendering its argument improper as a matter of law.

[8] Attempted monopolization occurs when: (1) a defendant engaged in anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

Second, AirTran argues that Plaintiffs fail to allege specific intent to monopolize. AirTran Mem. at 28. This is simply not true: Plaintiffs explicitly allege a specific intent to monopolize. CAC ¶ 91 ("AirTran engaged in anticompetitive conduct with a specific intent to monopolize: by communicating to Delta through, *inter alia*, earnings calls and conferences AirTran's actual and potential future competitive actions concerning pricing and capacity cuts, AirTran sought to affect Delta's business practices and reach an understanding with Delta as to pricing (including a first bag fee) and capacity levels."). Coupled with Plaintiffs' detailed allegations of Defendants' anticompetitive conduct discussed above, Plaintiffs' "intent" allegations properly state a claim for attempted monopolization. *See Andrx Pharms., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1236 (11th Cir. 2005) (finding plaintiff's allegations sufficient where plaintiff simply alleged defendant had the "specific intent to monopolize" the relevant market).

Third, AirTran argues that Plaintiffs do not allege that AirTran's invitation to collude had a dangerous probability of success because Plaintiffs do not properly allege a relevant market in which AirTran has greater than a 50 percent market share.[9] Specifically, AirTran argues that, because they have not identified

[9] *But see Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984) ("[A] share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present.").

city-pairs included in the relevant market/sub-market, Plaintiffs cannot show a dangerous probability of success. AirTran Mem. at 29. But Plaintiffs allege that city-pairs to and from Hartsfield-Jackson served by AirTran and Delta are within the relevant market, which puts AirTran on inquiry notice of the city-pairs subject to the attempted monopolization claim. *See* CAC ¶ 90 ("By inviting Delta to collude, AirTran attempted to monopolize the domestic airline passenger service market served by Delta and AirTran and/or submarkets for flights originating or terminating at Hartsfield-Jackson.").[10]

AirTran also argues that Plaintiffs improperly combine AirTran's and Delta's market shares to establish that AirTran's invitation to collude had a dangerous probability of success. AirTran Mem. at 31. But in invitation to collude

[10] To satisfy AirTran, Plaintiffs could also amend the CAC to include specific city-pairs to and from Hartsfield-Jackson, including identifying city-pairs in which AirTran's market share is greater than 50 percent – or more appropriately, where AirTran and Delta's combined share exceeds 50 percent, as discussed below. But this would not be necessary to put AirTran on inquiry notice of the specific city-pairs at issue in this case, as AirTran itself knows the city-pairs it serves to and from Hartsfield-Jackson, and flights to or from Hartsfield-Jackson may be a relevant market. *In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 220 (E.D. Mich. 2002) (rejecting defendants' argument that "it is necessary to separately examine each of Plaintiffs' 234 city-pairs for the presence of [monopoly] power," and instead allowing plaintiffs to present a "'hub-skewed' market analysis to the trier of fact."). Moreover, amending at this stage of the litigation is unnecessary, as defining a relevant market is a fact-intensive inquiry, and AirTran cites cases that are not decided upon a motion to dismiss. *See, e.g.*, *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 994 (11th Cir. 1993) ("The definition of the relevant market is essentially a factual question, so the precise issue we first must address is whether U.S. Anchor introduced sufficient evidence to raise a jury question[.]") (cited in AirTran Mem. at 29-30).

cases, it is entirely appropriate to combine market shares of two competitors to assess whether an invitation to collude has a dangerous probability of success. *See American Airlines*, 743 F.2d at 1118-19.[11]

In *American Airlines*, the Fifth Circuit held that an American Airline executive's call to his chief competitor to jointly raise prices constituted an act of attempted monopolization. *Id.* at 1121-22. Because the two airlines jointly had a high share of a market with entry barriers, the court reasoned that American Airline's invitation to collude had a dangerous probability of success:

> Both Crandall [from American Airlines] and Putnam [from Braniff] were the chief executive officers of their airlines; each arguably had the power to implement Crandall's plan. The airlines ***jointly had a high market share*** in a market with high barriers to entry. American and Braniff, at the moment of Putnam's acceptance, would have monopolized the market. Under the facts alleged, it follows that Crandall's proposal was an act that was the most proximate to the commission of the completed offense that Crandall was capable of committing. Considering the alleged market share of American and Braniff, the barriers to entry by other airlines, and the authority of Crandall and Putnam, the complaint sufficiently alleged that Crandall's proposal had a dangerous probability of success.

Id. at 1118-19 (emphasis added).

[11] Even the case AirTran relies upon for the 50 percent market share requirement recognizes an exception when there is proposed joint conduct. *U.S. Anchor Mfg.*, 7 F.3d at 1000 ("In *Cliff Food Stores* the former Fifth Circuit stated that something more than 50% market share would be required to show actual monopoly, at least *in the absence of collusive price leadership or tacit coordination* in an industry.") (emphasis added).

The Fifth Circuit's combining of American Airlines' and Braniff's market shares in determining the potential competitive effect of an invitation to fix prices makes sense: in assessing a dangerous probability of success, a fact finder would want to know what would happen to market prices if an invitation to fix prices were accepted. The Fifth Circuit's approach is also consistent with other Sherman Act § 2 cases concerning a "shared monopoly," including Sherman Act § 2 cases involving alleged conspiratorial conduct.[12]

AirTran's effort to distinguish *American Airlines* is unavailing at this stage of the case. According to AirTran, *American Airlines* is irrelevant here because that case involved a "*direct* and *secret* contact" between two competitors, whereas "the allegations here are public communications directed to investors[.]" AirTran Mem. at 32 (emphasis in original). But that is not what Plaintiffs allege. Rather, just as in *American Airlines*, Plaintiffs allege that AirTran's communications were

[12] *See Springfield Terminal Ry. v. Canadian Pac. Ltd.*, 133 F.3d 103, 108 (1st Cir. 1997) ("We recognize that aggregation of the market power of predator and predatee may in some cases be warranted…"); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1437 (9th Cir. 1995) (aggregating market shares in a Sherman Act § 2 conspiracy to monopolize case); *Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F. Supp. 2d 600, 614 (S.D.N.Y. 2002) (denying motion to dismiss an attempted monopolization claim where plaintiff alleged that defendants collectively possessed a dangerous probability of achieving monopoly power). AirTran's shared monopoly cases are inapposite here. *See Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003) (involving a single-firm monopoly leveraging claim as opposed to an invitation to collude claim); *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (affirming summary judgment in case that did not involve an alleged solicitation of price-fixing among horizontal competitors in concentrated market(s)).

directed specifically to Delta – not investors – and served no purpose except to articulate to Delta an invitation to collude. *See, e.g.*, CAC ¶ 91; *see also Continental Airlines, Inc. v. Am. Airlines, Inc.*, 824 F. Supp. 689, 706 (S.D. Tex. 1993) ("Defendants' implication that Plaintiffs' claim must be dismissed because it is not as strong as the one presented in . . . *American Airlines, Inc., supra,* is without merit.").

Indeed, simply because some of AirTran's alleged unlawful communications occurred on quarterly earnings calls does not render the communication any less collusive. For example, in *In re Valassis*, the Federal Trade Commission prosecuted a publicly-traded corporation for inviting its competitor to collude on a quarterly earnings call. During its call, Valassis specifically articulated the circumstances under which it would increase prices to customers. The Commission believed that the risk of anticompetitive coordination was heightened because Valassis' invitation occurred on an earnings call:

> Given the obligation under the securities laws not to make false and misleading statements with regard to material facts, Valassis' invitation to collude, made in the context of a conference call with analysts, may have been viewed by News America as even more credible than a private communication. If such public invitations to collude were per se lawful, then covert invitations to collude would be unnecessary.

Analysis of Agreement to Aid Public Comment, *In re Valassis*, FTC File No. 051 0008, at 4, Ex. B. As in *Valassis*, AirTran's use of earnings calls to collude with

Delta – which Delta admits it monitors – heightens the anticompetitive potential of this conduct.

C. The Securities Laws Do Not Immunize Collusion from the Antitrust Laws.

Defendants argue that the securities laws immunize collusion from the antitrust laws when publicly-traded corporations collude through earnings calls and at industry conferences. *See* AirTran Mem. at 33-39; Delta Mem. at 20-23. But no court has ever so held, the FTC has prosecuted an invitation to collude through earnings calls, [redacted]. *See In re Valassis*, FTC File No. 051 0008, Exs. A, B; Draft Case Management Order at 13, 17 (Jan. 20, 2010), attached as Ex. H [redacted]).

Consumers affected by Defendants' alleged collusion – such as those who paid a first bag fee – have no cause of action to recover under the securities laws. Defendants nonetheless ask the Court to break new ground by establishing implied antitrust immunity that would give public companies a free pass to collude in public forums, and would deprive Plaintiffs of any remedy for Defendants' collusion. *But see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 (9th Cir. 1990) ("'[T]he *form* of the [information] exchange – whether through a trade association, through private exchange . . . , or through public announcements of price changes – should not be

determinative of its legality.'") (quoting R. Posner, *Antitrust Law: An Economic Perspective* 146 (1976)).

Precisely because of the far-reaching implications of what Defendants are asking this Court to do, implied immunity is disfavored as a matter of law. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). The doctrine applies only when a "plain repugnancy" exists between the antitrust laws and the securities laws. *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350-51 (1963)). Immunity from the antitrust laws is implied "'only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.'" *Gordon*, 422 U.S. at 683 (quoting *Silver*, 373 U.S. at 357). Implied immunity analysis is fact intensive. *In re IPO Fee Antitrust Litig.*, No. 98-7890, 2003 WL 21496795, at *2 (S.D.N.Y. June 27, 2003) (citing *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002)). Claims of implied immunity "must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it." *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981). Defendants bear the burden of proving the doctrine should apply here, as implied immunity cannot be justified unless the movant makes "'a convincing showing of clear repugnancy between the antitrust laws and the

regulatory system.'" *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of K.C.*, 452 U.S. 378, 388 (1981) (citations omitted).

Defendants have not – and cannot – meet their burden. Rather than cite a single case in which the securities laws precluded an antitrust challenge to collusion reached through public disclosures, they simply argue that they meet the four-part test from *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007). However, Defendants fail to meet each element of this test.

First, Defendants do not show "the existence of regulatory authority under the securities laws to supervise the activities in question." *Credit Suisse*, 551 U.S. at 275. The SEC does not regulate collusion among competitors. Rather, as evidenced by the regulatory authority Defendants themselves cite, the SEC regulates truthful disclosures to investors and the investment community at large.[13] "If the SEC's power is limited to requiring disclosure, then the agency's exercise of that power does not conflict with antitrust law, under which disclosure is neither a remedy for anticompetitive conduct nor a defense to the imposition of liability."

[13] *See, e.g.*, Regulation FD, 17 C.F.R. § 243.100-03 (2000) (addressing selective disclosure of material nonpublic information by issuers); 15 U.S.C. § 7261 (addressing the truthfulness of pro forma financial information); 15 U.S.C. § 77z-2 and 15 U.S.C. § 78u-5 (dealing with issuer liability for untrue statements of material fact with respect to "forward-looking statements"); PSLRA of 1995, Pub. L. No. 104-67, 109 Stat. 737 (passed by Congress "to enact reforms to protect investors and maintain confidence in our capital markets" by avoiding deleterious effects of "abusive and meritless" private securities litigation, H.R. Conf. Rep. No. 104-369, at 31 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730).

Pa. Ave. Funds v. Borey, 569 F. Supp. 2d 1126, 1130 (W.D. Wash. 2008). Defendants "point to no source of authority that permits the SEC to substantively regulate" the conduct at issue. *Id.*; *accord Hinds County, Miss. v. Wachovia Bank N.A.*, __ F. Supp. 2d __, 2010 WL 1244765, at *18 (S.D.N.Y. Mar. 25, 2010) (finding no preclusion where the regulatory authority at issue did not have the authority to regulate "a conspiratorial agreement to . . . fix prices").

Unlike the plaintiffs in *Credit Suisse*, who had a cause of action for damages under the securities laws, 551 U.S. at 277, no cause of action exists under the securities laws for Plaintiffs here – consumers who paid higher prices, such as a first bag fee – because of Defendants' alleged collusion. Accordingly, assuming Defendants colluded on earnings calls and at industry conferences (as Plaintiffs allege), no SEC authority would prevent such anticompetitive coordination: as long as their collusive communications were truthful, they will not violate the securities laws. Just as the FTC feared in *Valassis*, Defendants' position would give publicly-traded corporations a free pass to collude.

Second, Defendants present no evidence that the SEC exercises the authority to regulate collusion among competitors. *Credit Suisse*, 551 U.S. at 275. The SEC has no such authority. AirTran argues that the SEC's "active and ongoing" regulation is evidenced by Regulation FD ("Fair Disclosure") and Regulation S-K. AirTran Mem. at 37. But regulation FD concerns insider trading issues, and

Regulation S-K concerns filing forms under the Securities Exchange Acts and Energy Policy and Conservation Act.[14] Neither regulation concerns communications with competitors. Immunity should not be implied where, as here, the regulatory agency "has not regularly exercised its legal authority to regulate the collusive price-fixing . . . practices as alleged." *Hinds County*, 2010 WL 1244765, at *19.

Third, there is no "resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting . . . requirements." *Credit* Suisse, 551 U.S. at 275-76. No conflict exists between these two areas of law. *See Hinds County*, 2010 WL 1244765, at *21 (finding no conflict in enforcing Section 1 where the regulatory scheme did not permit or encourage collective action). The securities laws require truthful disclosures to investors. The antitrust laws prevent collusion among competitors. In *Valassis*, the FTC recognized that enjoining collusive communications on earnings calls would not interfere with any communications required by the securities laws.[15] Similarly, [redacted], Delta acknowledged that its public statements on earnings calls were governed by

[14] *See* Regulation FD, 17 C.F.R. § 243.100-03 (2000) (the SEC is "adopting new rules and amendments to address the selective disclosure of material nonpublic information by issuers and to clarify two issues under the law of insider trading."); Regulation S-K, 17 C.F.R. § 229.10 *et seq.* (containing the disclosure requirements for the nonfinancial statement portion of filings with the SEC).

[15] *See* Analysis of Agreement to Aid Public Comment, *In re Valassis*, FTC File No. 051 0008, at 5 n.10, Ex. B ("[T]he Commission would likely not interfere with a public communication that is required by the securities laws.").

both securities laws (which mandate truthful disclosures) and the DOJ antitrust "rules" (*i.e.*, the Sherman Act):

> I think Ben Hirst, our general counsel, would prefer that I not talk about any future ideas about where fees would go in the industry. We are very careful about being certain we comply with the Department of Justice and Department of Transportation rules on those sorts of matters.

CAC ¶ 64 (quoting Richard Anderson, Delta CEO). [redacted], AirTran lamented that "the airline 'industry has a habit of being very self destructive by sharing too much information with your competition.'" *Id.* ¶ 65 (quoting Kevin Healy, AirTran Sr. VP). Clearly, the securities laws do not mandate that competitors invite coordinated action.

AirTran argues that the alleged collusive communications are not subject to challenge because they "simply reiterated or discussed subject matter on public file at the SEC." AirTran Mem. at 34. But that is simply not true. AirTran fails to provide a single SEC disclosure that contains the degree of specificity as to how AirTran and Delta can collectively increase prices, such as AirTran's following statement:

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

CAC ¶ 55 (quoting Robert Fornaro, AirTran CEO); *see also id.* ¶¶ 33-36. This communication – and others referenced in the CAC – is a clear departure from AirTran's typical disclosure on earnings calls regarding the circumstances under which it would impose a price increase. *Compare id.* ¶ 55 (quoted above) to *id.* ¶ 65 (AirTran's refusing "for competitive reasons" to give details concerning new ancillary fee programs). Consistent with the FTC's approach in *Valassis*, the fact that AirTran decided to describe in detail on certain earnings calls how it could work with Delta to increase prices – when contrasted with the lack of detail provided in AirTran's SEC disclosures – is further evidence of collusion.[16] Ultimately, a jury should make this determination. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 661 F. Supp. 2d 1172, 1180 (D. Nev. 2009) (finding no implied antitrust immunity where "[i]ntent and the existence and

[16] *See* Analysis of Agreement to Aid Public Comment at 5, *In re Valassis*, FTC File No. 051 0008, Ex. B ("Valassis historically had not provided information of this type to the securities community, analysts had not need for the information and did not report it, and Valassis had no legitimate business justification to disclose the information. Valassis would not have disclosed the detailed information except in the expectation that News America would be monitoring the [earnings] call and except for the purpose of conveying its proposal to News America.").

scope of a conspiracy are matters which judges and juries resolve every day," and no regulatory expertise is required).

With respect to Plaintiffs' Sherman Act § 2 claim, AirTran argues that Plaintiffs cannot fashion any injunctive relief that would allow investor disclosure under Regulation S-K. AirTran Mem. at 38-39. AirTran is wrong for the reasons discussed on p. 50, below.

Finally, allowing an antitrust challenge to Defendants' alleged collusion will not affect practices "that the securities law seeks to regulate." *Credit Suisse*, 551 U.S. at 276. As discussed above, the securities laws do not seek to regulate collusion between competitors.

D. The *Noerr Pennington* Doctrine Does Not Bar Plaintiffs' Allegations Concerning Hartsfield-Jackson.

Defendants suggest that the First Amendment and the *Noerr-Pennington* doctrine preclude Plaintiffs from establishing liability based on Defendants' joint negotiation with Hartsfield-Jackson. *See* Delta Mem. at 19-20; AirTran Mem. at 25 n.8. Defendants' argument fails for two reasons.

First, *Noerr-Pennington* "is not a defense for parties who seek to influence officials acting in a purely commercial, or proprietary, rather than 'governmental' capacity." *Hill Aircraft & Leasing Corp. v. Fulton County, Ga.*, 561 F. Supp. 667, 675 (N.D. Ga. 1982); *cf. Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1447 n.14 (11th Cir. 1991) (stating that *Noerr* does not apply to "activity that is more

economic than political"). In *Hill Aircraft*, this Court rejected a *Noerr* defense on summary judgment where there was evidence that the County government was acting "in its commercial capacity as landlord of the airport, and nothing more." *Id.* at 676. Plaintiffs' allegations similarly relate to negotiations with the City of Atlanta in its commercial capacity as landlord of Hartsfield-Jackson. *See, e.g.*, CAC ¶ 59. AirTran acknowledges that the Defendants were coordinating simply to "restrain airport charges." AirTran Mem. at 26.

Second, Plaintiffs do not seek to impose liability on Defendants for the outcome of their collusive negotiations with Hartsfield-Jackson – *i.e.*, the fees Defendants' restrained. Rather, Plaintiffs allege that Defendants coordinated negotiations gave them an opportunity to cement and ensure compliance with their conspiracy to increase prices to consumers. *See* CAC ¶¶ 31, 59. While *Noerr* permits private parties to petition the government to take certain action, *Noerr* does not permit private parties to themselves take coordinated action that is anticompetitive. *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (finding that *Noerr* did not immunize a horizontal group boycott even though it was intended to influence government action).[17]

[17] Even if *Noerr* applied to Defendants' alleged activity, evidence of their coordinated negotiations would still be admissible for the purposes intended by Plaintiffs – to show motive, opportunity, and intent. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1160 (7th Cir. 1983) (quoting *Feminist Women's*

E. Injunctive Relief Barring Future Invitations To Collude Is Appropriate and Necessary.

For four reasons, Delta argues that Claim Three of the CAC should be dismissed for failure to state a proper claim for injunctive relief. First, Delta argues that injunctive relief is unnecessary because Plaintiffs allege that Defendants have "resumed compliance with the antitrust laws." Delta Mem. at 24. Delta is mistaken. While Plaintiffs allege that Delta has adhered to certain policies ([redacted][18]) that were not in place before, these policies appear only to be directed to public disclosure of future fees. *See* CAC ¶ 64 (declining to discuss "any future ideas about where fees would go in the industry"). Plaintiffs make no allegation that Delta has adhered to policies that would prevent invitations to collude regarding capacity cuts, such as Delta's invitation in paragraph 38 of the CAC.

Moreover, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952);

Health Ctr. v. Mohammad, 586 F.2d 530, 543 n. 7 (5th Cir.1978)); *Continental Airlines*, 824 F. Supp. at 702-03.

[18] *See* [redacted].

accord LaMarca v. Turner, 995 F.2d 1526, 1541-42 (11th Cir. 1993). Thus, the adoption of practices or policies consistent with the antitrust laws does not preclude injunctive relief under the Clayton Act. *See, e.g.*, *Wilk v. Am. Med. Ass'n*, 671 F. Supp. 1465, 1487-88 (N.D. Ill. 1987) (awarding injunctive relief even though defendant's "present policies are in compliance with the antitrust laws" where the defendant "never acknowledged the lawlessness of its past conduct"), *aff'd* 895 F.2d 352 (7th Cir. 1990).

Second, Delta argues that Plaintiffs have not plausibly alleged a threat of future injury. Delta relies, for example, on *In re G-Fees Antitrust Litigation*, where the plaintiffs were existing mortgage holders, and there was no allegation that they would purchase a mortgage in the future. 584 F. Supp. 2d 26, 35 (D.D.C. 2008). Here, however, Plaintiffs are airline passengers who are "purchasers of Defendants' services" (CAC ¶ 2), including individuals who reside in Atlanta, have paid multiple first checked bag fees (*e.g.*, *id.* ¶ 7), and allege that they are threatened with further injury absent an injunction (*id.* ¶ 98). Unlike mortgage holders in *G-Fees* who were not likely to be repeat customers, Plaintiffs here are airline passengers who are likely to continue purchasing airline passenger services on routes served by Defendants, including first bag fees. *Cf. McNair v. Synapse Group, Inc.*, No. 06-5072, 2009 WL 3754183, at *4 (D.N.J. Nov. 5, 2009) (finding claim for injunctive relief was appropriate where plaintiffs were potential repeat

customers). Delta can explore in discovery whether Plaintiffs are indeed likely to continue to purchase airline services from Defendants.

Third, Delta argues that Plaintiff's claim for injunctive relief is overly broad. Delta's Mem. at 27-33. But courts have broad discretion to fashion an injunction that is tailored to prevent the unlawful practices a plaintiff proves at trial. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) ("'[A] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated[.]'") (citation omitted); *B.C. Morton Int'l Corp. v. FDIC*, 305 F.2d 692, 699 (1st Cir. 1962) (reversing dismissal where defendant argued that prayer for injunctive relief was too broad and stating that "[w]e have no doubt of the ability of the District Court at the proper time to fashion an appropriately limited decree"). Indeed, this Court has previously held – in denying summary judgment – that "the propriety and scope of any injunctive relief can only be addressed by the Court after plaintiffs have been given an opportunity to prove their claims at trial." *Kenny A. v. Perdue*, No. 1:02-cv-1686, 2004 WL 5503780, at *9-10 (N.D. Ga. Dec. 13, 2004).

Here, if Plaintiffs prove that Delta and/or AirTran invited each other to collude in violation of Sherman Act § 2, an injunction can be entered that prevents either Defendant from publicly communicating that it will agree to cut capacity or

raise prices if a competitor would also do the same. Any such injunction would mirror the relief ordered by the FTC in *Valassis.* Decision & Order, *In re Valassis*, FTC File No. 051 0008, at 3-4, Ex. A.[19] Moreover, the injunction would not interfere with either Defendant's obligations to share information with investors under the securities laws. Finally, any such injunction would be entirely consistent with Plaintiffs "Prayer for Relief." *See* CAC, p. 41-42. Accordingly, Plaintiffs' request for an injunction is appropriate and does not merit dismissing Plaintiffs' Sherman Act § 2 claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied in their entirety.

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[19] Delta's argument that injunctive relief is improper because Plaintiffs cannot establish a dangerous probability of success (Delta Mem. at 30-31) fails for the same reasons as those discussed on pp. 33-38, above.

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