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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	Civil Action No. 1:09-md-2089-TCB ALL CASES **FILED UNDER SEAL** Unsealed 11/10/2014

DELTA AIR LINES, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By early September 2008, every major legacy airline in the United States,[1] with the lone exception of Delta, charged a $15 fee for the first checked bag. There were differences of opinion within Delta about whether it should do the same. Delta's Airport Customer Service Department, responsible for airport operations including baggage handling, strongly favored the fee. The Revenue Management Department, responsible for setting fares, opposed it. By late September, however, Delta's two most senior executives – CEO Richard Anderson and President Ed Bastian – had decided that Delta should adopt a first bag fee. In light of the impending merger with Northwest (which already charged the fee), Anderson and Bastian agreed that the combined post-merger Delta should do so too.

But Anderson and Bastian recognized that Glen Hauenstein (Executive Vice President of Network Planning and Revenue Management) had different views. Anderson and Bastian agreed he should be given an opportunity to express those views "at [the] right time." Thus, on October 21, 2008 – two days before the AirTran earnings call statement at the heart of this lawsuit – the issue whether to

[1] "Legacy airlines" refer to the airlines that existed before airline deregulation in 1978. Prior to Delta's merger with Northwest, the major legacy airlines were: Delta, Continental, Northwest, American, US Airways and United.

adopt a first bag fee was placed on the agenda for discussion at the next meeting of Delta's Corporate Leadership Team ("CLT") to be held on October 27. On October 22, the day *before* the AirTran earnings call statement, Richard Anderson privately expressed his view that Delta should adopt the first bag fee, this time to Delta's Chief Operating Officer, Steve Gorman, who by that time also had become a strong advocate of the fee.

At the October 27, 2008 CLT meeting, Glen Hauenstein and other Revenue Management executives reporting to him argued against adoption of a first bag fee using slides they had prepared for that purpose entitled "Value Proposition." Steve Gorman argued in favor of charging the fee, as did Gil West, the head of Airport Customer Service who reported to him. Following further discussion, Delta's President Ed Bastian spoke out strongly in favor of the fee. Bastian was followed by CEO Richard Anderson – the ultimate decision-maker – who supported Bastian's arguments and announced to the entire leadership team his view (previously expressed privately only to Bastian and Gorman) that Delta should adopt the fee. Anderson decided to defer a formal ratification of the decision until after the merger closed, but Delta personnel immediately began work on the plan to announce and implement the first bag fee and the entire fee structure for the combined airline.

The pending merger was consummated two days later, on October 29, 2008. Within days, Delta announced the new harmonized fee structure for the combined airline, including charging a $15 fee for the first checked bag. Approximately one week later, AirTran announced that it also would adopt a $15 first checked bag fee.

Plaintiffs' only remaining claim in this case is that Delta's and AirTran's respective decisions to adopt a $15 first bag fee were the product of an unlawful agreement in violation of Section 1 of the Sherman Act.[2] Plaintiffs attempt to characterize AirTran CEO Robert Fornaro's undisputed public statements as an "invitation to collude" and Delta's undisputed decision to adopt a first bag fee shortly after its merger closed as an "acceptance" which established an "agreement" that violated Section 1 of the Sherman Act. But even if a company's hearing and acting upon a competitor's public statements when making its own independent business decisions could constitute an "agreement" that violates

[2] Plaintiffs' Consolidated Amended Complaint (Dkt. 53), filed in February 2010, contained new averments of conspiratorial capacity reductions through earnings call statements. Recitation of these averments takes up nearly all of nine pages of the factual discussion in the Court's Order on Defendants' Motions to Dismiss. *See* Aug. 2, 2010 Order (Dkt. 137) at 4-12 ("MTD Order"). Yet Plaintiffs' allegations of conspiratorial capacity reduction were affirmatively disproven by the undisputed fact that Delta *increased* capacity during the alleged conspiracy period in markets where it competes directly with AirTran, while significantly *decreasing* capacity system-wide. *See infra* at 44 & n.114. Plaintiffs have now abandoned those claims. *See* June 18, 2012 Order (Dkt. 335) ¶ 3.

Section 1,[3] there is no evidence to support the allegation that even this occurred here. To the contrary, the undisputed evidence establishes that Fornaro's statement had no impact on Delta's decision to adopt the first bag fee. The testimony and contemporaneous e-mails in the case confirm that the decision-makers at Delta had made up their minds *before* Fornaro's statement and had done so for reasons that were unrelated to whether AirTran might also adopt a bag fee. Those senior executives opposed to the fee at Delta before Fornaro's statement remained opposed after Fornaro's statement. Those in favor of the fee – including the CEO, who was the ultimate decision-maker – were all in favor of it before Fornaro's statement. No one changed their position as a result of his statement. These undisputed facts – conclusively demonstrated by contemporaneous documents and uncontradicted sworn testimony – entirely dispose of Plaintiffs' case.

But even if the ultimate decision-maker at Delta had not already decided what Delta would do before Fornaro's statement, Delta had several legitimate and compelling business reasons to adopt a first bag fee when it did. The merger with Northwest was imminent and Delta's CEO had made clear that to capture the efficiencies of the merger he wanted the carriers integrated into a single entity as

[3] As the Court observed in its Order on the Motion to Dismiss, "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.

quickly as possible. That meant, among many other things, a unified set of fees for the combined carrier. Northwest had already adopted a first bag fee and Delta therefore needed to decide whether the combined carrier would adopt Northwest's policy or Delta's. By late September 2008, *every* other major legacy airline had already adopted a bag fee and publicly reported it to be highly profitable and to produce few, if any, operational problems. Delta's top executives, therefore, had ample evidence that the first bag fee would generate significant and much-needed new revenue without any material adverse impact on the airline's operations. They also had ample reason to *reject* Revenue Management's concern that adopting the fee might result in a loss of market share to carriers, such as AirTran, JetBlue or Southwest which did not charge a fee. Every Delta executive deposed in this case has testified that the AirTran earnings call was irrelevant to his or her opinion of whether Delta should adopt a first bag fee.

But even if the Fornaro statement had been the key factor driving Delta's decision, Delta could not be held liable under the applicable law. The antitrust laws do not preclude firms from hearing and acting upon the public statements of their competitors. Under Plaintiffs' theory of liability, Delta would be foreclosed from doing what it believed was in its own independent best interest solely because of public statements made by one of its competitors. That theory is contrary to law

and common sense. It is also contrary to the policies the antitrust laws are intended to promote.

Plaintiffs cannot survive this motion for summary judgment because they cannot come forward with any evidence that tends to exclude the possibility that Delta acted independently. To the contrary, the evidence adduced during discovery in this case now affirmatively proves that Delta made the decision to adopt the first bag fee unilaterally. Delta therefore respectfully requests that the Court grant its motion for summary judgment.

STATEMENT OF FACTS[4]

A. Delta Unilaterally Implemented a First Bag Fee as Part of Its Post-Merger Integration With Northwest.

1. In 2007-2008, Airlines Begin to "Unbundle" Baggage Fees.

In the period leading up to the consummation of the Delta/Northwest merger in October 2008, there was a growing trend in the airline industry toward the "unbundling" of air transportation services – charging separately for some optional services that had previously been included in the price of the ticket for all travelers, whether they used the services or not.[5] As part of this trend, many airlines began separately charging for food, seat assignments, in-flight entertainment, and other services. In 2008, this trend expanded to checked baggage, as airlines began to charge separately for second and then first checked bags.[6] By the first half of

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[4] Accompanying this Memorandum, and incorporated by reference as if fully set forth herein, are Delta's (1) Statement of Undisputed Facts and (2) Appendix of Exhibits in Support of its Motion for Summary Judgment, which is comprised of the exhibits referenced in this Memorandum and the Statement of Undisputed Facts.

[5] Ex. 1, Expert Report of Dennis W. Carlton (Jan. 7, 2011) ¶¶ 8-11; Ex. 2, Expert Report of Andrew Dick (Jan. 7, 2011) ¶¶ 46, 49-50; Ex. 3, Expert Report of Daniel M. Kasper (Sept. 24, 2010) ¶¶ 22-25; Ex. 6, Bastian 9/17/2010 Dep. 178:14-179:8; Ex. 13, Gorman 12/10/2010 Dep. 108:10-15.

[6] Ex. 3, Kasper Report ¶¶ 22-25; Ex. 1, Carlton Report ¶ 11; Ex. 2, Dick Report ¶ 49 & Ex. 5. The trend in unbundled pricing for baggage was due, in part to the dramatic increase and volatility of fuel prices in 2007-2008. Ex. 31, U.S. Government Accountability Office, "Commercial Aviation: Consumers Could

2008, virtually every major domestic airline had adopted fees for *second* checked bags. Delta itself announced a $25 second bag fee on April 9, 2008. It went into effect the same day as the second bag fee of three other legacy carriers. Two days after Delta's announcement, AirTran announced a $10 second bag fee.

TABLE 1 - AIRLINE ADOPTION OF SECOND BAG FEES[7]

Announcement Date	Effective Date	Type	Carrier	Fee at Airport
3/6/2007	6/20/2007	Second Bag	Spirit	$10
July 2007	July 2007	Second Bag	Allegiant	$5
8/8/2007	8/8/2007	Second Bag	Virgin	$10
2/5/2008	5/5/2008	Second Bag	United	$25
2/6/2008	2/20/2008	Second Bag Change	Spirit	$20
2/26/2008	5/5/2008	Second Bag	US Airways	$25
3/28/2008	5/5/2008	Second Bag	Northwest	$25
4/4/2008	5/5/2008	Second Bag	Continental	$25
4/9/2008	5/5/2008	Second Bag	Delta	$25
4/11/2008	5/15/2008	Second Bag	AirTran	$10
4/22/2008	6/1/2008	Second Bag	JetBlue	$20
4/28/2008	5/12/2008	Second Bag	American	$25
4/24/2008	7/1/2008	Second Bag	Alaska	$25
5/1/2008	5/1/2008	Second Bag	USA 3000	$25
5/23/2008	6/10/2008	Second Bag	Frontier	$25
5/23/2008	6/16/2008	Second Bag	Midwest	$20
7/29/2008	8/5/2008	Second Bag Change	Delta	$50
8/12/2008	8/14/2008	Second Bag Change	AirTran	$25
9/3/2008	10/21/2008	Second Bag Change	Midwest	$25
11/5/2008	12/5/2008	Second Bag Change	Delta	$25

Benefit from Better Information About Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees," GAO-10-785 (July 2010), at 3 ("The U.S. passenger airline industry incurred nearly $4.4 billion in operating losses during calendar years 2008 and 2009. Volatile jet fuel prices—the airlines' biggest operating expense in 2008—was the chief contributor to airline losses in 2008.").

[7] Ex. 1, Carlton Report ¶ 21 & p. 14, Table 1; Ex. 2, Dick Report ¶ 50 & Ex. 6.

2. Delta Adopts a "Wait and See" Approach on First Bag Fees.

On May 21, 2008, American became the first major airline to begin charging a fee for a *first* checked bag.[8] Following American's announcement, Delta's senior executives began discussing whether Delta should do the same.[9] Steve Gorman, Delta's Chief Operating Officer – with responsibilities that include supervision of Delta's Airport Customer Service ("ACS") department[10] – recommended that Delta not "initiate a first bag fee now and . . . not reconsider it until after the summer peak."[11] Gorman's recommendation was based largely on concerns about the operational impact of adopting a first bag fee during the peak summer travel season.[12] CEO Richard Anderson agreed with Gorman's recommendation, stating that at that time he believed one free checked bag was "part of the basic bargain" when a customer purchased a ticket.[13] Delta's President Ed Bastian likewise agreed with the decision to wait and watch how the new first bag fee impacted other airlines over the summer.[14]

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[8] Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report ¶ 50 & Ex. 6.

[9] Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12); Ex. 4, Anderson 10/6/2010 Dep. 43:17-44:21; Ex. 6, Bastian 9/17/2010 Dep. 111:5-20; Ex. 7, Bastian DOJ Dep. 25:14-26:5. "R Cooper" is the internal Delta e-mail address of Delta CEO Richard Anderson. Ex. 4, Anderson 10/6/2010 Dep. 20:22-25.

[10] Ex. 13, Gorman 12/10/2010 Dep. 5:17-6:25, 21:16-18. During 2008, all baggage fees collected by Delta were attributed to the budget of Delta's Airport Customer Service department. *Id.* at 21:16-21; Ex. 4, Anderson 10/6/2010 Dep.

Several weeks later, on June 12, 2008, US Airways and United announced their adoption of a first bag fee.[15] These developments led to further discussion and more formal analysis of the issue at Delta.[16] On June 16, 2008, Delta's ACS group presented a written analysis of the first bag fee to the CLT, a group of Delta's most senior executives which serves as an advisory group to CEO Richard Anderson.[17] Anderson had final authority for making a decision on the first bag fee.[18]

48:17-22.

[11] Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12).

[12] *Id.* *See also* Ex. 33, at DLBAG-9552; Ex. 13, Gorman 12/10/2010 Dep. 13:18-16:23; 39:12-22.

[13] Ex. 32, at DLBF-35296 (Anderson 10/6/2010 Dep. Ex. 12); Ex. 4, Anderson 10/6/2010 Dep. 42:24-43:21, 106:22-107:4. *See also* Ex. 34, at DLBAG-6756 (Gorman 5/10/2012 Dep. Ex. 3).

[14] Ex. 6, Bastian 9/17/2010 Dep. 111:5-114:16; Ex. 7 Bastian DOJ Dep. 25:14-28:11.

[15] Ex. 35, at DLBF-2415; Ex. 36, at DLBF-17878-79.

[16] Ex. 5, Anderson 5/3/2012 Dep. 163:10-20; Ex. 6; Bastian 9/17/2010 Dep. 115:6-118:22.

[17] Ex. 37, at DLBF-35301 (Bastian DOJ Dep. Ex. 2); Ex. 5, Anderson 5/3/2012 Dep. 207:16-22, 238:2-19; Ex. 7, Bastian DOJ Dep. 11:24-12:19; Ex. 14, Gorman 5/10/2012 Dep. 44:10-21, 45:15-25.

[18] Ex. 5, Anderson 5/3/2012 Dep. 238:2-19; Ex. 7, Bastian DOJ Dep. 12:8-11. As reflected in the April 14, 2008 press release announcing the Delta/Northwest merger, Richard Anderson would be the CEO of the post-merger combined carrier. Ex. 38, Apr. 14, 2008 Delta Press Release.

Delta ACS's presentation to the CLT in June 2008 estimated that adoption of a first bag fee would generate over $220 million annually for pre-merger Delta (assuming, conservatively, that only 60% of passengers checking a bag would continue to do so after adoption of the fee).[19] It recommended, however, that Delta should "not adopt [a] first bag fee at this time," but "continue to monitor [other airlines] through [the] end of the summer and re-evaluate."[20] This approach would allow Delta to observe the operational and financial impact of the fee on other carriers, as well as avoid the potential risk of disruption at the airport from implementing this new fee during the peak summer travel season.[21]

Delta's wait-and-see strategy was not unique. On June 18, 2008, Continental was publicly reported to be "watching how the $15 fee on a first checked bag works at other airlines before deciding whether to ask passengers to

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[19] Ex. 37, at DLBF-35301 (Bastian DOJ Dep. Ex. 2); Ex. 13, Gorman 12/10/2010 Dep. 52:13-18; Ex. 28, West DOJ Dep. 48:4-49:1, 54:2-10. In reality, far more passengers continued to check a bag after the adoption of the fee than ACS had estimated in June 2008. Ex. 28, West DOJ Dep. 237:5-14; Ex. 39, at DLBF-63972-73.

[20] Ex. 37, at DLBF-35301 (Bastian DOJ Dep. Ex. 2).

[21] Ex. 6, Bastian 9/17/2010 Dep. 113:6-115:12; 117:22-118:7, 124:10-18; Ex. 7, Bastian DOJ Dep. 26:3-5, 29:4-31:11, 56:8-57:11; Ex. 13, Gorman 12/10/2010 Dep. 22:3-6, 39:12-22; Ex. 28, West DOJ Dep. 52:1-53:3, 58:5-22; 61:8-64:21, 83:14-84:5; *see also* Ex. 40, at DLBAG-39194 (West 5/11/2012 Dep. Ex. 4) (June 13, 2008 e-mail from Gil West to Gail Grimmett: "At $250M/yr, I suspect the pressure to match will be strong after the summer."); Ex. 41, at DLBAG-15476.

pay up." Continental's CEO was reported to believe that the fee could "raise a lot of money but might cause delays in boarding the plane," and that the airline was "studying whether passengers prefer airlines that do not charge the fee."[22]

3. Carriers Charging a First Checked Bag Fee Report Significant New Revenues, and All Remaining Major Legacy Carriers Except Delta Adopt the Fee.

Over the Summer of 2008, it became increasingly apparent that airlines which had adopted a first bag fee were earning significant additional revenue without any adverse impact on operational performance. Public earnings call statements by Delta's rival airlines during July 2008 included the following:

> **American** (July 16, 2008): "The first bag fee is still ramping up but we expect this and our other fee increases to drive several hundreds of millions of dollars of new revenue to the Company. . . . [We] don't think there's been any operational issue related to it."[23]
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> **United** (July 22, 2008): "We are creating significant incremental revenue by unbundling our products. Last quarter, we announced our new second checked bag fee, in June we announced that we will be charging for the first checked bag. . . . We estimate that the potential revenue from the new baggage service handling fees will be about $275 million annually in 2009."[24]
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> **US Airways** (July 22, 2008): "During the quarter we implemented an a la carte pricing model which includes the first and second bag charge, new choice seat option and sale of beverages . . . . [O]ur initial results are very encouraging. We are increasing our estimate of the annual benefits of this

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22 Ex. 42, at DLTAPE-2921; Ex. 2, Dick Report ¶¶ 52-53, 77, 87, 92.

23 Ex. 43, at DLTAPE-515, 527.

24 Ex. 44, at DLTAPE-154, 156.

> program by $100 million to [$]400 million to $500 million per year. . . . So far the implementation has gone smoothly in terms of operational and customer impact. . . . [W]e certainly can't see any difference in market share or bookings between carriers that have matched and carriers that haven't matched."[25]

On July 9, 2008, Northwest announced its adoption of a $15 first bag fee, and publicly reported that it expected the fee (along with other new or revised fees) to generate between $250 and $300 million in additional annual revenue.[26] Northwest's adoption of a first bag fee was of particular importance to Delta because of the proposed Delta-Northwest merger, which had been announced on April 14, 2008.[27]

Following the merger's announcement, and while the DOJ conducted its regulatory review of the proposed merger, Delta and Northwest commenced a massive effort to prepare for the post-merger integration of the two airlines. Delta planned to merge the two companies into a single carrier with a unified schedule and operations, common pricing, marketing strategy, route planning, and airport customer service as soon as possible after the merger closed.[28] To achieve this

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[25] Ex. 45, at DLTAPE-263, 264, 272.

[26] Ex. 46, at DLTAPE-1758; Ex. 47, at DLTAPE-374.

[27] Ex. 38, Apr. 14, 2008 Delta Press Release; Ex. 6, Bastian 9/17/2010 Dep. 125:4-12.

[28] Ex. 38, Apr. 14, 2008 Delta Press Release; Ex.48, at DLBAG-7195-205; Ex. 49, at DLBAG-994-1065, at 1000, 1008; Ex. 50, at DLTAPE-478; Ex. 51, DLBF-

goal, Delta's senior executives recognized that, as part of the post-merger integration, Delta would have to harmonize all of the fares, fees, and customer service policies of the two carriers, including fees charged for checked baggage.[29] Thus, after Northwest announced its adoption of a first bag fee, Delta's executives knew that Delta would have to decide whether to adopt a first bag fee, or eliminate Northwest's fee.[30]

Not surprisingly, Northwest's first bag fee announcement sparked interest in the investment community about Delta's plans for a first bag fee.[31] In anticipation

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82420-29, at 82426; Ex. 52, at DLBAG-30922; Ex. 4, Anderson 10/6/2010 Dep. 85:8-13, 97:14-98:17; Ex. 6, Bastian 9/17/2010 Dep. 127:13-128:1; Ex. 13, Gorman 12/10/2010 Dep. 25:24-26:15; Ex. 119, Jad Mouawad, *Delta-Northwest Merger's Long and Complex Path*, N.Y. Times, May 18, 2011.

[29] Ex. 49, at DLBAG-1025; Ex. 53, at DLBAG-2158; Ex.54, at DLBF-82433; Ex. 55, DLBF-82431; Ex. 4, Anderson 10/6/2010 Dep. 60:1-19, 87:17-88:6; Ex. 7, Bastian DOJ Dep. 18:23-19:3, 38:12-39:12, 40:20-41:6, 44:13-20; Ex. 6, Bastian 9/17/2010 Dep. 127:13-128:4; Ex. 13, Gorman 12/10/2010 Dep. 100:16-102:12, 123:12-124:19; Ex. 16, Hauenstein 9/30/2010 Dep. 12:6-25, 47:12-18; Ex. 15, Grimmett 9/28/2010 Dep. 101:17-21; Ex. 27, West 5/11/2012 Dep. 36:12-37:4; Ex. 28, West DOJ Dep. 35:1-12, 74:8-12, 75:8-77:16, 86:14-18; Ex. 1, Carlton Report ¶¶ 5, 25.

[30] Ex. 4, Anderson 10/6/2010 Dep. 60:1-61:5, 66:11-14, 84:18-86:3; Ex. 6, Bastian 9/17/2010 Dep. 127:21-128:4; Ex. 7, Bastian DOJ Dep. 38:12-17, 40:20-41:6, 44:13-20; Ex. 13, Gorman 12/10/2010 Dep. 123:12-124:19; Ex. 16, Hauenstein 9/30/2010 Dep. 61:3-62:15; Ex. 28, West DOJ Dep. 75:8-77:16, 85:16-21; Ex. 15, Grimmett 9/28/2010 Dep. 101:17-21. Delta was planned to be the surviving entity post-merger. *See* Ex. 38, Apr. 14, 2008 Delta Press Release.

[31] Ex. 50, at DLTAPE-487 (Delta Q2 2008 Earnings Call, Kevin Crissey, UBS Analyst: "Okay, and finally if I could, in terms of the first bag fee, I think

of such inquiries, Delta prepared responses to make clear that until regulatory approval of the merger was obtained the fee decisions of the two carriers remained "completely separate" and that "[c]ustomers can still check a first bag at no charge," but emphasized that "we [Delta] have to continue to look at everything given $140 fuel, etc."[32] Thus, when an analyst asked about Northwest's first bag fee 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*."[33]

On September 5, 2008, Continental announced it was adopting a first bag fee. Continental stated publicly that it had not experienced any significant market share gain from not charging the fee, and concluded that adoption of the fee was the "right competitive move":

> Continental Chairman and CEO Lawrence Kellner said this summer his airline was watching how the fee worked at other airlines - whether it caused delays in boarding - and whether customers would rather pay a fare increase than face a bunch of fees. "My general view is if those people need a product, how do we put that in an all-inclusive fare?" he said at the time. But in the nearly three months since American's fee took effect and other carriers began matching it, it hasn't seemed to sway customers. . . . Continental spokeswoman

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Northwest has it and you don't and where is that heading?").

[32] Ex. 46, at DLTAPE-1757.

[33] Ex. 50, at DLTAPE-487.

> Julie King said Friday. "So we feel it's the right competitive move" to charge for a first checked bag.[34]

Continental's decision left Delta as the *only* major legacy carrier without a first bag fee.

TABLE 2 - AIRLINE ADOPTION OF FIRST BAG FEES[35]

Announcement Date	Effective Date	Type	Carrier	Fee
3/6/2007	6/20/2007	First Bag	Spirit	$5
July 2007	July 2007	First Bag	Allegiant	$3
2/6/2008	2/20/2008	First Bag Change	Spirit	$20
5/21/2008	6/15/2008	First Bag	American	$15
6/12/2008	8/18/2008	First Bag	United	$15
6/12/2008	7/9/2008	First Bag	US Airways	$15
7/9/2008	8/28/2008	First Bag	Northwest	$15
7/30/2008	10/1/2008	First Bag	Hawaiian	$15
August 2008	10/21/2008	First Bag	Midwest	$15
9/4/2008	10/1/2008	First Bag	Sun Country	$12
9/5/2008	10/7/2008	First Bag	Continental	$15
9/12/2008	11/1/2008	First Bag	Frontier	$15
11/5/2008	12/5/2008	First Bag	Delta	$15
11/12/208	12/5/2008	First Bag	AirTran	$15
3/19/2009	5/5/2009	First Bag	Virgin America	$15
4/22/2009	7/7/2009	First Bag	Alaska Airlines	$15
July-Sept 2009	July-Sept 2009	First Bag	USA 3000	$12

4. A Debate Emerges Within Delta Concerning Whether the Post-Merger Entity Should Charge a First Bag Fee.

On September 2, 2008, just three days prior to Continental's announcement, Delta CEO Richard Anderson instructed the two senior executives leading the

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[34] Ex. 56, at DLBF-21565.

[35] Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report Ex. 6. Although generally considered to be a legacy carrier, Alaska Airlines is much smaller than the major legacy carriers. Ex. 1, Carlton Report at p. 13 n.31; Ex. 6, Bastian 9/17/2010 Dep. 68:24-69:2.

Revenue Management and ACS Departments – Gail Grimmett[36] and Gil West[37] – to develop a proposal for the combined entity's comprehensive post-merger fee structure, without input from Northwest, so that the harmonized fees for "new Delta" could be announced as quickly as possible upon the merger's close.[38] The two departments worked to plan the harmonization of dozens of different fees and

[36] At the time, Gail Grimmett was Senior Vice President Revenue Management, and reported to Glen Hauenstein, Executive Vice President Network Planning & Revenue Management. Ex. 57, at DLBF-82386; Ex. 15, Grimmett 9/28/2010 Dep. 19:16-20:4.

[37] Gil West at all relevant times has been Senior Vice President Delta ACS, reporting directly to Steve Gorman. Ex. 57, at DLBF-82396; Ex. 28, West DOJ Dep. 5:15-18, 22:12-13.

[38] Ex. 59, at DLTAPE-4040 (Anderson 5/3/2012 Dep. Ex. 42); Ex. 60, at DLBF-36512-13 (West DOJ Dep. Ex. 8) ("Last week, Gail met with Richard [Anderson] and she was informed that Richard wants to meet . . . to discuss the fee structure of the combined entity. Rather than waiting for the consummated merger date, he wants to determine the fee structure beforehand."); Ex. 61, at DLBF-82417; Ex. 62, at DLTAPE-8353; Ex. 63, at DLTAPE-6856; Ex. 64, at DLBAG-11283-89; Ex. 5, Anderson 5/3/2012 Dep. 198:3-18; Ex.13, Gorman 12/10/2010 Dep. 141:8-23; Ex. 27, West 5/11/2012 Dep. 36:5-37:10; Ex. 28, West DOJ Dep. 35:1-7, 86:14-87:8, 122:1-5; Ex. 15, Grimmett 9/28/2010 Dep. 128:5-129:17, 131:5-13, 138:23-140:11.

policies,[39] and reached agreement on all of them except one – whether to adopt Northwest's first bag fee.[40]

On the Revenue Management side, Grimmett and her supervisor Glen Hauenstein firmly opposed the fee.[41] Hauenstein and others in Revenue Management had concerns that potential revenue gains from a first bag fee would be offset by lower fare revenue because they believed charging the fee would result

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[39] Ex. 28, West DOJ Dep. 35:1-36:7, 116:2-120:2, 122:1-125:2, 129:18-3, 142:14-149:18; Ex. 5, Anderson 5/3/2012 Dep. 209:19-210:6 ("There's a myriad of fees, literally dozens and dozens of them, and we needed to go line by line by line by line and make sure that we had a fee structure that wouldn't confuse our customers upon closing the merger.").

[40] Ex. 65, DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49) (Oct. 21, 2008 e-mail from Gil West to Richard Anderson: "Gail [Grimmett] and I have coordinated the post merger fee structure. The one loose end is the first bag fee."); Ex. 28, West DOJ Dep. 116:2-117:21, 131:8-12, 140:22-142:5, 149:6-18, 153:21-154:2; Ex. 15, Grimmett 9/28/2010 Dep. 136:2-137:5; Ex. 16, Hauenstein 9/30/2010 Dep. 62:19-63:11; Ex. 13, Gorman 12/10/2010 Dep. 40:18-20; Ex. 28, West DOJ Dep. 35:3-36:11, 154:3-14, 155:14-156:5, 175:22-177:4.

[41] Ex. 15, Grimmett 9/28/2010 Dep. 90:7-91:6, 98:15-24, 102:6-20, 124:18-125:25, 128:5-134:4, 137:6-138:18, 153:16-22, 209:16-210:3; Ex. 16, Hauenstein 9/30/2010 Dep. 62:19-63:11, 78:8-79:5, 128:13-15. At the time, unlike ACS, Revenue Management did not receive credit in its budget for bag fee revenues. It was otherwise responsible for passenger revenues, however. Any passenger diversion to other airlines as a result of implementing a bag fee, therefore, would count against Revenue Management's budget without any offsetting benefit from bag fee revenues. Ex. 13, Gorman 12/10/2010 Dep. 43:15-22; Ex.7, Bastian DOJ Dep. 19:7-13; Ex. 16, Hauenstein 9/30/2010 Dep. 78:12-79:5, 99:3-17, 111:23-112:13, 115:24-116:7; Ex. 15, Grimmett 9/28/2010 Dep. 131:14-133:23.

in lower fares.[42] They were also concerned that adoption of the fee could eliminate potential market share gains for Delta at the expense of legacy carriers already charging the fee and risk potential market share loss to low fare carriers (e.g., Southwest, AirTran and JetBlue) that did not charge the fee.[43]

On the ACS side, Gorman and West rejected these concerns. They expected the first bag fee would generate hundreds of millions of dollars in revenue – about $250 million for Delta and over $200 million from Northwest.[44] Based on their

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[42] Ex. 16, Hauenstein 9/30/2010 Dep. 50:3-25 ("[W]hen you put in fees, there is a corresponding sensitivity to revenue and, actually, it has a depressing impact over time on fares. And I think you have to decide whether or not as an -- in an economic model that that's going to be part of a consumer's decision process."), 63:2-6 ("[W]hen these fees were in ACS's budget, they were not looking at the passenger revenue line item implications of what these fees might do to customer demand and passenger revenues and average ticket fares."); Ex 15, Grimmett 9/28/2010 Dep. 176:23-177:5 ("Q. Did you have a view about whether that would lead to lower fares? Lead Delta to lower its fares or change the inventory? A. Revenue management believed that it could harm the fare environment, yes.").

[43] Ex. 16, Hauenstein 9/30/2010 Dep. 78:8-79:5, 99:3-101:14, 108:12-109:7, 111:23-112:3; 115:24-116:7; Ex. 15, Grimmett 9/28/2010 Dep. 125:21-128:4, 150:10-151:11, 154:4-12, 181:9-18; Ex. 20, Phillips 12/7/2010 Dep. 10:7-19; Ex. 21, Phillips 5/17/2012 Dep. 20:8-22; Ex. 66, at DLTAPE-5135 (Hauenstein 5/10/2012 Dep. Ex. 1); Ex. 67, at DLBAG-6556 (Hauenstein 5/10/2012 Dep. Ex. 2); Ex. 68, at DLTAPE-3457; Ex. 69, at DLBAG-10944 (September 26, 2008 e-mail in which Revenue Management requests data from ACS to assess "the amount of revenue we may be risking if we implemented the fee and FL did not").

[44] Ex. 13, Gorman 12/10/2010 Dep. 40:13-48:10; Ex. 28, West DOJ Dep. 116:2-121:15, 134:9-137:3; Ex. 70, DLBF-36431 (West DOJ Dep. Ex. 10) (ACS estimating on September 22, 2008 $225 million Delta and $215 million Northwest annual first bag fee revenue, respectively); Ex. 71, DLBAG-11721 (ACS estimated

observations of other carriers' experience over the summer, they were now satisfied that the first bag fee would not have any significant adverse impact on either Delta's market share or operations.[45] Rather, Gorman and West believed the first bag fee would be "pure profit."[46] They rejected Revenue Management's view that there was any significant risk of "share shift" to competitors if Delta were to adopt the fee.[47] Gorman and West simply did not believe many customers – and certainly not Delta's key business customers – purchased a ticket based on whether an airline charged a first bag fee.[48] In fact, the increase in the number of carry-on

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in September 2008 $265 million annual revenue for Delta's first bag fee).

[45] Ex. 14, Gorman 5/10/2012 Dep. 20:6-22:9, 38:9-39:3, 51:15-52:6; Ex. 27, West 5/11/2012 Dep. 21:5-23:2, 45:3-22.

[46] Ex. 13, Gorman 12/10/2010 Dep. 20:9-22:6, 28:4-8, 29:19-21; 40:13-48:10, 61:13-17, 82:7-19; Ex. 14, Gorman 5/10/2012 Dep. 30:17-32:22, 35:22-36:6; Ex. 28, West DOJ Dep. 118:10-15, 222:3-230:5, 234:2-4.

[47] Ex. 14, Gorman 5/10/2012 Dep. 77:11-78:7; Ex. 13, Gorman 12/10/2010 Dep. 53:1-57:9, 68:4-69:4; Ex. 28, West DOJ Dep. 35:1-36:11, 118:1-12, 149:9-15, 157:7-163:7, 168:16-169:15; Ex. 27, West 5/11/2012 Dep. 45:3-22, 92:5-93:12; Ex. 15, Grimmett 9/28/2010 Dep. 131:14-132:4, 134:5-18, 190:8-21. Public statements from other airlines confirmed Gorman's and West's view that bag fees were not causing share shift. *See infra* at pp. 28-29; Ex. 72, at DLBF-21981-82; Ex. 73, at DLBF-115309.

[48] Ex. 13, Gorman 12/10/2010 Dep. 53:1-54:9; Ex. 14, Gorman 5/10/2012 Dep. 60:7-19; Ex. 28, West DOJ Dep. 36:8-37:22, 108:13-109:6, 118:1-12, 121:1-12.

bags during the summer of 2008 indicated to them that customers thought Delta already charged the fee (even though it did not).[49]

By early October 2008, Gil West described himself as "on a mission" to implement the first bag fee.[50] In budget documents distributed to Delta's most senior executives, ACS formally proposed the fee as a way to help close Delta's 2008 revenue shortfall.[51] During a dinner with Delta employees, Gorman told Delta personnel that "as we merge with Northwest other items will have to be reviewed, like 1st bag fee," and commented that there is "a substantial amount of revenue" involved.[52] However, while the leaders of ACS believed strongly that adopting the first bag fee was in Delta's best interest, they recognized that Revenue

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[49] Ex. 13, Gorman 12/10/2010 Dep. 68:3-72:4; Ex. 28, West DOJ Dep. 36:8-19; 95:2-22, 106:14-112:20, 218:2-220:18, 244:2-246:11, 250:6-251:10; Ex. 74, DLBAG-2817.

[50] Ex. 75, at DLBAG-39341.

[51] Ex. 76, at DLTAPE-3528 (Sept. 19, 2008 "Unit Cost Outlook" showing "Domestic first bag fee" among "gap closure opportunities" identified by Delta ACS); Ex. 77, at DLTAPE-17713 (Gorman 5/10/2012 Dep. Ex. 16) (Sept. 29, 2008 "December Quarter Action Plan" reflecting "Division Commitments" for "gap closure" included "First Bag Fee ($15)" from Delta ACS). *See also* Ex. 78, at DLBF-83344.

[52] Ex. 79, at DLTAPE-3584.

Management's opposition to the fee would have to be either changed or overruled by Delta's top executives – CEO Richard Anderson and President Ed Bastian.[53]

5. By the End of September 2008, Delta's Ultimate Decision-maker Concludes That Delta Should Adopt a First Bag Fee.

By the end of September, Richard Anderson and Ed Bastian had decided that the post-merger Delta should charge a first bag fee. On Sunday, September 28, 2008 – the day before Delta's senior executives met to discuss the company's plan for mitigating fourth quarter 2008 losses projected to exceed $250 million (including ACS's proposal to adopt a first bag fee)[54] – Anderson sent an e-mail to Bastian titled "First Bag Fee" stating: "**We need to think about implementing the fee post merger. A lot of revenue involved**." Bastian responded: "**Think we prob[ably] should do but as part of integrating [the] two companies**." Anderson replied simply: "**Agree**."[55] According to both Anderson and Bastian, this e-mail reflected the fact that he and Bastian "had already made the decision we were going to impose a first bag fee on Sunday, September 28, 2008."[56] As a

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[53] Ex. 14, Gorman 5/10/2012 Dep. 44:10-45:25, 79:4-12; Ex. 28, West DOJ Dep. 143:8-145:4; Ex. 27, West 5/11/2012 Dep. 88:1-91:7.

[54] Ex. 77, at DLTAPE-17713 (Gorman 5/10/2012 Dep. Ex. 16).

[55] Ex. 80, at DLTAPE-3069 (Anderson 5/3/2012 Dep. Ex. 48).

[56] Ex. 5, Anderson 5/3/2012 Dep. 226:8-227:16; *see also id.* at 207:16-22; Ex. 29, Bastian Declaration ¶ 5.

matter of corporate governance, Richard Anderson's decision that Delta would adopt a first bag fee was dispositive of the matter.[57]

Around October 8, Delta learned that DOJ Staff was not going to oppose the Delta/Northwest merger, making closure of the merger imminent.[58] Shortly thereafter, Ed Bastian foreshadowed to investors Delta's adoption of the first bag fee as part of closing the merger and aligning the two carriers' "fee-based revenues":

> We've probably been a little less aggressive in a couple of areas than some of our competitors, and we're still looking at that as we move forward. On the fee-based revenues, everyone is in a very different place across the industry, and ***as we merge with Northwest we'll have another opportunity to look again with respect to where the fee-based revenues align***."[59]

To that end, on October 21, Delta CEO Richard Anderson e-mailed Gil West and Gail Grimmett about their progress in coming up with a joint recommendation

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57 Ex. 5, Anderson 5/3/2012 Dep. 229:17-230:23, 238:2-19.

58 Ex. 4, Anderson 10/6/2010 Dep. 60:6-9; Ex. 6, Bastian 9/17/2010 Dep. 130:25-131:21; *see also* Ex. 53, at DLBAG-2158 (Sept. 18, 2008 "Critical Milestones" merger timeline showing "DOJ staff rec[ommendation]" to occur in early October). While Delta learned on about October 8, 2008 that DOJ Staff had recommended against challenging the merger, a final decision still had to be made by DOJ front-office personnel. Ex. 55, at DLBF-82431 (Oct. 8, 2008 merger timeline showing "DOJ front office decision" expected in late October); Ex. 81, Oct. 29, 2008 DOJ Press Release.

59 Ex. 82, at DLBF-38191.

for a post-merger fee structure.[60] West responded, stating that: "Gail and I have coordinated the post merger fee structure. **The one loose end is the first bag fee."** On October 22, Anderson forwarded that exchange only to Steve Gorman, Delta's COO, reiterating his conclusion expressed previously to Bastian that Delta needed to adopt the first bag fee: "**We need to do it**."[61] As Anderson testified, "do it" meant "adopt the bag fee."[62]

Thus, the contemporaneous documents confirm the testimony of the CEO of Delta that he had decided Delta should adopt a first bag fee as a part of its post-merger integration with Northwest *before* the Fornaro statement. His view was shared by Delta's President, Ed Bastian, and its Chief Operating Officer, Steve Gorman.[63] His decision had nothing to do with whether AirTran would match any action by Delta.[64] By the time of Delta's decision, every other major legacy carrier

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60 Ex. 65, at DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49).

61 Ex. 65, at DLTAPE-2907 (Anderson 5/3/2012 Dep. Ex. 49).

62 Ex. 5, Anderson 5/3/2012 Dep. 228:24-229:11.

63 Ex. 5, Anderson 5/3/2012 Dep. 227:13-16, 229:17-230:12, 233:15-234:4; Ex. 7, Bastian DOJ Dep. 58:15-20; Ex. 6, Bastian 9/17/2010 Dep. 45:9-48:5; Ex. 13, Gorman 12/10/2010 Dep. 39:5-41:4; Ex.14, Gorman 5/10/2012 Dep. 22:23-23:14. Anderson testified that "Steve [Gorman], Ed [Bastian] myself, Mike Campbell really operate . . . as a little . . . super executive team at the company." Ex. 5, Anderson 5/3/2012 Dep. 238:20-239:7.

64 Ex. 4, Anderson 10/6/2010 Dep. 69:23-70:16, 81:4-21, 82:22-83:2; Ex. 5, Anderson 5/3/2012 Dep. 215:6-16, 229:17-230:12.

had adopted the bag fee.[65] Northwest was already charging the fee, so the combined carrier would have to forego hundreds of millions in projected annual revenue Northwest was already generating if that fee was abandoned.[66] Based on other airlines' public reports and data, Delta's top executives did not see evidence of share shift from, or disruption to, the operations of the carriers who had already adopted the fee. And customers appeared generally to have accepted the fee. In the face of volatile fuel costs and economic uncertainty, Delta's senior executives determined that Delta simply could not afford to forego the approximately $500 million in revenue for the post-merger company. As Richard Anderson testified:

> Q. At what point in time did you change your point of view that a first bag fee was not part of the basic bargain?
>
> A. It would have been sometime after – after we'd gone through the summer and we'd seen a number of matches by other carriers. Those matches had not resulted in any discernable share shift or issues around revenues because, you know, by the time we got to the decision in early November of this year, you know, we'd seen everybody's earnings over the summer and it didn't seem to have made any difference. And so at that point in time, given the financial challenges that the industry faced with high fuel prices and then, we didn't realize it at the time, the great recession, but we knew that with

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65 Ex. 1, Carlton Report at p. 14, Table 1; Ex. 2, Dick Report Ex. 6.

66 Ex. 7, Bastian DOJ Dep. 42:6-14; Ex. 83, at DLBF-35102 (Gorman 12/10/2010 Dep. Ex. 5) (noting Revenue Management's Value Proposition omitted approximately $215 million in first bag fees Northwest was already earning); Ex. 13, Gorman 12/10/2010 Dep. 67:20-24; Ex. 46, at DLTAPE-1758 (July 9, 2008 Northwest Press Release announcing $250 and $300 million in expected revenues from ancillary fee initiatives, including the first bag fee).

> the Lehman Brothers meltdown and everything else, it was not going to be – '09 was not going to be a pleasant year, that it made good sense to go forward and align the Delta policy with the Northwest policy.[67]
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> * * * *
>
> A. . . . American, United, US Air, Continental and Northwest over the course of the summer and, you know, at – over the course of that six-month period each one of those carriers ended up matching this fee and we got to see how the marketplace reacted and the marketplace reacted in a way that guided us toward implementing the fee.[68]
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> * * * *
>
> A. . . . [W]e came to the conclusion that there was no share shift effect and that unbundling of certain of our services from the price of the ticket wouldn't have any effect on share.[69]
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> * * * *
>
> A. . . . I think our point of view over the summer evolved as we saw every other carrier impose it and impose it, you know, fairly smoothly. I mean the market – the marketplace accepted – the consumers accepted it.[70]

Bastian testified to holding similar views:

> Q. And what if anything had changed in the industry from the spring when Delta had decided not to adopt the first-bag fee?
>
> A. I would say that we didn't make a decision not to adopt it per se. . . . That we were going to watch it . . . And what had changed was certainly had a lot more knowledge and experience as to customer acceptance around the fee, which we didn't have in the spring; we were still learning, and we had gotten through in the summer. And

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67 Ex. 4, Anderson 10/6/2010 Dep. 66:18-67:10.

68 Ex. 4, Anderson 10/6/2010 Dep. 104:24-105:5.

69 Ex. 4, Anderson 10/6/2010 Dep. 66:14-17.

70 Ex. 4, Anderson 10/6/2010 Dep. 72:8-12.

had that which was a substantial amount of data which was in terms of customer acceptance. We had an economic picture that was continuing to unravel, while in the spring fuel was the big issue facing the airlines, by the fall fuel was coupled with a collapsing economy. So the economic pressures on the carriers were also a substantial matter of concern and consideration. And I think we had customer – our customers in general had come to accept the fact that they are not liked necessarily, but accept the fact that there were being fees charged for baggage services, was a topic of conversation throughout that spring and summer, it was new, novel. And it was not something that I saw Delta per se getting a lot of credit for not implementing the first-bag fee.[71]

* * * *

Q. We looked at the document earlier where [Anderson] was referring to the free first bag as part of the basic bargain, I think was the language. What had changed? Had anything happened or changes beyond that or your view of that?

A. I think it was still the evolving picture. When we first commented on it was still early in the evolution. But we had more data to suggest whether this was something that customers would accept or wouldn't accept. We had more data to indicate whether some employees would accept or not accept. We had more data, in terms of the state of the financial health of the industry. You know, we didn't know, I think, in May of 2008 the type of trouble we would be experiencing as an economy in October, with the collapse of the capital markets and the banking crisis and the like. So I think there were some fundamental facts that had changed in terms of the economic outlook. I think there were some fundamental operational data that had actually been introduced. And so I do think that his thinking – I know his thinking and certainly my thinking had evolved over that period of time.[72]

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71 Ex. 7, Bastian DOJ Dep. 56:8-57:14.

72 Ex. 7, Bastian DOJ Dep. 61:25-63:2.

> A. . . . We were estimating at Delta that we would generate . . . somewhere between two and three hundred million dollars of revenue a year if we did; coupled with the fact that Northwest was generating a couple hundred million dollars on its own . . . So when you look at needing to align the two carriers, it was close to a $500 million revenue decision.[73]
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> * * * *
>
> A. . . . We couldn't afford to be taking bets on the margin about share shift when we had the size of the revenue and economic pressures facing the company.[74]

Public statements by legacy carriers which had already adopted first bag fees confirmed Anderson's and Bastian's views that first bag fees were generating substantial incremental revenue, with minimal operational impact (and in some respects, an operational benefit):

> **United Airlines** (October 21, 2008): "Q. (*David Jannes, Pro Media)* . . . Regarding the fees, . . . you had mentioned some very moderate friction that you're seeing and I'm wondering if specifically on the first bag fee, if that has translated to a loss of passengers to those competitors that do not charge first bag fees? A. (*John Tague, President of United Airlines)* . . . [W]e can't see anything measurable. Granted, it's hard to discern some of these changes but nothing measurable and nothing that would have caused us to have made the decision differently."[75]
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> **Northwest Airlines** (October 22, 2008): "[W]e continue to see strong ancillary revenue growth. The airline's – our first and second checked

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73 Ex. 7, Bastian DOJ Dep. 58:15-59:14.

74 Ex. 7, Bastian DOJ Dep. 75:9-12.

75 Ex. 84, at DLTAPE-903 (United Airlines Q3 2008 Earnings Call Transcript).

> bag fees are performing exceptionally well, and based on the most recent data available the bag fee initiatives are generating an incremental $150 million to $200 million in additional revenues on an annualized basis."[76]
>
> **US Airways** (October 23, 2008): "On the revenue side, we continue to be pleased with the impact of our a la carte pricing model we implemented back in the second quarter. . . . We are on target to realize the annual benefit of $400 million to $500 million per year we previously announced. . . . [I]t's remark[able], just having fewer bags in the system how much that has helped improve the mishandled baggage ratio. In our perspective we have fewer bags . . . and now with fewer bags flowing through the system we not only lose fewer bags, it helps us run a much better operation. . . [W]e really haven't seen much impact [in markets where US is head to head with Southwest versus markets with other carriers who are putting in the ancillary revenue initiatives]. . . . So we're really excited about it. We haven't seen, as Scott indicated, any sort of discernible booking away."[77]

Although the top executives of Delta had decided before the AirTran earnings call that post-merger Delta should charge a first bag fee, consistent with Delta's management process,[78] they believed that Glen Hauenstein should have the

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[76] Ex. 85, at DLTAPE-852 (Northwest Airlines Q3 2008 Earnings Call Transcript).

[77] Ex. 86, at DLTAPE-750, 753-54, 758 (US Airways Q3 2008 Earnings Call Transcript).

[78] Ex.6, Bastian 9/17/2010 Dep. 45:9-16; Ex. 7, Bastian DOJ Dep. 11:24-12:11, 58:15-20, 61:6-24; Ex. 4, Anderson 10/6/2010 Dep. 10:12-25; Ex. 29, Bastian Declaration ¶ 5.

opportunity to advocate his position before the CLT.[79] Accordingly, on October 21, the "one loose end" remaining from ACS and Revenue Management's effort to propose a combined fee schedule for the merged company was placed on the agenda for the next meeting of Delta's CLT, scheduled for Monday, October 27, 2008.[80] This was, of course, without any knowledge of Fornaro's earnings call statement because it was still two days before the statement was even made.

6. Anderson's and Bastian's Statements Create a Consensus for the Fee at the October 27, 2008 CLT Meeting.

The October 27 CLT meeting began with ACS and Revenue Management presenting their respective positions. Revenue Management, which long opposed the first bag fee, presented the Value Proposition power point slides to advocate against the adoption of the fee.[81] A basic assumption of the Revenue Management

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[79] Ex. 80, at DLTAPE-3069 (Anderson 5/3/2012 Dep. Ex. 48) (Sept. 28, 2008 e-mail from Bastian to Anderson: "Glen has different thoughts so should have disc[ussion] at right time.") Ex.7, Bastian DOJ Dep. 11:6-17, 16:25-17:5, 20:9-13, 45:9-16, 61:13-22, 63:7-64:8; Ex.4, Anderson 10/6/2010 Dep. 47:16-48:7, 75:4-9, 88:16-19; Ex. 29, Bastian Declaration ¶ 6.

[80] Ex. 87, at DLBAG-9899; Ex. 88, at DLBAG-9901; Ex. 89, at DLBAG-6181; Ex. 90, at DLBAG-6888; Ex. 91, at DLTAPE-3087. Gil West e-mailed Bridget Carey, Gorman's assistant, asking her to place the first bag fee discussion on the agenda of the next CLT meeting. Later that afternoon, CEO Richard Anderson's assistant, Barbara Presley, placed the issue on the October 27, 2008 CLT meeting agenda.

[81] Ex. 4, Anderson 10/6/2010 Dep. 55:19-56:17; Ex. 7, Bastian DOJ Dep. 69:12-71:10; Ex. 15, Grimmett 9/28/2010 Dep. 137:6-138:12, 150:10-151:16,

presentation was that adoption of a bag fee could reduce Delta market share by: (1) ending market share gains to Delta from legacy carriers that did charge the fee; and (2) producing market share losses from Delta to carriers that did not charge the fee.[82]

Advocating for the opposing view, Gorman and West rejected the basic premise of the Value Proposition presentation, arguing that the decision whether to check a bag is not a point of purchase decision and has no bearing on most customers' choice of carrier. They reiterated their long-standing support for the fee which they believed constituted "pure profit."[83]

President Ed Bastian then spoke and, consistent with the view he expressed to Richard Anderson privately in September, strongly advocated that Delta adopt

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165:2-7, 165:24-25, 175:13-14, 177:14-22, 180:15-17; Ex. 16, Hauenstein 9/17/2010 Dep. 99:3-101:5, 108:10-109:7, 111:23-112:3, 114:3-16, 115:2-116:7.

[82] The Value Proposition presentation did not attempt to estimate market share or revenues that might be lost if Delta adopted the fee. Rather, it calculated the revenues associated with each point of market share and then arrayed the revenues associated with various levels of hypothetical share loss as a sensitivity analysis. The main point of the analysis, as explained by its sponsor, Glen Hauenstein, was to counter the view of the leaders of ACS that first bag fee revenues would be "pure profit." Ex. 16, Hauenstein 9/30/2010 Dep. 99:3-101:5, 108:10-109:7, 111:23-112:3, 115:2-116:7; *see also* Ex. 20, Phillips 12/7/2010 Dep. 10:7-11:10; Ex. 21, Phillips 5/17/2012 Dep. 20:8-22.

[83] Ex. 13, Gorman 12/10/2010 Dep. 51:9-10; Ex. 28, West DOJ Dep. 118:19-21, 178:18-180:21; Ex. 92, DLBAG-9554 (June 2, 2008 e-mail from West to Gorman commenting on first bag fee analysis in draft June 16, 2008 CLT presentation: "Big $$$").

the fee.[84] Bastian explained that the expected first bag fee revenues (from both Delta and Northwest) were too substantial to forego, especially in light of worsening economic conditions.[85] He also observed that Delta faced imminent cash obligations, such as the funding of the company's employee pension plan, and that the first bag fee would help generate needed cash flow.[86] Bastian also expressed the view that Delta could only benefit from not having a first bag fee if it could successfully market itself as a "no-fee" or "low-fee" airline – something he did not believe Delta could do credibly.[87]

Finally, Delta's CEO Richard Anderson said he agreed with Bastian that Delta should adopt a first bag fee.[88] Anderson explained that although he had not favored adopting a first bag fee in May and June of 2008, he had observed that the first bag fee had become the industry norm over the summer, that consumers had come to accept the fee, and that carriers charging the fee were earning substantial

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84 Ex.7, Bastian DOJ Dep. 71:9-72:25; Ex. 4, Anderson 10/6/2010 Dep. 87:9-13.

85 Ex. 7, Bastian DOJ Dep. 71:9-72:1, Ex. 6, Bastian 9/17/2010 Dep. 48:6-15. Bastian reiterated this view to Hauenstein after the October 27th CLT meeting, confirming his rejection of Hauenstein's concerns about "share shift." Ex. 93, DLTAPE-1276; Ex. 29, Bastian Declaration ¶¶ 7-8.

86 Ex. 7, Bastian DOJ Dep. 72:1-15, 73:1-74:2.

87 Ex. 7, Bastian DOJ Dep. 72:16-25, 81:10-18.

88 Ex. 4, Anderson 10/6/2010 Dep. 87:6-21; Ex.7, Bastian DOJ Dep. 74:3-6.

ancillary revenue with no adverse effect on operations or market share.[89]

Once Anderson and Bastian spoke in favor of the fee, the group reached a consensus that charging the fee was the right course.[90] Anderson decided not to formalize the decision on a post-merger fee structure until after the merger so that Delta could assess how other fees might be adjusted to account for a first bag fee (e.g., reduce its second bag fee), and obtain the input from Northwest executives.[91]

Every Delta executive who attended that meeting and was deposed on this subject has testified that the AirTran earnings call statement had *no effect* on his or her views about whether Delta should adopt the fee.[92] To the extent that AirTran

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[89] Ex. 4, Anderson 10/6/2010 Dep. 66:11-68:1, 71:23-72:15, 76:2-77:19; Ex. 7, Bastian DOJ Dep. 74:3-21. Anderson's and Bastian's views have been proven correct – first bag fees have generated hundreds of millions in annual revenues with no material "share shift" to carriers without the fee. *See* Ex. 29, Bastian Declaration ¶¶ 10-11.

[90] Ex. 28, West DOJ Dep. 182:1-16; Ex. 15, Grimmett 9/28/2010 Dep. 217:2-21. That afternoon, Steve Gorman e-mailed Gil West regarding the first bag fee. He noted, "We got there" and that "Glen [Hauenstein] is fine." West responded, "Thanks. It's the right decision in my view. The execution will be a bit challenging but well worth it." Ex. 94, at DLBAG-9935.

[91] Ex. 4, Anderson 10/6/2010 Dep. 60:1-61:5, 62:3-11, 87:17-88:6, Ex. 6, Bastian 9/17/2010 Dep. 43:23-45:8, 128:15-129:1, 130:24-131:2; Ex. 7, Bastian DOJ Dep. 39:8-12, 75:13-76:5.

[92] Ex. 4, Anderson 10/6/2010 Dep. 94:1-14; Ex. 7, Bastian DOJ Dep. 76:13-77:15, 85:19-25; Ex. 16, Hauenstein 9/30/2010 Dep. 127:8-12, 133:8-16; Ex. 15, Grimmett 9/28/2010 Dep. 214:18-20; Ex. 28, West DOJ Dep. 184:11-187:12, 190:17-191:15; Ex. 22, Phillips DOJ Dep. 306:22-307:16.

was mentioned at all, it was in passing. And no one remembers any discussion of Fornaro's statement.[93]

Richard Anderson testified that Fornaro's statement "didn't have any bearing on [Delta's] decision to put in place a first bag fee,"[94] because "[i]t didn't matter whether AirTran matched or not. It was irrelevant to the decision that [Delta] took."[95] Like Anderson, Bastian testified that the decision to adopt a first bag fee "didn't have anything to do with what AirTran was or wasn't going to do," and that Fornaro's statement thus had "no impact whatsoever."[96] In any event, Bastian personally believed well before Fornaro's statement that AirTran would adopt a first bag fee *regardless of what Delta did* because of AirTran's well-known financial problems.[97] Steve Gorman's view was likewise unaffected by Fornaro's statement because of his view that charging the first bag fee created no significant

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93 Ex. 6, Bastian 9/17/2010 Dep. 102:7-104:13; Ex. 4, Anderson 10/6/2010 Dep. 70:17-71:4.

94 Ex. 4, Anderson 10/6/2010 Dep. 94:1-14.

95 Ex. 4, Anderson 10/6/2010 Dep. 68:8-15, 69:23-70:16, 81:6-21, 83:1-2, 104:811. Significantly, an e-mail by one of the participants recounting Richard Anderson's reasons for adopting the fee makes no mention of AirTran. Ex. 95, at DLBAG-5727.

96 Ex. 7, Bastian DOJ Dep. 24:11-16, 50:4-51:16, 76:15-77:15, 85:19-25.

97 Ex. 6, Bastian 9/17/2010 Dep. 89:15-17, 101:12-102:3, 104:24-105:12.

risk of passenger loss.[98] Revenue Management's views were also unaffected by Fornaro's statement. That department's executives advocated against the fee both before *and* after the AirTran earnings call.[99]

7. Delta Adopts a First Bag Fee as Part of a Combined Post-Merger Fee Structure Following Closing of the Merger With Northwest.

Two days after the CLT meeting, on October 29, 2008, the DOJ issued a press release stating that it would not oppose the Delta-Northwest merger.[100] Later that day, Delta and Northwest consummated their merger.[101] After the merger closed, former Northwest employees confirmed that Northwest was earning about

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98 Ex. 14, Gorman 5/10/12 Dep. 60:7-19; Ex. 13, Gorman 12/10/2010 Dep. 44:11-45:5; Ex. 28, West DOJ Dep. 87:9-16, 115:11-19, 171:5-13, 173:6-174:19, 185:9-188:6.

99 In drafts of the Value Proposition slides, the probability of an AirTran match was changed from 50% to 75% and then 90% after the Fornaro statement. Ex. 26, Springer DOJ Dep. 117:5-118:11; Ex. 22, Phillips DOJ Dep. 190:4-193:10, 204:8-205:4, 232:8-234:6; Ex. 96, at DLBF-35499 (Phillips DOJ Dep. Ex. 15); Ex. 97, at DLBF-35515 (Phillips DOJ Dep. Ex. 17); Ex. 98, at DLBF-35539 (Phillips DOJ Dep. Ex. 19). That change, however, did not affect Revenue Management's recommendation against the first bag fee. Ex. 17, Hauenstein 5/10/2012 Dep. 42:21-43:5; Ex. 16, Hauenstein 9/30/2010 Dep. 128:13-15; Ex. 15, Grimmett 9/28/2010 Dep. 134:2-4.

100 Ex. 81, Oct. 29, 2008 DOJ Press Release; *see also* Ex. 99, at DLBF-23688-732.

101 Ex. 5, Anderson 5/3/2012 Dep. 231:6-15; Ex.81, Oct. 29, 2008 Delta Press Release.

a half a million dollars a day from first bag fees, and that the fees had not resulted in significant customer backlash.[102]

The following Monday, November 3, 2008, Delta's new CLT, which now included new members from the former Northwest, met for the first time.[103] At the meeting, the harmonized fee structure for the combined entity was finalized.[104] Delta adopted Northwest's $15 first bag fee and simultaneously reduced its second bag fee from $50 to $25 (which had been Northwest's pre-merger second bag fee).[105] Two days later, on November 5, 2008, Delta issued a press release announcing the alignment of Delta and Northwest fees.[106]

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[102] Ex. 4, Anderson 10/6/2010 Dep. 61:22-62:11, 76:19-77:20; Ex. 101, at DLBAG-3336; Ex.102, at DLBAG-00013208; Ex. 103, at DLBAG-9914-15; Ex. 104, at DLBAG-2555-60; Ex. 105, at DLBAG-14096.

[103] Ex. 13, Gorman 12/10/2010 Dep. 127:63-128:24; Ex. 4, Anderson 10/6/2010 Dep. 62:9-11; Ex. 7, Bastian DOJ Dep. 75:13-76:12; Ex. 106, at DLBF-35582 (Anderson 10/6/2010 Dep. Ex. 19).

[104] Ex. 4, Anderson 10/6/2010 Dep. 60:25-61:5; Ex. 13, Gorman 12/10/2010 Dep. 123:23-125:15; Ex. 106, at DLBF-35581-86 (Anderson 10/6/2010 Dep. Ex. 19); Ex. 107, at DLBF-3504-09.

[105] Ex. 108, at DLBF-3586. The CLT simultaneously harmonized numerous other fees covering overweight luggage, unaccompanied minors, surfboards, golf clubs, antlers, etc. *See* Ex. 107, at DLBF-3504-09; Ex. 109, at DLBF-3932-37; Ex. 106, at DLBF-35584 (Anderson 10/6/2010 Dep. Ex. 19).

[106] Ex. 110, at DLBF-7454-55. On November 12, 2008, AirTran announced its adoption of a first bag fee. The evidence makes clear AirTran did not decide to adopt the fee until *after* Delta's November 5, 2008 announcement. Ex. 111, at AIRTRAN-8340; Ex. 112, at AIRTRAN-64714 (Healy 11/19/2010 Dep. Ex. 22);

ARGUMENT

A. To Survive Summary Judgment, Plaintiffs Must Establish a Genuine Issue of Material Fact as to Whether Delta Entered Into an Agreement with AirTran.

The threshold requirement of any Section 1 claim is concerted action – an *agreement* between or among companies to unreasonably restrain trade. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) ("It is settled law that a threshold requirement of every antitrust conspiracy claim [brought under the Sherman Act] is 'an *agreement* to restrain trade.'") (quoting *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991)) (emphasis added).[107] To survive summary judgment, a plaintiff must establish facts that would allow a reasonable fact finder to conclude that an unlawful agreement existed. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (stating that summary judgment is appropriate if the "evidence establish[es] that no reasonable factfinder could conclude that [defendants] entered

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Ex. 113, at AIRTRAN-64935 (Fornaro 11/18/2010 Dep. Ex. 22); Ex. 12, Fornaro 11/18/2010 Dep. 85:17-86:17; Ex. 18, Healy 11/19/2010 Dep. 122:4-126:6.

[107] *Accord Theatre Enters., Inc. v. Paramount Film Distr. Corp.*, 346 U.S. 537, 540 (1954) ("The crucial question" in an antitrust conspiracy case is whether the alleged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express."); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1504 (11th Cir. 1985) ("The gravamen of the price fixing claim, therefore, is the existence of an *agreement* in which the conspirators manipulate market prices.").

into a price fixing conspiracy"). "To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement'" among the defendants. *Harcros*, 158 F.3d at 569 (quoting *Seagood*, 924 F.2d at 1573).[108]

"To survive [Delta's] motion for summary judgment, [Plaintiffs] must establish that there is a genuine issue of material fact as to whether [Delta] entered into an illegal conspiracy that caused respondents to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 575, 585-586 (1986). A dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

At a minimum, meeting that burden requires plaintiffs to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted

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[108] *See also United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963) ("Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there [is] no violation of the Sherman Act.").

independently." *Williamson Oil*, 346 F.3d at 1300 (quoting *Matsushita*, 475 U.S. at 588). Evidence that is as consistent with permissible interdependent behavior as with conspiracy does not permit an inference of unlawful agreement. *See also Matsushita*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.").[109] As this Court observed in its Order on the Defendants' Motions to Dismiss, "'at the summary judgment stage, a plaintiff must present evidence which tends to rule out the possibility that the defendants were acting independently.'" MTD Order at 24 (quoting *In re LTL Shipping Servs. Antitrust Litig.*, 2009 WL 323219, at *8 (N.D. Ga. Jan. 28, 2009)).

As discussed below, Plaintiffs cannot meet that burden here because Delta acted consistently with its independent interest – there is no evidence that tends to exclude the possibility of independent action. No "reasonable jury" could return a

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[109] *See also Williamson Oil*, 346 F.3d at 1300 ("In order to ensure that only potentially meritorious claims survive summary judgment, the Supreme Court has required that inferences of a price fixing conspiracy drawn from circumstantial evidence be reasonable."). Further, as the Eleventh Circuit has stressed, "when the defendant puts forth a plausible, procompetitive explanation for [its] actions, [courts should not be] quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred." *Seagood*, 924 F.2d at 1574 (citing *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991)).

verdict for Plaintiffs in light of the overwhelming direct evidence that Delta acted unilaterally and independent of AirTran in adopting a first bag fee.

B. Overwhelming Direct Evidence of Unilateral Conduct Establishes That Delta Did Not Enter Into an Agreement With AirTran.

It is Plaintiffs' burden to come forward with evidence from which a conspiracy can be inferred. They cannot do so here, and the record is replete with indisputable evidence that Delta acted unilaterally and completely independent of AirTran in adopting a first bag fee.

By early September 2008, *every* major legacy carrier *except* Delta had adopted a first bag fee. Shortly thereafter, as the merger with Northwest approached, Delta's CEO Richard Anderson decided that the post-merger Delta should adopt the first bag fee. While as CEO, he had the authority to make that decision for Delta on his own, Anderson shared his view with the number two officer in the company, President Ed Bastian, who agreed with Anderson. Richard Anderson also communicated his decision to Chief Operating Officer, Steve Gorman in anticipation of the CLT meeting where the first bag fee would be discussed. Gorman, the number three executive in the company, favored the first bag fee, believing that customers did not make decisions based on bag fees and that there was thus no risk of market share shift. These communications occurred

before the AirTran earnings call, and thus the decision to adopt the first bag fee could not have been influenced by Fornaro's statement.

If that were not enough, the evidence is unambiguous that the decision by Delta's top executives to charge for the first checked bag had nothing at all to do with AirTran. A decision had to be made because of the pending merger and based on their observations of other legacy carriers' revenue and operational experience after adopting the fee, Delta's three most senior executives did not believe it was even a close call. They did not believe that the bag fee presented any significant risk of operational disruption; nor did they believe there was any risk of share shift to competitors. Whether AirTran matched Delta was therefore irrelevant in their view.

Finally, there cannot be any genuine dispute that the timing of Delta's adoption was the first bag fee was driven by its merger with Northwest and had nothing to do with AirTran as Plaintiffs have alleged. Northwest had the fee and Delta did not, necessitating a decision as to which policy should be adopted as part of the merger integration. When Anderson and Bastian made the decision to adopt the fee, they agreed that it should be implemented "as part of integrating [the] two companies." That is what Delta did and there is no evidence to the contrary. As the Court already correctly stated, this provides "a valid justification for why the

first-bag fee was implemented" (MTD Order at 31), thereby disposing of Plaintiffs' allegations that the post-merger fee harmonization was a "pretext."

Plaintiffs have nothing to rebut this dispositive evidence of independent action. At one point they trumpeted supposed private "collusive communications" between an AirTran employee and low level current and former Delta employees.[110] Such "collusive communications," however, have proven to be non-existent.[111] Delta executives deposed in this case have uniformly testified there

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[110] *See, e.g.,* Plfs' Memo in Support of Motion for Class Certification (Dkt. 122) at 7-10; Plfs' Memo in Support of Motion for Spoliation Sanctions (Dkt. 196) at 9-10. These "private" "collusive communications" are alleged to have taken place over a six-day period from July 31 to August 5, 2008 – more than three months before Delta adopted a first bag fee – and purportedly consisted of: (1) telephone calls a former AirTran employee named Scott Fasano allegedly made to the Delta Station Manager in Knoxville, TN (Mike Ringler), and to the Delta Station Manager in Miami, FL (Mike Rossano) around July 31, 2008, and (2) a conversation Fasano reportedly had with "one of [his] former colleagues . . . embedded in the team amongst the Northwest crew" on or about August 5, 2008. Plaintiffs also have pointed to two e-mails Fasano attempted to send to two people he believed were Delta employees. Unbeknownst to Fasano, they were no longer employed at Delta when he sent them the e-mails, and thus never received them. *See* Ex. 114, at AIRTRAN-12346 (Fasano 12/1/2010 Dep. Ex. 25); Ex. 115, at AIRTRAN-12360 (Fasano 12/1/2010 Dep. Ex. 26); Ex.8, Boeckhaus 11/24/2010 Dep. 21:24-22:5; Ex. 9, Burman 12/4/2010 Dep. 8:14-17.

[111] The alleged participants uniformly testified that the alleged "collusive communications" about first bag fees never occurred. Ex.24, Ringler 11/12/2010 Dep. 37:22-39:9, 58:8-59:19, 66:4-8, 70:13-73:23; Ex. 25, Rossano 11/5/2010 Dep. 68:6-69:14, 75:1-80:17, 81:13-24, 87:15-88:20; Ex. 23, Rary 11/9/2010 Dep. 53:17-55:17, 77:8-82:22, 87:1-11; Ex. 11, Fasano 12/1/2010 Dep. 98:5-99:12, 109:9-110:15, 116:22-119:3, 187:8-18; Ex. 10, Fasano DOJ Dep. 46:7-19, 49:17-

have been no communications with AirTran about first bag fees.[112] The same is true of the supposed use of joint gate-lease negotiations with Hartsfield-Jackson International Airport in 2008 and 2009 that Plaintiffs alleged were used to "monitor" and "ensure" the alleged conspiracy between AirTran and Delta. Like Plaintiffs' allegations of "collusive communications," these allegations have been proven to be entirely imaginary. There is *no* evidence that the lease negotiations involved anything other the same type of negotiations that occur between airport landlords and their airline lessees at every major airport in the country.[113] Nor did

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22, 66:17-69:10. Moreover, even if such conversations had occurred, none of the alleged participants was even remotely in a position to provide any information about Delta's bag fee deliberations. Ex. 24, Ringler 11/12/2010 Dep. 9:4-14, 64:12-65:20; Ex. 25, Rossano 11/5/2010 Dep. 12:15-21, 22:16-21, 25:10-16, 40:8-41:8, 51:6-52:2, 57:10-18, 65:11-25, 81:13-24, 91:17-92:10; Ex. 23, Rary 11/9/2010 Dep. 23:8-17, 65:18-67:4, 99:17-100:3. Furthermore, Fasano testified that he simply "made up" or "embellished" the information supposedly learned from his alleged conversations. Ex.10, Fasano DOJ Dep. 79:13-83:15; Ex. 11, Fasano 12/1/2010 Dep. 72:25-73:13, 74:10-17, 92:11-93:4, 116:22-119:3, 146:24-151:7, 163:20-25; *see e.g.,* Ex.116, at AIRTRAN-28755 (Fasano 12/1/2010 Dep. Ex. 14) (Fasano reporting on July 15, 2008, that Delta "[w]ill go for the first bag fee after labor day" when in fact Delta only began in earnest to assess a first bag after Labor Day (September 1, 2008)).

[112] Ex. 4, Anderson 10/6/2010 Dep. 95:4-11; Ex. 6, Bastian 9/17/2010 Dep. 123:2-21, 190:5-191:10; Ex. 13, Gorman 12/10/2010 Dep. 147:21-148:1, 150:12-17; Ex. 16, Hauenstein 9/30/2010 Dep. 105:22-25; Ex. 15, Grimmett 9/28/2010 Dep. 38:25-39:15, 42:12-44:17, 118:18-120:19; Ex. 28, West DOJ Dep. 191:2-15; Ex. 20, Phillips 12/7/2010 Dep. 45:6-10, 47:4-17.

[113] *See* Ex. 4, Anderson 10/6/2010 Dep. 23:4-15, 26:2-28:9, 34:17-35:25, 40:10-24.

Plaintiffs' allegations of collusive capacity reductions fare any better. Delta capacity *went up* on AirTran routes – at the same time that capacity was reduced everywhere else across Delta' system.[114]

C. Plaintiffs' "Invitation to Collude" Theory Fails as a Matter of Law.

With the evidence adduced during discovery having disproven their allegations about conspiratorial capacity reduction, airport lease negotiations, and private "collusive communications," Plaintiffs are left with the two core facts which have been known and undisputed since before they filed their first case: (1) Fornaro's statement during the October 23, 2008 AirTran earnings call, and (2) Delta's adoption of a first bag fee shortly afterward. Plaintiffs characterize these undisputed events as AirTran's "invitation to collude" and Delta's "acceptance." Even ignoring the overwhelming and undisputed evidence that Fornaro's statement was irrelevant to Delta's decision, Plaintiffs' novel legal theory fails as a matter of law.

As this Court observed in its Order on Defendants' Motions to Dismiss, "it is well settled that two competitors may lawfully observe each other's public

[114] Ex 30, Kasper Declaration ¶ 4 ("For the full year 2009, Delta capacity (seats) on nonstop routes to/from Atlanta overlapping with AirTran grew year-over-year by 2.9%, while Delta's capacity on the rest of its domestic system decreased by 9.2%.) & Exhibit 1 (Surrebuttal Report of Daniel M. Kasper ¶ 7); Ex. 19, Kasper 12/15/2010 Dep. 18:5-18.

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." MTD Order at 32 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007)). Conscious parallelism is not only legal, but the competitive norm in markets like airline passenger service. *Twombly*, 550 U.S. at 553-54 ("'[C]onscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)); *Williamson Oil*, 346 F.3d at 1299 ("[T]he distinctive characteristic of oligopoly is recognized interdependence among the leading firms: the profit-maximizing choice of price and output for one depends on the choices made by others.") (internal quotations omitted); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) ("In an oligopolistic market, meaning a market where there are few sellers, interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions.").

As the Eleventh Circuit has observed, the very essence of lawful *conscious* parallelism is a firm's *awareness* of public information disseminated by rivals coupled with *action* taken in response to the observed conduct. *See Williamson*

Oil, 346 F.3d at 1305 ("'[I]n competitive markets, particularly oligopolies, companies monitor each other's communications with the market in order to make their own strategic decisions.'") (quoting *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1276 (N.D. Ga. 2002)); *see also Holiday Wholesale*, 231 F. Supp. 2d at 1275-76 ("Plaintiffs have done nothing more than show that in an oligopoly, each company is aware of the others' actions. This is the nature of the economic interdependence of companies in an oligopoly.").

In *Williamson Oil,* an oft-cited Eleventh Circuit precedent, defendants were alleged to have "formulated and cemented their plans to collusively fix cigarette prices by indirectly communicating with each other through media outlets and other public announcements," including through press releases and other public statements about "future pricing intentions at meetings with stock analysts." 346 F.3d at 1305-08. One defendant stated that it would "forgo any further price increases on premium brands for the foreseeable future," while another stated that "[we] may be one of those who started the price war in the U.S., but we have no wish to escalate it." *Id.* at 1306, 1307. Other communications included a statement by a defendant's CEO to stock analysts that "our company fully intends to pursue options other than price for our [discount] brands," an earnings call statement by another CEO that the company was "willing to accept modest market

share losses as the cost of improving earnings," and a statement by a CEO that "[w]e plan no increases in 1995 . . . If the competitive environment changes significantly, however, we will respond immediately and appropriately." *Id.* at 1308, 1309, 1312 n.15.

The Eleventh Circuit rejected plaintiffs' claim that those alleged public communications – including an "unambiguous message" by one of the defendants that it "would act aggressively to attempt to maintain its desired price differential" – permitted an inference of conspiracy, even when viewed against the defendants' subsequent lock-step implementation of price increases. *Id.* at 1308 n.13, 1311. Such an inference was not "reasonable" – as it is required to be by *Matsushita* – because the defendants' pricing actions were "readily explained as economically rational, self-interested responses to" the public statements: "[defendants] only viable route back to profitability was to increase prices; that they did so in a parallel manner does not establish collusion." *Id.* at 1307, 1311. Indeed, it would have been "utterly irrational" for the defendants to have reacted "any way other" than to match each other's prices. *Id.* at 1308.

As a matter of law, Delta was free to act solely in reliance on AirTran's earnings call in reaching a decision to impose a first bag fee. Had Delta done so, it simply would have been making an "economically rational, self-interested

response" to public information – exactly what the court found was lawful in *Williamson Oil*. *Id.* at 1307. If the factor driving Delta's decision to impose a first bag fee actually had been whether or not AirTran would match, then it would have been "utterly irrational" for Delta to have reacted "any way other" than to consider AirTran's public statements in making its decision. *Williamson Oil* makes clear that this would have been permitted as a matter of law. *Id.* at 1308. Having heard AirTran's statement, Delta was not "thereby immobilized and precluded from acting in a normal fashion as its interests might dictate." *Standard Oil Co.*, 316 F.2d at 896; *see also United States v. Gen. Motors Corp.*, 1974 WL 926, at *21 (E.D. Mich. Sept. 26, 1974) ("The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react."); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1037 (8th Cir. 2000) (conspiracy could not be inferred from evidence of defendants' consciously parallel pricing supplemented by "signaled pricing intentions to each other through advance price announcements and price lists"); *In re Baby Food*, 166 F.3d at 133 ("[C]ourts generally reject conspiracy claims that seek to infer an agreement from communications despite a lack of independent evidence tending to show an agreement.") (internal citation omitted).

Even assuming that the Fornaro statement was the key factor in Delta's decision, the facts of this case would present an even clearer example of lawful interdependence than that presented in *Williamson Oil*. The defendants there were alleged to have engaged in extensive public negotiations to end a price war, each responding in public to statements by competitors. By contrast, Delta made no public statements describing its own future intentions with respect to the bag fee, and would simply have taken a competitor's single public statement on the subject into account in making its own decision about whether to charge one. *Williamson Oil* stands unequivocally for the proposition that Delta cannot violate the antitrust laws by simply hearing and acting on the statement of a competitor.[115]

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[115] Delta is not aware of any case that finds a conspiracy in violation of Section 1 of the Sherman Act based on facts that are remotely similar to this case. The few cases that have been brought based on "invitations to collude" did not include allegations of conspiracy but rather challenged single-firm conduct under Section 2 of the Sherman Act or Section 5 of the FTC Act (which has broader scope than the Sherman Act). *See, e.g.*, *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-455 (1986). And these cases were brought against the firm *conveying* the information, not the *recipient* of the information. *See, e.g.*, *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984) (challenging American Airlines' CEO's alleged private invitation to collude against the *conveyor* of the invitation as attempted monopolization under Section 2); Ex. 118, *In the Matter of Valassis Commc'ns, Inc.*, No. C-4160, FTC File No. 051 0008, Analysis of Consent Order at 3 & n.2 (Mar. 14, 2006) (alleging Valassis' "invitation to collude" on public earnings call constituted an "unfair method of competition" in violation of Section 5, but finding no evidence to "support a charge that the anticompetitive agreement proposed . . . was consummated").

Aside from the fact that there is no legal basis for it, holding a firm liable merely for acting on public information would run directly counter to the procompetitive policies underlying the antitrust laws. It would create tremendous uncertainty about how competitors can use public information to make business decisions. It also would create a perverse incentive for firms to freeze their competitors through strategic public statements. If the Court were to accept Plaintiffs' theory of liability, it would establish a rule whereby any company can prevent its competitor from acting unilaterally in a profit-maximizing way simply by making a statement that it would "strongly consider" implementing a price increase if a competitor does first.[116]

Applied here, this rule would mean that, regardless of the many legitimate business reasons Delta had for adopting a first bag fee when it did, once Fornaro made his public statement on the subject, Delta was instantly precluded from harmonizing the post-merger fee structure of its combined entity to the pre-merger Northwest policy without rendering itself liable for treble damages under the the antitrust laws. This is not the law. *See* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1419a (2010) ("It would be poor policy to allow an uninvited

[116] Ex. 1, Carlton Report ¶¶ 5, 15-20; Ex. 117, Rebuttal Expert Report of Dennis W. Carlton (Feb. 4, 2011) ¶ 12.

solicitation to disable an innocent recipient from lawfully taking a step it would otherwise have taken.").

Plaintiffs' theory also would frustrate the important public policy of allowing firms to communicate openly about forward-looking business decisions.[117] The investment community was clearly interested in AirTran's (and other airlines') plans for first bag and other ancillary fees in a very difficult economy. Yet, Plaintiffs would impose antitrust liability based upon an assertedly *truthful* answer to an analyst's inquiry.[118]

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[117] *See, e.g.*, *Harris v. Ivax Corp.*, 182 F.3d 799, 806-07 (11th Cir. 1999) ("Congress enacted the safe-harbor provision [of the Private Securities Litigation Reform Act of 1995] in order to loosen the 'muzzling effect' of potential liability for forward-looking statements, which often kept investors in the dark about what management foresaw for the company."); *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1433 (3d Cir. 1997) (observing that a "goal" of the disclosure rules under federal securities laws is to "encourag[e] the maximal disclosure of information useful to investors"); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 514 (7th Cir. 1989) ("Investors value securities because of beliefs about how firms will do tomorrow, not because of how they did yesterday."); Ex. 2, Dick Report ¶¶ 99-106; Ex. 1, Carlton Report ¶¶ 15-17.

[118] Summary judgment is therefore also warranted under the doctrine of implied preclusion, which forecloses antitrust claims inconsistent with federal securities law. *See Credit Suisse Secs.(USA) LLC v. Billing*, 551 U.S. 264, 275 (2007) ("[W]hen a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint"); *Elec. Trading Group, LLC v. Banc of America Sec. LLC*, 588 F.3d 128, 136-37 (2d Cir. 2009) (preclusion appropriate when "allowing antitrust liability for the conduct alleged to have the anticompetitive effect would inhibit permissible (and even

CONCLUSION

For the foregoing reasons, Delta respectfully requests that the Court grant its motion for summary judgment.

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beneficial) market behavior"). In support of this position, Delta incorporates the arguments set forth in its briefs submitted in support of its motion to dismiss. *See* Dkt. 73 (Mar. 8, 2010) & 97 (May 17, 2010).

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Respectfully submitted,[119]

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[119] Pursuant to L.R. 7.1D, counsel for Delta certifies that this Memorandum was prepared with a font and point selection approved in L.R. 5.1.

CERTIFICATE OF SERVICE

I certify that on August 31, 2012 the foregoing DELTA AIR LINES, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was submitted to the Court via e-mail for filing under seal and served on the following counsel of record via e-mail:

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