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

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

Roger W. Fones
Joshua A. Hartman
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, DC 20006
Tel: (202) 887-1500
Fax: (202) 887-0763

Alden L. Atkins
Vincent C. van Panhuys
Thomas W. Bohnett
VINSON & ELKINS L.L.P.
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, DC 20037
Tel: (202) 639-6500
Fax: (202) 639-6604

Bert W. Rein
WILEY REIN LLP
1776 K Street N.W.
Washington, DC 20006
Tel: (202) 71907080
Fax: (202) 71907049

Thomas W. Rhodes
Wm. Parker Sanders
SMITH, GAMBRELL & RUSSELL, LLP
Suite 3100, Promenade II
1230 Peachtree Street, N.E.
Atlanta, GA 30309
Tel: (404) 815-3551
Fax: (404) 685-6851

October 2, 2015

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Table of AirTran Exhibits Cited in Reply Brief

Number	Description
EX 13	October 2008 spreadsheet titled "1st bag revenue impact Data from October 2008" (AIRTRAN00005254)
EX 14	October 23, 2008 Q3 2008 AirTran Holdings, Inc. Earnings Conference Call (AIRTRAN00049563)
EX 15	November 5, 2008 Email from Kevin Healy to John Kirby (AIRTRAN01997755)
EX 16	November 5, 2008 Email from Kevin Healy to Judy Graham-Weaver et al. (AIRTRAN00064710)
EX 19	November 5, 2008 Email from Matthew Klein to Kevin Healy et al. (AIRTRAN00005253)
EX 20	November 6, 2008 Email from Robert Fornaro to Kevin Healy et al. (AIRTRAN00005433)
EX 21	November 6, 2008 Email from Jason Bewley to Arne Haak (AIRTRAN00007455)
EX 22	November 6, 2008 Email from Arne Haak to Kevin Healy (AIRTRAN00064716)
EX 23	November 6, 2008 Meeting Invitation from Kevin Healy to Rocky Wiggins et al. (AIRTRAN00461947)
EX 24	November 7, 2008 Email from Jason Bewley to Matthew Klein et al. (AT0025821)
EX 26	November 12, 2008 AirTran Airways Press Release (AIRTRAN00006740)
EX 27	Excerpts of Expert Report of Dr. Andrew Dick and Exhibits 3, 4, 5, 6 and 13 (Jan. 7, 2011)
EX 28	Excerpts of Expert Rebuttal Report of Dr. Andrew Dick (Feb. 4, 2011)
EX 43	October 22, 2008 Q3 2008 Northwest Airlines Earnings Conference Call (AIRTRAN0035416)

Number	Description
EX 51	October 27, 2008 Delta Fee Revenue Update, Combined Entity Structure (DBLF-00035358)
EX 52	October 22, 2008 Draft of Delta Value Proposition (DLBF-00036104)
EX 53	October 23, 2008 Draft of Delta Value Proposition (DLBF-00035512)
EX 54	October 24, 2008 Delta Value Proposition (DLBF-00035536)
EX 65	July 31, 2008 Email from Scott Fasano to Kathy Terryberry (AIRTRAN00012282)
EX 66	Excerpts of Anderson Deposition of October 6, 2010
EX 69	Excerpts of Bastian Deposition of September 17, 2010
EX 74	Excerpts of Fasano DOJ Deposition of July 17, 2009
EX 75	Excerpts of Fasano Deposition of December 1, 2010
EX 76	Excerpts of Fornaro DOJ Deposition of July 15, 2009
EX 77	Excerpts of Fornaro Deposition of November 18, 2010
EX 82	Excerpts of Hauenstein Deposition of September 30, 2010
EX 84	Excerpts of Healy DOJ Deposition of July 16, 2009
EX 86	Excerpts of Healy Deposition of November 19, 2010
EX 87	Excerpts of Klein Deposition of November 17, 2010
EX 91	Excerpts of Rary Deposition of November 9, 2010
EX 92	Excerpts of Ringler Deposition of November 12, 2010
EX 93	Excerpts of Rossano Deposition of November 5, 2010
EX 94	Excerpts of Singer Deposition of August 11, 2010
EX 95	Excerpts of Singer Deposition of November 22, 2010
EX 96	Excerpts of Singer Deposition of November 23, 2010
EX 98	Excerpts of Smith DOJ Deposition of September 15, 2009
EX 101	Excerpts of Mateer Deposition of December 7, 2010

Number	**Description**
EX 102	Excerpts of Transcript of Special Master Proceedings Before Bruce P. Brown (Aug. 12, Aug. 13, Aug. 15, Sept. 3, 2014) (Vols. 1-4) [Dkts. 543-546]
EX 103	Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, *In re Travel Agency Commission Antitrust Litig.*, No. 4-95-107 (D. Minn. July 10, 1995)

Table of Abbreviations

AirTran	AirTran Airways, Inc.
AirTran Br.	Memorandum of AirTran Airways, Inc. in Support of Its Motion for Summary Judgment (Aug. 31, 2012), ECF No. 353
American	American Airlines, Inc.
Aug. 3, 2015 Order	Order of Hon. Timothy C. Batten, Sr. adopting in part and rejecting in part the Special Master's Report & Recommendation (Aug. 3, 2015), ECF No. 548
Continental	Continental Airlines, Inc.
Crissey Decl.	Declaration of Kevin Crissey (Feb. 6, 2014), Exhibit 131 to Delta's Opposition to Plaintiffs' Motion for Discovery Sanctions (Feb. 7, 2014), ECF No. 434
Delta	Delta Air Lines, Inc.
DOJ	U.S. Department of Justice
DX	Delta's Exhibits to Motion for Summary Judgment
EX	AirTran's Exhibits to Motion for Summary Judgment
FBF	First bag fee
Feb. 22, 2011 Order	Order of Hon. Timothy C. Batten, Sr. (Feb. 22, 2011), ECF No. 271
Feb. 3, 2012 Order	Order of Hon. Timothy C. Batten, Sr. (Feb. 3, 2012), ECF No. 302
FTC	Federal Trade Commission
Initial R&R	Report & Recommendation of Special Master Bruce B. Brown (Nov. 21, 2014), ECF No. 520
MTD Order	Order of Hon. Timothy C. Batten, Sr. denying in part and granting in part Defendants' motions to dismiss (Aug. 2, 2010), ECF No. 136
Northwest	Northwest Airlines, Inc.

Opp'n	Plaintiffs' Opposition to Defendants' Motions for Summary Judgment (Sept. 11, 2015), ECF No. 554
Pls.' Facts	Plaintiffs' Statement of Additional Material Facts That Present a Genuine Issue for Trial (Sept. 11, 2015), ECF No. 554-3
PX	Plaintiffs' Exhibits to Opposition to Motions for Summary Judgment
Sanctions Hr'g Tr.	Transcript of Special Master Proceedings Before Bruce P. Brown (Aug. 12, Aug. 13, Aug. 15, Sept. 3, 2014) (Vols. 1-4), ECF Nos. 543-546
Southwest	Southwest Airlines Co.
Share Shift	Shift in market share as passengers shift from one airline to another
United	United Air Lines, Inc.
US Airways	US Airways, Inc.

When Plaintiffs first moved for sanctions against Delta, the Court said that Plaintiffs had an "overly sanguine" view of their evidence of an alleged conspiracy. (Feb. 22, 2011 Order at 24) The Court said that "[t]hese emails simply are not direct evidence of collusion." (*Id.* at 26) Those same emails are still the centerpiece of Plaintiffs' conspiracy claims.

When Plaintiffs again moved for sanctions a year later, they did not submit any new evidence of a conspiracy. The Court observed that "if Plaintiffs had better examples of how the new documents show that Defendants conspired to impose a first-bag fee, surely they would have said so." (Feb. 3, 2012 Order at 22-23)

In the three years since Defendants filed their summary judgment motions, Plaintiffs have pursued a quest for merits-based sanctions in which Delta turned itself inside-out. Their expert, Mr. Pixley spent more than 18 months and over $5 million, but he could not find any evidence of a conspiracy in the mountain of data Delta produced. (EX102, Sanctions Hr'g Tr. 241:19-244:6, 275:5-277:2) Upon reviewing the Special Master's Report and Plaintiffs' latest evidence, the Court observed that, "as far as the Court can tell, these documents do not contain any smoking guns, do not shed light on any other evidence destruction by Delta, and do not appear to be particularly damaging to Defendants' position in this litigation." (Aug. 3, 2015 Order at 35) The fact that Plaintiffs spent three years unsuccessfully

seeking merits-based sanctions—while Defendants' summary judgment motions were pending—is testament to the insufficiency of Plaintiffs' evidence.

During those same three years, the law favoring summary judgment where plaintiffs rely on inference to prove conspiracy has strengthened. In its opening brief, AirTran explained the unremarkable principle that, to prove a conspiracy in violation of Section 1 of the Sherman Act, a plaintiff must establish an *agreement* between two or more persons to restrain trade, and mere "tacit collusion" or "conscious parallelism" is not enough. As AirTran explained, the Eleventh Circuit concluded in *Williamson Oil Co. v. Philip Morris USA* that summary judgment was proper where the Plaintiffs attempted to infer a conspiracy from the defendants' consciously parallel pricing actions after a series of more informative public statements than the single statement at issue here.

Since AirTran's opening brief, courts of appeals repeatedly have rejected Section 1 claims based on stretched inferences like those that Plaintiffs offer here.[1]

[1] *In re Chocolate Confectionary Antitrust Litig.*, No. 14-2790, 2015 WL 5332604 (3d Cir. Sept. 15, 2015) (affirming summary judgment of conspiracy based on parallel conduct and alleged plus factors); *In re Musical Instruments & Equip. Antitrust Litig.*, No. 12-56674, 2015 WL 5010644 (9th Cir. Aug. 25, 2015) (affirming dismissal of complaint alleging parallel conduct and plus factors); *Mayor of Balt. v. Citigroup, Inc.*, 709 F.3d 129 (2d Cir. 2013) (affirming dismissal for lack of plausible allegations of conspiracy); *Hyland v. HomeServices of Am.*,

Notably, Judge Posner, writing on behalf of a unanimous panel of the Seventh Circuit, affirmed summary judgment in a similar case. The court identified the airlines' adoption of checked bag fees as a paradigm of lawful tacit collusion. It noted that when an airline responds to economic conditions by adopting a "checked-bag fee" to maximize profits, competitors "will monitor carefully the effects of the airline's response . . . and may well decide to copy the response should . . . [it] turn out to have increased its profits."[2]

The Seventh Circuit anticipated this case. It is undisputed that AirTran and Delta adopted first bag fees after most other major airlines already had adopted them and reported them to be highly profitable. It also is undisputed that (i) both AirTran and Delta performed independent, internal analyses confirming the expected profitability of first bag fees before adopting them, and (ii) decision-makers in each company vigorously debated the merits of these fees. And it is undisputed that Delta adopted its first bag fee only after it merged with Northwest,

---

Inc., 771 F.3d 310 (6th Cir. 2014) (affirming summary judgment because plaintiffs' circumstantial evidence did not show a plausible conspiracy); *In re Commodity Exch., Inc. Silver Futures & Options Trading Litig.*, 560 F. App'x 84 (2d Cir. 2014) (summary order affirming dismissal for lack of a plausible conspiracy); *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig*., 997 F. Supp. 2d 526 (N.D. Tex. 2014) (granting dismissal for lack of a plausible conspiracy).

[2] *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015).

that Northwest had already had a first bag fee, that Delta's Value Proposition analysis was prepared only for a stand-alone Delta and not for the merged carrier, and that the combined Delta-Northwest management adopted the fee in conjunction with aligning the merging airlines' fee structures. That is the antithesis of collusion.

Plaintiffs ask for that undisputed evidence to be ignored. Instead, Plaintiffs contend that they need only show that Delta's first bag fee decision might have been "affected" by AirTran CEO Robert Fornaro's answer to an analyst's question during a public, quarterly earnings call. (*See*, *e.g.*, Opp'n at 33, 43, 62.) But that cannot be squared with the ample case law holding that competitors in a concentrated market like the airline industry may observe each other's public statements and factor them into their strategic decisions. As this Court has observed, "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 Order at 32)

Elsewhere, Plaintiffs try to manufacture issues of fact from outlandish conclusions, wild conjecture, irrelevant facts, and assertions that are at odds with the record. For example:

- Plaintiffs contend that Delta "planted" the analyst's question that engendered Mr. Fornaro's first bag fee response during the earnings call. But no evidence supports this, and Plaintiffs chose not to depose the analyst, who swears it is untrue.[3]

- Plaintiffs claim that AirTran "never conducted a cost-benefit analysis" of first bag fees, but extensive undisputed evidence shows that AirTran did just that and determined a first bag fee would be highly profitable.[4]

- Plaintiffs state that "Defendants publicly admitted that they were 'working together' in Atlanta," but they omit the context: a legitimate and open effort to address costs and congestion at the Atlanta airport.[5]

- Plaintiffs speculate that Delta's internal "Value Proposition" assessment of a 50% probability that AirTran would adopt a first bag fee is "best explained" by supposed contacts between an AirTran middle manager, Scott Fasano, and lower-level Delta employees,[6] but they cannot cite any evidence linking Mr. Fasano and any Delta decision-maker, let alone that any alleged communication from him influenced Delta's analysis.[7] Elsewhere, they admit the 50% probability was based on nothing more than a coin flip. (Pls.' Facts ¶ 152)

In the end, after more than six years of litigation, tens of millions of pages of documents, dozens of depositions, an exhaustive sanctions detour, and millions of dollars in attorney fees, Plaintiffs have little more than they had at the pleading

[3] Opp'n at 15 & n.55; Crissey Decl. ¶¶ 6-7.

[4] Opp'n at 27 & n.125, 63; PX153; PX268; PX270; PX278; EX13; EX15; EX16; EX19 (AirTran's analysis); EX20; EX21; EX22; EX23; EX24 (further AirTran analysis); EX86, Healy 11/19/10 Dep. 119:22-121:7, 124:20-125:1.

[5] Opp'n at 28; PX326 at 4.

[6] Opp'n at 22; PX213 at 7, 15.

[7] Opp'n at 22 (citing PX213 and PX234 (two versions of the Value Proposition)).

stage: a response to an analyst's question during a public earnings call and consciously parallel decisions by AirTran and Delta to adopt first bag fees that followed their numerous competitors. This, and the litany of unsupported assertions that Plaintiffs wish were true, does not create an issue of fact for a jury to resolve. Summary judgment should be granted.

A. Plaintiffs Conflate Lawful Interdependent Conduct with an Unlawful Conspiracy.

It is well-established that the Sherman Act does not prohibit "conscious parallelism" or "tacit collusion."[8] As the Seventh Circuit recently said, "[e]xpress collusion violates antitrust law; tacit collusion does not." *In re Text Messaging*, 782 F.3d at 872.

---

[8] *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("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 in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."); *Williamson Oil*, 346 F.3d at 1298-99 (distinguishing between "collusive price fixing, i.e., a 'meeting of the minds' to collusively control prices, which is prohibited under the Sherman and Clayton Acts, and 'conscious parallelism,' which is not"); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1363 (N.D. Ga. 2010) ("[I]t is well settled that two competitors may lawfully observe each other's public statements and decisions without running afoul of the antitrust laws. This is commonly referred to as conscious parallelism, which is not unlawful under the Sherman Act.").

Plaintiffs conflate the two. They allege facts purporting to prove illegality, but which actually describe lawful interdependence in an oligopolistic market:

- "each Defendant *considered* the other's existing and expected FBF in determining its own fee policy" (Opp'n at 42 (emphasis added));
- "the AirTran earnings call *impacted* Delta's [FBF] decision" (*id.* at 2 (emphasis added));[9]
- "'D[elta] is carefully watching [AirTran] and waiting for a move on 1st bag'" (*id.* at 9 (quoting PX109));
- "AirTran was hopeful that Delta would be 'right behind' [Northwest in announcing FBF]" (*id.* at 7); and
- "Defendants recognized that FBF . . . would be more profitable for both AirTran and Delta to charge the fee than for neither airline to charge" (*id.* at 31).

Each of those allegations is at least equally consistent with lawful conscious parallelism as with unlawful express collusion. It is perfectly lawful for a participant in an oligopolistic market, such as the airline industry, to observe its competitors' actions and statements and consider them in assessing its response. That interdependent behavior may lead to a price increase, but absent an express agreement, the price increase is lawful. *See In re Text Messaging*, 782 F.3d at 875

[9] *See also id.* at 6 ("Delta promptly factored AirTran's offer into its analysis of whether to charge FBF"), 33 ("the October 23 earnings call affected Delta's decision"), 64 ("a reasonable jury could . . . infer that [Fornaro's answer] affected [Delta's] decision making").

(describing firms observing a competitor's price increase and noting, "[i]f any of these reflections persuaded the other firms—without any communication with the leader—to raise their prices, there would be no conspiracy, but merely tacit collusion, which to repeat is not illegal"). Indeed, the Seventh Circuit identified the airline industry's adoption of "checked-bag fee[s]" as a paradigmatic example of lawful parallel pricing. *Id.*

It was permissible for AirTran to consider Delta's announced adoption of a first bag fee when deciding whether it was in its rational, economic interest to adopt a first bag fee. Likewise, although the evidence shows that AirTran's public statements did not influence Delta's final decision, even if they had it would be of no legal moment. Delta could lawfully consider AirTran's statements when independently deciding whether it was in Delta's interest to adopt first bag fees. To hold otherwise would improperly create enormous legal risk any time firms in oligopolistic markets are aware of competitors' actions or public statements when making pricing or other strategic decisions.[10]

[10] *See In re Text Messaging*, 782 F.3d at 874 ("A seller must decide on a price; and if tacit collusion is forbidden, how does a seller in a [concentrated] market . . . decide what price to charge? If the seller charges the profit-maximizing price (and its 'competitors' do so as well), and tacit collusion is illegal, it is in trouble.").

Plaintiffs argue that Delta's only proper reaction to AirTran's alleged "invitation to collude" would have been to "report it to authorities." (Opp'n at 49 n.202) According to Plaintiffs, once the "invitation" has been reported, the "competitor would . . . be free to engage in actions that it would have taken absent the invitation with little risk of liability." (*Id.*) But Plaintiffs cite no authority for this purported rule that reporting an invitation to collude immunizes the recipient against an antitrust violation when it subsequently acts consistently with the invitation by, for example, raising prices.

On the other hand, such a rule would bring business decision-making to a halt because companies would risk crushing antitrust liability when they act on a topic where a competitor had spoken. Or, it would lead to a deluge of protective disclosures to antitrust regulators of public statements that an aggressive plaintiff might later label an "invitation." Plaintiffs have fabricated this rule from thin air, and it would be unworkable in a competitive economy. There are good reasons no court has ever adopted Plaintiffs' proposed rule.[11]

[11] Judge Posner anticipated this problem as well: "how is [a seller in a concentrated market] to avoid getting into trouble? Would it have to adopt cost-plus pricing and prove that its price just covered its costs (where cost includes a 'reasonable return' to invested capital)? Such a requirement would convert

B. Plaintiffs' "Plus Factors" Do Not Establish an Agreement

Plaintiffs do not, and cannot, contend there is any direct evidence of a conspiracy or agreement. Despite years of discovery and Mr. Pixley's exhaustive efforts, there is no evidence of any meetings or communications between decision makers about first bag fees, let alone evidence of an agreement.[12]

Plaintiffs therefore must rely on "plus factors" to try to show a conspiracy. *Williamson Oil*, 346 F.3d at 1300-01. "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. *In re Chocolate*, 2015 WL 5332604, at *8 ("Plus factors are 'proxies for direct evidence' because they 'tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'" (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004))). Plaintiffs suggest they need to prove just one plus factor to survive summary judgment (Opp'n at 1, 43), but that misstates the law. Rather, Plaintiffs' evidence, taken as a whole, must tend to "exclude the possibility that the alleged conspirators

---

antitrust law into a scheme resembling public utility price regulation, now largely abolished." *In re Text Messaging*, 782 F.3d at 874.

[12] *See* Initial R&R at 64-65 ("Mr. Pixley did not recall seeing *any* communications between anyone at Delta with anyone at AirTran concerning first-bag fees.").

acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Thus, even when 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; *In re Citric Acid Litig.*, 191 F.3d 1090, 1096-97 (9th Cir. 1999); *see also* MTD Order at 23 & n.8.[13]

In parallel conduct cases such as this one, "traditional non-economic evidence of a conspiracy [is] the most important plus factor." *In re Chocolate*, 2015 WL 5332604, at *8. In a concentrated industry, evidence that the Defendants had a "motive" to enter into an alleged conspiracy or "acted against their self-interest" in making the parallel decision(s) is of little value because such economic evidence "largely restate[s] the phenomenon of interdependence." *Id.* at *8, *10 (citing *Flat Glass*). "[W]e cannot infer too much from mere evidence of parallel pricing among oligopolists . . . [because] oligopolists may maintain supra-

[13] Evidence cannot be considered as a "plus factor" 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. *Id.* at 1301; *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991).

competitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action." *Id.* at *7. Therefore, the "most important plus factor in this case [is] whether there is enough traditional conspiracy evidence to create a reasonable inference that the [Defendants] conspired to fix prices." *In re Chocolate*, 2015 WL 5332604, at *11.

1. Plaintiffs' Public Signaling Allegations Are Not Evidence of a Conspiracy.

Plaintiffs argue that Mr. Fornaro's answer to an analyst's question during the October 23, 2008 earning call is a plus factor evidencing a conspiracy. Courts rarely have assessed antitrust liability based on signaling; Plaintiffs cite no case in which Section 1 liability was based only on a one-way "invitation to collude" without further dialogue; and even a public dialogue is not enough. *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, 672, 681 (E.D.N.C. 2003) (granting summary judgment over claims that airlines had engaged in price signaling through interviews in the trade press), *aff'd*, 118 F. App'x 680 (4th Cir. 2004). That is because the public "dissemination of price information is not 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., Sugar Inst. v. United States*, 297 U.S. 553, 598 (1936) ("the dissemination of information is normally an aid to commerce"); *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); *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253 (N.D. Ga. 2002) ("Because in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions, antitrust law permits such discussions even when they relate to pricing because the dissemination of price information is not itself a per se violation of the Sherman Act."), *aff'd sub nom. Williamson Oil Co.*, 346 F.3d 1287.

To support their alleged signaling conspiracy, Plaintiffs cite two cases where companies engaged in extensive dialogues about prices. (*See* Opp'n at 2-3 & n.1) In the first, *United States v. Airline Tariff Publishing Co.*, the DOJ wrote in a competitive impact statement that airlines had come to over 50 agreements on price using a code of communication they created within their jointly owned fare dissemination system. (PX1 at 9-15) "Through this electronic dialogue, [the defendants] conducted negotiations, offered explanations, traded concessions with one another, took actions against their independent self-interests, punished

recalcitrant airlines that discounted fares, and exchanged commitments and assurances—all to the end of reaching agreements to increase fares, eliminate discounts, and set fare restrictions." (*Id.* at 10) In Plaintiffs' other case, *In re Travel Agency Commission Antitrust Litigation*, the court credited evidence including electronic communications, private dinners among airline executives,[14] and "numerous telephone contacts, meetings and discussions among the defendants at critical times"[15] as sufficient to withstand summary judgment.

In contrast, Mr. Fornaro's spontaneous response to an analyst's question during AirTran's October 23, 2008 public earnings call cannot reasonably be construed as improper "price signaling." It was a truthful response that provided information that the investment community legitimately wanted to know regarding AirTran's fees that other airlines had found profitable. It was consistent with AirTran's SEC obligations to share information with its shareholders. Labeling Mr. Fornaro's response "an invitation to collude," as Plaintiffs do repeatedly, does not make it so.

The "invitation to collude" cases cited by Plaintiffs (Opp'n at 44-52) do not advance their argument. *Interstate Circuit*, *Gainesville*, and *Petruzzi* all involved

[14] 898 F. Supp. 685, 691 (D. Minn. 1995).
[15] EX103 at 10.

explicit *private* invitations to collude.[16] Plaintiffs' remaining citations are to FTC consent decrees based on Section 5 of the FTC Act, 15 U.S.C. § 45, but *Section 5 does not require evidence of an agreement*. Accordingly, no agreement was alleged in any of these actions, including in the *U-Haul* case, where at least one invitee took the action requested of it. Moreover, in each of those proceedings, the alleged invitation to collude was far more pointed, detailed, and explicit than Mr. Fornaro's public answer at issue here.[17]

Plaintiffs also argue that Delta "accepted" Mr. Fornaro's "invitation" by initiating a first bag fee. But any finding of acceptance under these facts would

---

[16] *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 215-17, 226-27 (1939); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300-01(5th Cir. 1978); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1242-46 (3d Cir. 1993). Moreover, in *Interstate Circuit*, the private letter to competitors included a detailed request to "pursue a radical departure from previous practices of the industry." 306 U.S. at 222. Here, analysts questioned AirTran because the majority of other airlines had already adopted first bag fees.

[17] In *In re Nationwide Barcode*, the FTC focused on email exchanges about pricing plans between competitor employees with pricing authority. (PX428 at 2-3) In *In re U-Haul International*, Inc., the FTC similarly highlighted private communications to competitors about pricing authorized by senior management with pricing authority. (PX361 at 1-3) And the FTC's Section 5 analysis in *In re Valassis Communications, Inc.* states there is evidence that the company intended to facilitate collusion and describes numerous affirmative statements to investors that included detailed company pricing and marketing plans that the company said it would implement under different competitive scenarios. (DX118 at 203)

radically depart from well-established law that "tacit collusion" is lawful.[18] As a leading antitrust treatise explains, an "oligopolist who raises prices to a supracompetitive level 'invites' rivals to follow . . . [but] 'acceptance' of this 'invitation' by following . . . does not violate either FTC Act § 5 or Sherman Act § 1."[19] Under Plaintiffs' theory, once Mr. Fornaro spoke, Delta could not make an independent decision to adopt a first bag fee without creating an inference that it "accepted" Mr. Fornaro's invitation. That is not the law. To have an agreement, there must be evidence that one party "sought" an agreement and that the other party "communicated its acquiescence," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 n.9 (1984), and there is no evidence that Delta did so.[20] It is not enough to show that one party suggested a price (which Mr. Fornaro did not) and that the other party charged the same price. *Id.* Yet Plaintiffs have no more.

---

[18] *See, e.g., Brooke Grp.*, 509 U.S. at 227; *In re Text Messaging*, 782 F.3d at 872; *In re Flat Glass*, 385 F.3d at 360.

[19] 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1419e4 (3d ed. 2010).

[20] Plaintiffs contend that Delta "planted" the analyst's question to Mr. Fornaro. (Opp'n at 15 & n.55) But there is no evidence supporting that claim, and the analyst denies it. (Crissey Decl. ¶¶ 6-7)

2. There Is No Evidence of "Collusive Communications."

Plaintiffs next argue that the unsuccessful efforts of Scott Fasano, an AirTran middle-manager, to learn Delta's plans about first bag fees amounts to a plus factor. They mention Mr. Fasano 35 times in their Brief and 98 times in their Statement of Facts.

Plaintiffs' reliance is misplaced. Chatter or "shop talk" among lower-level employees who lack decision-making authority does not tend to exclude the possibility of independent action and therefore is insufficient to withstand summary judgment. *See, e.g.*, *In re Chocolate*, 2015 WL 5332604, at *18 ("sporadic communications among individuals without pricing authority are insufficient to create a reasonable inference of a conspiracy"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124-25 (3d Cir. 1999) ("Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment."). Communications between competitors may be credited as a plus factor only if: (i) the communications are among decision makers; (ii) "an immediate sequel" to the communications is a "simultaneous or near-simultaneous price increase"; *and* (iii) the communications include a detailed information exchange that likely caused the parallel conduct at issue. *In re Text Messaging*, 782 F.3d at 875, 878 (evidence of

10 parallel pricing steps not compelling because "there were substantial lags"). For example, in *Flat Glass* the court concluded that information exchanges were relevant because they occurred suspiciously close in time to the price increases. 385 F.3d at 369.[21]

After extensive discovery, and giving Plaintiffs the benefit of all reasonable inferences, the evidence shows at most:

- Mr. Fasano's efforts to obtain information about Delta's plans spanned about a week in late July and early August 2008, long before either Defendant adopted a first bag fee;[22]
- Mr. Fasano may have reached only a few lower-level Delta employees who were far removed from those with decision-making authority over first bag fees;[23]
- Mr. Fasano also lacked responsibility for AirTran's first bag fee decision;[24]

[21] Plaintiffs' cases follow this pattern. *See, e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 68-69 (2d Cir. 2012) (conversations between competitors' executives closely preceding price increases presented an issue of material fact).

[22] *See, e.g.*, EX65; EX74, Fasano DOJ Dep. 46:20-50:4.

[23] Mr. Ringler and Mr. Rossano each testified that they did not recall any conversation with Mr. Fasano that involved first bag fees. Further, it is undisputed that neither had any knowledge or involvement in Delta's first bag fee decision. EX93, Rossano Dep. 11:17-19, 16:6-12, 79:5-25; EX92, Ringler Dep. 8:15-9:18, 37:22-39:15, 58:24-59:12, 64:12-66:8.

[24] EX74, Fasano DOJ Dep. 28:7-11.

- Mr. Fasano attempted to contact several people who were ***not*** employed by Delta at all, including employees of third party vendors and two former Delta employees;[25]

- The information supposedly obtained by Mr. Fasano was inaccurate;[26] and

- Mr. Fasano stopped those efforts several months before AirTran and Delta made their first bag fee decisions after he was reprimanded.[27]

Moreover, there is not a scintilla of evidence that anyone at Delta involved in, much less responsible for, Delta's bag fee decision, ever learned of Mr. Fasano's efforts.[28] Even after Mr. Pixley's exhaustive review of Delta's data, he could find no evidence of communications from Mr. Fasano in Delta's files. Nor could he find any other evidence that communications from AirTran found their

[25] EX91, Rary Dep. at 23:8-17; EX101, Mateer Dep. at 6:14-19; EX74, Fasano DOJ Dep. 61:4-65:20; EX75, Fasano 12/1/10 Dep. 128:15-131:18, 133:13-135:17.

[26] *See*, *e.g.*, DX116; EX75, Fasano 12/1/10 Dep. 147:19-149:24.

[27] Mr. Fasano was reprimanded in early August, and there is no evidence of communications after that date. *See* EX75, Fasano 12/1/10 Dep. 161:14-163:4; EX84, Healy DOJ Dep. 187:5-188:12.

[28] *See, e.g.*, EX82, Hauenstein Dep. 105:22-25 ("I was unaware of any communication [between Delta and AirTran about first bag fees]."); EX69, Bastian 9/17/10 Dep. 136:23-137:13 (outside of conversations regarding negotiations about Hartsfield airport expansion, Bastian was not aware of conversations between Delta employees or former employees and AirTran); EX66, Anderson 10/6/10 Dep. 95:4-11 (Anderson unaware of anyone at Delta communicating with anyone at AirTran about first bag fees).

way to Delta's decision-makers.[29] Consequently, none of Plaintiffs' evidence tends to show an AirTran-Delta agreement or excludes the possibility of independent decisions by each company.[30]

Moreover, Mr. Fasano's attempted communications were neither close in time to the Defendants' first bag fee decisions nor successful at producing correct information. For instance, in mid-July, Mr. Fasano reported that Delta would "go for the first bag after labor day."[31] But discovery has shown that Delta was not close to making a decision at that time.[32] None of this evidence suggests any communications about bag fees among decision-makers, let alone an agreement.

Finally, Plaintiffs assert that the CEOs of AirTran and Delta, Robert Fornaro and Richard Anderson, communicated with one another between May and October 2008. (Opp'n at 55) But their evidence shows only that Messrs. Fornaro and Anderson, who were former Northwest colleagues, attended some of the same

---

[29] EX102, Sanctions Hr'g Tr. 275:5-277:2; Initial R&R at 64-65.

[30] The absence of high-level communications contrasts with those found in Plaintiffs' cited cases. This case is nothing like *Gainesville Utilities*, where the court found a "continuous exchange of letters" between defendants' executives. 573 F.2d at 301.

[31] DX116 (July 15, 2008 email).

[32] *See* DX50 at DLTAPE-487 (on Delta's July 16, 2008 second quarter public earnings call, Delta President Ed Bastian explained that Delta would "continue to study" the adoption of a first bag fee, but had no plans to implement it "at this point.").

meetings, such as an Air Transport Association dinner and meetings with the Mayor of Atlanta to discuss the Atlanta airport. These contacts are legitimate, completely consistent with independent conduct, and do not tend to prove an alleged conspiracy. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1575 (11th Cir. 1991) ("It is well settled, however, that mere evidence of an opportunity to conspire, standing alone, will not support an inference of antitrust conspiracy."); *In re Citric Acid*, 191 F.3d at 1103 ("communications between competitors do not permit an inference of an agreement to fix prices).[33]

3. Allegations of Information Exchanges Are Insufficient

Plaintiffs also cannot prove an agreement or conspiracy based on alleged "information exchanges." (Opp'n at 58-64) Taking notice of one's rivals' statements and actions is integral to oligopolistic behavior and lawful conscious

[33] Lacking plausible evidence of a conspiracy, Plaintiffs resort to trying to infer a conspiracy from the *absence* of evidence. They argue that "AirTran and Delta likely engaged in additional collusive communications about FBF, but evidence of many of the communications was not preserved." (Opp'n at 57) Plaintiffs contend that "Delta destroyed relevant documents" and "AirTran's e-mail archiver malfunctioned." (*Id.* at 57 n.236) However, the Court has already held that plaintiffs may not present to the jury evidence of Delta's alleged spoliation because, among other reasons, there would be a "significant risk of unfair prejudice to AirTran." (Aug. 3, 2015 Order at 43) The Court emphasized that "AirTran has not been accused of, let alone shown to have committed, any discovery misconduct." (*Id.* at 44) It would be even more prejudicial to AirTran to permit a jury to speculate that there might have been conspiracy evidence but for the innocent malfunction of AirTran's archiving system.

parallelism. Plaintiffs cite cases for the proposition that an "information exchange" that "affects" pricing decisions can establish liability under Section 1 (*id.* at 58-61), but they are readily distinguishable. In *Flat Glass*, one alleged co-conspirator admitted that it had entered into an "across the board agreement" to increase prices with competitors and there was evidence of information sharing that included faxing a price increase announcement to a competitor before the price increase was announced. 385 F.3d at 363, 367-69. In *In re Static Random Access Memory Litigation*, extensive information was exchanged in both directions, including "production, pricing and revenue" data in one direction, and "production volume, volume supplied to Intel, and pricing" in the other, and documents indicated that one exchange took place at a lunch meeting between the two rivals' representatives. No. 07-md-01819, 2010 WL 5138859, at *2 (N.D. Cal. Dec. 10, 2010). And in *Currency Conversion*, senior representatives of defendants "attended many meetings" where they explicitly discussed the arbitration clauses at the center of the alleged conspiracy. *In re Currency Conversion Fee Antitrust Litig.*, No. 05 Civ. 7116, 2012 WL 401113, at *8 (S.D.N.Y. Feb. 3, 2012).

Here, in contrast, Plaintiffs' supposed evidence of "information exchanges" is limited to: (1) the failed, inaccurate, and untimely communications attempted by Mr. Fasano; (2) legitimate and sparse contacts between Messrs. Fornaro and

Anderson that had nothing to do with first bag fees; and (3) Mr. Fornaro's spontaneous earnings call response to an analyst's question on October 23, 2008. (Opp'n at 59-64) That evidence fails to show any "exchange" of information—there is no evidence that Delta provided material information about its bag fee plans to anyone. The only potentially relevant information communicated in this case went from AirTran to the public on October 23, 2008. While Delta received this information, it did not respond, and there was no dialogue. The first and only material public statement from Delta was its press release on November 5, 2008 announcing the decision after it had been made for the newly merged Delta/Northwest.[34]

Plaintiffs argue that the purported information exchanges affected AirTran's and Delta's decisions because internal analyses consider the other's likely first bag fee strategy, pointing again to the alleged effect of Mr. Fornaro's public earnings call answer on the Value Proposition prepared by Delta's Revenue Management group. (Opp'n at 59-64) But even if the Fornaro statement influenced Delta's

[34] To support the proposition that the alleged information exchanges "affected" pricing, Plaintiffs argue that Defendants' introduction of first bag fees in late 2008 represented an "abrupt shift from the past," citing *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000). (Opp'n at 61-62) Unlike *Toys "R" Us*, however, this case concerns two firms *conforming* to what had already become standard industry practice.

decision, that would not be evidence suggestive of conspiracy. First, Delta did not revise the Value Proposition to reflect AirTran's probable adoption of a first bag fee until after Mr. Fornaro's public remark, which undermines any inference of earlier private information exchanges. Second, as explained above, competitors in concentrated markets are permitted—and expected—to "watch one another like hawks," predict their competitors' responses, and factor those responses into their own decisions. *See In re Text Messaging*, 782 F.3d at 875. The Value Proposition proves nothing more.

Finally, Plaintiffs' reliance on the Value Proposition is misplaced. Delta's Revenue Management team prepared it before the Northwest merger was approved by DOJ, and accordingly it analyzes the decision only for stand-alone Delta.[35] After merging with Northwest, an analysis of stand-alone Delta was no longer relevant to the decision at hand. The merged carrier's decision makers had to consider that the merged entity would lose about $200 million in Northwest revenue if it did not impose a first bag fee, while considering Northwest's experience that there was little share-shift. Thus, when the final decision was

[35] EX52; EX53; EX54.

made, the Value Proposition did not reflect the decision Delta had to make for the combined entity.[36]

4. Defendants' Actions Were in Their Independent Self-Interest.

Plaintiffs next argue that, absent collusion, instituting a first bag fee would have been contrary to each Defendant's economic self-interest. (Opp'n at 64-67) Courts repeatedly have held that, in concentrated industries, this plus factor merely restates the fact that the market is interdependent.[37] A competitor in a concentrated market might conclude that a price increase would increase revenues only if competitors did the same, but nevertheless independently decide to adopt the price increase hoping that competitors will follow. As explained above, consciously "coordinated pricing" in oligopolistic industries is equally consistent with

[36] EX43; EX51; EX69, Bastian 9/17/10 Dep. 46:17-47:3; EX66, Anderson 10/6/10 Dep. 62:4-8.

[37] *In re Chocolate*, 2015 WL 5332604, at *8 (because "evidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market," self-interest arguments "largely restate the phenomenon of interdependence" and does not preclude summary judgment); *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1467 (M.D. Ala. 1993) (proof that a firm would not raise prices unless rivals did the same is simply a "restatement of interdependence"); *In re Flat Glass*, 385 F.3d at 360; *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011); *In re McWane, Inc.*, 2012-2 Trade Cas. (CCH) ¶ 78,061, 2012 WL 4101793, at *8 (FTC Sept. 14, 2012).

interdependent decision-making, and therefore does not tend to establish a conspiracy.[38]

Plaintiffs' argument is divorced from the real-world circumstances that existed when AirTran and Delta made their decisions. By September 2008, American, United, US Airways, Northwest and Continental all had adopted first bag fees (in some instances within days or hours of one another), which Plaintiffs do not contend to have been collusive.[39] The airlines and the press reported that these fees were highly profitable and led to little, if any, share-shift.[40] Based on this real-world evidence, AirTran and Delta each rationally concluded that adopting first bag fees would provide additional revenue far exceeding any lost

[38] *Williamson Oil*, 346 F.3d at 1310 ("Equipoise is not enough to take the case to the jury."); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 570-71 (11th Cir. 1998) ("evidence of consciously parallel behavior alone leaves the circumstantial evidence of collusion in equipoise").

[39] *See* AirTran Br. at 8-10 and exhibits cited therein, describing this history.

[40] DX45 at DLTAPE-272 (US Airways telling analysts it "certainly can't see any difference in market share or bookings" based on unbundled bag fees); DX56 (Continental noting that "in the nearly three months since American's fee took effect and other carriers began matching it, it hasn't seemed to sway customers"); DX72 at DLBF-00021982 (Sept. 18, 2008 Wall Street Journal article reporting Southwest "hasn't been rewarded by an uptick in traffic" for foregoing first bag fees).

market share.[41] As Judge Posner wrote in *Text Messaging*, one airline might adopt a "checked-bag fee" and competitors "may well decide to copy the response should . . . [it] turn out to have increased its profits." 782 F.3d at 875. The decisions of AirTran and Delta, supported by real-world evidence, do not tend to exclude independent decisions made in each carrier's self-interest.

Plaintiffs and their expert Dr. Singer ignore that real-world experience. To begin, Dr. Singer considers conscious parallelism to be "collusion," thus improperly conflating lawful and unlawful behavior.[42] By the time AirTran made its decision, Delta already had announced first bag fees, and AirTran could

---

[41] EX19 (AirTran saw internal analyses that suggested the revenue potential of a first bag fee was "staggering"); EX66, Anderson 10/6/2010 Dep. 66:14-17 ("[W]e came to the conclusion that there was no share shift effect"), 66:18-67:10, 72:8-12, 104:23-105:5; DX7, Bastian DOJ Dep. 56:8-57:14, 58:15-59:14, 61:25-63:2, 75:9-12 (revenue potential of first bag fee overwhelmed concerns about share shift); PX180 at DLTAPE-6394; *see also* DX73 (Elledge forwarding as a "good summary" an article entitled "Air Fees Cause No Share Shift, But Why?").

[42] EX28, Dick Rebuttal Report ¶¶ 40-44; EX95, Singer Dep. 11/22/10 437:22-438:13; EX96, Singer Dep. 11/23/10 674:21-675:8; EX94, Singer Dep. 8/11/10 321:9-25; *Hyland*, 771 F.3d at 322 (affirming exclusion of expert); *In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 810 (N.D. Ill. 2014) ("the opinions of plaintiffs['] experts do *not tend to exclude* the possibility that defendants' actions were merely parallel, rather than collusive"), *aff'd*, 782 F.3d 867, 879 (7th Cir. 2015).

lawfully consider that announcement.[43] Plaintiffs ignore evidence showing that AirTran had not decided whether to adopt a first bag fee even after Delta announced its first bag fees on November 5, 2008. This evidence shows that, following Delta's announcement, AirTran performed two detailed financial analyses and its management had several internal discussions about whether to adopt the first bag fee. The financial analyses showed that the revenue potential from first bag fees would be "staggering"[44] and estimated that the revenues from first bag fees would greatly exceed those AirTran might earn from Delta customers shifting to AirTran if it were to forgo a first bag fee.[45] Indeed, Dr. Singer acknowledged that AirTran thought it was economically rational for AirTran to follow Delta's lead rather than gamble on market share.[46]

There was a spirited debate among AirTran management about these analyses,[47] with several AirTran executives, especially those in marketing and

---

[43] *See Williamson Oil*, 346 F.3d at 1314-15; *see also In re Chocolate*, 2015 WL 5332604, at *11.

[44] EX19; *see also* EX87, Klein Dep. 208:11-17; EX24.

[45] EX19; EX87, Klein Dep. 208:11-17.

[46] PX398 ¶ 73 (Singer conceding that AirTran estimated fee revenues up to twice what it could gain in market share).

[47] EX20; EX13; EX21; EX22; EX24.

sales, opposing the fee.[48] Finally, on November 10, AirTran's top executives, Messrs. Fornaro and Healey discussed first bag fees again and decided to adopt the fee.[49] If there had been collusion, such detailed analysis and discussion would not have been necessary.

In the face of the information that informed AirTran's and Delta's decision-makers, Plaintiffs and Dr. Singer resort to second-guessing their business decisions. But the Eleventh Circuit has cautioned that courts must not "be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil*, 346 F.3d at 1310. "Thus, if a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor." *Id.*

Plaintiffs also argue that self-interested airlines would not unbundle first bag fees in November 2008 because of falling oil prices and a weakening economy. But in *Text Messaging*, the court rejected "the apparent anomaly of competitors' raising prices in the face of falling costs" as a plus factor because competitors may "have determined independently that they may be better off with a higher price."

---

[48] EX23; EX87, Klein Dep. 206:13-20; EX98, Smith DOJ Dep. 128:20-129:13; EX86, Healy 11/19/10 Dep. 122:4-126:3.

[49] *See* EX77, Fornaro 11/18/10 Dep. 85:25-86:17. *See also* EX26 (press release).

782 F.3d at 871. That is what the evidence shows here too. Oil prices were significantly higher than they had been the year before and were highly volatile.[50] AirTran had just reported a $107 quarterly loss, and a rational firm could decide to raise prices to fill that gap despite fuel prices beginning to decline from their recent peaks and economic uncertainty.[51] Firms in concentrated industries are prone to mimic one another's prices regardless of input costs, so evidence that they have done so does not give rise to an inference of conspiracy.[52]

5. AirTran's Public Statements Concerning Its First Bag Fee Were Not "Pretextual."

Plaintiffs assume a conspiracy on first bag fees, and then label AirTran's public statements that provide non-conspiratorial explanations as "pretext," and call that a "plus factor."[53] Even if there were a factual basis for Plaintiffs circular

[50] PX 344 at AirTran-490866 to -490867.

[51] EX27, Dick Rep. at 16.

[52] *See In re Chocolate*, 2015 WL 5332604, at *10 (finding "price increase disconnected from changes in costs or demand" did not create fact issue on conspiracy, as it "only raises the question" whether increase resulted from "rational interdependence"); *In re Text Messaging*, 782 F.3d at 874 (sellers may converge "on a joint profit-maximizing price without their actually agreeing to charge that price").

[53] Opp'n at 68, 70.

"pretext" argument (there is not), "pretext" is "insufficient to create a genuine issue of fact without other evidence pointing to a price-fixing agreement."[54]

Moreover, Plaintiffs get the facts wrong. Plaintiffs' own evidence shows that AirTran expressly and publicly acknowledged its interdependence with Delta in adopting a first bag fee,[55] and AirTran's *actual* press release announcing the fee did not mention fuel costs (Plaintiffs cite an *internal draft*).[56] Plaintiffs also cite the following *proposed* response to a reporter's question as evidence of pretext: "[W]e're still recovering from the staggering fuel prices from earlier this year—and fees are still necessary to this despite the fact that fuel is down."[57] Even if the evidence showed that AirTran actually had made this statement publicly (it does not), there would be nothing pre-textual about it.

Finally, AirTran's actions mirrored those of every other airline that had adopted checked bag fees in 2008. None of those other airlines withdrew their fees

---

[54] *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 452 (7th Cir. 2007); *see also In re Chocolate*, 2015 WL 5332604, at *20 ("[P]retext alone does not create a reasonable inference of a conspiracy."); *accord In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 53 (E.D. Pa. 2007).

[55] PX311 at 5 ("*We were waiting for Delta* [to adopt a first bag fee] but in this environment I don't see that any carrier has much choice. Certainly at first fuel costs were the reason, and now it's declining demand." (emphasis added)).

[56] *See* Opp'n at 30-31 (citing PX285); *compare* PX285 (draft), *with* EX26 (final released Nov. 12, 2008).

[57] PX313.

after fuel costs and demand began to fall. Thus, this differs from the cases on which Plaintiffs rely, where the courts credited "pretext" evidence in part because the defendants' alleged conduct was "extremely rare" or surprising.[58]

6. Alleged Motive and Intent to Conspire Are Not a Plus Factor.

Plaintiffs' allegations of motive and intent to conspire merely describe competitively motivated actions in a concentrated industry. "[E]vidence of motive without more does not create a reasonable inference of concerted action because it merely restates interdependence." *In re Chocolate*, 2015 WL 5332604, at *8 (citing *Flat Glass*). The evidence that Plaintiffs cite to support AirTran's alleged motive to conspire are the same handful of emails, focusing on the attempted communications by Mr. Fasano, that Plaintiffs use for nearly every alleged plus factor. Plaintiffs contend that AirTran had a "culture" of collecting intelligence about competitors (Opp'n at 10), but (even if true) that is perfectly consistent with independent actions in a concentrated industry where one competitor's actions

[58] In *DeLong Equipme*nt, the parties disputed the reasons for the defendant-manufacturer's alleged conspiratorial termination of the plaintiff-distributor, and the court concluded that the jury could hear the conflicting evidence because "[t]ermination of distributors by [defendant] was extremely rare," with only two other distributors terminated in thirteen years. *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1999). In *Linerboard*, the court credited pretext evidence in part because, in the defendants' combined fifty years of operating linerboard mills, they had taken "market downtime" — the alleged anticompetitive conduct — only once between them. 504 F. Supp. 2d at 53.

have a direct impact on another's profitability. It is unsurprising that AirTran would gather information about competitors from reporters, customers, vendors, and other legitimate sources, and consider such information in its own analyses and actions. [59] Plaintiffs emphasize AirTran's communications with reporters, but they reflected its interest in how customers would perceive a change to first bag fees[60] and what the public reaction and financial effects had been for other airlines that had already implemented such fees.[61] In sum, the evidence on which Plaintiffs rely for this alleged plus factor in no way tends to show collusion more than it shows that "[c]ompetitors in concentrated markets watch each other like hawks."[62]

C. Plaintiffs Are Precluded From Relying On the October 23, 2008 AirTran Earnings Call

In its motion for summary judgment, AirTran explained why Mr. Fornaro's truthful yet ambiguous answer to analysts' question about first bag fees on October 23, 2008 cannot be used as evidence to oppose summary judgment. (AirTran Br. at 52-55) As AirTran explained, this evidence meets each of the four

---

[59] With respect to Mr. Fasano's competitive intelligence, as discussed above, it was largely wrong and irrelevant to AirTran's first bag fee decisions months later.

[60] *See, e.g.*, EX86, Healy 11/19/10 Dep. 85:16-89:22.

[61] *Id.*

[62] *In re Text Messaging*, 782 F.3d at 874-75 (explaining why competitors in inter-dependent markets legitimately watch and follow one another).

factors that the Supreme Court applies to determine when the SEC's regulatory scheme precludes application of the antitrust laws. (*Id.* (citing *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 275-77, 282 (2007))) Plaintiffs have not offered any law or evidence that rebuts this preclusion. Plaintiffs cite only this Court's opinion on the Defendants' motion to dismiss where the Court noted that "at [that] early stage" (MTD Order at 36), implied preclusion was not yet appropriate. (Opp'n at 80 (citing MTD Order at 35-37)) As AirTran has since shown, *at the summary judgment stage*, and after extensive discovery, preclusion is warranted. If accepted, Plaintiffs' claims would chill public companies from making public disclosures and would use the antitrust laws to regulate information disclosures encouraged by the SEC regulatory scheme. Their claims would undermine the SEC's goal of encouraging public companies to provide accurate and material information to their investors.

D. Conclusion

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

Respectfully submitted,

/s/ Alden L. Atkins
Alden L. Atkins
Vincent C. van Panhuys
Thomas W. Bohnett
VINSON & ELKINS L.L.P.
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, DC 20037
Tel: (202) 639-6500
Fax: (202) 639-6604
aatkins@velaw.com
vvanpanhuys@velaw.com
tbohnett@velaw.com

Roger W. Fones
Joshua A. Hartman
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, DC 20006
Tel: (202) 887-1500
Fax: (202) 887-0763

Thomas W. Rhodes
Wm. Parker Sanders
SMITH, GAMBRELL & RUSSELL, LLP
Suite 3100, Promenade II
1230 Peachtree Street, N.E.
Atlanta, GA 30309
Tel: (404) 815-3551
Fax: (404) 685-6851
trhodes@sgrlaw.com
psanders@sgrlaw.com

Bert W. Rein
WILEY REIN LLP
1776 K Street N.W.
Washington, DC 20006
Tel: (202) 71907080
Fax: (202) 71907049
brein@wileyrein.com

Attorneys for Defendant AirTran Airways, Inc.

October 2, 2015

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

The undersigned counsel hereby certifies that this Reply Memorandum of Airtran Airways, Inc. in Support of Its Motion for Summary Judgment, 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 2nd day of October, 2015, I filed the foregoing Reply Memorandum of Airtran Airways, Inc. in Support of Its Motion for Summary Judgment, and accompanying attachments, with the Clerk of Court and caused the same to be delivered via email to the following attorneys of record:

Interim Liaison Counsel for Plaintiffs:
David H. Flint
Jared Heald
SCHREEDER, WHEELER & FLINT LLP
1100 Peachtree Street
Suite 800
Atlanta, GA 30309
dflint@swfllp.com
jheald@swfllp.com

Interim Co-Lead Counsel for Plaintiffs:
Daniel A. Kotchen
Daniel L. Low
KOTCHEN & LOW LLP
2300 M Street NW, Suite 800
Washington, DC 20037
dkotchen@kotchen.com
dlow@kotchen.com

Counsel for Defendant Delta Air, Inc.
Randall Lee Allen
ALSTON & BIRD
1201 West Peachtree Street
One Atlantic Center
Atlanta, GA 30309-3424
randall.allen@alston.com

James P. Denvir
BOIES SCHILLER & FLEXNER-DC
5301 Wisconsin Avenue, N.W.,
Suite 800
Washington, DC 20015
jdenvir@bsfllp.com

/s/ Alden L. Atkins
Alden L. Atkins
VINSON & ELKINS L.L.P.
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, DC 20037
Tel: (202) 639-6500
Fax: (202) 639-6604