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

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| IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION | Civil Action No. 1:09-md-2089-TCB<br><br>ALL CASES |

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

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|---|---|
| DX __ | Delta Exhibits (Dkt. 350) |
| AX __ | AirTran Exhibits (Dkt. 353) |
| PX__ | Plaintiffs' Exhibits (Dkt. 556-557) |
| DL Br. | Delta's Memorandum in Support of Its Motion for Summary Judgment (Dkt. 350-1) |
| AT Br. | AirTran's Memorandum in Support of Its Motion for Summary Judgment (Dkt. 353-1) |
| DL SOF | Delta Statement of Undisputed Facts (Dkt. 350-3) |
| Plfs' SOAF | Plaintiffs' Statement of Additional Facts (Dkt. 554-3) |
| | |
| ACS | Airport Customer Service |
| AirTran | AirTran Airways, Inc. |
| American | American Airlines, Inc. |
| CLT | Corporate Leadership Team |
| Continental | Continental Airlines, Inc. |
| Delta | Delta Air Lines, Inc. |
| DOJ | U.S. Department of Justice |
| FTC | Federal Trade Commission |
| MTD Order | Aug. 2, 2010 Order (Dkt. 136) |
| Northwest | Northwest Airlines, Inc. |
| RM | Revenue Management |
| United | United Airlines, Inc. |
| US Airways | US Airways, Inc. |
| Southwest | Southwest Airlines Co. |

## INTRODUCTION

Plaintiffs do not dispute that Delta adopted a first bag fee only after watching as, one by one, all of Delta's legacy airline competitors implemented such fees. Nor do Plaintiffs dispute that Delta adopted its fee only after observing those competitors uniformly report hundreds of millions of dollars in revenue from the fee and the absence of any significant loss of market share as a result of adopting it.[1] Each of these competitors faced much more competition than Delta from airlines not charging a bag fee.[2] These undisputed facts establish an obvious, legitimate business reason for Delta's decision to adopt the fee.

Plaintiffs also do not dispute that Northwest Airlines was one of the carriers that implemented a first bag fee during the summer of 2008 and, like the others, reported substantial incremental revenue. They do not dispute that Delta and Northwest merged in October 2008, or that Delta was publicly committed to

[1] DL SOF ¶ 23 (DX 43 (American) at DLTAPE-515, 527; DX 44 (United) at DLTAPE-154, 156; DX 45 (US Airways) at DLTAPE-263, 264, 272), ¶ 24 (DX 47 (Northwest) at DLTAPE-374), ¶ 33 (DX 56 (Continental) at DLBF-21565), ¶ 69 (DX 84 (United) at DLTAPE-903; DX 85 (Northwest) at DLTAPE-852; DX 86 (US Airways) at DLTAPE-750, 753-54, 758).

[2] DX 117, Carlton Rebuttal ¶ 14. While Delta competed with AirTran on more than 75% of *AirTran's* domestic routes in 2008, AirTran operated competing service on only about 6% of Delta's domestic routes. DX 2, Dick Rept. ¶ 90 & Ex. 13b, 13c. By contrast, more than 76% of Delta's passengers traveled on routes served by legacy carriers with first bag fees. DX 3, Kasper Rept. ¶ 28 & Ex. 3.

having uniform policies and practices immediately following the merger. While they assert that Delta's merger was somehow a "pretext" for adopting a first bag fee, Plaintiffs cannot dispute that to harmonize the disparate pre-merger fee policies of the two carriers, the combined post-merger carrier had to choose between Northwest's policy of charging for the first checked bag and Delta's policy of not charging the fee. They do not dispute that Northwest publicly reported before the merger that the fee was generating hundreds of millions of dollars, or that Northwest confirmed to Delta executives soon after the merger that there was little if any loss of market share as a result of the fee. Nor do Plaintiffs dispute that Delta formally adopted the first bag fee in conjunction with other measures to align the merged company's fees and policies at the first post-merger CLT meeting of the combined company and announced its adoption as part of its announcement aligning other, formerly disparate, policies of Delta and Northwest, including reduction of the second bag fee from $50 to $25.

These undisputed facts establish legitimate business reasons for Delta's action which is at least as plausible as Plaintiffs' conspiracy theory. That alone requires summary judgment for Defendants. To defeat summary judgment, Plaintiffs must prove that the inference of conspiracy outweighs any "competing inferences of independent" (or interdependent) action. *Williamson Oil Co. v.*

*Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003) (quotation omitted). Standing alone the undisputed, publicly announced success of the first bag fee in generating huge incremental revenues for Delta's most significant competitors, and Delta's decision to follow their lead as part of its merger integration, supply a "competing inference of independent action" more than sufficient to overcome any possible inference of conspiracy. In the Court's words, the observed profitability of the fee and the pending merger with Northwest provide a "valid justification" (MTD Order at 31) for both Delta's adoption of the fee and its timing.

Judge Richard A. Posner recently described exactly what happened here:

> Competitors in concentrated markets watch each other like hawks. *Think of what happens in the airline industry*, where costs are to a significant degree a function of fuel prices, when those prices rise. Suppose one airline thinks of and implements a method for raising its profit margin that it expects will have a less negative impact on ticket sales than an increase in ticket prices—*such as a checked-bag fee* or a reservation-change fee or a reduction in meals or an increase in the number of miles one needs in order to earn a free ticket. The airline's competitors will monitor carefully the effects of the airline's response to the higher fuel prices afflicting the industry and may well decide to copy the response should the responder's response turn out to have increased its profits.

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

Consistent with Judge Posner's description of lawful interdependent conduct, Delta watched its principal competitors (the other legacy airlines) as each

"implement[ed] a method for raising its profit margin that it expect[ed] [to] have a less negative impact on ticket sales than an increase in ticket prices . . . [by charging] a checked-bag fee." *Id.* And, as Judge Posner would have anticipated, Delta "decid[ed] to copy the response" when each of its competitors reported that its "response turn[ed] out to have increased its profits." *Id.* This is paradigmatic "'conscious parallelism,' a perfectly legal phenomenon commonly associated with oligopolistic industries." *Williamson Oil*, 346 F.3d at 1291.

Against this obvious logical explanation for Delta's adoption of a first bag fee, Plaintiffs strain to spin the facts as alleged "plus factors" they argue tend to exclude the possibility that Delta could have acted without an agreement with AirTran. They argue that AirTran and Delta engaged in "collusive communications" concerning the first bag fee, despite overwhelming evidence that those allegations are baseless. They cite meetings between the AirTran and Delta CEOs without mentioning that those meetings related to the Atlanta airport lease negotiations, were perfectly legitimate, and had nothing to do with bag fees. They claim that Delta's decision to adopt a bag fee was against its economic self-interest despite undisputed evidence in the public record that adopting the bag fee was highly profitable for Delta's competitors and would also be for Delta. And finally, Plaintiffs claim that Delta had a "motive to conspire" with AirTran because it

might otherwise lose market share—despite the many public statements by Delta's most significant competitors and the post-merger feedback from Northwest itself that charging a bag fee did not result in any material share shift to competitors without the fee.

At the end of the day, Plaintiffs are left where they began—arguing that Delta's decision to adopt the bag fee was influenced by AirTran's CEO's public response to an analyst question, a theory which fails factually and as a matter of law. While the final, formal Delta decision to adopt the bag fee was made shortly after the merger, the evidence clearly establishes that Delta's three top officers had already made up their minds that Delta should adopt the fee well before the AirTran earnings call. Their testimony about that is confirmed by the documents, which Plaintiffs inaccurately portray as ambiguous—a fiction aided by Plaintiffs' calculated refusal to ask any of the executives about the documents and despite their request to reopen discovery in order to do so. More importantly, however, even if Delta had relied on AirTran's statement in making its own decision, that would not have violated Sherman Act § 1. Plaintiffs cite ***no case*** that holds otherwise. Businesses are legally entitled to consider public information, including the public statements of their competitors, when making business decisions. Any

contrary rule would stifle corporate decision-making and allow rivals to freeze their competitors by making public announcements of their purported intentions.

## I. Plaintiffs Must Show That The Evidence More Strongly Supports Conspiracy Than Conscious Parallelism

Plaintiffs argue that at summary judgment it is improper for the Court to "weigh the evidence and determine [whether] the evidentiary inferences more strongly support conspiracy than conscious parallelism." Plfs' Opp. at 40-41. But that is precisely what the law requires at summary judgment in a Sherman Act § 1 case. As the Eleventh Circuit instructs: "it ***unquestionably is the duty of the district court*** to evaluate the evidence proffered by the plaintiffs . . . to determine whether that evidence, if credited, 'tends to' establish a conspiracy ***more than*** it indicates conscious parallelism." *Williamson Oil*, 346 F.3d at 1301 (emphasis added). This is because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

Put differently, Plaintiffs "must show that the inference of conspiracy is reasonable in light of *competing inferences* of independent action." *Williamson Oil*, 346 F.3d at 1303 (quotation omitted, emphasis added). "Evidence that does

not support the existence of a price fixing conspiracy *any more strongly* than it supports conscious parallelism is insufficient to survive summary judgment." *Id.* at 1300 (emphasis added); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) ("A fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury.") (quotation omitted). Therefore, unless Plaintiffs "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," summary judgment is appropriate. *Harcros*, 158 F.3d at 570 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)); *see also In re Chocolate Confectionary Antitrust Litig.*, --- F.3d ----, 2015 WL 5332604, at *10 (3d Cir. Sept. 15, 2015) (holding that consciously parallel conduct "must be *so unusual* that *in the absence of an advance agreement*, no reasonable firm would have engaged in it") (quotation omitted, emphasis added).

Plaintiffs' evidence falls far short of this standard. Adoption of first bag fees by Delta and AirTran was not "so unusual" that it can only be explained by "an advance agreement." To the contrary, charging a first bag fee was the norm among legacy carriers by the time Delta adopted it. Adopting the fee was obviously in Delta's unilateral economic interest in light of what its major competitors were

reporting. In this context, what would have been "unusual" would have been for Delta to decide unilaterally *not* to adopt the fee once it merged with Northwest.

In applying summary judgment standards in antitrust cases, courts have cautioned against drawing inferences that could impose liability for lawful conduct and, consequently, "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Under *Matsushita*, the range of acceptable inferences that may be drawn from circumstantial evidence "var[ies] with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) (quotation omitted). The danger of mistaken inferences based on circumstantial evidence is especially acute where, as here, doing so would establish a rule allowing firms to "immobilize[] and preclude[] [their rival] from acting in a normal fashion as its interests might dictate" merely by making a public statement of purported intentions. *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963).

Plaintiffs argue the summary judgment standard is "more easily satisfied" in cases like this one involving "an oligopolistic market." Plfs' Opp. at 40. Plaintiffs again have it backwards. The need for "caution" is greater in cases like this one

where interdependence is the norm.[3] *Chocolate*, 2015 WL 5332604, *7; *Flat Glass*, 385 F.3d at 358 ("[T]his Court and others have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists."). "The basis for this circumspect approach is the theory of 'interdependence,'" *Flat Glass*, 385 F.3d at 359, which recognizes the differences between markets with many smaller firms and oligopolistic markets (*i.e.*, more concentrated markets with only a few firms). *Chocolate*, 2015 WL 5332604, *7. In an oligopolistic market, competitors "may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices." *Id.* Thus, in such cases, "a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment." *Id.* (citing *Matsushita*, 475 U.S. at 597 n.21).

## II. Plaintiffs Have Adduced No "Plus Factors" Which Would Make It Permissible To Infer a Conspiracy

### A. Delta Did Not "Accept" an AirTran "Invitation to Collude"

The crux of Plaintiffs' conspiracy theory is that the October 23 statement by

[3] MTD Order at 32-33 (quoting *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 283 (D. Minn. 1997): "[I]n an oligopolistic market, such as that in which the airlines operate, rapid price coalescence is the norm . . . .").

AirTran's CEO was an "invitation" to Delta to jointly adopt first bag fees, and that Delta "accepted" it when it harmonized its fee policies with Northwest after closing its merger.[4] Plaintiffs do not claim that Delta made *any* statement (public or otherwise) in reply to the AirTran statement.[5] It is undisputed that Delta simply announced that its post-merger bag fee policy would include such a fee—consistent with Northwest's pre-merger policy—on November 5, 2008, shortly after closing its merger with Northwest. This announcement came after Delta had observed every one of its major legacy competitors successfully adopt the fee and report hundreds of millions of dollars in revenue as a result.

These undisputed facts stand in stark contrast to the extensive public give-and-take over a five year period by the defendants in *Williamson Oil*, which the Eleventh Circuit found *insufficient* to raise an inference of conspiracy. The cigarette company defendants in that case were alleged to have "formulated and cemented their plans to collusively fix cigarette prices by indirectly

[4] Fornaro's truthful answers to an analyst's questions cannot be considered an "invitation" because they expressed no "commitment to impose FBF" (Plfs' Opp. at 49), as Plaintiffs' expert admits. 8/11/10 Singer Dep. at 277:4-10. The 75% and 90% estimated probability of AirTran matching in the "Value Proposition" slides show Delta did not interpret the statement as a "commitment." PX221 at 16, PX234 at 16. And AirTran did not decide whether to adopt the fee (or the amount if it did) until *after* Delta's announcement. DX 111; DX 112; PX278; PX269.

[5] Plaintiffs assert Fornaro made a similar statement on June 18, 2008, but concede Delta did not respond in any way. Plfs' Opp. at 7, 53.

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. These numerous public communications making specific statements about their future pricing intentions were interspersed with *twelve* parallel price increases. *Id*. at 1294.

Yet the Eleventh Circuit rejected Plaintiffs' conspiracy claims, holding defendants' pricing actions were "readily explained as economically rational, self-interested responses to" the public statements. *Id.* at 1307. Even more clearly on the facts in this record, Delta's adoption of the first bag fee was a "self-interested response" to the successful adoption of the fee by Delta's competitors, and the need to decide whether after the merger it would follow the Northwest policy of charging a fee or the contrary pre-merger Delta policy—which with no fee was alone among legacy network carriers. *Williamson Oil* establishes conclusively that Delta's decision to adopt the first bag fee under these circumstances is not a "plus factor" from which any conspiracy could be inferred.

Plaintiffs do not cite *any case* holding that a public statement like Fornaro's provides a basis for inferring an unlawful agreement. All of the cases they cite which characterize public statements as an "invitation to collude" involve FTC

challenges to those statements under *Section 5 of the FTC Act*, not Section 1 of the Sherman Act. In each, the FTC targeted only the party conveying the invitation, not the recipient.[6] Plaintiffs cite no case in which a competitor was held to have violated any antitrust law by making a unilateral business decision in the wake of or even in direct reliance upon such a public statement by a competitor.[7]

Plaintiffs rely on *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685 (D. Minn. 1995) for the premise that public statements about future pricing

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[6] DX 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); *In the Matter of U-Haul Int'l, Inc.*, No. C-4294, File No. 081-0157, 2010 WL 2966779 (July 14, 2010). Unlike Sherman Act § 1, a violation of FTC Act § 5 does not require proof of a contract, combination, or conspiracy. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

[7] All of the Section 1 cases Plaintiffs cite involved *private* communications specifically inviting or reaching agreement to collude. *See Interstate Circuit Inc. v. United States*, 306 U.S. 208, 216 n.3 (1939) (private letter demanding specific action and threatening retaliation unless the recipients agreed to comply); *Gainesville Utilities Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978) ("continuous exchange of [private] letters between high executives of [defendants] prior to" the alleged conspiracy the court described as "a blatant agreement to divide the market"); *In re Currency Conversion Fee Antitrust Litig.*, 2012 WL 401113, at *6 (S.D.N.Y. Feb. 8, 2012) (*private* sharing of "sensitive information with a competitor"). Plaintiffs' other cited cases did not involve an "invitation to collude" at all. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1244-46 (3d Cir. 1993) (finding evidence of "actual agreement" and that defendants "acted in ways not attributable to interdependence" in case "not dealing with parallel pricing"); *Merkle v. Aetna Health, Inc.*, 2005 WL 6151455, at *5 n.7 (S.D. Fla. Apr. 27, 2005) (dismissing antitrust claim, finding defendants acted "consistent with self-interest," and plaintiffs "failed to allege any other plus factors").

intentions may be sufficient to survive summary judgment because plaintiffs needed only to identify "a simple triable question of fact." *Id.* at 690. Plaintiffs are wrong. Even assuming that Plaintiffs' characterization was the standard in the District of Minnesota twenty years ago, it is directly contrary to the holding of *Williamson Oil*. The Eleventh Circuit requires that Plaintiffs produce evidence that "more strongly" supports conspiracy "than it supports conscious parallelism [in order] to survive summary judgment." *Williamson Oil*, 346 F.3d at 1300.[8]

**B. There Were No "Collusive Communications"**

Plaintiffs point to what they call "collusive communications" as an alleged "plus factor." None of the alleged "communications" can sustain any inference of conspiracy given Delta's obvious legitimate business reasons for unilateral action. Moreover, in order for inter-firm communications to count as evidence from which a jury could reasonably infer a conspiracy, Plaintiffs must offer evidence (not speculation) that those communications actually occurred. Plaintiffs offer no such proof, and evidence of the mere opportunity to communicate is not enough.[9]

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[8] *Travel Agency* also allegedly involved information exchanges in multiple private settings, 898 F. Supp. at 690, and actions by seven airlines over the course of 144 hours to change a 35 year old commission structure. *Id*. at 687. By contrast, Delta adopted the fee after other airlines' bag fee adoptions over a six month period, which gave Delta ample opportunity to reach its own conclusions about the fee.

[9] *Williamson Oil*, 346 F.3d at 1319 ("[T]he opportunity to fix prices . . . does not tend to exclude the possibility that they did not avail themselves of such

The alleged "collusive communications" upon which Plaintiffs rely primarily involve the apparent efforts by AirTran employee Scott Fasano to communicate with various low-level Delta employees or vendors, none of whom had any role in Delta's bag fee decision.[10] There is no evidence that Fasano ever succeeded in conveying any information to anyone at Delta, let alone anyone in a position to influence Delta's first bag fee decision.[11] The communications, even assuming they occurred, are therefore irrelevant.[12]

A cursory review of the evidence concerning the alleged "collusive communications"—all of which purportedly occurred *more than three months*

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opportunity or, conversely, that they actually did conspire."); *see id.* at 1302 ("a statement could not constitute a plus factor . . . if it required the jury to engage in speculation and conjecture to such a degree as to render its finding a guess or mere possibility") (quotation omitted).

[10] As detailed in Delta's initial brief, Fasano testified at his DOJ deposition that his claims about these alleged communications were overblown or completely false, made in an effort to impress his superiors. *See* DL Br. at 42 n.111.

[11] Plaintiffs speculate that the 50% "estimated probability of AirTran matching" in Delta RM's draft Value Proposition slides is "best explained" by the alleged private "collusive communications." Plfs' Opp. at 22. Plaintiffs' speculation is unsupported by any evidence, and contradicted by their concession that the 50% was not based "*on anything other than flip of the coin*." *See* Plfs' SOAF ¶ 152.

[12] *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) ("[S]poradic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment."); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982) (same).

*before* the CLT meetings at which Delta decided to adopt the first bag fee—shows how attenuated they actually are from Delta's first bag fee decision:[13]

- Two e-mails dated July 31, 2008 which Fasano *attempted* to send to two Delta employees who, unbeknownst to Fasano, no longer worked at Delta, and did not receive his emails. Plaintiffs admit this undisputed fact, yet continue to cite the emails as evidence of "collusive communications."[14]

- An internal AirTran email dated July 31, 2008 in which Fasano reports on purported conversations with Delta airport managers in Knoxville, TN (Mike Ringler) and Miami, FL (Mike Rossano).[15] Neither recalled any discussion of first bag fees with Fasano (Ringer did not recall having a conversation with Fasano at all). And neither had any knowledge of, or involvement in, Delta's first bag fee decision.[16]

- An August 5, 2008 AirTran email in which Fasano reports to his superiors a conversation with someone "connected on the high level operational and planning side" at Delta.[17] The "high level" connection was a person who worked for a *Northwest vendor*. He had nothing to do with Delta's bag fee decision, and Plaintiffs admit that the information Fasano said he learned (that Delta's first bag fee "functionality is ready") was incorrect.[18]

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[13] Plaintiffs also speculate that "collusive communications" occurred "[i]n 2008" at "the airport," in "baggage committee meetings," and in "phone calls," and that "a lot of competitive information" was "relayed through vendors." Plfs' Opp. at 56-57 nn.229-234. Plaintiffs do not identify these employees, when the communications occurred, or the substance of the communications. But even from the meager description given, it is apparent that none of the supposed participants (if the communications occurred) had anything to do with Delta's bag fee decision.
[14] Plfs' Opp. at 54 n.218.
[15] Plfs' Opp. at 55 n.217.
[16] DX 24 at 9:4-14, 64:12-65:20; DX 25 at 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.
[17] Plfs' Opp. at 54-55 nn.222-224.
[18] DX 23 at 53:17-55:17, 77:8-82:22, 87:1-11, 99:17-100:3; Plfs' SOAF ¶ 214.

- August 4-5, 2008 AirTran emails supposedly reflecting communications with vendors about first bag fee technology.[19] There is no evidence that Delta either received or provided any information to those vendors, or that those vendors knew anything about Delta's first bag fee plans.[20] Moreover, not only do communications with third-parties "not provide any evidence of *interfirm* communications . . . they tend to suggest the *absence* of such communications."[21]

Plaintiffs also point to what they describe as a "pattern" of *public* "collusive communications," but that is similarly baseless.[22] Plaintiffs identify only two public statements (in addition to the October 23 Fornaro statement) by AirTran or Delta executives that they contend were "collusive":

- A statement by AirTran's CEO at a June 18, 2008 investor conference that: "AirTran had not instituted a first bag fee because AirTran would be uncomfortable competing in Atlanta with Delta, which was not charging a first bag fee."[23] Plaintiffs contend this was a signal that "AirTran would

[19] Plfs' Opp. at 54 nn.219-220.

[20] To the contrary, Plaintiffs themselves argue that Delta's vendor was "surprised" by Delta's first bag fee announcement in November 2008, and that "Delta was technologically unprepared to implement the fee." Plfs' Opp. at 27.

[21] *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 139 (2d Cir. 2013) (emphasis in original) ("if, for example, [defendants] were talking, [they] would not have had to rely on third parties" to obtain information).

[22] The alleged public "collusive communications" were statements made in response to questions posed by industry analysts, to whom the airlines have a legitimate business interest and legal obligation under the securities laws to provide accurate information. *See* AT Br. at 52-55. Because imposing antitrust liability and treble damages here based on AirTran's *truthful* response to the investor community would create a serious conflict between the antitrust laws and the securities laws, summary judgment is warranted under the doctrine of implied preclusion. *See* DL Br. at 51 & n.118 (citing *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 275 (2007)).

[23] Plfs' Opp. at 53 n.213.

impose FBF if Delta agreed to impose one first," but concede it "*did not elicit any reaction by Delta*." Plfs' Opp. at 7. Plaintiffs do not explain how a statement that elicited no response can be considered "collusive."

- A Delta statement on its October 15, 2008 earnings call that "a la carte pricing is where we need to go *as an industry*" and that "as we merge with Northwest, we'll have another opportunity to look again with respect to where fee based revenues align."[24] This statement conveyed: (1) an opinion about the general desirability of unbundled pricing (which was well underway, including first bag fees by all major legacy carriers) and (2) the obvious—that the Northwest merger would require Delta to align the carriers' disparate policies on fees. Neither invites an agreement nor can reasonably be interpreted as sending a signal to anyone from which an inference of conspiracy can be drawn.[25]

Plaintiffs' other claims of "collusive communications" lack any factual support. For example, Plaintiffs claim that "sometime between May 21, 2008 and October 27, 2008" Delta's and AirTran's CEOs "communicat[ed] about the need for joint capacity reductions."[26] This statement is patently false and unsupported by any record evidence. The document Plaintiffs cite as evidence for this claim does not even remotely suggest the carriers' CEOs discussed capacity reductions, and certainly not bag fees.[27] It is an apparent reference to communications

[24] Plfs' Opp. at 55 n.226 (emphasis added).
[25] *Williamson Oil*, 346 F.3d at 1305 (affirming rejection as a plus factor public "statements taken out of context, as well as ominous readings of typical industry reporting on strategy").
[26] Plfs' Opp. at 55-56.
[27] Plaintiffs' evidence consists of an email by an outside economic consultant that employees in Delta's real estate department forwarded to employees in AirTran's real estate department. *See* PX141.

between Richard Anderson and Robert Fornaro during the 2008 Atlanta airport lease negotiations with the City of Atlanta, which had nothing to do with bag fees.[28] And the undisputed fact that Delta ***increased*** capacity in markets where it competed with AirTran during the relevant period disposes of any claim that Delta and AirTran agreed to jointly reduce capacity.[29] Indeed, Plaintiffs long ago stipulated that they were abandoning any claim concerning capacity reductions. *See* Dkt. 335.

Equally spurious is Plaintiffs' speculation that the question asked by analyst Kevin Crissey on the October 23 AirTran earnings call was "planted." Plfs' Opp. at 15 & n.55. Plaintiffs do not cite any evidence to support this assertion, and completely ignore sworn evidence in the record from Mr. Crissey that the question was *not* planted.[30] Plaintiffs referred to Mr. Crissey in their 2010 complaint but never even sought to depose him.[31] They argue instead that it can be inferred from a calendar invitation for a call on October 20 between Delta Investor Relations employees and Mr. Crissey. Yet Delta's Investor Relations team obviously has many legitimate reasons to schedule telephone calls with airline industry financial

[28] *See* PX133; DX 4 at 23:4-15, 26:2-28:9, 35:21-25, 40:10-24.
[29] *See* DL Br. at 44 n.114. This increase in capacity on AirTran routes also discredits Plaintiffs' misinterpretations of various public statements by Delta regarding capacity in 2008. *See* Plfs' Opp. at 8 nn.16-17, 52 n.209.
[30] Dkt. 434-16 at 18-19 (Ex. 131, Crissey Decl. ¶¶ 5-8).
[31] *Id.* at 19 (Ex. 131, Crissey Decl. ¶ 8).

analysts—that is their job. There is no evidence that AirTran or even bag fees were discussed on the call.[32]

Plaintiffs also contend that it is plausible to infer that Crissey's question was "planted" because it was "odd" compared to his other more "sophisticated" questions. *Id.* Plaintiffs' opinion as to the relative sophistication of a stock analyst's questions is not a reasonable basis for inferring conspiracy. Moreover, the question was not "odd" given the intense interest among investment analysts in bag fees during 2008, and Mr. Crissey's was just one of many similar questions.[33]

### C. Delta Did Not Rely on AirTran's October 23 Statement In Deciding to Adopt a first Bag Fee, But Was Legally Entitled to Do So

Plaintiffs also contend that "a plus factor can be inferred from 'evidence that exchanges of information had an impact on pricing decisions.'" Plfs' Opp. at 58 (quoting *Flat Glass*, 385 F.3d at 369). But they do not allege, much less prove, that Delta participated in any "exchange" of information with AirTran. Instead they go to great lengths in an effort to show that Delta's decision to adopt the first

[32] Record evidence establishes the subject of the call was financial modeling of the soon-to-be-merged Delta/Northwest. *Id.* at 17 (Ex. 131, Crissey Decl. ¶ 3).

[33] DX 50, at DLTAPE-487, Delta Q2 2008 Earnings Call (7/16/08) ("Okay, and finally if I could, in terms of the first bag fee, I think Northwest has it and you don't and where is that heading?"); DX 43, at DLTAPE-527, American Q2 2008 Earnings Call (7/16/08) ("[W]hat are you expecting for that first checked bag fee?"); DX 86 at DLTAPE-753, US Airways Q3 Earnings Call (10/16/08) ("Behavior change with ancillary bags are you seeing – one of the carriers said 40% reduction in second bags and stuff. Are you seeing a similar trend?").

bag fee was "affected" by Fornaro's October 23 statement. These efforts fail for at least two reasons. First, as a matter of law, even if Fornaro's statement had been pivotal to Delta's decision, that would not create a factual issue as to the existence of an agreement. Second, the indisputable evidence demonstrates that the Fornaro statement was immaterial to Delta's actual first bag fee decision.

**1. Delta Was Legally Entitled to Act on Fornaro's Statement**

Plaintiffs do not cite *any case* holding that an unlawful agreement in violation of Section 1 can be inferred because a company takes into account a public statement made by a competitor. As this Court has correctly 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.[34] Even assuming (counterfactually) that the evidence showed Fornaro's

[34] Each of the cases Plaintiffs cite involved evidence of *private* exchanges of non-public information. *See Flat Glass*, 385 F.3d at 369 (extensive private sharing of non-public price information, including one defendant's fax to competitors of a "planned future [price] increase that it had not announced publicly"); *In re SRAM Antitrust Litig.*, 2010 WL 5138859, at *6-7 (N.D. Cal. Dec. 10, 2010) (involving only private exchanges of "sensitive" pricing information between "executives and other managers with influence or ultimate authority over pricing"); *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 356-58, 368-70 (S.D.N.Y. 2011) (finding "numerous inter-firm communications," including a private meeting among "senior in-house credit card counsel" where non-public pricing information was discussed); *S&S Forage & Equip Co. v. UP North Plastics, Inc.*, 2002 WL 505919, at *4-6 (D. Minn. Mar. 31, 2002) (involving "direct evidence" of explicit agreement to privately share "pricing information before prices went out to

October 23 statement was the *sole basis* for Delta's decision to adopt a first bag fee, Delta was legally entitled to make that decision. *See* Delta Br. at 44-51. Taking into account *public* information cannot be a basis for inferring an agreement. This is the essence of "conscious parallelism, which is not unlawful under the Sherman Act." MTD Order at 32 (citing cases); *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.") (quotation omitted).

In *Williamson Oil*, the leading precedent in this Circuit on alleged price signaling through public statements, the Eleventh Circuit found that five years of public discussion of pricing intentions by competitors and a dozen parallel price increases were insufficient to raise an inference of conspiracy. 346 F.3d at 1305-08. This case does not come close to the quantity and variety of public communications and the modes of communications allegedly used to communicate pricing intentions in *Williamson Oil*.

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customers"); *Rosenfielde v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1057-58 (D.N.J. 1988) (evidence that defendants' sales employees "routinely exchanged information" about prices during private "monthly telephone conversations," and that defendants' "senior executives were aware of the price information and considered the data . . . to set" prices).

Moreover, any contrary rule would "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. If businesses were prohibited from acting in their own unilateral interest simply because a competitor had made a public statement about its pricing intentions, a company could use public statements to prevent its competitors from acting unilaterally in a profit-maximizing way.[35] Applied here, this 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 conforming the post-merger fee structure of the combined entity to the highly profitable pre-merger Northwest policy that every other one of its major legacy airline competitors had already adopted. This is not the law, and would produce anticompetitive outcomes if it were.[36]

**2. Fornaro's October 23 Statement Did Not Affect Delta's Decision**

The undisputed evidence demonstrates the factual premise of Plaintiffs' argument is also wrong: Fornaro's statement had no material impact on Delta's decision. There is no dispute that some Delta executives were aware of AirTran's statement. But it is also undisputed that by the time of Fornaro's statement, every

[35] DX 1, Carlton Report ¶¶ 5, 15-20; Ex. 117, Carlton Rebuttal ¶ 12.

[36] *See* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1419a (2010) ("It would be poor policy to allow an uninvited solicitation to disable an innocent recipient from lawfully taking a step it would otherwise have taken.").

major legacy airline had adopted a bag fee and trumpeted its profitability. In September 2008, as the country was entering a severe recession, Delta was facing a $250 million revenue shortfall for the fourth quarter.[37] In budget documents distributed to Delta's most senior executives in September 2008, ACS repeatedly proposed a first bag fee as a way to partially close the gap—including an "Action Plan" circulated to Richard Anderson and Ed Bastian on Friday, September 26, 2008.[38] That Sunday (September 28), the day before Delta's senior executives met to discuss ways to mitigate expected fourth quarter losses, Anderson and Bastian exchanged emails, agreeing that Delta "prob[ably] should" adopt the fee "as part of integrating two companies" because there was "a lot of revenue involved."[39] They also agreed that Glen Hauenstein, the head of Delta's RM division, "had different thoughts" and they "should have disc[ussion] at [the] right time."[40]

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[37] DX 77 at DLTAPE-17713.

[38] DX 77 at DLTAPE-17713 ("Airport Customer Service" slide: "First bag fee ($15)"); DX 76 at DLTAPE-3528; DX 78 at DLBF-83344.

[39] DX 80 at DLTAPE-3069. Plaintiffs maintain this email, and another showing Mr. Anderson told Delta's COO Steve Gorman "We need to do it" (*i.e.*, adopt the bag fee) *before* Fornaro's October 23 statement (DX 65), are "ambiguous" (Plfs' Opp. at 77), despite their refusal to ask the executives about them after having requested the Court reopen discovery do to so. *See* Dkt. 533 at 23-24 n.16. Plaintiffs' interpretation of DX 65 as a request for a meeting (Plfs' Opp. at 78) is highly strained and unreasonable given that Anderson had just approved the October 27 CLT meeting agenda (DX 91) and in light of Anderson's unequivocal testimony. DX 5 at 228:24-229:11.

[40] DX 80 at DLTAPE-3069.

Both Anderson and Bastian testified these emails reflect that by the end of September each had made up his own mind Delta should adopt a first bag fee.[41] Plaintiffs claim that this testimony conflicts with testimony that Delta did not decide to adopt the bag fee until after the merger with Northwest. Plfs' Opp. at 71. But the documents and testimony are fully consistent.

Bastian and Anderson anticipated that Glen Hauenstein's "different thoughts" would be discussed at "the right time," which under Delta's decision-making process would be at a CLT meeting.[42] That meeting occurred on October 27, 2008, and had been scheduled to discuss the bag fee *two days before Fornaro even made his statement*.[43] The fee was initially approved at that meeting, following Bastian's and Anderson's arguments in support of it.[44] Two days later, DOJ approved the merger with Northwest, and at the first post-merger CLT meeting, which included the new members from Northwest, the first bag fee was formally approved as part of the combined company's unified ancillary fees and policies.[45] There is no inconsistency between Anderson's and Bastian's testimony that *individually* each had become convinced by September 28 that Delta should

[41] DX 5 at 207:16-22, 226:8-227:16; DX 29 at ¶ 5.
[42] AX 67 at 173:8-13; DX 4 at 10:12-25.
[43] *See* DL Br. at n.80.
[44] *See* Plfs' SOAF ¶¶ 208-209.
[45] *See* Plfs' SOAF ¶ 210.

adopt the fee when it merged with Northwest and their simultaneous desire to allow the issue to be addressed at a CLT meeting to ensure all views were vetted before any final decision was announced.[46]

*Plaintiffs' own recounting of the October 27 CLT meeting contradicts their argument that Fornaro's October 23 statement led Delta to change its position from against the bag fee to a decision to adopt it*. They state that the majority of the CLT members were *against* the fee at the beginning of the October 27 CLT meeting (obviously not swayed by the Fornaro statement, which occurred four days earlier): "the majority of CLT members *initially spoke out against* FBF." Plfs' Opp. at 26. They then state that it was Ed Bastian's statement (not Fornaro's) that turned them around: "the CLT reversed course and decided . . . to adopt FBF" only "after Ed Bastian expressed that he was '*worried about Delta surviving*' and *not about AirTran benefitting from FBF*, and after Bastian pointed out the *importance of every dollar* of incremental profit *to fund impending pension obligations*." *Id.* Plaintiffs themselves have thus provided a reasonable non-conspiratorial explanation for Delta's decision to adopt the fee.

[46] Plaintiffs cite an October 10, 2008 email from Richard Anderson to a pilot (PX191) stating that "We have not adopted first bag fee—still studying." This is hardly evidence that Mr. Anderson had not made up his mind about the fee and it is implausible that he would widely disclose having made up his mind before the CLT had a chance to consider the issue or before a public announcement.

### D. Delta Did Not Act Against Its Own Independent Economic Interest

Plaintiffs also claim that Delta's adoption of a first checked bag fee was against its own independent economic interest, and therefore constitutes a "plus factor" supporting an inference of conspiracy.[47] To prove that, however, Plaintiffs must demonstrate that Delta's "behavior would not be reasonable or explicable . . . if [it] were not conspiring to fix prices or otherwise restrain trade." *Harcros*, 158 F.3d at 572. "[I]f a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor." *Williamson Oil*, 346 F.3d at 1310. A court thus "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds." *Id.* (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999)).[48]

[47] Plaintiffs rely on the opinions of Dr. Singer, whose merits opinions are the subject of Defendants' forthcoming *Daubert* motion. Dkt. 551 at 3.

[48] *See also Chocolate*, 2015 WL 5332604, at *10 ("Parallel price fixing must be so unusual that *in the absence of an advance agreement*, no reasonable firm would have engaged in it.") (emphasis added); *In re Musical Instruments & Equip. Antitrust Litig.*, --- F.3d ----, 2015 WL 5010644, at *6 (9th Cir. Aug. 25, 2015) ("An action that would seem against self-interest in a competitive market may just as well reflect market interdependence giving rise to conscious parallelism [in an interdependent market]. . . . More extreme action against self-interest, however, may suggest prior agreement – for example, where individual action would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement.").

Delta had ample reason to unilaterally adopt a first bag fee. According to public statements of every one of its major legacy competitors, charging a bag fee was not only highly profitable but there was little or no market share loss to carriers not charging a fee.[49] Thus, by September and October, it became apparent to Anderson and Bastian that there was virtually no risk in adopting the fee and hundreds of millions of dollars in upside.[50] Moreover, Northwest was already publicly reporting "$150 million to $200 million" in annual revenue from its bag fee, so choosing *not* to harmonize to the Northwest policy post-merger would have meant abandoning that revenue as well.[51] The profitability of the fee and lack of market share shift reported by Delta's competitors refute any suggestion that it would not have been in Delta's self-interest to adopt the fee, much less, that to do so would have been "[un]reasonable or [in]explicable," *Harcros*, 158 F.3d at 572, "unusual," *Chocolate*, 2015 WL 5332604, at *10, or "perilous in the absence of advance agreement." *Musical Instruments*, 2015 WL 5010644, at *6.

Delta also had more than a reasonable basis to conclude that whether AirTran matched was irrelevant. Delta's major legacy competitors were publicly

[49] *See supra* at 1 n.1.
[50] In June 2008 after American, United, and US Airways adopted the fee, Delta decided to "not adopt [a] first bag fee at this time," but "continue to monitor [other airlines] through end of the summer and re-evaluate." DX 37, at DLBF-35301.
[51] DL SOF ¶ 69 (DX 85, at DLTAPE-852).

reporting they had not experienced meaningful share shift. After the merger, Northwest executives confirmed the same experience.[52] And those legacy airline competitors were facing more competition from carriers not charging a bag fee than Delta was at the time it made its decision—including AirTran, which operated competing service on only about 6% of Delta's domestic routes.[53] The reasonableness of this conclusion is further borne out by Delta's actual experience after adopting the fee. It is undisputed that Delta and AirTran have not had a matching first bag fee policy since August 2009, and that Delta has kept the fee even after Southwest acquired AirTran and then eliminated AirTran's first bag fee.[54] All of this leads to the inescapable conclusion that the evidence is at least equally consistent with the inference that Delta's adoption of the fee was in its interest no matter what AirTran did.

It is also undisputed that Delta was publicly committed to the "seamless integration" of Delta and Northwest into one company with a uniform set of policies and fees in order to minimize customer confusion.[55] It could not achieve this goal without deciding which of the two firms' first bag fee policies the merged

[52] DX 4 at 61:22-62:11, 76:19-77:20.
[53] DX 2, Dick Rept. ¶ 90 & Ex. 13b.
[54] PX398, Singer Rept. ¶¶ 21-22; Dkt. 553-1 at 3-7 (Tenley Decl. ¶¶ 5-14).
[55] DX 50, at DLTAPE-0476; Ex. 82, at DLBF-38191.

airline would implement.[56] It is undisputed that Delta began its consideration of which company's fees to adopt in connection with the merger long before Fornaro's October 23 statement.[57] It is also undisputed that when Delta's CEO asked for an update on that process on October 21, he was told the review was completed, except that "*the one loose end is the first bag fee.*"[58] Later that same day—*two days before* Fornaro's October 23 statement—the issue of whether to adopt a first bag fee was put on the October 27 CLT meeting agenda.[59] Nor do Plaintiffs dispute that Delta formally adopted Northwest's first bag fee in the first CLT meeting of the merged company, along with numerous other fees that needed to be harmonized.[60] This is plainly behavior that is "reasonable" and "explicable" in the absence of conspiracy. *Harcros*, 158 F.3d at 572.

In the words of the Eleventh Circuit, where, as here, "a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor." *Williamson Oil*, 346 F.3d at 1310.

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[56] DX 49 at DLBAG-0997, 1000 , 1025; Ex. 59, at DLTAPE-4040; DX 60, at DLBF-36512-13; DX 62 at DLTAPE-8353.
[57] Plfs' Opp. at 17 & n.62 (citing PX149).
[58] Plfs' Response to Delta SOF ¶ 61.
[59] DL Br. at 30 & n.80 (citing DL Exs. 87-91); DL SOF ¶ 71 & n.79 (same).
[60] Plfs' Response to Delta SOF ¶¶ 96, 97, 99-103.

### 1. The Value Proposition Deck Is Not Probative of Any Conspiracy

Plaintiffs argue the Value Proposition deck presented to Delta's senior executives during the October 27 CLT meeting "demonstrated that the fee would be unprofitable for Delta and AirTran to impose unilaterally." Plfs' Opp. at 64-65. Delta has already explained that the Value Proposition presentation did not reflect the views of "Delta," but rather was an "advocacy piece" prepared by Delta's RM team, which opposed adoption of the first bag fee (before and after the Fornaro statement).[61] The deck did not change the views of Delta's CEO, President, or COO—each of whom had decided prior to the Fornaro statement that they favored imposing a fee.[62] They rejected the basic premise of the presentation that adoption of the fee would lead to significant loss of market share to carriers without the fee—a view that was not theoretical but supported by the actual reported experience of airlines with the fee.[63]

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[61] *See* DL Br. at 30 n.81. If the Court were to ignore that Delta RM created the deck in order to oppose the fee, and accept Plaintiffs' characterization of the slides as the view of "Delta," it would turn virtually any document presented to senior management assessing a course of action different from the one eventually taken as evidence contrary to economic interest.

[62] *See* DL Br. at 31-35.

[63] *See supra* at 1 n.1. The Value Proposition's authors testified the deck's figures were illustrative calculations, not actual estimates, as confirmed by the document itself. PX234 at 11 (identifying among range of "potential" share shift 4-5% as the amount necessary to offset the fee revenue); *see also* DL Br. at 31 & n.82.

However, even if one were to believe the Value Proposition's analysis, the senior executive sponsor of the document (the Executive Vice President of RM) testified without contradiction that whether AirTran matched did not make a material difference in the calculations—under either scenario the result was "revenue neutral" or "a wash" for an over $30 billion company.[64]

The Eleventh Circuit in *Williamson Oil* rejected a similar argument that a business decision was not in a defendant's independent interest because on paper some other course of action would have been more profitable, refusing to "second guess" the defendant's business judgment. 346 F.3d at 1310, 1315. There is no basis to "second guess" Delta's first bag fee decision, which was plainly "reasonable" and "explicable" without a conspiracy with AirTran. *Harcros*, 158 F.3d at 572.

**2. Delta's Adoption of the Fee Was Not "Unreasonable" or "Inexplicable" In the Face of Decreasing Fuel Prices and Demand**

Plaintiffs contend that Delta acted contrary to its economic self-interest by adopting the bag fee in the face of falling fuel costs and decreasing demand. Yet the mere fact that prices increase or remain stable in the face of declining costs is not evidence from which a conspiracy can be inferred as a matter of law—especially in an oligopolistic market. *Chocolate*, 2015 WL 5332604, at *10

[64] AX 82 at 125:20-24, 134:19-25; DX 93, DLTAPE-1276.

("evidence of a price increase disconnected from changes in costs or demand" does not tend to exclude the possibility of independent conduct.); *Petruzzi's*, 998 F.2d at 1244 ("[I]t is quite likely that oligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut.").

Plaintiffs are also wrong on the facts. Although fuel costs were declining in late 2008, they were decreasing from record highs, which had caused crippling losses, and remained volatile.[65] Further, Delta faced massive revenue shortfalls, and other cost *increases*, including pension funding obligations of almost a billion dollars.[66] As Plaintiffs themselves argue, during the October 27 CLT meeting, "the CLT reversed course and decided . . . to adopt FBF" ***only after*** Delta President Ed Bastian "expressed that he 'was worried about Delta surviving' and not about AirTran benefitting from FBF, [and] after Bastian pointed out the importance of every dollar of incremental profit to fund impending pension obligations."[67]

Plaintiffs admit that Delta was "in desperate need of revenue."[68] They insist, however, that Delta's decision to impose the fee and gain what Delta's

[65] Plfs' Opp. at 29. No one knew whether fuel costs would continue to fall or increase again. DX 7 at 74:22-75:12; DX 131 at 3.
[66] Plfs' Opp. at 29; DX 7 at 73:1-74:2; Plfs' Response to Delta SOF ¶ 80.
[67] Plfs' Opp. at 26; *see also* Plfs' SOAF ¶ 207.
[68] Plfs. Opp. at 29 & n.148.

senior executives viewed as hundreds of millions of dollars in revenue could only be the result of conspiracy, notwithstanding the glowing public reports of airlines that had adopted the fee.[69] Nothing in the law countenances or requires such "second guessing [of] reasonable business decisions." *Williamson Oil*, 346 F.3d at 1310 ("[F]irms must have broad discretion to make decisions based on their judgments of what it best for them and that business judgments should not be second guessed even where the evidence concerning that rationality of the challenged activities might be subject to reasonable dispute.") (quotation omitted).

### E. Plaintiffs' "Pretext" Arguments Provide No Basis for Inferring Conspiracy

For their fifth purported "plus factor," Plaintiffs assert "a conspiracy can be inferred" because Delta's public statements that it was adopting the first bag fee as a part of its post-merger harmonization of fees with Northwest were "pretextual."[70] This argument is frivolous. There is no question that pre-merger Delta and

[69] As discussed above, Plaintiffs contend Delta's only means to avoid antitrust liability was to forego the fee (including Northwest's hundreds of millions in revenue) and hope to capture the revenue through speculative and uncertain share gains. *See supra* at 26-27.

[70] Pretext "alone [is] not [] sufficient to show joint action in violation of the antitrust laws . . . ." *DeLong Equip. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1989); *Chocolate*, 2015 WL 5332604, at *20 ("pretext alone does not create a reasonable inference of a conspiracy"); *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 452 (7th Cir. 2007) (same); *H. L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981) (same).

Northwest had different first bag fee policies, and that the merged carrier was going to have to decide what its policy would be. As already discussed, there is overwhelming evidence proving that the timing of Delta's fee decision and announcement was driven by the merger. *See supra* at 28-29.[71]

Plaintiffs concoct their "pretext" argument by parsing Delta's press release stating that it was "align[ing] customer policies and fees to simplify the travel experience for our customers." However, Delta never claimed it was adopting the first bag fee to "simplify the travel experience" or that the fee would do so. The press release merely stated that harmonizing the fees would make the "travel experience" "simpl[er]," which of course it would, by eliminating situations in which a passenger pays different fees on different flights on the same airline.[72]

**F. Motive or Intent To Conspire Is Not A Plus Factor**

[71] Plaintiffs' argument is contradicted by their document citations showing it was communicated internally prior to late-September 2008 that bag fee decisions were expected when the merger closed (PX172) and a post-merger effort to quickly implement the new fee structure (PX255). Their "false exculpatory statements" argument (Plfs' Opp. at 70-71) merely rehashes their manufactured claims of supposed "contradictory" testimony (*see supra* at 24-25) with a citation to a jury instruction in a criminal kidnapping case that is plainly inapposite.

[72] Plaintiffs' cited evidence shows that Mr. Gorman's quote in the press release that customers were not differentiating Delta for not charging a first bag fee was true, not pretextual. *See* PX445 (showing a decrease in checked bags on Delta flights after *American Airlines* adopted a first bag fee); PX181 at DLBAG-10956 (focus group "[r]espondents are confused as to which airlines are charging for bags and which are not").

Plaintiffs float as a "plus factor" Defendants' "strong motive to conspire" because they "were losing so much money" and were "in a desperate financial situation." Plfs' Opp. at 71-72. This Court and many others have rejected or questioned motive as a plus factor. *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1306 (N.D. Ga. 2002) ("the characterization of motive as a 'plus factor' is questionable."), *aff'd Williamson Oil*, 346 F.3d 1287.[73] This is particularly the case in interdependent oligopolistic industries because in such markets "common motive does not suggest an agreement." *Musical Instruments*, 2015 WL 5010644, at *6 ("Any firm that believes that it could increase profits by raising prices has a motive to reach an advance agreement with its competitors. Thus, alleging 'common motive to conspire' simply restates that a market is interdependent.").[74]

## CONCLUSION

For the foregoing reasons, and those in Delta's initial brief, Delta's motion for summary judgment should be granted.

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[73] *See also Chocolate*, 2015 WL 5332604, at *8 ("Evidence of a motive to conspire means the market is conducive to price fixing . . . . By nature, oligopolistic markets are conducive to price fixing . . . . Therefore, [this] factor[] [is] neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists."); *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011); *Miles*, 476 F.3d at 452.

[74] Plaintiffs argue the airline industry's structure as an oligopoly is a "plus factor" (Plfs' Opp. at 39-40), but *Williamson Oil* rejected that notion. 346 F.3d at 1317.

Dated: October 2, 2015 Respectfully submitted,[75]

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

## CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing DEFENDANT DELTA AIR LINES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to counsel of record in this matter.

This 2nd day of October, 2015.

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