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

DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1(B)(3), Defendants hereby submit this Joint Response to Plaintiffs' Statement of Additional Facts (Dkt. 554-3).[1]

In addition to the specific responses stated below, Defendants object to Plaintiffs' Statement of Additional Material Facts because it cites extensively to evidence that is not cited in Plaintiffs' brief.[2] **202 of the 454** exhibits contained in Plaintiffs' Appendix of Exhibits (Dkt. 555) are not cited in Plaintiffs' Opposition

[1] Plaintiffs' Statement of Additional Facts is apparently directed at both of Defendants' summary judgment motions. The 329 numbered-statements do not indicate that they pertain to one motion or the other. Therefore, and in the interest of efficiency and avoiding the submission of 658 responses, Defendants submit this joint response.

[2] More than one hundred of Plaintiffs' statements contain citations to evidence not included in their brief. Defendants have endeavored to object individually to each such statement below.

Brief. *See* p. 230, Table 1 (listing Plaintiffs' Exhibits not cited in Plaintiffs' Opposition Brief). This violates the Court's Instructions to Parties and Counsel (Dkt. 49), which requires for summary judgment filings: "All citations to the record evidence should be contained in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.[3] Plaintiffs' disregard of the Court's Instructions has only added to the already burdensome task of sifting through the volumes of exhibits and testimony.

Compounding that difficulty in the present case is that many of Plaintiffs' statements are completely unsupported by the cited evidence, misstate or mischaracterize the evidence, or are not purported factual statements at all but rather legal conclusions and argument masquerading as facts. Dozens of Plaintiffs' purported "facts" assert "collusion" or "collusive" conduct. Others make "statements of facts" that are nothing more than Plaintiffs' unsupported speculation (such as claims that the analyst question at the October 23 earnings call was "planted"). Plaintiffs' tactics are improper under LR 56.1.[4]

Finally, many of Plaintiffs' hundreds of statements are not material. This, perhaps, is an expected reality for a submission of over 300 purported statements

[3] The Court should disregard all statements of fact that violate this Instruction.
[4] Plaintiffs' Statement of Additional Facts also contains argumentative headings which should also be disregarded by the Court.

of fact that, at times, cite to exhibits that did not even warrant citation in Plaintiffs' 80-page brief. Indeed, many of Plaintiffs' statements are entirely unrelated to the Defendants' adoptions of a first bag fee. Defendants state objections below to statements that are not material. In addition to any applicable individual objections, the basis for Defendants' materiality objections below is that Plaintiffs' stated fact has no bearing on whether AirTran and Delta implemented a first bag fee as part of an agreement between the two companies.

Below Defendants respond to each of Plaintiffs' 329 numbered statements. Defendants' objections and concessions contained herein are for purposes of the Court's consideration of the summary judgment motions. The concessions contained herein are limited to the context of LR 56.1(B)(3)(d) concessions that certain matters can be properly considered for purposes of Defendants' summary judgment motions. Defendants reserve all of their objections for all other purposes.

1. AirTran executives fostered a culture of encouraging communications with competitors about future plans, including communications at airports. J. Smith 9/15/09 DOJ Dep. Tr. (Dkt. #360), PX353 at 65:1-12, 83:3-10 ("you could characterize the culture of the company as wanting to know everything that's going on: all the rumors, the gossips, the chatter; and the airports are good sources of that . . . . so the culture is, we feed that Down South to [AirTran headquarters in] Orlando").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not evidence a "culture of encouraging communications with competitors about future plans." Defendants also object because Plaintiffs' stated fact is not material because it has no bearing on whether AirTran and Delta reached an agreement regarding the implementation of a first bag fee.

2. AirTran operational personnel "have discussions all the time" with competitors related to operational issues, which would include implementing bag fees. R. Fornaro 7/15/09 DOJ Dep. Tr. (Dkt. #362), PX346 at 71:13-72:16, 74:5-8.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Mr. Fornaro does not say in the cited deposition sections that the "operational issues" include "implementing bag fees."

Defendants also object because Plaintiffs' stated fact is not material for multiple reasons. Whether or not AirTran operational personnel had discussions with other airline operational personnel related to operational issues has no bearing on whether or not there was an agreement between AirTran and Delta regarding the implementation of a first bag fee. Finally, Defendants object because Plaintiffs' stated fact is not material, as "implementing bag fees" does not specify

whether it refers to the operational implementation of a bag fee or an agreement to adopt bag fees.

3. When AirTran employees learned about other airlines' future fee plans from private communications with other airlines, they typically forwarded that information to top AirTran executives. J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 42:4-12, 65:6-12, 72:9-15, 81:17-82:3, 83:3-19; 93:3-8; J. Smith 11/15/10 Dep. Tr., PX381 at 51:13-52:2, 53:14-19, 54:1-9, 55:15-22, 57:19-22, 66:11-18, 74:8-10; S. Fasano 12/1/10 Dep. Tr., PX387 at 38:1-39:5, 78:24-79:8, 116:22-117:2, 117:15-118:2, 119:10-120:6; E-mail from J. Smith to R. Fornaro, *et al.* (July 31, 2008), PX109; E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126; E-mail from K. Healy to T. Hutchins (Aug. 5, 2008), PX125; E-mail from J. Smith to R. Fornaro (July 12, 2008), PX71.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs' rely does not support the stated fact about "private communications with other airlines." Defendants also object to because Plaintiffs' stated fact is not material, as whether or not AirTran employees forwarded information about "other airlines" to AirTran executives has no bearing on whether there was an agreement between AirTran and Delta regarding the implementation of a first bag fee.

4. For example, AirTran executive Jack Smith and others typically passed information learned from indirect communications with Delta and other airlines to AirTran CEO Robert Fornaro and other AirTran executives. J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 65:1-12, 83:3-10 ("all the rumors, the gossips, the chatter . . . . so the culture is, we feed that Down South to Orlando"); E-mail from J. Smith to R. Fornaro

(July 31, 2008), PX106.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs' rely does not support the stated fact that "Smith and others passed information" learned from "Delta" or that there were "indirect communications" with "Delta." Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact because the term "indirect communications" is ambiguous and does not show that there were actual communications between AirTran and Delta or other airlines. Finally, Defendants object because Plaintiffs' stated fact is not material.

5. AirTran and Delta frequently engaged in private communications with each other about future plans, including in communications at the airport. J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 42:4-12 69:13-70:6, 71:2-8, 84:4-5; J. Smith 11/15/10 Dep. Tr., PX381 at 20:20-21:3, 54:14-55:3; S. Fasano 12/1/10 Dep. Tr., PX387 at 43:22-45:13; F. Cannon 3/22/12 Dep. Tr., PX406 at 31:25-32:1 ("The airport has a lively grapevine."); E-mail from K. Terryberry to S. Fasano (July 31, 2008), PX103 at AIRTRAN 12282.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as it does not show communication with "Delta." Defendants also object because Plaintiffs' stated fact is not material.

6. AirTran acted on information it learned through its grapevine of Delta sources about Delta's future first bag fee plans. E-mail from K. Healy

to M. Klein, *et al.* (July 16, 2008), PX81 (asking his staff to move forward on first bag fee technology in response to an e-mail about what AirTran had learned through its grapevine).

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited exhibit does not establish the existence of a "grapevine of Delta sources" nor the source of the "information" about "DL's [interest] in charging for the first bag." Further, Defendants object because Plaintiffs' statement is not material.

7. In 2008, AirTran station managers frequently provided feedback to AirTran management about what they heard from other airlines about first bag fees. S. Fasano 7/17/09 DOJ Dep. Tr. (Dkt. #363), PX348 at 88:9-92:6; S. Fasano 12/1/10 Dep. Tr., PX387 at 38:1-39:5, 43:22-45:13, 86:4-17, 86:21-87:1.

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material. Also, the evidence upon which Plaintiffs reply for their statement is not admissible pursuant to FRE 602.

8. In or around July 2008, AirTran executive Jack Smith asked subordinates to find out through private communications whether and when Delta would impose a first bag fee. J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 65:13-17; 70:13-19; J. Smith 11/15/10 Dep. Tr., PX381 at 52:7-12.

Defendants' Response:

Defendants object because the cited evidence does not support the stated fact that Mr. Smith encouraged "private communications" or that any "private communications" occurred with Delta. Defendants also object because the phrase "private communications" is ambiguous. Defendants also object because Plaintiffs' statement is not material.

9. On July 9, 2008, AirTran executive Kevin Healy encouraged AirTran director Matt Klein to communicate to Delta that AirTran wanted to impose a first bag fee. E-mail from K. Healy to M. Klein, *et al.* (July 9, 2008), PX59 at AIRTRAN 23599 (Klein: "Here we go first bag, here we go (CLAP! CLAP!)." Healy: "Cheer louder, the guys with the blue and red tails in ATL need to hear you.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because it does not evidence that Mr. Healy "encouraged" Mr. Klein to "communicate" with Delta. Defendants also object because Plaintiffs' stated fact is not material.

10. On July 9, 2008, AirTran director Matt Klein indicated that he had been advocating to Delta for first bag fees. E-mail from M. Klein to K. Brulisauer, *et al.* (July 9, 2008), PX57 ("I've been banging the drum on my side.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because it does not evidence that Mr. Klein had been

"advocating to Delta for first bag fees." Defendants also object because Plaintiffs' stated fact is not material.

11. On July 12, 2008, an AirTran employee (Greg Sayler) provided information he obtained from Northwest to AirTran executives about Delta's plans to impose a first bag fee. E-mail from G. Sayler to J. Smith (July 12, 2008), PX70; E-mail from J. Smith to R. Fornaro (July 12, 2008), PX70; J. Smith 11/15/10 Dep. Tr., PX381 at 53:1-20.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact as it does not show communication with "Northwest." The evidence upon which Plaintiffs rely does not support the stated fact because it does not evidence that Sayler "obtained" "Delta's plans." Defendants object because the evidence upon which Plaintiffs rely is inadmissible hearsay (PX70: "I haven't seen anything official on this but Robin is saying…"). Defendants further object because Plaintiffs' stated fact is not material.

12. **[1]** By mid-July 2008, first bag fees had become AirTran's "new number one revenue priority," and **[2]** AirTran renewed its efforts to prepare the technology required to implement first bag fees, with **[3]** Mr. Fornaro asking AirTran staff to "speed this up." E-mail from T. Hutchins to MIS Group (July 13, 2008), PX74; E-mail from M. Klein to T. Hutchins, *et al.* (July 12, 2008), PX75; E-mail from R. Fornaro to R. Wiggins (July 14, 2008), PX77; Kinetics AirTran FBF Timeline (July 21, 2008), PX93; AirTran Responses to DOJ Specifications 2, 5, and 6 (July 7, 2009), PX345 at AIRTRAN 3930285.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Defendants object to **[1]** because Plaintiffs' stated fact is not material and because the evidence upon which Plaintiffs rely does not support the stated fact, because *inter alia*, the evidence does not differentiate between "AirTran" and a small working group within AirTran. Defendants object to **[2]** because Plaintiffs' stated fact is not material, and because the evidence upon which Plaintiffs rely does not support the stated fact, because *inter alia*, the evidence does not support the Plaintiffs' characterization of "renewed." Defendants object to **[3]** because Plaintiffs' stated fact is not material. Defendants object to the Plaintiffs' Exhibit PX93 as it lacks the proper foundation and is incomplete.

13. Scott Fasano was AirTran's Director of Customer Service and reported to Jack Smith, who in turn reported directly to CEO Robert Fornaro. S. Fasano 12/1/10 Dep. Tr., PX387 at 19:6-19.

Defendants' Response:

Defendants concede that the Court can properly consider the stated fact for purposes of summary judgment.

14. Scott Fasano participated in meetings and e-mail exchanges about

whether AirTran should charge first bag fees with AirTran CEO Robert Fornaro, and other AirTran executives who were involved in the first bag fee decision, including Jack Smith and Kevin Healy. E-mail from M. Klein to S. Fasano, *et al.* (Aug. 4, 2008), PX117; E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126; E-mail from J. Smith to S. Fasano, *et al.* (July 10, 2008), PX64; First Bag Meeting Invitation (May 22, 2008 meeting), PX450; First Bag Meeting Invitation (May, 27, 2008 meeting), PX451; E-mail from K. Healy to S. Fasano, *et al.* (Nov. 5, 2008), PX452 at AIRTRAN 11832; E-mail from S. Fasano to J. Smith (July 31, 2008), PX109; E-mail from S. Fasano to J. Smith (July 15, 2008), Delta Exhibit 116.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as Mr. Fasano and Mr. Fornaro were never both included on any single email exchange in the cited exhibits, and therefore the evidence does not support the statement that Fasano "participated in . . . e-mail exchanges . . . with AirTran CEO Robert Fornaro." Defendants also object because Plaintiffs' stated fact is not material.

15. Scott Fasano worked at Delta for about twelve years before working at AirTran. S. Fasano 12/1/10 Dep. Tr., PX387 at 11:3-7.

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material.

16. Scott Fasano did not believe that there were any legal or ethical restrictions on discussing with Delta or other competitors whether they would charge first bag fees. S. Fasano 12/1/10 Dep. Tr., PX387 at 161:2-13 ("Q. Did you think it was okay to discuss first bag fees with competitors if you didn't discuss the fee amount? . . . . Q. I

believe in general operational conversations that it's okay to discuss policies, yes. Q. Including the policy of whether or not an airline would charge a fee for a certain product or service? A. Yes.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, because the cited evidence – that Mr. Fasano said that "in general operational conversations . . . it's okay to discuss policies" – does not evidence that Mr. Fasano "did not believe that there were any legal or ethical restrictions on discussing with Delta or other competitors whether they would charge first bag fees." Defendants further object because Plaintiffs' stated fact is not material.

17. In 2008, Scott Fasano communicated with Delta employees in group meetings at the airport and on Air Transport Association committee meetings, including the baggage committee. S. Fasano 7/17/09 DOJ Dep. Tr. PX348 at 24:2-13.

Defendants' Response:

Defendants object that the stated fact is not material.

18. Scott Fasano passed information along to his boss, Jack Smith, about Delta's plans to impose a first bag fee that came from private communications, including conversations between AirTran station managers and Delta station managers. S. Fasano 12/1/10 Dep. Tr., PX387 at 38:1-39:5 ("Q. [Airport chatter] might include conversations between an AirTran station manager and a Delta station manager? A. Potentially, yes. . . . Q. When you heard airport chatter about Delta's plans for a first bag fee, did you pass along that information to anybody else? A. I would say from time to time I did, yes. . . . . Q.

Would you have told your boss, Jack Smith? A. Yes.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, because it does not show "private communications," it does not show communications with "Delta," nor does it show conversations with "Delta station managers." Defendants also object because Plaintiffs' stated fact is not material.

19. Scott Fasano periodically passed along information to his boss, Jack Smith, that he had heard from his former Delta colleagues about Delta's future plans. S. Fasano 12/1/10 Dep. Tr., PX387 at 79:2-8 ("Q. You sometimes discussed with [Mr. Smith] the airport chatter you heard about Delta's future plans? A. Yes. Q. Sometimes you'd pass along to Mr. Smith information you heard from your former Delta colleagues? A. Yes."); J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 71:2-8 ("Q. Did Mr. Fasano send you emails with things he had heard [from other airlines] on a frequent basis? . . . A. Once a week, couple times a week, two or three times a week.").

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material because "information" can refer to a wide variety of operational issues and does not relate to whether AirTran and Delta discussed or agreed to the implementation of a first bag fee. Defendants also object because the cited evidence does not show that Mr. Fasano "heard from his former Delta colleagues" anything about Delta's future plans.

20. **[1]** On July 15, 2008, AirTran learned through private collusive communications that Delta was not planning to impose a first bag fee until after Labor Day, at the earliest – **[2]** consistent with ACS's mid-July recommendation to "continue to monitor AA through end of summer and re-evaluate" (PX91 at DLBF 36503) – and **[3]** AirTran provided this information to AirTran's CEO and other top executives. E-mail from S. Fasano to J. Smith (July 15, 2008), AIRTRAN 28755, Delta Ex. 116 ("D[elta] . . . . Will go for the first bag fee after labor day."); E-mail from J. Smith to R. Fornaro, *et al.* (July 16, 2008), PX82; J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 72:16-22.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object to **[1]** because the evidence upon which Plaintiffs' rely does not support the stated fact because it does not show any "private collusive communications." Defendants further object to **[1]** because Plaintiffs' stated fact is an argumentative legal conclusion ("AirTran learned through private collusive communications . . .") (emphasis added). Defendants object to **[2]**, which on its face refers to American Airlines, because it assumes **[1]**. Defendants also object because it is not material. Defendants object to **[3]** because Plaintiffs' stated fact is not material, and because the evidence upon which Plaintiffs rely does not support the stated fact, as that evidence does not differentiate between "AirTran" and one

individual AirTran employee (Jack Smith).

Defendants further object to the Plaintiffs' exhibit PX91 as lacking foundation and because the exhibit appears to be incomplete.

21. On July 31, 2008, Scott Fasano communicated with Delta employees and learned that AirTran and Delta "are in a stand-off. DL [Delta] is carefully watching us waiting for a move on 1st bag." E-mail from S. Fasano to J. Smith (July 31, 2008), PX109.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not show communication with Delta, nor does it show that Fasano's statement about "a stand-off" was "learned" from Delta. Defendants further object that the evidence does not support the stated fact because the rumor Fasano reported was not accurate. Defendants further object that Plaintiffs' stated fact is not material.

22. On July 31, 2008, AirTran CEO Robert Fornaro instructed subordinates to communicate to Delta that AirTran was working on the technology to impose first bag fees. E-mail from R. Fornaro to J. Smith, *et al.* (July 31, 2008), PX109 ("They should hear through the grapevine that we are doing the programming to launch this effort."); J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 84:21-86:9.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not

support the stated fact, as the evidence, Mr. Fornaro's statement, "They should hear through the grapevine that we are doing the programming to launch this effort" – does not support Plaintiffs' characterization – that Mr. Fornaro was "instruct[ing] subordinates to communicate to Delta." Defendants also object because Plaintiffs' stated fact is not material.

23. On July 31, 2008, Jack Smith ensured that Robert Fornaro's instruction to communicate to Delta about AirTran's desire to charge first bag fees was carried out. E-mail from J. Smith to R. Fornaro, *et al.* (July 31, 2008), PX108 ("It will be communicated today.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, that Mr. Fornaro issued an "instruction to communicate to Delta," as the evidence does not support Plaintiffs' characterization of Mr. Fornaro's statement ("They should hear through the grapevine that we are doing the programming to launch this effort."). Defendants further object that the evidence does not support the stated fact because it does not show that an instruction "was carried out." Defendants further object that Plaintiffs' stated fact is not material.

24. On or around July 31, 2008, at Robert Fornaro's request (PX109), AirTran director Scott Fasano spoke to multiple people at Delta about AirTran's and Delta's plans regarding implementing a first bag fee. E-mail from S. Fasano to J. Smith (July 31, 2008), PX106 ("I spoke with two more people over there. They are holding and our name has been

included in every conversation."); S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 46:7-47:10, 48:14-49:16, 52:20-53:9, 66:17-67:10, 67:16-68:10; S. Fasano 12/1/10 Dep. Tr., PX387 at 14:10-15:3, 28:9-19, 92:20-22, 99:3-5, 109:9-17, 111:3-112:2, 138:20-23.

Defendants' Response:

Defendants object to because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not show that Mr. Fornaro "request[ed]" that Mr. Fasano "[speak] to multiple people at Delta about AirTran and Delta's plans regarding implementing a first bag fee." Nor does the evidence show that Mr. Fasano "spoke to multiple people at Delta about AirTran and Delta's plans regarding implementing a first bag fee." Defendants also object because Plaintiffs' stated fact is not material.

25. On July 31, 2008, Scott Fasano e-mailed at least two individuals at Delta, at least one of whom was involved in Delta's first bag fee analysis, asking about Delta's plans to impose first bag fees (although both had recently left Delta). E-mail from S. Fasano to G. Boeckhaus (July 31, 2008), PX104 ("Are you guys close to making the move on first bag yet?"); E-mail from S. Fasano to A. Burman (July 31, 2008), PX105 ("When are you making the move?"); S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 61:4-62:14, 63:9-64:21; S. Fasano 12/1/10 Dep. Tr., PX387 at 128:11-132:24, 133:13-136:20; Baggage Delivery and Baggage Fee Review, Appendix 1: 1st Bag Analysis (May 21, 2008), PX27 at DLBF 3752 ("Completed by Amanda Burman.").

Defendants' Response:

Defendants object because Plaintiffs' cited evidence does not support the stated fact because, as Plaintiffs' statement concedes, "both [of the individuals Mr.

Fasano emailed] had recently left Delta." Plaintiffs' evidence contradicts that the two individuals were "at Delta." Plaintiffs' statement is also not material.

Defendants object to Plaintiffs' Exhibit PX27 as lacking foundation and because the exhibit appears to be incomplete.

26. AirTran executive Kevin Healy encouraged subordinates to spread the word to Delta that AirTran was working on the technological capability to impose first bag fees. E-mail from K. Healy to R. Wiggins, *et al.* (Aug. 4, 2008), PX120 ("Who does DL's kiosk etc. for bags? . . . [W]e don't need to maintain confidentiality on the fact that we're working on this as well.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as the cited evidence – Mr. Healy's statement that "we don't need to maintain confidentiality on the fact that we're working on this as well" – does not support Plaintiffs' characterization that Mr. Healy "encouraged subordinates to spread the word to Delta that AirTran was working on the technological capability to impose first bag fees." Defendants further object because Plaintiffs' stated fact is not material.

27. One of the Delta employees that Scott Fasano spoke to about FBF was Mike Rossano, a Delta Station Manager who participated in internal Delta weekly calls with Gil West, Mark Zessin, and Stephen Almeida, all of whom were involved in Delta's first bag fee analysis. S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 26:7-18, 46:20-49:2, 67:3-10, 67:16-

68:2; Weekly Baggage Meeting Invitation Update (Oct. 7, 2008), PX188; S. Almeida 5/30/12 Dep. Tr., PX419 at 150:15-19.

Defendants' Response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Gil West, Mark Zessin, and Stephen Almeida were not involved in "Delta's" first bag fee analysis, but were involved in an analysis of first bag fees within Delta's Airport Customer Service division.

28. AirTran "learn[s] all kinds of things through vendors . . . . [AirTran] learn[s] a lot of competitive data . . . through vendors." R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 73:7-16.

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material.

29. **[1]** Airlines' plans to impose first bag fees was a "hot topic" in Scott Fasano's conversations with vendors in 2008, including his conversations with Owens Group, BAGS, Inc., and Rynn's Luggage, and **[2]** Scott Fasano also communicated to vendors that AirTran was "watching the industry, specifically our key competitors." E-mail from S. Fasano to R. Magurno (April 20, 2009), PX337 at AirTran 25922939.

Defendants' Response:

Defendants object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact, as nowhere in the cited exhibit is it discussed that Mr. Fasano had conversations with vendors in 2008. In the cited exhibit the time

period during which Mr. Fasano had "conversations with vendors" is not specified. Defendants further object to **[1]** because Plaintiffs' stated fact is not material.

Defendants object to **[2]** because Plaintiffs' stated fact is not material.

30. On or around July 31, 2008, Scott Fasano communicated to Delta either directly or through a third party intermediary that AirTran was working on the technology to impose a first bag fee. E-mail from S. Fasano to J. Smith (July 31, 2008), PX107; J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 88:15-90:12; S. Fasano 7/17/09 DOJ Dep. Tr. , PX348 at 55:18-56:12, 57:6-22; S. Fasano 12/1/10 Dep. Tr., PX387 at 123:24-125:2, 125:13-18.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because it does not show that any information was communicated to Delta. Defendants also object because Plaintiffs' statement is not material.

31. On July 31, 2008, AirTran station manager Kathy Terryberry reported to Scott Fasano that she had suggested to a manager of a Delta subsidiary, Comair, that Delta should consider charging a first bag fee before September. E-mail from K. Terryberry to S. Fasano (July 31, 2008), PX103 at AIRTRAN 12282 ("So I'm talking to the Comair mgr . . . And I said- you'll probably charge for the first bag here soon, right? He said- No-No we consider it included in the price. Perhaps DL [Delta] should consider it before September. It will be a slow travel time and all . . . .").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as a jury could not reasonably conclude that Ms. Terryberry's statement was a "suggest[ion]". Defendants further object because Plaintiffs' stated fact is not material.

32. On August 4, 2008, AirTran executive Kevin Healy instructed subordinates to communicate to AirTran's first bag fee vendor, Kinetics, that Kinetics could communicate AirTran's first bag fee capabilities to Delta, and that subordinates should ask Kinetics about Delta's capabilities. E-mail from K. Healy to R. Wiggins, *et al.* (Aug. 4, 2008), PX120 (Healy: "Who does DL's kiosk, etc. for bags? . . . [I]t would be good to know if we'll be there ahead or behind [Delta] – we don't need to maintain confidentiality on the fact that we're working on this as well." Hutchins: "They use dedicated developers at NCR/Kinetics. I have dinner planned with them on Wednesday. I will try to get info then.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as the evidence does not support Plaintiffs' characterization that Mr. Healy "instructed subordinates to communicate to AirTran's first bag fee vendor Kinetics, that Kinetics could communicate AirTran's first bag fee capabilities to Delta." Defendants further object because Plaintiffs' stated fact is not material.

33. On August 4, 2008, Kevin Healy, Jack Smith, Matt Klein, and Scott Fasano met and discussed first bag fees, and concluded that AirTran's

first bag fee would remain free because Delta was not charging the fee. E-mail Meeting Invitation from M. Klein to S. Fasano, *et al.* (Aug. 4, 2008), PX118; E-mail from M. Klein to K. Healy, *et al.* (Aug. 4, 2008), PX119; E-mail from M. Klein to S. Fasano, *et al.* (Aug. 4, 2008), PX121 ("Here is the outcome of our discussion – 1st bag – $0"); E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Defendants object because Plaintiffs' stated fact is not material.

34. On August 5, 2008, Kevin Healy learned through collusive communications that Delta had already obtained the Kinetics technology to implement a first bag fee. E-mail from K. Healy to T. Hutchins (Aug. 5, 2008), PX125; K. Healy 11/19/10 Dep. Tr., PX385 at 96:11-97:10.

Defendants' Response:

Defendants object that the evidence does not support the stated fact that communications with Kinetics were "collusive," and in any event the stated fact is a legal conclusion. Defendants also object because Plaintiffs' stated fact is not material.

35. **[1]** On August 5, 2008, as a follow-up to Scott Fasano's August 4, 2008

meeting with Jack Smith, Kevin Healy, and Matt Klein about AirTran's first bag fee, **[2]** Scott Fasano met with a Delta employee who was "very connected on the high level operational and planning side of the house" about first bag fees, **[3]** who invited AirTran to collude:

> Following up on our conversation from yesterday, I had a cup of coffee with one of my former colleagues who is still embedded in the team amongst the Northwest crew. He is very connected on the high level operational and planning side of the house. He claims that their functionality is ready to go live with 1st bag. He said their current conversations are centered around 2 issues – 1. They want us to jump first. (we need it more than they do) 2. They are feeling some pressure to make a move soon if oil continues to come down – they are worried about negative public perception – The other carriers made 1st bag announcements when oil was at record levels and climbing . . . .

E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126.

Defendants' Response:

Defendants object to **[1]** because the cited evidence does not support the stated fact, as the cited exhibit does not establish that Mr. Fasano met with "Jack Smith, Kevin Healy, and Matt Klein about AirTran's first bag fee" on August 4, 2008.

Defendants object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact that Mr. Fasano "met with a Delta employee." Defendants further object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact that Mr. Fasano met with someone who was "'very

connected on the high level operational and planning side of the house.'"

Defendants object to **[3]**, because Plaintiffs' stated fact states a legal conclusion ("Scott Fasano met with a Delta employee who . . . *invited AirTran to collude*.") (emphasis added). Defendants object to **[1]**, **[2]**, and **[3]** because Plaintiffs' statement is not material.

36. When Scott Fasano referred to meeting with a former colleague who is "still embedded in the team amongst the Northwest crew," he was referring to the fact that the Delta employee that he met with was "increasingly surrounded by [former] Northwest employees after a former Northwest executive [Richard Anderson] took over as CEO of Delta." S. Fasano 12/1/10 Dep. Tr., PX387 at 145:6-15.

Defendants' Response:

Defendants object because the cited evidence does not support the stated fact that Mr. Fasano met with a "Delta employee." Further, Defendants object because the cited evidence does not support the stated fact that the individual with whom he met was "increasingly surrounded by [former] Northwest employees." Defendants object because Plaintiffs' stated fact is not material.

37. At the August 5, 2008 meeting with his former Delta colleague, Scott Fasano carried out AirTran CEO Fornaro's instruction (PX109) to let Delta know that AirTran was doing the programming to launch first bag fees, and offered Delta a counter-proposal inviting Delta to collude if Delta agreed to act first: "I let him know that we have a confirmed delivery date for our automation that will give us the versatility we need BUT our changes are dependent on moves by our competitors."

E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126; J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 104:1-6.

Defendants' Response:

Defendants object because Plaintiffs' stated fact states a legal conclusion ("Scott Fasano . . . offered Delta a counter-proposal *inviting Delta to collude*.") (emphasis added). Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because the cited document does not evidence that Mr. Fasano "invit[ed] Delta to collude." Defendants further object because the evidence upon with Plaintiffs rely does not support the stated fact that Mr. Fasano "let Delta know" that AirTran was "doing the programming to launch first bag fees." The cited evidence does not show communication with any individual who could plausibly be characterized as "Delta." Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact, because it does not evidence that AirTran CEO Fornaro gave an "instruction." Defendants object because Plaintiffs' stated fact is not material.

38. One consideration in Delta's first bag fee decision was its effect on operational performance. S. Gorman 5/10/12 Dep. Tr., PX414 at 15:10-13 ("Q. Was the operational impact a consideration in Delta's decision whether to charge bag fees? A. Yes, it was."); G. West 5/11/12 Dep. Tr., PX416 at 14:6-17.

Defendants' Response:

The Court can properly consider the cited evidence for purposes of the

summary judgment motions.

39. In 2008, Delta communicated privately with competitors regarding the effect of bag fees on operational performance. E-mail from G. West to C. Knotek, Northwest Senior VP of Customer Service, (July 9, 2008), PX61 ("Just saw NW implemented 1st bag fee. What is the expected impact on [on-time performance]?"); E-mail from H. Kuykendall to K. Howard, *et al*. (June 25, 2008), PX54 ("Just spoke to my AA counterpart . . . . He said they are not having any issues with baggage at the gates or lobby due to the fees."); E-mail from M. Zessin to S. Gorman, *et al*. (Feb. 6, 2008), PX13 at DLBAG 2405 (forwarding e-mail exchange with United about the "backdoor understanding behind the [United bag fee] decision"); E-mail from J. Tilenas to S. Almeida (Aug. 14, 2008), PX134 at DLBF PD 151 (providing a list of contact names, e-mail addresses, and phone numbers for contacts at American, United, and US Airways that Mr. Almeida wanted to ask about "what they are doing, if anything, to mitigate carry-on bag delays"); E-mail from S. Almeida to M. Zessin (Aug. 12, 2008), PX132 at DLBF 3587; E-mail from S. Almeida to G. West (Aug. 20, 2008), PX137 at DLBAG 12219 (chart of other airlines' approach to gate checking baggage); M. Zessin 5/8/12 Dep. Tr., PX413 at 135:14-18 ("[T]here was an . . . informal network where we shared DOT information and at times asked each other questions . . . concerning policies and procedures . . . ."); E-mail from M. Rossano to S. Corvino (July 11, 2008), PX69 ("Also in discussions with U[S] Air[,] when they go live [with first bag fees] they will no longer have curb check in."); E-mail from B. Atwell to M. Zessin (June 17, 2008), PX45 at DLBAG 12081 ("I talked to AA and the 'carry on' policy has not changed"); S. Almeida 5/30/12 Dep. Tr., PX419 at 111:9-15, 127:7-17; E-mail from M. Zessin to G. West (Aug. 18, 2008), PX136 at DLTAPE 17773 ("I talked with a couple of airlines this afternoon . . . AA: Attributes change [in DOT metric] to . . . moving from 1.0 checked bags per enplanement prior to 1st bag fee to now .83. AS: . . . moving from 1.4 bags per enplanement to 1.15 with the advent of bag fees.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' stated fact is also not material.

40. In 2008, Delta communicated with Northwest before the merger closed about whether they would charge a first bag fee. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 142:13-23, 144:21-145:4; E-mail from J. Friedel, Senior VP of Strategic Planning for Northwest, to Wayne Aaron, VP of Strategic Planning for Delta (June 17, 2008), PX46 at DLBF PD 31 (forwarding internal Northwest memo stating that Northwest was "exploring whether we match our competitors by charging for the first checked bag").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not reflect any communication by *Delta* at all, or whether Delta—before or after the merger with Northwest—"would charge a first bag fee."

41. AirTran executive Jack Smith spoke with friends at Northwest on a regular basis, including about bag fee revenue and about Delta's future plans. J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 37:5-38:4, 39:15-41:11; J. Smith 11/15/10 Dep. Tr., PX381 at 34:19-36:24; E-mail from J. Smith to K. Healy, *et al*. (May 28, 2008), PX33 ("Just

spoke with one of my NWA buddies . . . . [about capacity] reductions post Labor Day [and that] their kiosks alone are generating $200,000 per day in ancillary revenue.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Defendants object because Plaintiffs' fact is not material, because Northwest was at the time independent of Delta. Thus, whether Mr. Smith "spoke with friends at Northwest on a regular basis" has no bearing on whether or not AirTran and Delta reached an agreement related to the implementation of a first bag fee. Defendants further object because Plaintiffs' stated fact is not material to the extent that "future plans" refers to operational issues.

42. AirTran employees had friends or former colleagues at Delta with whom they kept in touch, providing an opportunity to conspire. S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 26:7-25; S. Fasano 12/1/10 Dep. Tr., PX387 at 42:8-15; J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 70:2-6, 78:14-79:13; J. Smith 11/15/10 Dep. Tr., PX381 at 18:2-7; 21:21-22:12, 55:21-22; E-mail from R. Maruster to J. Bertram (Mar. 4, 2009), PX453 ("Ran into Scott Fasano (remember him?)").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Defendants object because Plaintiffs' statement is an argumentative legal conclusion ("providing an opportunity to conspire."). Defendants further object because Plaintiffs' stated fact is not material. Defendants object to Plaintiffs' statement because the evidence upon which Plaintiffs' rely does not support the stated fact, because the cited exhibits include, *inter alia*, an email from a Jet Blue employee.

43. AirTran's Tad Hutcheson tried to communicate to Delta through a reporter at Fox News that AirTran was working on the programming for first bag fees and contemplating imposing a first bag fee. E-mails between T. Hutcheson and K. Healy (July 31, 2008), PX114 (Hutcheson: "Fox News told me yesterday DL will launch 1st bag in mid August." Healy: "Did you tell them we are working on automation and are contemplating the same?" Hutcheson: "yes").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, because it does not evidence that Mr. Hutcheson was "tr[ying] to communicate to Delta." Defendants further object because Plaintiffs'

stated fact is not material.

44. In August 2008, Delta's Stephen Almeida communicated with American, Continental, United, and Northwest about issues related to the advisability of charging first bag fees. E-mail from S. Almeida to G. West (Aug. 20, 2008), PX137 at DLBAG 12213, 12219; E-mail from S. Almeida to M. Zessin (Aug. 12, 2008), PX131 at DLBAG 12207.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited documents do not reflect that Mr. Almeida "communicated" with the other referenced airlines about "the advisability of charging first bag fees"; rather the documents state Almeida conducted an "analysis" of what other airlines were "doing from a process standpoint," and those airlines' "approach to gate checked baggage." PX137 at DLBAG 12219, PX131 at DLBAG 12207.

45. Scott Fasano received feedback from station managers around August or September 2008 that Delta did not plan to implement a first bag fee

because the price of oil dropped and it would be a "customer service disaster" – "suicide" – to unilaterally implement a first bag fee. S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 88:9-92:6.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because it does not evidence that the "feedback from station managers" that Mr. Fasano received "around" August or September 2008 had any relationship to Delta's actual first bag fee plans. Defendants object because Plaintiffs' stated fact is not material.

46. On November 10, 2008, Scott Fasano communicated with U.S. Airways about the advisability of charging first checked bag fees. E-mail from S. Fasano to J. Klein (Nov. 10, 2008), PX283 at AIRTRAN 27996; E-mail from S. Fasano to J. Smith (Nov. 11, 2008), PX287 at AirTran 24276750; AirTran Responses to 1st RFAs, No. 16 (Dec. 13, 2010), PX395.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Defendants object because Plaintiffs' stated fact is not material. Plaintiffs' stated fact does not involve Delta, and involves operations. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact

because, *inter alia*, the cited evidence does not support Plaintiffs' characterization of "advisability."

47. Defendants privately communicated with each other about future plans through investment analysts, including UBS analyst Kevin Crissey, and Delta's Gail Grimmett used an investment analyst to "work on" and "talk[] to" AirTran. E-mail from J. Bewley to A. Haak, *et al*. (July 30, 2010), PX365 at AirTran 25321316 ("When I talked to Kevin Crissey about D[elta]'s forward capacity, he relayed that they had said they are likely to reduce it as they firm up schedules in the fall."); E-mail from J. Greer to G. Grimmett (Feb. 6, 2008), PX14 at DLBF 191990 ("[Jamie Baker of JP Morgan] [i]s still trying to work on AirTran for us."); E-mails between J. Baker and J. Greer (Feb. 6-7, 2008), PX15 at DLBF 191992 (Baker: "I talked to AirTran, do you object to me calling Gail on her cell?" Greer: "Not at all – she's anxious to hear what you found out!"); E-mail from J. Greer to J. Baker (Oct. 23, 2008), PX222 at DLTAPE 14929 ("You should ask AirTran why they have a billboard in Atlanta that says . . . 'All Destinations on Sale.' Apparently making money isn't a priority.").

Defendants' Response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the evidence: does not reflect any "private communications" between Delta and AirTran, does not indicate what "future plans" were supposedly "communicated" "through analysts" or whether those "future plans" were already publicly disclosed; and because in support of the assertion that "*Defendants* privately communicated . . . with UBS Analyst Kevin Crissey," Plaintiffs cite only an

internal *AirTran* email that does not reflect any private communications, but merely information Delta's CEO Richard Anderson stated publicly in response to an analyst question on its July 15, 2008 second quarter earnings call. *See* DL Ex. 50 at DLTAPE 481 ("I think we're still in the planning process for '09, and I think probably what we would look at doing is in the Q3 call is to try to give you a bit more of an update. But I think we need to see where the final schedule tapes come in in the fall."). Defendants also object to PX365 because the supposed statements attributed to Mr. Crissey in the document are inadmissible hearsay.

48. Competitors sometimes collude via public information exchanges, such as earnings calls or investor conferences. A. Dick 2/25/11 Dep. Tr., PX403 at 49:8-10 ("Q. Can competitors collude via public information exchanges? A. Yes, there are examples."); D. Carlton 2/24/11 Dep. Tr., PX402 at 55:17-56:12; E-mail from J. Greer to J. Baker (Feb. 26, 2009), PX329 at DLBF 193375; T. Reed, *Airlines Slow to Get on Board with Bag Fees*, TheStreet.com (June 19, 2008), PX50 at AIRTRAN 64398-99.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely (PX50) is not admissible. The

evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of it shows that "[c]ompetitors sometimes collude." Plaintiffs' stated fact is not material. Plaintiffs' stated fact states a legal conclusion.

49. Delta and AirTran used public communications to send and receive "signals" and "messages." E-mail from K. Healy to J. Kirby (Nov. 30, 2007), PX8 (regarding capacity cuts by Delta: "Interesting moves by DL, any message?"); E-mail from J. Robertson to L. Macenczak, *et al*. (Apr. 26, 2007), PX3 at DLBF 68188 ("message from UA" in earnings call); E-mail from K. Healy to J. Kirby, *et al*. (April 7, 2008), PX18 at AIRTRAN 1671782 ("Any chance we missed a signal?"); E-mail from K. Healy to J. Kirby, *et al.* (May 16, 2008), PX23 ("This [announced capacity change] may be a signal"); E-mail from S. Fasano to A. Asbury, *et al*. (July 20, 2008), PX92 at AIRTRAN 12420 ("There is a very clear message from DL [in the July 16, 2008 earnings call]."); E-mail from J. Greer to G. Hauenstein (Oct. 23, 2008), PX227 at 1 ("they [AirTran] are expecting us to pull some of that capacity").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' stated fact is not material.

50. Delta and AirTran used investor earnings calls to send and receive signals and messages. E-mail from K. Healy to R. Fornaro, *et al.* (July 31, 2008), PX109 ("I was hoping that we'd be asked on the [July 29 earnings] call [about first bag fees]."); E-mail from R. Anderson to S. Gorman, *et al*. (July 22, 2008), PX94 at DLBF 183158 ("They are waiting for us. We stand firm.") (attaching and underlining excerpts of Continental earnings call); E-mail from S. Fasano to A. Asbury, *et al*.

(July 20, 2008), PX92 at AIRTRAN 12420 ("There is a very clear message from DL."); E-mail from J. Robertson to L. Macenczak, *et al*. (Apr. 26, 2007), PX3 at DLBF 68188 ("message from UA" in earnings call); E-mail from R. Anderson to B. Hirst, *et al.* (Feb. 3, 2009), PX324; E-mail from G. Hauenstein to J. Esposito, *et al.* (Jan. 28, 2009), PX321 at DLBF 186411 (referring to AirTran Q4 2008 Earnings Call Transcript, "Cheating on their capacity reductions.").

Defendants' Response:

Defendants object. Plaintiffs' stated fact is not material. Plaintiffs' statement is also an argumentative legal conclusion regarding their signaling theory. The evidence upon with Plaintiffs rely does not support the stated fact because, *inter alia*, the cited documents do not comport with Plaintiffs' characterization.

51. AirTran routinely monitors Delta's quarterly earnings calls and internally circulates information about the calls, including copies of transcripts and notes or summaries. AirTran Responses to 1st RFAs, Nos. 6-8 (Dec. 13, 2010), PX395; R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 161:14-162:21; AirTran 30(b)(6) K. Healy 6/3/10 Dep. Tr., PX360 at 149:18-21; E-mail from S. Fasano to A. Asbury, *et al.* (July 20, 2008), PX92; E-mail from S. Clausen to C. Badlani, *et al.* (Oct. 17, 2008), PX203; Delta Q308 Earnings Call notes (Oct. 15, 2008), PX197.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

52. Delta routinely monitors AirTran's quarterly earnings calls and internally circulates information about the calls, including copies of transcripts and notes or summaries. Delta Answer ¶¶ 29, 32 (Dkt. #147); Delta Responses to 1st RFAs, No. 13 (Dec. 13, 2010), PX396; E. Bastian 10/27/09 DOJ Dep. Tr. (Dkt. #366), PX355 at 46:4-13 ("Q. Do you get transcripts of all the other airlines earnings calls on a regular basis? A. Yes."); E-mail from C. Cloud to W. Aaron, *et al.* (Oct. 24, 2008), PX232; E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257, 3259.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

53. AirTran is aware that Delta monitors AirTran's earnings calls. R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 162:22-163:8 ("Q. . . . [W]hen AirTran has a conference call, you anticipate that other airlines, including Delta . . . are listening to that call? A. Yeah."); R. Fornaro 11/18/10 Dep. Tr., PX384 at 11:10-13.

Defendants' Response:

Defendants object that the statement is not material. The court may consider for purposes of the summary judgment motions that R. Fornaro testified that "when AirTran has a conference call" he "anticipate[s] that other airlines, including Delta" may be listening to the call, but that he did not "really pay much attention to it." R. Fornaro 7/15/09 DOJ Dep. Tr., PX384 at 11:10-13.

54. Delta is aware that AirTran likely monitors Delta's earnings calls. E. Bastian 9/17/10 Dep. Tr., PX367 at 86:16-17 ("I expect our competitors will either listen or see the transcript."); E-mail from S. Schultz to T. Ingle (Dec. 10, 2008), PX309, at DLBF 188483.xls (attaching guestbook reflecting that AirTran listened to Delta's analyst meeting).

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Defendants also object that the statement is not material.

55. Delta's earnings calls are scripted. R. Anderson 10/6/10 Dep. Tr., PX372 at 16:7-9; Delta Q3 2008 Earnings Call Script (Oct. 14, 2008), PX194.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, as shown by PX194, only the opening remarks by Delta's

executives are scripted, not the entire "earnings calls," which include Q&A by industry analysts.

56. Delta anticipates questions it will receive on its earnings calls and prepares answers to anticipated questions. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 34:6-19; E. Phillips 5/17/12 Dep. Tr., PX418 at 8:17-20; G. Grimmett 5/4/12 Dep. Tr., PX412 at 287:12-14; Delta Q2 2008 Earnings Call Q&A v5 (July 14, 2008), PX79 at DLBAG 33371 ("Record high fuel costs are causing us to look at everything; however, at this point we have no plans to implement a first bag fee."); E-mail from D. Carr to A. Meilus, *et al*. (Oct. 8, 2008), PX189 at DLBAG 8719-20 ("As we prepare for the third quarter earnings call, we are putting together anticipated Q&A," including "Do you plan to implement a first bag fee? . . . We do not currently have plans to charge for the first checked bag."); Delta Q3 2008 Earnings Call Q&A v3 (Oct. 10, 2008), PX190 at DLBF 189520 ("we are seeing some consumer preferential behavior due to the fact that we are the only mainline carrier that does not charge for the first checked bag.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

57. AirTran's earnings calls are scripted. AirTran Q3 2008 Earnings Call Script (Oct. 23, 2008), PX214; AirTran Q2 2008 Earnings Call Script (July 27, 2008), PX97; Meeting Request re: Script Review (Oct. 22, 2008), PX209.

Defendants' Response:

Plaintiffs state that "AirTran's earnings calls are scripted." The Court may

consider for purposes of the summary judgment motions that a portion of AirTran's earnings calls include a scripted statement.

58. AirTran prepares answers to anticipated questions on its earnings calls. K. Healy 7/16/09 DOJ Dep. Tr. (Dkt. #361), PX347 at 216:14-217:2; E-mail from K. Healy to R. Fornaro, *et al*. (July 31, 2008), PX109; Meeting Invitation, Updated: Q&A Discussion – 3Q Earnings Call (Oct. 22, 2008 meeting), PX210.

Defendants' Response:

The Court may consider the cited evidence for purposes of the summary judgment motions.

59. AirTran listens to other airlines' earnings calls to anticipate questions that will be asked on its own call because analysts tend to ask a lot of the same questions. AirTran 30(b)(6) K. Healy 6/3/10 Dep. Tr., PX360 at 79:23-80:1; E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 46:21-23.

Defendants' Response:

The Court may consider the cited evidence for purposes of the summary judgment motions.

60. Delta was asked about ancillary fees, including baggage fees, on its July 16, 2008 and October 15, 2008 earnings calls. Delta Q2 2008 Earnings Call Tr. (July 16, 2008), PX85 at DLTAPE 4426-28; Delta Q3 2008 Earnings Call Tr. (Oct. 15, 2008), PX198 at AIRTRAN 64287-88.

Defendants' Response:

The Court can properly consider the cited evidence for purposes of the

summary judgment motions.

61. AirTran anticipated being asked on its quarterly earnings call whether AirTran would impose a first bag fee. R. Fornaro 11/18/10 Dep. Tr., PX384 at 23:5-16, 44:3-24; K. Healy 7/16/09 DOJ Dep. Tr., PX347 at 147:12-149:12.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely (PX384 at 23:5-16; 44:3-24) does not support the stated fact.

The court may consider for purposes of the summary judgment motions that Mr. Healy anticipated a bag fee question at the second quarter 2008 earnings call, and prepared an answer for that call. PX 347 at 148:21-149:8 ("I didn't know the answer of would you do a fee, but my preparation was, we were working on the automation to do that. Can't do it yet. Haven't made a determination yet . . . but we are at least putting ourselves in the position to be able to do it. So from an investor perspective, they understand at least you're considering it."). The anticipated question did not occur at the second quarter 2008 earnings call, and thereafter, AirTran did not anticipate such a question.

62. Information provided on earnings calls can provide a data point that can be used by competitors. AirTran 30(b)(6) K. Healy 6/3/10 Dep. Tr., PX360 at 144:4-7; G. Hauenstein 5/10/12 Dep. Tr., PX415 at 42:18-43:17.

Defendants' Response:

The Court may consider the cited evidence for purposes of the summary judgment motions.

63. On its April 22, 2008 earnings call, **[1]** AirTran invited Delta to collude to reduce capacity and raise prices, **[2]** stating that it was "resetting its priorities to be highly profitable," that it **[3]** "strongly believe[d]" that AirTran and its competitors in the industry, **[4]** *i.e.*, Delta, needed to reduce capacity to **[5]** "create opportunities" for the airlines to impose price increases. AirTran Q1 2008 Earnings Call Tr. (Apr. 22, 2008), PX21 at DLTAPE 5513, 5517, 5520 ("There is a [strong correlation] between capacity and pricing. . . . in order to support the price increases, the capacity has to drop. . . . you will see our average fares go up[.]") (statement of AirTran CEO Robert Fornaro); *id.* at 5513 ("we strongly believe that more *industry capacity needs to be removed*.") (statement of AirTran CFO Arne Haak) (emphasis added); AirTran Q1 2008 Earnings Call Script (April 22, 2008), PX20 at AirTran 2089075, 2089077; Delta Answer ¶¶ 33-36 (Dkt. #147); AirTran Answer ¶¶ 33-36 (Dkt. #146).

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because Plaintiffs' stated facts are not material. Defendants object because Plaintiffs' stated fact states a legal conclusion ("AirTran invited Delta to collude…"). Defendants also object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact. If it finds **[2]**

material, the court may consider for purposes of the summary judgment motions that Mr. Fornaro said, "And right now, our goal is we are going to adapt, and we are going to adapt faster than every one of our competitors. We've taken this seriously, and our feeling is we would rather be out in front of the changes rather than be in the back of the line. We're simply resetting our priorities to be highly profitable in a high energy environment." (PX21 at 5520). If it finds **[3]** material, the court may consider for purposes of the summary judgment motions that Arne Haack stated: "While several airlines have announced modest adjustments to their capacity, we strongly believe that more industry capacity needs to be removed. Our current fleet plan which was developed in late 2006 at a time when oil prices were at $60 a barrel, and many had expectations of continued oil price reductions, we adjusted our growth rate down to 10% per year, from our previous plans to grow 20% a year." (PX21 at 5513). Defendants object to **[4]** because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object to **[5]** because the evidence upon which Plaintiffs rely does not support the stated fact. If it finds it material, the court may consider for purposes of the summary judgment motions that Arne Haak stated "We do spend a lot of time talking about non-fuel [CASM], but even with the advantages of low-cost, new aircraft and industry leading quality, we are not immune to the challenges that face our entire

industry. Adapting to high energy prices is a challenge faced by all airlines. It will also create opportunities for those who successfully adapt." (PX21 at 5513).

64. On April 23, 2008, Delta signaled to AirTran on its earnings call that it accepted the offer to jointly reduce capacity to support price increases, stating that Delta planned to "push[] fare increases and fee increases," that "the industry has got to maintain discipline with respect to capacity," that Delta was "very watchful of all the ancillary fees and the revenue opportunities that provides," that Delta would "be aggressive about pulling capacity," but "can't do it alone," and wanted to work in "conjunction with the other carriers [to] remedy the industry woes" from high oil prices, and that "if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we'd be in pretty [good] shape." Delta Q1 2008 Earnings Call Tr. (Apr. 23, 2008), PX22 at DLTAPE 5574-75, 5579, 5583, 5586. Delta Answer ¶¶ 37-38 (Dkt. #147).

Defendants' Response:

Defendants object. Plaintiffs' statement is a legal conclusion ("Delta signaled…"). Plaintiffs' stated fact is also not material. *See* Dkt. 335, Order & Stipulation at 2. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the quoted statements from Delta's public first quarter 2008 earnings call support that AirTran made any "offer to jointly reduce capacity to support price increases," or that Delta heard or understood AirTran to have made any such offer, let alone that Delta "accepted" it.

65. In June 2008, Delta's public statements reflected that Delta did not intend to impose a first bag fee. S. McCartney, *Space Race: A Battle Looms for*

the Overhead Bins, The Middle Seat, Wall St. J. (June 17, 2008), PX44 at AIRTRAN 3956352 ("Delta Air Lines Inc. last week said it didn't plan on charging for the first bag. 'This would not be good for customers, and it could be operationally difficult as customers try to bring all of their luggage onto the aircraft,' says spokeswoman Betsy Talton."); CEO Forum, Hank Halter – Senior Vice President and Controller (June 17, 2008), PX47 at DLTAPE 15454-55 (Hank Halter: "We think we have other opportunities that will be easier to implement and won't aggravate our customers.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely (PX44) is not admissible because it is inadmissible hearsay. The Court can properly consider for purposes of the summary judgment motions that in June 2008, Delta's public statements reflected that Delta did not intend to impose a first bag fee at that time.

66. On June 18, 2008, at a Merrill Lynch Transportation Conference, AirTran CEO Robert Fornaro signaled to Delta a willingness to collude to impose first bag fees, suggesting that AirTran would be willing to impose one if Delta acted first. T. Reed, *Airlines Slow to Get on Board with Bag Fees*, TheStreet.com (June 19, 2008), PX50 at AIRTRAN 64398-99 ("AirTran CEO Bob Fornaro said at the conference his airline has not instituted the fee because it would be 'pretty uncomfortable' competing in Atlanta with Delta, which doesn't charge the fee."); AirTran Responses to 1st RFAs, No. 2 (Dec. 13,

2010), PX395 (admitting that Mr. Fornaro made the statement reflected in PX50); R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 43:9-44:11 (same); Delta Responses to 1st RFAs, No. 5 (Dec. 13, 2010), PX396 (admitting that Delta became aware of Mr. Fornaro's statement).

Defendants' Response:

Defendants object because Plaintiffs' stated fact states a legal conclusion. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact.

67. At the same June 18, 2008 Merrill Lynch Transportation Conference, Delta President and CFO Ed Bastian signaled to AirTran that it was willing to act in concert to further reduce capacity: "I said no in terms of has enough capacity been cut . . . . So I think everyone while they've made some fairly significant announcements, *everybody is watching each other* in terms of how the capacity is coming over, and exactly what's coming out." Delta Tr. of Merrill Lynch Transp. Conference (June 18, 2008), PX49 at DLBF 38866-67 (emphasis added); Delta Answer ¶ 41 (Dkt. #147).

Defendants' Response:

Defendants object. Plaintiffs' statement is a legal conclusion ("Bastian signaled to AirTran…"). Plaintiffs' stated fact is not material. *See* Dkt. 335, Order & Stipulation at 2. The evidence upon which Plaintiffs rely does not support the stated fact because it does not evidence that Delta "was willing to act in concert to further reduce capacity."

68. On its July 16, 2008 quarterly earnings call for Q2 2008, Delta

signaled its willingness to reduce capacity to support price increases, but warned AirTran that Delta would maintain an increased level of capacity in Atlanta unless AirTran agreed to also reduce capacity:

> I think we're still in the planning process for '09, and I think probably what we would look at doing is in the Q3 call is to try to give you a bit more of an update. But I think we need to see where the final schedule tapes come in in the fall. *While there have been a number of announcements, we still need to see what the final schedules are and I think we've got a bit more work to do on our business plan looking out at '09. I think the model has got to, the whole industry model has got to evolve much more quickly in that kind of a fuel environment* . . . When you think about the amount of leisure traffic, there's been a lot of capacity built in the United States over the past decade to carry pretty much low end traffic. . . . *[I]t's probably the lower end traffic that is not going to want to purchase at the market clearing price that covers the cost of fuel. So we're spending a lot of time rethinking what that model, what the industry model looks like, and how you make it work at those levels. But a lot of it is going to depend upon what the industry reaction is to these fuel price levels and how that reaction is demonstrated in the capacity changes that are made over the next two quarters.*
>
> . . . .
>
> There are no capacity cuts in AirTran Markets. As a matter of fact, despite the fact we're down in general capacity by about 13 to 14% in the fall domestically, we're actually up in AirTran competitive markets into and out of Atlanta[.] [S]ome of the point to point flying we have taken reductions in. But into and out of Atlanta – of course Atlanta being our core strength market, we are continuing to leave that capacity in.

> . . . .
>
> We are – we will study [a first bag fee]. We will continue to study it but we've no plans to implement it at this point. . . . .
>
> [O]ur capacity cuts have put us at the upper end of the range of where the industry is at as far [as] unit revenues go, and we think there's a lot more opportunity as we fine tune this. We've never as an industry seen pricing move as quickly as we have, of course in response to [the] run up in fuel, and that creates an entirely different demand set. So now we have to go back and analyze, individual market, every individual market, was that the right move? Is there more upward mobility in pricing? Do we have to move back on some markets or should we take capacity out? *And that's the process [] we're in right now and that's why I think we're not doing more capacity cuts right now. We're waiting to see essentially where this equilibrium goes and how, when we fine tune it, what more we get out and as the industry starts to come to the party in the fall what the implication of that is.*

Delta Earnings Call Tr. (July 16, 2008), Delta Ex. 50, at DLTAPE 481, 487-88 (emphasis added); Delta Answer ¶¶ 42-45 (Dkt. #147); A. Haak 11/16/10 Dep. Tr., PX382 at 33:12-34:9 (admitting that the transcript of the Delta call and notes about the call were circulated within AirTran).

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely (PX382) is not admissible as to Delta. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the quoted statement includes that Delta was not reducing capacity in "AirTran Markets"

because "of course Atlanta being our core strength market, we are continuing to leave that capacity in." Plaintiffs' stated fact states a legal conclusion. Defendants concede that the Court can properly consider Delta Ex. 50 for purposes of summary judgment.

69. AirTran analyzed Delta's July 16, 2008 earnings call transcript for signals from Delta to AirTran. E-mail from S. Fasano to A. Asbury, *et al.* (July 20, 2008), PX92 at AIRTRAN 12420 ("There is a very clear message from DL [in the July 16, 2008 earnings call].").

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because the evidence upon with Plaintiffs rely does not support the stated fact.

70. In July 2008, AirTran attempted to publicize the possibility that AirTran might charge a first bag fee in order to signal to Delta that AirTran would be willing to impose a first bag fee if Delta acted first. E-mail from K. Healy to J. Graham-Weaver (July 11, 2008), PX76 (asking "how best to float the idea of a 1st bag fee – a trial balloon of sorts."); E-mail from J. Graham-Weaver to Q. Jenkins (July 18, 2008), PX88 at AIRTRAN 64672 (stating that an upcoming interview with the Atlanta Journal Constitution "[m]ight be a good opportunity to float the first bag possibility"); E-mail from K. Healy to J. Graham-Weaver (July 17, 2008), PX86 at AIRTRAN 5497; E-mail from K. Healy to R. Fornaro, *et al.* (July 31, 2008), PX109 ("We've all but given it to the AJC, we'll push it out there."); E-mails between T. Hutcheson and K. Healy (July 31, 2008), PX114 (Healy: "Did you tell [Fox News] we are working on automation and are contemplating [a first bag fee]? Hutcheson: "Yes."); K. Healy 7/16/09 DOJ Dep. Tr., PX347 at

150:12-17, 152:13-154:10, 164:2-165:3.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Defendants object because Plaintiffs' statement is a legal conclusion related to their signaling theory. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact.

71. AirTran attempted to gather competitive intelligence from reporters about Delta's first bag fee plans. E-mail from C. Tinsley-Douglas to J. Graham-Weaver (July 14, 2008), PX78 at AIRTRAN 64729 ("[Kevin Healy] just asked me to feel [a reporter at the AJC] out as far as what DL was doing [about charging for the first checked bag].").

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material.

72. On its July 29, 2008 earnings call, AirTran signaled to Delta that AirTran was willing to increase prices and accelerate capacity cuts in conjunction with Delta, suggesting that the capacity cuts could support new price increases, such as baggage fees:

> [An] area of focus is revenue improvements. . . . We are very pleased with our new ancillary revenues initiatives, such as . . . second bag fee . . . .
>
> . . . .

> We know we need to increase o[u]r realized average fare[s]. And we have taken some very significant increases to the fare structure. Some fare[s] still need to be increased further. Some fare[s] may have been too high. *We also know that our capacity needs to be reduced to a level that will support price increases to cover the increase[d] cost of jet fuel. This capacity will begin to come out in September. We have accelerated the amount of capacity [] we're removing. We now expect the capacity to be down 7% to 8% in the September through December period.*
>
> . . . .
>
> [W]e created the market in Atlanta, for low fare, for, close-end reasonable business fare. Quite frankly, those *average prices need to come up*. What that says is, when the prices come up, [the] market is going to contract. We have to find the right levels in Atlanta.
>
> [The] priorities here are balance sheet and profitability. Growth is, again, as I mentioned before, a distant third [goal].

AirTran Q2 2008 Earnings Call Tr. (July 29, 2008), PX101 at DLTAPE 4126, 4128, 4134, 4136 (emphasis added); Delta Answer ¶¶ 46-48 (Dkt. #147) (admitting the accuracy of several of these quotations); AirTran Answer ¶¶ 46-48 (Dkt. #146) (same).

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because Plaintiffs' stated fact states a legal conclusion; namely, that AirTran signaled to Delta that it was willing to increase prices and accelerate capacity cuts. Defendants also object because the evidence upon which Plaintiffs

rely does not support the stated fact.

73. AirTran was "hoping" to be asked about first bag fees on its investor earnings calls so that it could communicate to Delta its willingness to follow Delta's lead on first bag fees. E-mails between K. Healy and R. Fornaro, *et al.* (July 31, 2008), PX109 (Fornaro: "[Delta] should hear through the grapevine that we are doing the programming to launch this effort." Healy: "I was hoping we'd be asked on the call [about first bag fees]. We've all but given it to the AJC, we'll push it out there."); E-mail from K. Healy to J. Graham-Weaver (July 11, 2008), PX76 (asking "how best to float the idea of a 1st bag fee – a trial balloon of sorts. . . . it wouldn't be bad for . . . somebody to ask us if we plan or contemplate matching"); E-mail from K. Healy to J. Graham-Weaver (July 17, 2008), PX86 at AIRTRAN 5497 ("We need to be clear that we're evaluating [1st Bag Fee], mainly from a technology preparation perspective, but are considering it.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because Plaintiffs' stated fact states a legal conclusion. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object because Plaintiffs' statement is not material.

74. In an August 2008 interview, Delta President Ed Bastian reiterated that

industry capacity cuts were necessary to support higher prices. S. Percy, *Air Force*, Georgia Trend (August 2008), PX127 at DLBF PD 25 (Bastian: "If you look at . . . why the airlines in this country have been relatively unstable – there is too much capacity, too many aircraft. . . . So if you don't adjust the capacity quotient, the market will not accept higher price points.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the quoted statement does not mention "industry capacity cuts," or that Mr. Bastian "reiterated" that such cuts "were necessary."

75. On or around September 1, 2008, AirTran followed through on its public commitment to Delta to reduce capacity by at least 8 percent beginning in September 2008: "[V]irtually overnight in the summer we went from an 8% growth rate to a minus 8% again, right around Labor Day." AirTran Q1 2009 Earnings Call Tr. (Apr. 22, 2009), PX340 at DLBAG 24145; Delta Answer ¶ 50 (Dkt. #147) (admitting the accuracy of these quotations); AirTran Answer ¶ 50 (Dkt. #146) (same); AirTran Q2 2008 Earnings Call Tr. (July 29, 2008), PX101 at DLTAPE 4128.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Defendants object because Plaintiffs' statement is not material. Defendants also object because Plaintiffs' stated fact states a legal conclusion, namely that there was a "public commitment" to Delta.

76. On September 18, 2008, AirTran participated in the Calyon Securities Airline Conference with Delta. Delta Answer ¶ 51 (Dkt. #147); AirTran Answer ¶ 51 (Dkt. #146).

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material.

77. Although **[1]** oil prices had fallen, **[2]** Delta and AirTran both signaled during the September 18, 2008 Calyon Securities Airline Conference that they would maintain their commitment to capacity discipline. Delta SEC Filing of Tr. of Calyon Securities Airline Conference (Sept. 18, 2008), PX160 at 5 ("We've led the industry with respect to an aggressive stance on domestic capacity rationalization.); *id.* at 8 ("Fourth quarter capacity, we're looking . . . to be down 14% . . . ."); AirTran Tr. of Calyon Securities Airline Conference (Sept. 18, 2008), PX164 at DLBF PD 6586-88 ("As oil has come back down people begin to ask the question again . . . the decision to stop growth and shrink, is that still the right decision? . . . . What has been missing is the capacity reduction to support these fare increases. We are now having those capacity reductions here in September and they are supporting our increases in unit revenues. . . . Our outlook for capacity for next year is to be down 3 to 7% in 2009."); AirTran Answer ¶ 51 (Dkt. #146) (admitting that AirTran projected capacity reductions for 2009); AirTran 2008 Calyon Airline Conference Presentation (Sept. 18, 2008), PX158 at AIRTRAN 15910 ("All carriers will face unit cost

increases from capacity cuts. . . . [C]apacity cuts will support unit revenue increases").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The court may consider for purposes of the summary judgment motions that **[1]** oil prices had fallen at the time of the September 18, 2008 Calyon Securities Conference. Defendants object to **[2]** because Plaintiffs' stated fact is not material. Defendants object because Plaintiffs' stated fact relates to capacity, not bag fees. Defendants also object because Plaintiffs' stated fact states a legal conclusion.

78. In October 2008, Delta anticipated that it would be asked about first bag fees on its quarterly earnings call, and prepared an answer to the question. E-mail from A. Meilus to D. Carr (Oct. 8, 2008), PX189 at DLBAG 8719-20; E-mail from S. Mutschler to J. Greer, *et al*. (Oct. 6, 2008), PX185; E. Phillips 5/17/12 Dep. Tr., PX418 at 8:21-9:14.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

The Court can properly consider for purposes of summary judgment that in October 2008, Delta anticipated that it would be asked about first bag fees on its quarterly earnings call, and prepared an answer to the anticipated question.

79. On its October 15, 2008 quarterly earnings call, Delta signaled to AirTran: Delta's continued commitment to capacity reductions; Delta's willingness to increase ancillary fees, such as baggage fees, in conjunction with others in the industry; and that Delta would be willing to impose the new fees in conjunction with its merger with Northwest even though oil prices had fallen dramatically:

> Our domestic capacity . . . will be down 12 to 14% in the fourth quarter.
>
> . . . .
>
> [Atlanta capacity] will be significantly below [prior projections] when it actually gets loaded in the next few weeks here.
>
> . . . .
>
> Q. . . [W]hat's your view on the sustainability of the numerous additional fees the industry is charging; the baggage fees, the change fees[?] . . .
>
> A. . . . We've probably been a little less aggressive in a couple areas than some of our competitors, and we're still looking at that as we move forward. . . . And *as we merge with Northwest, we'll have another opportunity to look again with respect to where the fee-based revenues align*. But strategically, going forward, *a la carte pricing is where we need to go as an industry*."

Delta Q3 2008 Earnings Call Tr. (Oct. 15, 2008), Delta Ex. 82 at DLBF 38177, 38189, 38191 (emphasis added); Delta Answer ¶ 50

(Dkt. #147).

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. The Court can properly consider Delta Ex. 82 for purposes of the summary judgment motions.

80. AirTran executive Kevin Healy suggested that AirTran plant a question about first bag fees. E-mail from K. Healy to J. Graham-Weaver (July 11, 2008), PX76 ("it wouldn't be bad for the AJC or Bloomberg or somebody to ask us if we plan or contemplate matching"); E-mail from K. Healy to R. Fornaro, *et al.* (July 31, 2008), PX109 ("I was hoping we'd be asked on the call [about first bag fees]. We've all but given it to the AJC, we'll push it out there.").

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support Plaintiffs' characterization of "planting" a question. Defendants object because Plaintiffs' stated fact is not material.

81. **[1]** On October 20, 2008, Jill Greer and two other members of Delta's investor relations department had a conference call with Kevin Crissey, a UBS analyst who **[2]** AirTran talked to on another occasion about Delta's future capacity plans. Meeting Invitation from J. Greer to C. Cloud, *et al.* re: Kevin Crissey (Oct. 20, 2008), PX205; E-mail from J. Bewley to A. Haak, *et al.* (July 30, 2010), PX365 at AirTran 25321316 ("When I talked to Kevin Crissey about D[elta]'s forward capacity, he relayed that they had said they are likely to reduce it as they firm up schedules in the fall."); E-mail from S. Mutschler to J. Greer (Oct. 20, 2008), PX207 ("Accepted: Kevin Crissey – modeling coaching").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. Defendants object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, neither PX205 nor PX207 show that "Jill Greer and two other members of Delta's investor relations department had a conference call"; the documents merely show that a conference call was scheduled. Defendants object to **[2]** because the evidence upon which Plaintiffs rely is not admissible because the supposed statements attributed to Mr. Crissey in PX365 are inadmissible hearsay.

82. **[1]** Earlier in 2008, Delta's Jill Greer had persuaded an investment analyst to "talk[] to AirTran" and "to work on AirTran for us," **[2]** at the request of Gail Grimmett, **[3]** an executive in Revenue Management partially responsible for Delta's fee recommendations, and **[4]** the analyst subsequently called Ms. Grimmett to relay his discussion with AirTran. E-mail from J. Greer to G. Grimmett (Feb. 6, 2008), PX14 at DLBF 191990 ("[Jamie Baker of JP Morgan] [i]s still trying to work on AirTran for us."); E-mails between J. Baker and J. Greer (Feb. 6-7, 2008), PX15 at DLBF 191992 (Baker: "I talked to AirTran, do you object to me calling Gail on her cell?" Greer: "Not at all – she's anxious to hear what you found out!").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. Defendants object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited documents do not show that "Jill Greer had persuaded an investment analyst to 'talk[] to AirTran' and "to work on AirTran for us." Defendants object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not show that Gail Grimmett requested Jill Greer do anything. Defendants object to **[3]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Gail Grimmett was not partially responsible for "Delta's" fee recommendations; she was partially responsible for fee recommendations by Delta's Revenue Management division. Defendants object to **[4]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of Plaintiffs' cited evidence shows that the analyst actually called Gail Grimmett or, even if he did, that he relayed his supposed discussion with AirTran.

83. For its quarterly earnings calls, **[1]** AirTran prepared a response to an anticipated question about first bag fees, and **[2]** the proposed response was discussed with Mr. Fornaro. K. Healy 7/16/09 DOJ Dep. Tr., PX347 at 146:12-147:5, 216:14-217:2; K. Healy 11/19/10 Dep. Tr., PX385 at 91:16-92:25.

Defendants' response:

Defendants object to **[1]** to the extent Plaintiffs allege that a response was

prepared for any earnings call other than the second quarter 2008 earnings call. The Court may consider for purposes of the summary judgment motions that AirTran anticipated a question on first bag fees for the second quarter 2008 earnings call, but did not anticipate such a question on any other earnings call. As to **[2]**, the Court may consider for purposes of the summary judgment motions that any response prepared by AirTran regarding the second quarter 2008 earnings call would have been discussed with Mr. Fornaro.

84. AirTran discussed proposed questions and answers for its October 23, 2008 earnings call on October 22, 2008. Meeting Invitation, Updated: Q&A Discussion – 3Q Earnings Call (Oct. 22, 2008 meeting), PX210.

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material.

85. On October 23, 2008, **[1]** AirTran selected UBS analyst Kevin Crissey to ask the first questions, and his first questions were more consistent with planted questions proposed by AirTran than with the questions that would be asked by a sophisticated airline industry financial analyst who had been studying AirTran, allowing a reasonable inference that the call with Delta earlier that same week had informed and led to the questions:

- First checked bag fee, you don't have one, do you? And will you? . . . But if [Delta] were [charging] you'd consider it? It's not a matter of practice?
- And what are you seeing from Delta? . . . Capacity, competition. In any which way you want to describe it's fine.

AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264. By contrast, **[2]** Mr. Crissey's final question on the October 23 call was more consistent with what a sophisticated analyst who studied AirTran would ask:

- This is for [CFO] Arne [Haak]. The 5 to 6%, I think you said [CASM - cost per available seat mile] ex[cluding fuel] was a little higher than we had modeled. Maybe we just underestimated the impact of the reduced capacity. But as we look forward into 2009, that type of run rate which would be a little higher than what we have modeled, is that something we should be thinking about?

Id. at DLTAPE 3265.

Defendants' response:

Defendants object to **[1]** because Plaintiffs' stated fact is not material, the evidence upon which Plaintiffs rely does not support the stated fact, and Plaintiffs' stated fact states a legal conclusion. Defendants also object because Plaintiffs' opposition brief does not allege AirTran planted the Crissey question. Defendants object to **[2]** because Plaintiffs' stated fact is not material, the evidence upon which Plaintiffs rely does not support the stated fact, and Plaintiffs' stated fact states a legal conclusion.

86. On AirTran's October 23, 2008 earnings call, AirTran CEO Robert Fornaro invited Delta to collude to impose first bag fees, stating that AirTran was ready and willing to follow Delta in imposing a first bag fee:

> Let me tell you what we've done on the first bag fee. We

> have the programming in place to initiate a first bag fee. And at this point, we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights hasn't done it. And I think, we don't think we want to be in a position to be out there alone with a competitor who we compete on, has two-thirds of our nonstop flights and probably 80 to 90% of our revenue is not doing the same thing. So I'm not saying we won't do
>
> it. But at this point, I think we prefer to be a follower in a situation rather than a leader right now.
>
> Q. But if they were, you'd consider it? It's not a matter of practice?
>
> A. We would strongly consider it, yes.

AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264; Delta Answer ¶ 55 (Dkt. #147) (admitting the accuracy of these quotations); AirTran Answer ¶ 55 (Dkt. #146) (same).

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely supports only the quoted language, but does not support the stated fact. Defendants also object because Plaintiffs' stated fact is supported by citation to a pleading rather than to evidence. Defendants also object because Plaintiffs' stated fact states a legal conclusion.

87. AirTran warned that if Delta did not want to collaborate, then AirTran was prepared to compete aggressively:

> Delta has capacity against AirTran . . . in most of the markets they have more capacity. The one thing we do know is it generally impacts them a lot more than it impacts us. . . . *[I]t's not as if they had capacity and it's a one-way street. I mean, I think we've proven over time that we're a pretty tough competitor.* And at least in the near term, we've got a lot more flexibility to manage our revenue base because oil's come down quite a bit. And we are a low-fare carrier. *We can be a lot more tactical and we can be a lot more aggressive with oil prices down here versus where we were last year.*
>
> . . . .
>
> *So again for us, I think this is a good opportunity for us to get a little bit more aggressive in the marketplace.* We can be more tactical. Again our fares are up in Atlanta, but at the same time allows us to be a little bit more promotional if necessary. And it may take that if in a situation right now where the consumers' got a lot of worries. *I mean, the consumers got it in their minds that airfares are through the roof.*

AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3270 (emphasis added); Delta Answer ¶ 54 (Dkt. #147); AirTran Answer ¶ 54 (Dkt. #146).

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because Plaintiffs' stated fact states a legal conclusion. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, AirTran had not and was not inviting Delta to collaborate with respect to first bag fees. Instead, it reflects intense competition between AirTran and

Delta.

88. AirTran also expressed on its October 23, 2008 earnings call a willingness to cut capacity further: "We are prepared under the right circumstances to further reduce our capacity . . . ." AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3261.

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material.

89. Mr. Fornaro understood that his comments about bag fees on the October 23, 2008 earnings call conveyed that "AirTran was not going to implement first bag . . . unless Delta did it." R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 76:12-16.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs did not include the question that preceded the quoted answer. The Court may consider for purposes of the summary judgment motions that Mr. Fornaro testified that "AirTran was not going to implement first bag in Atlanta unless -- unless Delta did it, and once Delta made it, we would now have our own decision to make." (PX346 at 76:15-17).

90. Delta understood that Mr. Fornaro's statement about its "largest competitor" in Atlanta referred to Delta. S. Gorman 12/10/10 Dep. Tr., PX393 at 33:11-16 ("very obviously he was referring to Delta"); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 53:2-5 ("it clearly was Delta"); E. Bastian 9/17/10 Dep. Tr., PX367 at 91:11-20; Delta Responses to 1st RFAs, No. 12 (Dec. 13, 2010), PX396; E. Phillips 12/7/10 Dep. Tr., PX390 at 21:21-22.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support the fact that all of "Delta" understood that Mr. Fornaro's statement about its "largest competitor" in Atlanta referred to Delta. The Court can properly consider for purposes of the summary judgment motions that Steve Gorman, Ed Bastian and Eric Phillips testified that they understood that Mr. Fornaro's statement about AirTran's "largest competitor" in Atlanta referred to Delta.

91. Delta employees monitored AirTran's October 23, 2008 earnings call. Delta Responses to 1st RFAs, Nos. 11, 13 (Dec. 13, 2010), PX396 (admitting that Delta typically listens to AirTran's earnings calls, and that Delta employees Joe Esposito, Jill Greer, and Amy Martin listened to AirTran's October 23, 2008 earnings call); G. Boyd Decl. & Exhibit (June 1, 2012), PX420 (reflecting that Delta repeatedly listened to AirTran's Oct. 23, 2008 call); Brian Conti calendar entry re: FL [AirTran] Earnings Conference Call (Oct. 23, 2008 call), PX216; Dana Carr calendar entry re: AAI [AirTran] Earnings Call (Oct. 23, 2008 call), PX219; Catherine Cloud calendar entry re: AAI [AirTran] earnings (Oct. 23, 2008 call), PX220.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

92. Delta executives were immediately made aware of Robert Fornaro's statement about first bag fees on AirTran's October 23, 2008 earnings call. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 48:1-49:8 ("Shortly thereafter. . . . I was aware that [AirTran] did comment on first-bag fees, yes."); S. Springer 6/16/09 DOJ Dep. Tr. (Dkt. #368), PX343 at 170:22-173:16; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 (Dkt. #367) at 207:1-8; E. Phillips 12/7/10 Dep. Tr., PX390 at 46:14-47:1; Delta Responses to 1st RFAs, No. 14 (Dec. 13, 2010), PX396; E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257 ("They clearly want the first bag fees."); E-mails between G. Hauenstein and J. Greer (Oct. 23, 2008), PX226 at 1 (Greer: "The AirTran transcript has finally appeared" Hauenstein: "Stupid me has been waiting for it.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not show that all "Delta executives" were "immediately" made aware of Fornaro's statement about first bag fees on AirTran's October 23, 2008 earnings call, and because PX396 states merely that "Delta admits that Delta Investor Relations typically prepares and circulates summaries of quarterly earnings calls of other airlines, including AirTran, to certain Delta executives."

93. On October 24, 2008, Glen Hauenstein communicated to Richard Anderson that, based on Mr. Fornaro's statements on AirTran's quarterly earnings call, AirTran would clearly follow if Delta imposed a first bag fee. E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257 ("They clearly want the first bag fees."); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 42:18-43:3.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. The Court can properly consider the cited evidence for purposes of the summary judgment motions, but should also consider pursuant to Fed. R. Evid. 106 the complete answer provided by Mr. Hauenstein in PX415, which Plaintiffs omit: "A Well, they said in their transcript that they wanted the first bag fees. So I think that I was just stating that they clearly wanted the first bag fees. *And I was looking forward to our discussion on Monday, because I still didn't think we should do it*." PX415 at 42:18-43:5 (emphasis added).

94. Delta's senior executives understood and discussed that Mr. Fornaro's October 23, 2008 statements were improper and not typical industry reporting, because they referred to conditional future pricing intentions. S. Gorman 12/10/10 Dep. Tr., PX393 at 30:24-31:5 ("I do remember discussion among senior leaders that . . . this particular comment by Mr. Fornaro . . . how inappropriate the comment was and almost disbelief that he made such a comment considering his position in the company."); *id.* at 34:4-6 (". . . I do very clearly remember at least Richard and Ed and I were commenting on the inappropriateness."); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 49:12-20 ("[W]e found it kind of odd that it was even discussed, that AirTran would even talk about that topic on the call. . . . Because we know not to talk about

pricing matters in a public call. It was just odd that the question was even addressed."); E. Bastian 9/17/10 Dep. Tr., PX367 at 107:20-25, 108:19 ("I think that would be not something we would talk about is pricing matters . . . .[*i.e.*,] [o]ur forward intent with respect to how we'll price our product or service . . . . I think that's a legal limitation."); G. Grimmett 9/28/10 Dep. Tr., PX370 at 200:10-19 (describing internal Delta discussion about earnings call that "could you believe . . . that he made a pricing comment on a call"); G. Hauenstein 9/30/10 Dep. Tr., PX371 at 121:23-122:12 ("[W]e were somewhat taken back because we didn't think it was a very wise statement for him. . . . [I]f you go back to our antitrust compliance, we would not talk about anything we're going to do in fares or tariffs in the future. . . . We thought it was unwise. And kind of can you believe he said that . . . ."); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 41:2-8 ("Q. Do you recall what you said [to others at Delta] about the [October 23 AirTran] transcripts? A. Well, I thought that it was not probably the wisest thing to say in a public forum. . . . Because I didn't want to get stuck in a room like this."); E-mail from G. Hauenstein to J. Greer (Oct. 23, 2008), PX226 at 1 ("Is it my imagination, or does this [AirTran earnings] call look a bit amateurish"); E-mail from K. Landers to B. Talton, *et al.* (May 21, 2008), PX28 at DLTAPE 12655 ("We can't say 'we WONT [sic] match' [a first bag fee]. . . . This is like other fees or fares – we can only say that 'we have made no changes and we don't comment on potential fee or fare changes.'"); Delta Antitrust Compliance Manual (Nov. 2009), PX357 at DLBF 39728 ("Signaling: Private plaintiffs and government enforcers sometimes point to competitors' public announcements of future business plans as evidence of a tacit illegal agreement. . . . An issue can arise . . . when the information being announced involves pricing . . . initiatives that likely must be matched by competitors to be sustainable in the market.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited evidence reflects that "Delta executives" understood or discussed Mr. Fornaro's October 23 earnings call statements to be about "future conditional pricing intentions," PX226 does not support Plaintiffs' assertion that the document relates to Mr. Fornaro's October 23 earnings call statements, and PX28 is not a document that involves any Delta executives.

95. Delta understood Mr. Fornaro's October 23, 2008 statements to be intended as an improper communication directed at Delta. S. Gorman 12/10/10 Dep. Tr., PX393 at 31:21-32:4 ("And to me [Fornaro's October 23, 2008 statement] fell in that category of in that [antitrust compliance] training that it was in the sensitivity of an area that you should not have any discussions with your counterparts.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Mr. Gorman's personal views are not the views of "Delta." Plaintiffs' stated fact states a legal conclusion.

96. Delta understood that Mr. Fornaro's October 23, 2008 statements committed AirTran to imposing a first bag fee if Delta did so first. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 207:13-18 ("Q. Okay. So what did you understand that statement to mean? A. That . . . they would put a first-bag fee in if Delta were to have one."); E-mail from

G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257 ("They clearly want the first bag fees."); G. Hauenstein 9/30/10 Dep. Tr., PX371 at 124:14-125:15 (stating that the 90 percent probability to match estimate in the Value Proposition analysis was "indicative of a high confidence level that [AirTran] would match after [Fornaro's] unfortunate statement" and was not higher because occasionally "people [have] said things in public and then not done them later"); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 47:5-17; E-mail from G. West to M. Medeiros (Nov. 12, 2008), PX294 ("no surprise" that AirTran matched); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 170:22-178:15, 216:3-217:6, 225:16-226:13, 247:8-249:17; E. Phillips 12/7/10 Dep. Tr., PX390 at 20:14-21:14; E-mail from M. Rogers to M. Clark, *et al.* (Oct. 23, 2008), PX217; E-mail from M. Clark to M. Rogers, *et al.* (Nov. 5, 2008), PX274 ("look for FL to follow with the bag fee soon . . ."). *Compare* Value Proposition - Final (Oct. 24, 2008), PX234 at 4 (reflecting 90% probability that AirTran would impose a first bag fee if Delta imposed one), *with* Value Proposition v4 (Oct. 22, 2008), PX213 at 7 (reflecting 50% probability).

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support that all of "Delta" was aware of the Fornaro statements let alone "understood" them as a "commitment," and because the evidence actually shows that Delta did *not* understand that Mr.

Fornaro's October 23, 2008 statements "committed" AirTran to imposing a first bag fee if Delta did so first; rather, the evidence shows there remained uncertainty whether AirTran would match among those at Delta who were aware of the statements. *See, e.g.*, PX371 at 124:14-125:15 (stating that the 90 percent probability to match estimate in the Value Proposition analysis was "indicative of a high confidence level that [AirTran] would match after [Fornaro's] unfortunate statement" and was not higher because occasionally "*people [have] said things in public and then not done them later*") (emphasis added); PX213 at 7 (reflecting 50% probability of AirTran match); PX221 at 16 (reflecting 75% probability on October 23 after Fornaro's statement); PX234 at 4 (reflecting 90% probability in final version of document).

97. There is no legitimate reason for AirTran to share conditional future pricing plans with investors. R. Fornaro 11/18/10 Dep. Tr., PX384 at 9:5-25; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶¶ 43-62; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 121:23-122:12 ("it wasn't helpful to anything.").

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Mr. Fornaro was not asked about "conditional" future pricing or given a definition of "conditional future pricing." Defendants

also object to PX 384 because the evidence upon which Plaintiffs rely is not admissible as it is incomplete testimony and represents an improper hypothetical. Defendants also object because Plaintiffs' stated fact states a legal conclusion. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

98. Mr. Fornaro's October 23, 2008 statements about bag fees constituted an invitation to collude. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 207:13-18; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 112-13; D. Carlton 2/24/11 Dep. Tr., PX402 at 117:2-118:11; S. Gorman 12/10/10 Dep. Tr., PX393 at 31:19-32:4; G. Hauenstein 5/10/12 Dep. Tr., PX415 at 41:2-8.

Defendants' response:

Defendants object because Plaintiffs' stated fact states a legal conclusion. Plaintiffs also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

99. Based on Delta's understanding from the October 23, 2008 earnings call of AirTran's likelihood of matching a first bag fee, Delta's internal analysis projected a net profit from imposing a first bag fee instead of a net loss. S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 225:8-18, 226:9-13 ("Q . . . in prior versions [of the Value Proposition PowerPoint], it's projecting a loss, correct? A. That's correct. Q. And in this version [dated October 24, 2008] for the first time you're projecting a gain,

> right? A. That's correct. . . . Q. The only thing that's changed between the two versions is the probability to match associated with projected share shift to AirTran, correct? A. Correct."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 292:2-12; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 24, 115-119. *Compare* Value Proposition v4 (Oct. 22, 2008), PX213 at 15 (projected $46M loss at 50% likelihood that AirTran would match), *with* Value Proposition (Oct. 24, 2008), PX234 at 16 (projected $26M gain at 90% likelihood that AirTran would match).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely (PX398) is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. *See* Dkt. 551 at 3. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence refers to the Value Proposition presentation prepared by Delta's Revenue Management division, which was neither "Delta's internal analysis" nor reflected "Delta's understanding," and because neither the alleged "net profit" nor "net loss" in either version of the Value Proposition document accounted for Northwest's estimated first bag fee revenues of $200 million, which, when included turns the supposed "net loss" of $46 million before Fornaro's statement into a "net gain" of over $150 million, and the alleged net gain of $26 million after Fornaro's statement to a "net gain" of over $225 million. *See* PX234 at 17 (projecting Northwest's "Annual Value of First Bag Fee" at $200 million).

100. On November 5, 2008, Delta publicly accepted AirTran's invitation to collude on first bag fees, publicly announcing that it would begin charging a $15 first bag fee, effective for travel December 5, 2008. Delta Answer ¶ 56 (Dkt. #147); Delta First Bag Fee Press Release (Nov. 5, 2008), AirTran Exhibit ("EX") EX60 at DLBF 7007.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact states a legal conclusion. The Court can properly consider AirTran Exhibit ("EX") EX60 for purposes of the summary judgment motions.

101. **[1]** If Delta had unilaterally imposed a first bag fee, AirTran likely would not have followed, **[2]** as the most profitable scenario for AirTran would be for Delta to charge a first bag fee and for AirTran not to charge a fee. J. Smith 11/15/10 Dep. Tr., PX381 at 91:17-22 (K. Healy believed AirTran would gain market share if only Delta implemented a first bag fee); E-mail from K. Healy to M. Klein (Sept. 15, 2008), PX153; E-mail from K. Healy to R. Wiggins (Aug. 21, 2008), PX138 at AIRTRAN 54727 ("I'm leaning towards not doing 1st bag even if DL does."); Value Proposition (Oct. 24, 2008), PX234 at 11 ("Value of potential share shift to AirTran in ATL overlap markets only = $295M" if AirTran did not match versus potential $70M in first bag fees if AirTran did match); H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 33-35.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely (PX363) is not admissible and is subject to Defendants' *Daubert* motion related to Dr. Singer's opinions. The evidence upon which Plaintiffs rely (PX234) is not admissible

because the Value Proposition document prepared by Delta's Revenue Management division is not admissible as to what AirTran viewed as "the most profitable scenario" for AirTran if Delta charged a first bag fee. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, neither PX381, PX153, nor PX138 relate to what AirTran viewed "as the most profitable scenario for AirTran" if Delta charged a first bag fee.

102. AirTran's CEO, Robert Fornaro, decided to impose the first bag fee to match Delta because he had committed to doing so on the October 23, 2008 earnings call. AirTran Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264; R. Fornaro 11/18/10 Dep. Tr., PX384 at 72:11-13; David Field, *Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4 ("Bob Fornaro says: 'We were waiting for Delta . . . .'").

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object because Plaintiffs' stated fact states a legal conclusion. Defendants object to Plaintiffs' Exhibit PX311 because it is inadmissible hearsay.

103. On November 5, 2008, AirTran reassured Delta of its commitment to follow Delta's lead in imposing first bag fees by stating to reporters that AirTran would make a first bag fee announcement the following week. E-mail from J. Graham-Weaver to M. Credeur, Bloomberg/Newsroom (Nov. 5, 2008), PX271 at AIRTRAN 6682; Bloomberg, *Delta to Start Charging Fee For Checked Luggage* (Nov. 6, 2008), PX279; AirTran Airways' Daily Crew Member (Nov. 6,

2008), PX277 at AIRTRAN 46948.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, because *inter alia*, no indication was given of what the announcement would be. The court may consider for purposes of the summary judgment motions that Judy Graham-Weaver said "I checked on this and here is the answer I got – basically what we said on the earnings a few weeks ago: We have the technology, we certainly need to evaluate it. We will likely announce next week one way or the other." PX271 at 6682. Defendants object to Plaintiffs' Exhibits PX279 and PX277 because they are inadmissible hearsay.

104. On December 5, 2008, AirTran reassured Delta of its long-term commitment to maintaining the first bag fee and other ancillary fees by publicly stating that it was "really unlikely to roll any of those [fees] back." K. Yamanouchi, *Delta, AirTran Say Fees Are Here to Stay*, Atl. J. Constitution (Dec. 5, 2008), PX305 at DLTAPE 17317 (quote from R. Fornaro).

Defendants' response:

Defendants object because Plaintiffs' stated fact states a legal conclusion.

Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact, namely that AirTran was reassuring Delta of anything. Defendants object to Plaintiffs' Exhibit PX305, because it is inadmissible hearsay.

105. On December 9, 2008, Delta encouraged the industry to maintain its agreement to restrict capacity. Delta Air Lines Analyst Meeting Tr. (Dec. 9, 2008), PX308 at DLBF 188573 (G. Hauenstein: "airlines have exerted an incredible amount of capacity discipline and moving forward we're hopeful that they will all continue. We certainly will do our part.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact states a legal conclusion.

106. In January 2009, on its quarterly earnings call, AirTran indicated that its 2009 capacity would be down approximately 4%. AirTran Q4 2008 Earnings Call Tr. (Jan. 28, 2009), PX321 at DLBF 186417.

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material.

107. Delta was troubled by AirTran's January 2009 capacity guidance, which was inconsistent with the understanding between AirTran and Delta and constituted "cheating" on their agreement for deeper cuts. E-mail from G. Hauenstein to J. Esposito (Jan. 28, 2009), PX321 at DLBF 186411 ("Cheating on their capacity reductions").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon

which Plaintiffs rely does not support the stated fact because, *inter alia*, the statement by Mr. Hauenstein ("cheating on their capacity reductions") does not show that "Delta was troubled," and does not provide any evidence from which an "understanding" or "agreement" can reasonably be inferred. Plaintiffs' stated fact states a legal conclusion.

108. Despite a substantial and lasting decrease in oil prices, AirTran and Delta agreed to – and did – cut capacity as a result of their public collusive communications, including their statements about industry capacity discipline. AirTran 2008 Airline Industry Review (Jan. 13, 2009), PX316 at AIRTRAN 15443324; AirTran Q2 2008 Earnings Call Tr. (July 29, 2008), PX101 at DLTAPE 4128 ("We have accelerated the amount of capacity [] we're removing. We now expect the capacity to be down 7% to 8% in the September through December period."); AirTran Q1 2009 Earnings Call Tr. (Apr. 22, 2009), PX340 at DLBAG 24145 ("virtually overnight in the summer [2008] we went from an 8% growth rate to a minus 8%."); Delta Q3 2008 Earnings Call Tr. (Oct. 15, 2008), Delta Ex. 82 at DLBF 38189 ("[Atlanta capacity] will be significantly below [prior projections]").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact states a legal conclusion. Plaintiffs' stated fact is not material. *See* Dkt. 335, Order & Stipulation at 2. The evidence upon which

Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited evidence supports the assertion that there was "a substantial and lasting decrease in oil prices" or when such a decrease occurred, and because none of the cited evidence supports that AirTran and Delta engaged in "public collusive communications" or "agreed to—and did—cut capacity."

109. In early 2009, Defendants publicly admitted that they were "working together" in Atlanta and that there were no "gains in shift going on between AirTran and Delta as to who is going to one-up each other." E-mail from R. Anderson to B. Hirst, *et al.* (Feb. 3, 2009), PX324 at DLBF 187876-77 (pointing out earnings call statement of R. Fornaro on January 28, 2009); AirTran Raymond James Growth Airline Conference Tr. (Feb. 5, 2009), PX326 at 4.

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cite two documents reflecting statements by AirTran, not Delta, and therefore, provide no support for the assertion that "Defendants publicly admitted . . . ," and because the quoted statements by Mr. Fornaro do not relate to capacity or pricing by the airlines, but relate to "increases in [airport] fees" proposed by the Atlanta Airport, which Delta and AirTran were "working together" on to keep costs down as part of their lease negotiations with Atlanta airport authorities. PX326 at 4 ("The question has to do with Atlanta airport and they are proposing increases in

fees. The situation in Atlanta is really somewhat interesting. Most of the carriers operate under 30 year releases and those releases expire in September 2010. And AirTran and Delta have been working together to -- and we have a couple of principles. One is we wanted to remain the lowest cost large airport in the United States. We want to make sure that, it's protected from additional congestion and a series of things like that. And so, we're having active conversations with the airport to make sure that our cost structure is protected.").

110. After receiving DOJ CID's related to Defendants first bag fee collusion that was based at least partly on public collusive communications, on April 21 and 22, 2009, Defendants temporarily halted making collusive public statements and instead declined to answer questions about contingent future plans. DOJ CID to AirTran (Feb. 2, 2009), PX323; DOJ CID to Delta (Feb. 2, 2009), PX322; Delta Q1 2009 Earnings Call Tr. (Apr. 21, 2009), PX339 at 15187 (Anderson: "I think Ben Hirst, our General Counsel, would prefer that I not talk about any future ideas about where fees would go in the industry."); AirTran Q1 2009 Earnings Call Tr. (Apr. 22, 2009), PX340 at DLBAG 24129 (Healy: "Really not going to get into the specifics of the ancillary programs"); *id.* at 24132 (Fornaro: "I think the concern is this industry has a habit of being very self-destructive by sharing too much information with your competition").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed

(or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, nothing in the DOJ's CIDs (PX322 & PX323) indicate that they were "at least partly on public collusive communications," none of the cited evidence supports the assertion that "public collusive communications" had previously occurred, and none of the quoted public statements are about "contingent future plans."

> 111. Defendants resumed signaling about their collusive commitment to industry capacity discipline shortly thereafter. E-mail from J. Greer to J. Baker, JP Morgan (June 11, 2009), PX342 (informing analyst that Delta had cut capacity "to do our part to help the industry!"); J. Boehmer, *2010 Business Travel Survey: Carriers Continue to Make the Most of Capacity Control*, Business Travel News (July 14, 2010), PX364 at 2 (citing statements made by AirTran that it was now "much more disciplined" and that "we think discipline is important" and statements by Delta that variability of fuel prices has "caused us all to think hard about not expanding . . . in terms of . . . capacity").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact states a legal conclusion. Plaintiffs' stated fact is not

material. The evidence upon which Plaintiffs rely (PX364) is not admissible because it is inadmissible hearsay. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited evidence reflects any "signal" by Delta and therefore provides not support for Plaintiffs' assertion that "Defendants resumed signaling," PX342 does not mention capacity at all, let alone reflect a "signal about [Defendants] collusive commitment to industry capacity discipline."

112. Through numerous public statements beginning around 2008, Delta and other airlines agreed to limit capacity growth to the rate of growth of GDP. Delta Q3 2014 Earnings Call Tr. (Oct. 16, 2014), PX424 at 3 ("We plan to keep our system capacity fairly disciplined at about the rate of growth of GDP."); F. Morton, *et al.*, *Benefits of Preserving Consumers' Ability to Compare Airline Fares* (May 19, 2015), PX427 at 30 ("The strategy of restricting capacity is widely discussed among the large airlines and has been the subject of many recent statements by top airline executives."); T. Reed, *Southwest Airlines' Capacity Gains Are Panned by Wall Street Analysts*, TheStreet (May 20, 2015), PX430 at 1 ("A frequently referenced rule of thumb is that airline capacity growth should be in line with GDP growth.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact states a legal conclusion. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely is not admissible pursuant to Fed. R. Evid. 401 and 403, and because PX427 and PX430 are inadmissible hearsay. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited public statements provide any support for Plaintiffs' assertion that Delta and other airlines "agreed" to limit capacity growth.

113. Defendants and other airlines have repeatedly made statements about industry capacity discipline, and "[w]hen airline industry leaders say they're going to be 'disciplined,' they mean they don't want anyone to expand capacity." J. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times (June 11, 2015), PX437 at 2 (quoting Fiona Scott Morton, Professor of Economics at Yale School of Management and former Deputy Assistant Attorney General for Economics at the Antitrust Division, Department of Justice); D. Bartz, *Airlines' Undisciplined Talk May Have Led to Antitrust Probe: Experts*, Reuters (July 2, 2015), PX449.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Further, Defendants object because Plaintiffs' stated fact made in 2015 is not material, as whether or not "[d]efendants and other airlines have repeatedly made

statements about industry capacity discipline" has no relationship to whether Delta and AirTran reached an agreement related to the implementation of a first bag fees in 2008. Finally, Defendants object because the evidence upon which Plaintiffs' rely, PX437, PX449, is not admissible because it is hearsay and speculation without foundation.

114. Emphasizing the airline industry's history of collusion and Defendants' collusive public comments during an airline conference, Senator Blumenthal requested that the Department of Justice open an investigation into the airlines' anticompetitive coordination via public statements. Letter from Sen. Blumenthal to W. Baer, Assistant Attorney General, Antitrust Division, DOJ (June 17, 2015), PX438 at 3.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Further, Defendants object because Plaintiffs' stated fact is not material, as whether or not "Senator Blumenthal requested that the Department of Justice open an investigation into the airlines' anticompetitive coordination via public statements" in 2015 has no relationship to whether Delta and AirTran reached an agreement related to the implementation of a first bag fee in 2008. Defendants also

object because a senator's request for an investigation of an unrelated matter is not material to this case.

Defendants object because the evidence upon which Plaintiffs rely, PX438, is hearsay, without foundation and therefore is not admissible. Finally, Defendants object because Plaintiffs' stated fact states a legal conclusion, (referring to "Defendants' *collusive* public comments") (emphasis added).

115. On or around July 1, 2015, the DOJ confirmed that it had opened an investigation of Delta, Southwest, and other airlines for colluding to reduce capacity. T. Maxon, *Justice Is Looking Into Airline Collusion on Holding Down Capacity*, Airline Biz Blog, Dallas Morning News (July 1, 2015), PX439; DOJ Airline Capacity CID Specifications, PX447.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants further object that the DOJ's investigation of an unrelated matter in 2015 is not material to whether Delta and AirTran reached an agreement related to the implementation of a first bag fee in 2008. Defendants further object that the cited evidence is inadmissible hearsay.

116. In May 2015, Southwest had announced publicly that it intended to grow capacity 7-8% in 2015 (instead of an earlier announced 7% increase) and 6-7% in 2016, but reiterated that its capacity increase (which deviated from the collusive agreement to restrict capacity growth to the rate of GDP growth) was justified by extenuating circumstances, *i.e.*, obtaining new gates as a result of American's divestitures, and the lifting on certain government regulations on flights out of Dallas Love Field. JP Morgan Aviation, Transportation and Industrials Conference, Southwest Presentation (Mar. 3, 2015), PX426 at 9; Southwest Q4 2014 Earnings Call Tr. (Jan. 22, 2015), PX425 at 4; *id.* at 7 ("our guidance for full year 2015's year-over-year capacity growth remains unchanged at approximately 6%"); S. Jean, *Southwest Airlines Expects to Save at Least $1.2 Billion in Fuel Costs This Year*, Airline Biz Blog, Dallas Morning News (May 19, 2015), PX429 at 2; T. Reed, *Southwest Airlines' Capacity Gains Are Panned by Wall Street Analysts*, TheStreet (May 20, 2015), PX430 at 1.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' statement is a legal conclusion ("deviated from the collusive agreement"). Defendants further object because the evidence upon which Plaintiffs rely, PX 429, PX430, is not admissible because it is hearsay. Defendants also object that Plaintiffs' stated fact is not material because statements by Southwest—which is not a party to this lawsuit— about unrelated matters in 2015 have no bearing on whether AirTran and Delta reached an agreement related to the

implementation of a first bag fee in 2008.

117. Southwest's proposed capacity growth in Dallas was in Southwest's unilateral interests, but not in the industry's collective interests: "The truth is that Southwest capacity gains at Dallas Love Field are very likely accretive for Southwest, but increased capacity could hurt other carriers' pricing if supply exceeds demand." T. Reed, *American Airlines Is Downgraded Thanks to Southwest's Growth in Dallas*, TheStreet (June 3, 2015), PX433.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Defendants object because the evidence upon which Plaintiffs rely, PX 433, is not admissible because it is hearsay and lacks foundation. Defendants further object because Plaintiffs' stated fact is not material, as, even if true, actions by Southwest—which is not a party to this lawsuit—about unrelated matters in 2015 have no bearing on whether or not Delta and AirTran reached an agreement related to the implementation of a first bag fee in 2015.

118. In light of Southwest's new gates and new flights in Dallas, coconspirators American, Delta, and United did not publicly dispute Southwest's initial plan to increase capacity 6% in 2015, but after Southwest indicated that it would increase capacity 7 or 8% in 2015,

coconspirators publicly expressed disagreement in an attempt to bring Southwest back in line. J. Nicas, *Southwest's Upgraded Growth Plans Stir Airline Stocks and Prices Tumble*, Wall St. J. (May 20, 2015), PX431 (reporting that on May 19, 2015, American Airlines CEO Doug Parker on CNBC threatened to retaliate if Southwest maintained its 8% growth plans instead of 7%, stating that: "*Capacity is being added, not by us, but by some of our competitors, and we will obviously respond to that*.") (emphasis added); Mad Money, CNBC, American Airlines CEO Doug Parker interview, *available at* https://www.youtube.com/watch?v=ik51UsQ0Rpw (video of May 19, 2015 CNBC interview) ("[S]ome airlines are talking about 8, 10% growth rates . . . . I don't think that's right. But again, that's a lot different than the past when we all took the good times to try and, like, kill each other.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants further object that the cited evidence does not support the stated facts. Defendants further object because the evidence upon which Plaintiffs rely, PX 431, is not admissible because it is hearsay and lacks foundation.

Defendants also object because Plaintiffs' stated fact is not material, as these events occurred in May 2015, years after AirTran and Delta made their decisions to implement a first bag fee. Defendants further object that actions by different entities are not material to whether AirTran and Delta reached an agreement related

to the implementation of a first bag fee. Finally, Defendants object because Plaintiffs' stated fact states a legal conclusion (describing American, Delta, and United as "coconspirators").

119. Delta President Ed Bastian was among the airlines executives who made public statements admonishing Southwest's violation of the airlines collusive agreement:

> "[I]t's always a bit challenging when *you're posting all-time record profits and margins and still talking about reducing capacity* and *it just goes to show the difference that this industry has made* from where it used to be. You would never in this industry see close to a 50% fall in fuel and then the airlines talking about reducing capacity in the same sentence."

E. Bastian, Deutsche Bank Global Industrials and Materials Conference Tr. (June 4, 2015), PX434 at 5, 7, 8 (emphasis added); *id.* at 7 ("[W]e're proud of the . . . *capacity discipline* in the current environment.") (emphasis added); *id.* at 8 ("[A]t Delta . . . *we are monitoring our capacity plans quite carefully, looking at what's going on in the marketplace*.") (emphasis added).

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact states a legal conclusion. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely is not admissible pursuant to

Fed. R. Evid. 401 and 403. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Mr. Bastian's statements do not mention Southwest, let alone reflect an "admonishment" of Southwest, and Plaintiffs cite no evidence supporting the notion that Mr. Bastian's use of the word "industry" means "Southwest," or that there was some unspecified "collusive agreement" among "the airlines."

120. Southwest relented under pressure from Delta and other competitors and reduced its capacity growth plans to be in line with Delta and other competitors' expectations, with CEO Gary Kelly stating: "We don't want to grow 8%, we're not going to grow 8% and we can easily trim the schedule to stick to 7%." T. Owusu, *Southwest Airlines (LUV) Soars on Downgraded Capacity Growth Expectations*, TheStreet (June 1, 2015), PX432; T. Maxon, *Southwest Airlines to Curb Capacity Growth in Second Half and in 2016*, Airline Biz Blog, Dallas Morning News (June 9, 2015), PX436.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Further, Defendants further object that the cited evidence does not support the stated facts. Defendants further object because the evidence upon which Plaintiffs rely is not admissible because it is hearsay, lacks foundation and is

speculative.

Defendants also object because Plaintiffs' stated fact is not material because actions by Southwest—which is not a party to this litigation—about unrelated matters in 2015 have no bearing on whether or not Delta and AirTran reached an agreement related to the implementation of a first bag fee in 2008. Plaintiffs' stated fact states an argumentative legal conclusion.

121. A few days after Southwest relented, industry participants publicly reiterated their commitment to industry capacity discipline. J. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times (June 11, 2015), PX437 at 1 (quoting Delta President Ed Bastian as stating that Delta was "*continuing with the discipline* that the marketplace is expecting") (emphasis added); A. Scott, *American Airlines CEO Cites Capacity Growth Risks*, Reuters (June 7, 2015), PX435 at 1 (American CEO Doug Parker: stating that the airlines had learned painful lessons from past cycles about adding capacity, and that "the real question is, is this a one-time catch up for fuel prices being lower or is this airlines behaving like airlines used to and just increasing capacity because times are good."); *id.* at 2 (Air Canada CEO Calin Rovinescu: "The industry has learned the errors of the past. We're dealing with a more mature and experienced dynamic now. People were undisciplined in the past, but they will be more disciplined this time.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants further object that the cited evidence does not support the stated fact. Defendants further object because the evidence upon which Plaintiffs rely is not admissible because it is hearsay, lacks foundation and is speculative. Defendants also object because Plaintiffs' stated fact is not material.

Finally, Defendants object because Plaintiffs' stated fact is not material because actions by Southwest—which is not a party to this lawsuit—about unrelated matters in 2015 have no bearing on whether AirTran and Delta agreed to adopt first bag fees in 2008. Plaintiffs' stated fact states an argumentative legal conclusion.

122. Robert Fornaro and Richard Anderson have known each other for over 20 years and are friends. E-mail from T. Hutcheson to R. Pelc, *et al.* (Apr. 1, 2009), PX336 at AIRTRAN 3987578 ("Richard Anderson . . . . Friends with Bob Fornaro."); R. Fornaro 11/18/10 Dep. Tr., PX384 at 46:3-20; R. Anderson 5/3/12 Dep. Tr., PX410 at 150:23-151:16; AirTran Responses to 2d RFAs, Nos. 3-4 (May 2, 2012), PX408.

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, neither Mr. Anderson nor Mr. Fornaro testified that they are "friends"; rather the cited evidence shows that Mr. Fornaro testified that he considers Mr. Anderson a "business colleague" (PX384 at 46:3-20), and Mr. Anderson testified that he

considers Mr. Fornaro a "professional colleague" or "professional friend" (PX410 at 150:23-151:16), and because PX408 states merely that Mr. Hutcheson's notes (PX336) reflect that Richard Anderson stated that he is "[f]riends with Bob Fornaro."

123. Sometime between May 21 and October 27, 2008, Delta CEO Richard Anderson and AirTran CEO Robert Fornaro participated in meetings with each other and communicated with each other by e-mail and by phone. Delta Responses to 1st RFAs, Nos. 17-19 (Dec. 13, 2010), PX396; E-mail from R. Fornaro to R. Anderson (Sept. 4, 2008), PX144; R. Anderson 10/6/10 Dep. Tr., PX372 at 30:12-16.

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material.

124. Richard Anderson and Robert Fornaro met several times in 2008, including at least twice in fall 2008. E-mail from J. Boatright to S. Kolski (Aug. 14, 2008), PX133 at DLBF 59803 (discussing Aug. 20, 2008 meeting involving "Richard [Anderson] and me on D[elta] side and you and Bob [Fornaro] on your [AirTran] side"); Delta/AirTran Meeting Reminder, (Sept. 18, 2008 meeting) PX159; DL/AirTran Meeting Reminder re ATL Strategy (Sept. 18, 2008 meeting), PX162; E-mail from R. Fornaro to R. Anderson, *et al.* (Sept. 19, 2008), PX166 ("It felt like the old days yesterday – kind of fun. See you next week."); Calendar Entry re Delta/AirTran Meeting (Sept. 22, 2008 meeting), PX167; R. Fornaro 11/18/10 Dep. Tr., PX384 at 46:6-16; E-mail from R. Fornaro to R. Anderson (Sept. 4, 2008), PX144 ("Richard, We had a little fun [at the meeting]. . . . Bob"); R. Anderson 10/6/10 Dep. Tr., PX372 at 30:12-16.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in

violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs identify only one potential meeting between Mr. Fornaro and Mr. Anderson in "fall 2008" (i.e., on or after September 22, 2008).

125. At an August 2008 meeting at Delta's headquarters, Mr. Anderson and Mr. Fornaro, along with Steve Kolski from AirTran and John Boatright from Delta, discussed capacity decreases and price increases to cover the cost of fuel: Delta proposed reductions of 7 to 10% if oil prices remained unchanged. E-mail from J. Boatright to S. Kolski (Aug. 14, 2008), PX133 at DLBF 59803 (discussing Aug. 20, 2008 meeting); E-mail from J. Boatright to D. Kasper (Aug. 22, 2008), PX141 at DLTAPE 11062 ("Dan: in an update session with AirTran on Wednesday, they asked should we consider on page 18 where we have the 12% and 17% reductions should we have a smaller %, i.e., 5-7% for comparative purposes for use in our Vision 2030 document."); Email from D. Kasper to J. Boatright (Aug. 26, 2008), PX141 at DLTAPE 11059 ("If oil stays at current prices (~$115/bbl), capacity reductions of 7-10% would be necessary."); Email from J. Boatright to S. Kolski, *et al.* (Aug. 27, 2008), PX141 at DLTAPE 11059 ("here are thoughts of experts on economics . . . . let me know your thoughts"); Email from D. Kasper to J. Boatright (Aug. 25, 2008), PX141 at DLTAPE 11060-61 ("I believe Ed Bastian is still saying another 10% reduction by DL is possible.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon

which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited documents do not reflect any discussions between Mr. Fornaro and Mr. Anderson about capacity decreases or price increases, and the emails mentioning capacity between Delta corporate real estate employee John Boatright and AirTran corporate real estate employee Steve Kolski, in connection with the airlines' negotiations with the Atlanta Airport, are about capacity plans that had already been announced publicly. PX141 at 11060 ("AirTran has already announced capacity reductions in its fall schedule of ~7% and Delta has announced reductions of ~10%.").

126. AirTran executive Kevin Healy wanted Delta to hear about AirTran's desire to charge first bag fees and suggested that a question be planted about first bag fees. E-mail from K. Healy to M. Klein, *et al.* (July 9, 2008), PX59 at AIRTRAN 23599 ("Cheer louder, the guys with the blue and red tails in ATL need to hear you."); E-mail from K. Healy to R. Fornaro, *et al.* (July 31, 2008), PX109 ("[W]e'll push it out there."); E-mail from K. Healy to R. Fornaro, *et al.* (July 10, 2008), PX66; E-mail from K. Healy to J. Graham-Weaver, *et al.* (July 11, 2008), PX76.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, although Mr. Klein was supportive of first bag fees, the cited materials do not show that AirTran was supportive of them. The evidence also does not support that the question was planted. Putting

Plaintiffs' Exhibit PX49 into context, the Court may consider for purposes of the summary judgment motions that upon learning that Northwest had announced a first bag fee, M. Klein said to K. Healy *et al.* "Here we go first bag, here we go (CLAP! CLAP!) Here we go first bag, here we go (CLAP! CLAP!)" and in response K. Healy replied: "Cheer louder, the guys with the blue and red tails in ATL need to hear you." PX59 at AIRTRAN 23599.

127. AirTran executive Jack Smith suggested to other executives that AirTran should signal to competitors that AirTran thought first bag fees were a good idea. E-mail from J. Smith to K. Healy, *et al.* (July 10, 2008), PX66 (suggesting steps to "show our competitors that we think first bag charges are a good idea").

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants object because Plaintiffs' stated fact is not material.

128. On July 31, 2008, AirTran CEO Robert Fornaro stated that he wanted AirTran to communicate to Delta that AirTran wanted to impose first bag fees. E-mail from R. Fornaro to J. Smith, *et al*. (July 31, 2008), PX109 ("They should hear through the grapevine that we are doing the programming to launch this effort.").

Defendants' response:

Defendants object because Plaintiffs' stated fact is not material. Defendants further object because the evidence upon which Plaintiffs rely does not support the

stated fact, as that evidence does not support the Plaintiffs' characterization that "AirTran CEO Robert Fornaro stated that he wanted AirTran to communicate to Delta . . ."

129. Kevin Healy suggested to other executives on July 31, 2008 that AirTran could communicate to Delta its willingness to follow Delta's lead on first bag fees through a public earnings call. E-mail from K. Healy to R. Fornaro, *et al.* (July 31, 2008), PX109 ("I was hoping we'd be asked on the call. We've all but given it to the AJC, we'll push it out there.").

Defendants' response:

Defendants object to Plaintiffs' stated fact because the evidence upon which Plaintiffs' rely does not support the stated fact, because the evidence does not show that Mr. Healy "suggested to other executives on July 31, 2008 that AirTran could communicate to Delta its willingness to follow Delta's lead on first bag fees through a public earnings call."

Defendants also object to Plaintiffs' stated fact because the stated fact is not material.

130. AirTran understood that public communications could be used for signaling between AirTran and Delta and analyzed Delta's public communications for signals to AirTran. E-mail from K. Healy to J. Kirby, *et al.* (Apr. 7, 2008), PX18 at AIRTRAN 1671782 ("Any chance we missed a signal?"); E-mail from K. Healy to J. Kirby, *et al.* (May 16, 2008), PX23 ("This [announced capacity change] may be a signal"); E-mail from S. Fasano to A. Asbury, *et al.* (July 20, 2008),

PX92 at AIRTRAN 12420 ("There is a very clear message from DL [in its July 2008 earnings call]"); E-mail from K. Healy to J. Kirby (Nov. 30, 2007), PX8 ("Interesting moves by DL, any message?").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the cited evidence does not support Plaintiffs' statement. Plaintiffs stated fact is also a legal conclusion related to Plaintiffs' signaling theory. Defendants object because Plaintiffs' stated fact is not material. All of the evidence cited by Plaintiffs relates to actual capacity changes.

131. On November 5, 2008, Delta announced a $15 first bag fee effective for travel beginning December 5, 2008. Delta First Bag Fee Press Release (Nov. 5, 2008), Delta Ex. 110, at DLBF 7454; Delta Answer ¶¶ 1, 56 (Dkt. #147); Delta SOF ¶ 34 Table 2.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

132. On November 12, 2008, AirTran announced a first bag fee identical to Delta's (i.e., $15), effective for travel beginning on the same date (i.e., December 5, 2008). AirTran Press Release (Nov. 12, 2008), PX290; AirTran Answer ¶ 57 (Dkt. #146); Delta SOF ¶ 34 Table 2.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. The Court can properly consider for purposes of summary judgment that on November 12, 2008, AirTran announced a first bag fee identical to Delta's (i.e., $15), effective for travel beginning on the same date (i.e., December 5, 2008).

133. When deciding whether to impose a first bag fee, Delta actively considered the fact that AirTran was not charging a first bag fee. E-mail from G. Hauenstein to G. West (July 18, 2008), PX89 at DLBAG 1067 ("For the same reason that we do not charge for the first bag domestically (do not want to create preference to AirTran/JetBlue/Continental) . . . ."); E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("we are concerned competitively with CO, JetBlue and AirTran domestically on the 1st bag fee."); E-mail from G. West to N. Shah, *et al.* (Sept. 5, 2008), PX146 at DLBAG 9724 ("AirTran and jetblue don't charge [a first bag fee] and they are our key competitors in our main hubs."); E-mail from G. West to S. Gorman (Sept. 5, 2008), PX148 at DLBF 187470 ("I assume we still want to hold until airtran moves?"); E-mail from P. Elledge to C. Phillips, *et al.* (Sept. 29, 2008), PX172 ("One key consideration is the risk when we are up against AirTran, JetBlue, Southwest"); E-mail from G. Hauenstein to S. Gorman (Sept. 18, 2008), PX157 ("If we did not have the lcc exposure I would be all over this [first bag fee]."); E-mail from B. Morey to R. Anderson (Oct. 1, 2008), PX182 at 1 (Morey: "Here are the notes from last week's CEO Forum for your edits."); *id.* at 2 (R. Anderson Meeting Notes: "We are now trying to decide whether or not we should charge for the first checked bag. Adding a charge for checking the first bag, could bring us hundreds of millions in additional

revenue next year. . . . [B]ut the flip side of doing so could negatively affect our customers and revenue.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support that all of "Delta" considered or that anyone at Delta "actively" considered "the fact that AirTran was not charging a first bag fee," or that "the fact that AirTran was not charging a first bag fee" was considered by Delta's decision-makers when "deciding whether to impose a first bag fee."

134. When deciding whether to impose a first bag fee, Delta actively considered AirTran's likely response to Delta charging a first bag fee. Value Proposition v4 (Oct. 22, 2008), PX213 at 11, 14-15 (analyzing likely lost market share based on probability of AirTran matching); E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257 ("[AirTran] clearly want[s] the first bag fees. Will look forward to our discussions on Monday [October 27]."); E-mail from L. Macenczak to G. Hauenstein (May 22, 2008), PX31 at DLTAPE 5135 ("While [AirTran] matched on the second bag fee [I] don't see it happening on the 1st").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support that all of "Delta" or that Delta's decision-makers "actively considered" AirTran's likely response to Delta charging a first bag fee "[w]hen deciding whether to impose a first bag fee."

135. When deciding whether to charge first bag fees, AirTran actively considered Delta's first bag fee and Delta's likely response to AirTran charging the fee. AirTran Responses to 1st RFAs, No. 2 (Dec. 13, 2010), PX395; E-mail from R. Fornaro to K. Healy, *et al.* (Aug. 8, 2008), PX128 ("We are not going to do 1st bag unless Delta does."); A. Haak 11/16/10 Dep. Tr., PX382 at 84:14-20; E-mail from M. Klein to K. Healy (June 25, 2008), PX53 ("I think we should discuss 1st bag again – will DL do it if we do it?"); E-mail from M. Klein to J. Junk (Nov. 12, 2008), PX291 at AIRTRAN 24529 ("inform the government today" that AirTran will charge first bag fee "before D[elta] changes their mind").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' stated fact is not material.

136. Defendants admit that the imposition of first bag fees constituted, at a minimum, conscious parallelism. E. Gaier 2/22/11 Dep. Tr., PX401 at 23:22-24:8, 24:12-19, 25:15-19 ("Q. Do you think the imposition of a first bag fee by AirTran and Delta was a result of conscious

parallelism? A. In the sense that they were looking at the experience of one another, yes.").

Defendants' response:

Defendants object because Plaintiffs' stated fact states a legal conclusion. Defendants also object because Plaintiffs' characterization of "at a minimum" is unsupported by the cited evidence. Defendants also object that AirTran's expert's statement is not admissible evidence of an admission by either Defendant.

137. Before AirTran's October 23, 2008 earnings call, Delta did not expect AirTran to match if Delta imposed a first bag fee. E-mail from L. Macenczak to G. Hauenstein (May 22, 2008), PX31 at DLTAPE 5135 ("While [AirTran] matched on the second bag fee [I] don't see it happening on the 1st"); Value Proposition v4 (Oct. 22, 2008), PX213 at 15 (estimating likelihood of Southwest or JetBlue matching at 0% and AirTran at 50%).

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support that all of "Delta" or that Delta's decision-makers "did not expect AirTran to match if Delta imposed a first bag fee," and because the cited evidence, if anything, suggests that before AirTran's

October 23, 2008 earnings call Delta did expect AirTran to match if Delta imposed a first bag fee, as reflected by the fact that the authors of the Value Proposition document estimated the likelihood of AirTran matching at 50%--higher than both Southwest or JetBlue, for which Delta estimated the likelihood of a match at 0%. PX213 at 15.

138. In spring 2008, Delta decided not to impose a first bag fee. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 50:5-13 ("first checked bag was off the table"); E. Phillips 12/7/10 Dep. Tr., PX390 at 12:16-13:7; E-mail from G. Hauenstein to S. Gorman, *et al.* (May 28, 2008), Delta Ex. 67 at DLBAG 6556 ("Our fee structure is already not competitive with [AirTran] and [JetBlue] and putting this fee in would not only be an operational challenge (at best), but also potentially create a revenue challenge in our competitive local markets. I would be the last in if the industry moves this direction."); E-mail from R. Anderson to S. Gorman (May 28, 2008), PX34 ("No $15.00 fee. Issue closed."); E-mail from E. Phillips to J. Leach, *et al.* (May 28, 2008), PX35 at DLBF 35599 ("we are not considering [first bag fee] as a potential fee"); R. Anderson 5/3/12 Dep. Tr., PX410 at 161:2-5.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

139. Richard Anderson and Delta's Corporate Leadership Team ("CLT") were opposed to charging a first bag fee because it was "part of the basic bargain" with passengers that they would receive a free first

checked bag. E-mail from R. Anderson to S. Gorman, *et al.* (May 28, 2008), Delta Ex. 32 ("it is part of the basic bargain. . . . That is in the price of the ticket."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 55:9-12; Right from Richard [Anderson] Script (Aug. 1, 2008), PX116 at DLTAPE 14134; R. Anderson 5/3/12 Dep. Tr., PX410 at 189:9-22 (a "fair agreement with our customers" that first checked bags were included in the ticket price "was the policy we had adopted as the CLT at that time"); E-mail from M. Campbell to T. Mapes (June 12, 2008), PX39 ("RA has been vocal on one bag being part of the basic customer promise."); E-mail from R. Anderson to T. Trippler (July 30, 2008), PX102 at 1 ("We allow for free . . . one checked bag . . . . That is fair for any traveler—basically ninety pounds for free.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not show that every member of Delta's Corporate Leadership Team was opposed to charging a first bag fee nor does Plaintiffs statement identify the timeframe to which it refers. The Court can properly consider the cited evidence for purposes of the summary judgment motions.

140. Delta opposed a first bag fee because charging a first bag fee would help AirTran become financially stronger and a more formidable competitor to Delta in Atlanta, and Delta believed that AirTran could potentially file for bankruptcy. G. Grimmett 5/4/12 Dep. Tr., PX412 at 320:10-12 ("Revenue management did not want to do anything to help AirTran – we . . . did not want a rising tide to lift all boats"); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 68:24-25, 76:21-25; Value Proposition (Oct. 24, 2008), PX234 at 11 (illustration of bag fees as life preserver for AirTran); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 29:9-11; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 63:21-64:2; E-mail

> from E. Bastian to M. Campbell, *et al.* (July 2, 2008), PX56 at 1 (Bastian remarking "Beginning of the end" in response to e-mail forwarding AJC article titled *AirTran plans 5% to 15% pay cuts; furloughs also expected*); E-mail from T. Dunn to PRM665, *et al.* (June 20, 2008), PX51 at DLBAG 15476 ("Richard [Anderson] expects bankruptcy filings from several large US carriers. The business plans of many low fare carriers don't work in this environment").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not support the assertion that all of "Delta" opposed the first bag fee, or that those who opposed a first bag fee did so only "because charging a first bag fee would help AirTran become financially stronger and a more formidable competitor to Delta in Atlanta, and because none of the cited evidence supports that "Delta" "believed that AirTran could potentially file for bankruptcy." Plaintiffs' stated fact is contradicted by Plaintiffs' Additional Fact ¶ 207, which states that "[d]uring the October 27, 2008 CLT meeting, Ed Bastian spoke in favor of the fee because he 'was worried about Delta surviving and no one else,' and Delta needed all the incremental revenue it could get in order to fund

pensions and other financial obligations."

141. Delta did not want to impose a first bag fee unless it was certain that the fee would not cause market share shift in excess of first bag fee revenue. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 40:10-13 ("[W]e wanted to be competitive. We wanted to make certain that it was not anything that would unduly impact our market share."); R. Anderson CEO Forum Meeting Notes (Sept. 23, 2008), PX182 at 2 ("Adding a charge for checking the first bag . . . could negatively affect our customers and revenue.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Mr. Bastian's quoted statement says "We wanted to make certain that it was not anything that would *unduly* impact our market share" (PX355 at 40:10-13 (emphasis added)), and because Mr. Anderson's quoted statement does not express any view about whether "Delta did not want to impose a first bag fee," and states merely that "a charge for checking the first bag . . . *could* negatively affect our customers and revenue" (PX182 at 2 (emphasis added)).

142. Delta initially opposed a first bag fee because it would cause competitive issues. R. Anderson 5/3/12 Dep. Tr., PX410 at 161:4-17 ("Intensely competitive industry, so your all-in pricing and fare offerings had to be competitive to be certain you would keep your customer base."); *id.* at 164:25-165:5, 166:18-25; Value Proposition (Oct. 24, 2008), PX234 at 8-16 (analyzing competitive share shift); E-mail from T. Dunn to PRM665, *et al.* (June 20, 2008), PX51 at

DLBAG 15476.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, that evidence does not support that all of Delta "initially opposed a first bag fee," or that Delta initially opposed a first bag fee only "because it would cause competitive issues." Defendants concede that Delta initially opposed a first bag fee in May and June 2008 because, among other reasons, it could cause competitive issues.

143. Delta was more exposed to low-cost carriers than any other legacy carrier. Value Proposition (Oct. 24, 2008), PX234 at 18 ("[Delta is] the network with [the] most LCC overlap"); CEO Forum, Hank Halter – Senior Vice President and Controller (June 17, 2008), PX47 at DLTAPE 15456.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed

(or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the Value Proposition page cited by Plaintiffs argued that Delta had a higher domestic overlap on an available-seat-miles basis based solely on the airline schedules of the first quarter of 2008, and reflects that Delta's domestic overlap on an available-seat-miles basis for that quarter was close to or the same as other of the major legacy carriers when multi-airport cities (e.g., New York, Chicago, Houston, and Dallas) were considered (PX234 at 18). PX47 merely says that "Northwest has very little LCC overlap."

144. Delta initially opposed a first bag fee because it would cause operational problems such as increased gate checks, increased competition for overhead bin space, collection problems, and flight delays. E-mail from R. Anderson to M. Campbell (June 13, 2008), PX42 at DLTAPE 2911 ("Gorman and I agreed yesterday that we will not be charging for the first bag."); E-mail re: breakfast with R. Anderson (June 18, 2008), PX48 at DLBAG 7417 ("Will not charge for 1st bag – creates customer and employee problems, gate check, compete for overhead space, how to efficiently collect $$, potential to destroy on time stats."); R. Anderson 5/3/12 Dep. Tr., PX410 at 161:2-22; E-mail from E. Phillips to J. Leach, *et al.* (May 28, 2008), PX37 at DLTAPE 8036 ("we are not considering [first bag] as a potential fee"); Email from T. Dunn to PRM665, *et al.* (June 20, 2008), PX51 at DLBAG 15476 ("We aren't planning 1st bag charge at this point for both competitive and operational reasons."); Notes of MCI Station Visit (July 15, 2008), PX80 at 2 ("Two days after our visit DL announced it will not charge for the first checked bag.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

145. In June 2008, Delta maintained its position that it would not charge a first bag fee. E-mails between S. Gorman and H. Halter, *et al.* (June 13, 2008), PX43 (Gorman: "My recommendation to CLT is we not take this action at this time and have DL as the lone major not charging for the first bag be a differentiator." Halter: "I would like to see DL as the lone major not charging too."); CLT Baggage Service Review (June 16, 2008), Delta Ex. 37 at DLBF 35301 (recommending against first bag fee); E-mail from R. Anderson to S. Gorman (June 20, 2008), PX52 at DLTAPE 2921 ("My views do not change."); E-mail from R. Anderson to S. Gorman, *et al.* (July 22, 2008), PX94 at DLBF 183157 ("We stand firm."); E-mail from H. Halter to G. West, *et al.* (June 25, 2008), PX54 ("We'll find it elsewhere; not on the first bag."); E-mail from J. Greer to C. Cloud, *et al.* (July 9, 2008), PX63 ("Per Ed [Bastian] – we're not doing it. No way, no how."); Fee Competitive Analysis (July 9, 2008), PX62 at DLBF 360 ("Combined entity . . . 1st Bag: Free"); E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("I still do not recommend first bag fee.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact

because, *inter alia*, PX94, PX63, PX62 and PX142—none of which are from June 2008— do not support that "in June 2008, Delta maintained its position that it would not charge a first bag fee," and because Plaintiffs' stated fact is contradicted by Plaintiffs' Additional Fact ¶ 159 (" . . . Delta continuously revisited its first bag fee decision."). The Court can properly consider for purposes of the summary judgment motions that in June 2008, Delta decided that it would not charge a first bag fee at that time. The Court can properly consider the cited evidence for purposes of the summary judgment motions.

146. In late summer and fall 2008, Delta planned for the merged Delta-Northwest entity to have a free first bag fee. Fee Competitive Analysis (July 9, 2008), PX62 at DLBF 360 ("Combined entity . . . 1st bag Free"); Fee Competitive Analysis (Sept. 23, 2008), PX169 at DLBF 36434 (same); Fees Combined Entity (Oct. 6, 2008), PX184 at DLBAG 11007 (same); Fee Competitive Analysis (Oct. 24, 2008), PX236 at DLTAPE 8574 (same); E-mail from G. West to G. Grimmett (Sept. 5, 2008), Delta Ex. 59 ("I plan to propose the current DL bag fees for the new DL."); E-mails between H. Halter and S. Gorman, *et al.* (Sept. 5, 2008), PX147 (Halter: "With Continental's decision to charge, . . . is there any discussion underway on our side to reconsider implementing the fee?"; Gorman: "Will re-surface but likely no change"); Integration Communications Plan (Sept. 29, 2008), PX173 at DLBF 188350 ("Delta will roll out new customer benefits . . . including the [X] of the first checked bag fee on all Northwest flights."); E. Phillips 12/7/10 Dep. Tr., PX390 at 41:1-7 ("Q. . . . September 2008, was it your understanding that the consensus for Delta was that the first bag fee was going to be free? . . . A. My understanding of it was yes, that this was where we stood."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 140:13-142:2 ; E-mail from M. Zessin to G. West, *et al.* (Oct. 23, 2008), PX215 at 1; Meeting Invitation from S. Laster to C.

Czuprynski, *et al.* (Oct. 20, 2008), PX206 at DLBF PD 377, 378.xls (New DL Fees: "1st Bag No Fee."); 2009 Operating Plan Update (Oct. 28, 2008), PX244 at DLBF PD 70 ("Plan only current fees (i.e. fees not same as NW).").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited documents show that Delta had not made a decision about whether the merged Delta-Northwest entity would have a free first bag fee, and because Plaintiffs' stated fact is contradicted by Plaintiffs' Additional Fact ¶ 159 (" . . . Delta continuously revisited its first bag fee decision."), and ¶¶ 209-210 (stating in the fall of 2008 Delta decided for the merged Delta-Northwest entity to have a first bag fee).

147. In an internal document preparing responses to anticipated questions for its October 15, 2008 earnings call, Delta recognized that "we are seeing some consumer preferential behavior due to the fact that we are the only mainline carrier that does not charge for the first checked bag." Delta Q3 Earnings Q&A v3 (Oct. 10, 2008), PX190 at DLBF 189520.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not show that "Delta recognized . . . ," but states merely draft responses to potential questions prepared by Delta Investor Relations. The Court can properly consider the cited evidence for purposes of the summary judgment motions.

148. **[1]** Although Delta had initially decided conclusively that there was "[n]o way, no how" that Delta would charge FBF, that the "issue [was] closed," and that a free checked bag was "part of the basic bargain" included in a plane ticket, **[2]** after private and public collusive communications with AirTran occurred in July and August, Delta recognized that AirTran might charge FBF, and its steadfast opposition to first bag fees softened: **[3]** In early August, Delta's ACS division analyzed the impact of FBF, **[4]** in early September, executives questioned whether Delta "still want[s] to hold until airtran [sic] moves?," and **[5]** in late September top executives requested an analysis and discussion of the impact of charging FBF. E-mail from R. Anderson to S. Gorman (May 28, 2008), PX34 ("No $15.00 fee. Issue Closed. . . . RA [Richard Anderson]"); E-mail from R. Anderson to S. Gorman, *et al.* (May 28, 2008), Delta Ex. 32 ("it is part of the basic bargain. . . . That is in the price of the ticket."); E-mail from H. Halter to S. Gorman, *et al.* (June 13, 2008), PX43 ("I would like to see D[elta] as the lone major not charging too."); E-mail from J. Greer to C. Cloud, *et al.* (July 9, 2008), PX63 ("Per Ed – we're not doing it. No way, no how."); PX410 at 161:2-5, 189:9-22; E-mail from S. Almeida to G. West, *et al.* (Aug. 11, 2008), PX130 (ACS first bag fee analysis); E-mail from G. West to S. Gorman (Sept. 5, 2008), PX148 at DLBAG 187470 ("I assume we still want to hold until [A]ir[T]ran moves?"); E-mail from E. Phillips to S. Scheper (Sept. 9, 2008), PX152 at DLBF 36512 ("[Anderson] wants to meet sometime during the week of September 22 to discuss the fee structure of the combined entity."); E-mail from M. Brawner to M. Randolfi, *et al.* (Sept. 15, 2008), PX154 (providing a list of "Gap Closing opportunities" that included first bag

> fees); E-mail from R. Anderson to E. Bastian (Sept. 28, 2008), Delta Ex. 80 ("We need to think about implementing the fee post merger."); E-mail from G. West to G. Grimmett (Sept. 5, 2008), PX149 ("A[nderson] asked that the two of us determine the fees for the 'new' D[elta] . . . . I just plan to propose the current D[elta] bag fees"); E-mail from P. Elledge to C. Phillips, *et al.* (Sept. 29, 2008), PX172 ("Even though we were originally advised in another exec meeting [that] final decision would be delayed until closing, this is not necessarily the case, unless we can quantify the risk.").

Defendants' Response:

Defendants object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' stated fact is contradicted by Plaintiffs' Additional Fact ¶ 159 ("Even though Delta had decided against first bag fees earlier in 2008, Delta continuously revisited its first bag fee decision."). Defendants object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited documents evidence that any "private and public collusive communications with AirTran occurred in July and August." The Court can properly consider for purposes of the summary judgment motions that in early August, Delta's ACS division analyzed the impact of FBF, and that in early September, Delta executive Gil West wrote Delta COO Steve Gorman asking: "I assume we still want to hold until [A]ir[T]ran moves?" Defendants object to **[5]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of

the cited documents evidence that "in late September top executives requested an analysis and discussion of the impact of charging FBF."

149. In mid-October 2008, in a PowerPoint analysis titled "Value Proposition," Delta estimated that AirTran was 50% likely to match a first bag fee if Delta imposed one, but estimated a 0% chance that Southwest or JetBlue would match. Value Proposition v4 (Oct. 22, 2008), PX213 at 14-15.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not evidence that "Delta estimated . . ." because the cited document is a draft presentation prepared by Delta Revenue Management, and Plaintiffs cite no evidence that anyone outside of Revenue Management saw that version of the document. The Court can properly consider for purposes of the summary judgment motions that in mid-October 2008, in a draft PowerPoint analysis titled "Value Proposition," certain employees in Delta's Revenue Management division wrote that AirTran was 50% likely to match a first bag fee if Delta imposed one, but wrote that there was 0% chance that Southwest or JetBlue would match.

150. Delta's Revenue Management and Airport Customer Service departments were both involved in creating the Value Proposition analysis. E. Bastian 9/17/10 Dep. Tr., PX367 at 46:24-47:8 ("They were both involved in the analysis."); S. Springer 6/16/09 DOJ Dep.

Tr., PX343 at 59:1-13, 113:18-114:16; E-mail from E. Phillips to G. West (Oct. 24, 2008), PX230 at DLBAG 9956; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 56-68; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶¶ 39-42; E-mail from S. Springer to J. Tanguay (Oct. 29, 2008), PX247.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely (PX230 & PX400) is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. *See* Dkt. 551 at 3. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of the cited evidence shows that Airport Customer Service was "involved in creating" the Value Proposition analysis, and because the cited excerpt to Mr. Bastian's deposition testimony was not about the Value Proposition analysis at all (PX367 at 46:24-47:8: "Q. And I'm guessing at the 200 to $300 million revenue figure was not something you just pulled out of your head, but it came from documents or materials you heard or saw or reviewed at that time? A. That's correct. Q. And those would have been the documents created by the revenue management group, correct? A. They or the ACS team. I can't remember which one prepared that analysis. They were both involved in the [first bag fee] analysis.").

151. **[1]** The analysis started in September 2008 and went through at least

seven drafts by the time the final version of the Value Proposition was completed on October 24, 2008. PX195 (v1); PX196 (v2); PX202 (v3); PX213 (v4); PX221 (v5); PX235 (v6); PX234 (final); E-mail from S. Springer to D. Elkon, *et al*. (Sept. 24, 2008), PX170 (initiating Value Proposition analysis); E-mail form E. Phillips to M. Holt, *et al*. (Oct. 13, 2008), PX192 ("We should have a good draft of the [Value Proposition] together tonight."); E-mail from E. Phillips to G. Grimmett, *et al*. (Oct. 7, 2008), PX187 (status update on Value Proposition analysis). **[2]** Further, in late September, Anderson, Bastian, and Hauenstein participated in a meeting at which the risk analysis reflected in the Value Proposition was explicitly requested. E-mail from P. Elledge to C. Phillips, *et al.* (Sept. 29, 2008), PX172 ("One key consideration is the risk when we are up against AirTran, JetBlue, Southwest – they have no fee and promote this fact. Based on the market overlap, what is the estimated risk – assuming the price sensitive nature of the traveler.").

Defendants' response:

The Court can properly consider **[1]** for purposes of the summary judgment motions. Defendants object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, PX172 does not evidence that the "risk analysis reflected in the Value Proposition was explicitly requested" in a September 29 meeting in which Anderson, Bastian, and Hauenstein participated—a supposed fact contradicted by Plaintiffs' characterization of PX170 as "initiating Value Proposition analysis" on September 24.

152. Delta executive Eric Phillips chose the 50% estimate that AirTran would match a first bag fee if Delta imposed one, but testified that he does not recall why he chose 50% and that he "didn't base it on anything other than flip of the coin." E. Phillips 12/7/10 Dep. Tr.,

PX390 at 17:22-23; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 191:7-10.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

153. Delta claims that its attribution of a 0% chance that JetBlue would match rather than the 50% chance attributed to AirTran was based on public statements or advertising by JetBlue that it would not charge a first bag fee. E. Phillips 12/7/10 Dep. Tr., PX390 at 18:7-9 ("The basis for that was just that Jet Blue had made public comments about fees and bag fees in particular that they would not implement one.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the quoted statement does not reflect what "Delta claims," merely the testimony of Delta executive Eric Phillips about how he came up with the 0% chance that JetBlue would match reflected in the initial version of the Value Proposition document, and because Delta did not "claim" in support of its summary judgment motion that the 0% chance that JetBlue would match reflected in the first version of the Value Proposition document "was based on public statements or advertising by JetBlue that it would not charge a first bag fee."

154. But in 2008, JetBlue did not advertise or represent that it would not

charge a first bag fee. A. Haak 11/16/10 Dep. Tr., PX382 at 81:9-14; F. Cannon 3/22/12 Dep. Tr., PX406 at 59:24-60:2; G. Hauenstein 5/10/12 Dep. Tr., PX415 at 35:12-14; E-mail from S. Gorman to S. Mackie (Nov. 13, 2008), PX298 at DLTAPE 3644 ("Only one airline has staked out that they will not charge fees and, as you note, that is Southwest.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely is not admissible pursuant to Fed. R. Evid. 602 and is inadmissible hearsay. The evidence upon which Plaintiffs rely does not support the stated fact.

155. After the October 23, 2008 AirTran earnings call, Delta raised its estimate of JetBlue (but not Southwest) matching a first bag fee to 25%, but Delta had no basis for this change other than the increased likelihood of AirTran matching based on Mr. Fornaro's statements. E. Phillips 12/7/10 Dep. Tr., PX390 at 22:10-14 ("Q. . . . [T]here was no basis whatsoever for the increase from zero to 25 percent on Jet Blue? A. No."); *compare* Value Proposition v4 (Oct. 22, 2008), PX213 at 14-15 (zero percent chance that JetBlue matches), *with* Value Proposition v5 (Oct. 23, 2008), PX221 at 15-16 (25 percent chance that JetBlue matches).

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited testimony does not support that Delta increased the likelihood of a JetBlue match based on "the increased likelihood of AirTran matching based on Mr. Fornaro's

statements," because the cited testimony instead evidences there was "no basis whatsoever" for that change. PX390 at 22:10-14 ("Q. . . . [T]here was no basis whatsoever for the increase from zero to 25 percent on Jet Blue? A. No.").

156. The higher probability attributed to the likelihood of AirTran matching is a result of the public and private collusive communications between Delta and AirTran. *See supra* ¶¶ 1-125.

Defendants' response:

Defendants object. Plaintiffs stated fact does not comply with Local Rule 56(B)(1) because it is "not supported by a citation to evidence." Plaintiffs' stated fact states a legal conclusion. Defendants incorporate by reference all of their responses to Plaintiffs' Additional Facts ¶¶ 1-125, and observe that Plaintiffs' stated fact is contradicted by Plaintiffs' Additional Fact ¶ 152, which states that "Delta executive Eric Phillips chose the 50% estimate that AirTran would match a first bag fee if Delta imposed one, but testified that he does not recall why he chose 50% and that he "didn't base it on anything other than flip of the coin."

157. Before AirTran's October 23, 2008 earnings call, Delta expected that its profits would decline if it imposed a first bag fee, and the Value Proposition analysis explicitly recommended against the fee, citing multiple reasons: the negative revenue impact, the negative impact on customer preference, the current economic environment, and the benefit to AirTran. Value Proposition v4 (Oct. 22, 2008), PX213 at 15-16 ("Delta should not adopt a first bag fee"); G. Grimmett 5/4/12 Dep. Tr., PX412 at 321:10-21 ("There were multiple arguments that

were used in that deck.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support the fact that "Delta" "expected its profits would decline if it impose a first bag fee" as the document reflected only the views of Delta Revenue Management. The Court can properly consider for purposes of the summary judgment motions that the draft Value Proposition document (PX213) explicitly recommended against the fee.

158. Hours before AirTran's October 23, 2008 earnings call, Delta planned not to impose a first bag fee and to repeal Northwest's fee. E-mail from G. West to M. Zessin, *et al.* (Oct. 23, 2008), PX215 at 1 ("Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not evidence that "Delta planned not to impose a first bag fee" because the document evidences that no decision about whether to adopt a first bag fee had yet been made as of October 23, 2008, and explicitly states that the decision was to be discussed among Delta's CLT on October 27. PX215 ("Gail has analyzed the book away sensitivity. She just forwarded me a rough draft of the analysis. Sounds like its [sic] about a

was[h] in terms of net revenue which would mean we would not implement 1st bag fee. *This will be discussed on Monday's CLT*.") (emphasis added).

159. Even though Delta had decided against first bag fees earlier in 2008, Delta continuously revisited its first bag fee decision. G. West 5/11/12 Dep. Tr., PX416 at 30:11-12 ("We were continuously asked to re-visit bag fees as an ongoing [e]valuation."); R. Anderson 5/3/12 Dep. Tr., PX410 at 212:5-6 ("But you always analyze, continuously analyze fares, fees, schedules."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 322:11-323:13; Delta Domestic Fees - Overview and Future Opportunities (Mar. 17, 2009), PX334 at DLBAG 20432, 20434.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

160. Delta recognized that Robert Fornaro's October 23, 2008 statements were important in Delta's analysis of whether to charge a first bag fee. E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257 ("They [AirTran] clearly want the first bag fees. Will look forward to our discussions on Monday [October 27 about adopting a first bag fee]."); P. Dailey 5/4/12 Dep. Tr., PX411 at 134:12-135:13.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed

(or disputed) facts." Dkt. 49 at 12

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, PX223 does not evidence that Fornaro's October 23, 2008 statements were "important in Delta's analysis of whether to charge a first bag fee," and because PX411 is the testimony of pre-merger Northwest employee Paul Dailey, who was not involved in Delta's analysis of whether to charge a first bag fee. The Court can properly consider for purposes of the summary judgment motions that on October 24, 2008 Glen Hauenstein emailed Richard Anderson stating: "They [AirTran] clearly want the first bag fees. Will look forward to our discussions on Monday [October 27 about adopting a first bag fee]." PX223 at DLTAPE 3257.

161. Based on Robert Fornaro's October 23, 2008 statement, Delta revised its Value Proposition analysis to reflect a 90% likelihood that AirTran would impose a bag fee if Delta acted first. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 125:7-9; G. Hauenstein 5/10/12 Dep. Tr., PX415 at 43:14-17; E-mail from G. Hauenstein to R. Anderson (Oct. 24, 2008), PX223 at DLTAPE 3257; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 233:10-17; E. Phillips 5/17/12 Dep. Tr., PX418 at 30:7-9; Value Proposition (Oct. 24, 2008), PX234 at 15-16.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support their characterization of the Value Proposition as the analysis of "Delta."

162. Delta's Value Proposition analysis provided Delta's best estimates of the revenue implications of Delta's imposition of a first bag fee. S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 45:11-17 ("The analysis as a whole was to take an honest look at where Delta was positioned . . . and to look at if we could justify charging an additional fee"); *id.* at 56:1-5 ("Q. In other words, it's your best guess or your best estimate as to share gain that Delta is currently benefitting from, from US Air; is that correct? A. That's correct."); *id.* at 58:4-5 ("The idea here was to accurately represent what we were seeing in the marketplace."); *id.* at 186:18-19 ("We generally provide a range and we go with the midpoint as our best guess."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 283:14-284:6 (testifying that the share shift analysis in the Value Proposition analysis was "[t]he best approximation of what the order of magnitude could be"); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 64:1-2 ("[Revenue Management] wanted to have an honest dialogue and discussion of the pros and cons [of first bag fees]").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not evidence that the document reflected "Delta's" "best estimates" of the "revenue implications of Delta's imposition of a first bag fee"; merely that the authors of the Value Proposition presentation in Delta's Revenue management division testified that the document reflected their "best guess or your best estimate *as to share gain that Delta is currently benefitting from, from US Air*" (PX343 at 56:1-5) or the "[t]he best approximation of *what the order of magnitude could be*" (PX350 at 283:14-284:6).

163. The Value Proposition analysis was praised by CEO Anderson and others. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 289:7-13

("[Richard Anderson] told us [at the October 27, 2008 CLT meeting that the Value Proposition analysis] was a very good deck; it was a very good discussion."); E-mail from J. Tanguay to S. Springer (Oct. 29, 2008), PX247 ("Awesome deck. Nicely done."); E-mail from M. Cole to S. Springer (Oct. 29, 2008), PX246 (Cole: "This is excellent." Springer: "It oughta be after 89 revisions from 4 different people.").

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material.

164. Southwest itself has conducted market share analyses similar to the Value Proposition and concluded that the likely share loss from charging a bag fee would "wipe out" bag fee revenue. T. Reed, *Southwest Airlines' Capacity Gains Are Panned By Wall Street Analysts*, TheStreet (May 20, 2015), PX430 at 2 ("You see the results that we have, which are affirmed by all the research that we do in marketing that say if we charged for bags, the defection rate of our customers would be such that it would more than wipe out the bag fee revenue.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely is not admissible pursuant to Fed. R. Evid. 401 or 403, and because it is inadmissible hearsay. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the quoted statement about "all the research we

do" does not evidence Plaintiffs' stated fact that "Southwest itself has conducted market share analyses similar to the Value Proposition."

165. After Robert Fornaro made statements about first bag fees on AirTran's October 23, 2008 earnings call, Delta for the first time expected that it would make money if it imposed first bag fees, because it expected AirTran to match. S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 225:13-226: 13 ("Q. . . . in prior versions [of the Value Proposition PowerPoint, PX234], it's projecting a loss, correct? A. That's correct. Q. And in this version [dated October 24, 2008] for the first time you're projecting a gain, right? A. That's correct. . . . Q. The only thing that's changed between the two versions is the probability to match associated with projected share shift to AirTran, correct? A. Correct."); Value Proposition (Oct. 24, 2008), PX234 at 16; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 292:2-12; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 115-19.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely (PX398) is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. *See* Dkt. 551 at 3. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the Value Proposition document did not reflect the views of "Delta"; it reflected only the views of Delta Revenue Management, who, as reflected in the cited document, opposed the fee even after Fornaro's October 23, 2008 statements. PX234 at 19.

166. Delta's goal is to maximize profits. E. Bastian 9/17/10 Dep. Tr., PX367 at 49:5-6; G. West 5/11/12 Dep. Tr., PX416 at 67:23-25 ("Q. . . .

ultimately, Delta's goal would be to maximize profits; is that right? A. Yes."); S. Gorman 5/10/12 Dep. Tr., PX414 at 67:8-69:15.

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited testimony does not evidence that Delta's only goal is to maximize profits. *See* PX414 at 67:8-69:15 ("as an executive officer of a public company, that in the end it's -- we have to do what's right for all of our stakeholders including our shareholders, and long-term profit is an important part of that in making decisions."). The Court can properly consider the cited evidence for purposes of the summary judgment motions.

167. The final version of the Value Proposition analysis no longer explicitly recommended against first bag fees. Value Proposition (Oct. 24, 2008), PX234 at 19.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact.

168. The final version of the Value Proposition analysis was circulated to Delta's CLT on Friday, October 24, 2008 for review. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 200:15-201:5.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

169. During an October 27, 2008 meeting of the CLT, the only written analysis or data presented was the Value Proposition analysis. E. Bastian 9/17/10 Dep. Tr., PX367 at 55:2-12, 58:20-60:13; G. Hauenstein 9/30/10 Dep. Tr., PX 371 at 136:15-17.

Defendants' response:

Defendants object. The evidence upon which Plaintiff rely does not support the stated fact because, *inter alia*, it does not establish that the Value Proposition was the only "written analysis or data" on any topic presented at the meeting. Plaintiffs' statement is not material.

170. Delta executives considered the Value Proposition in making the first bag fee decision. E. Bastian 9/17/10 Dep. Tr., PX367 at 49:7-17 ("Q. . . . would you ever make a significant revenue decision like implementing a first bag fee without seriously considering the data that you were provided by the teams reporting to you . . . ? . . . A. I certainly take the input from my team in making decisions, yes."); H. Halter 5/17/12 Dep. Tr., PX417 at 51:18-21 ("I do recall individuals saying [at the CLT meeting] that the analysis shows there's significant revenue opportunity if a fee were implemented.").

Defendants' response:

Defendants object. The evidence upon which Plaintiff rely does not support the stated fact. Plaintiffs' statement is not material.

171. Delta executives had confidence in the abilities of those who prepared

the Value Proposition analysis. E. Bastian 9/17/10 Dep. Tr., PX367 at 52:19-53:2.

Defendants' response:

Defendants object. Plaintiffs' stated fact is not material.

172. Delta executives did not request or receive any additional analysis of net first bag fee revenues beyond the Value Proposition PowerPoint that was presented on October 27, 2008. E. Bastian 9/17/10 Dep. Tr., PX367 at 55:8-12, 55:25-56:4, 57:14-20, 58:20-59:20, 60:7-13.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited testimony does not evidence that "Delta executives" "requested" the Value Proposition Powerpoint, or that Delta executives did not receive any additional analysis of net first bag fee revenues other than the Value Proposition at some time other than the October 27, 2008 CLT meeting.

173. Delta's Airport Customer Service ("ACS") division was headed by Gil West (who reported to Steve Gorman), and included Mark Zessin, Theresa Keaveny, and others. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 74:9-17, 218:15-17.

Defendants' Response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

174. Delta executives were aware that ACS was predisposed to favor a first

bag fee because gross revenues would be attributed to their budget, and revenue losses, e.g., from share shift or decreased demand, would not be deducted from their budget. G. Hauenstein 5/10/12 Dep. Tr., PX415 at 21:9-17; R. Anderson 10/6/10 Dep. Tr., PX372 at 48:17-22.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

175. Nonetheless, Delta's ACS division only wanted to implement the fee if it would be profitable for Delta. G. West 8/16/09 DOJ Dep. Tr. (Dkt. #369), PX351 at 144:7-11 ("I think we all agreed conceptually that we want to do the right thing financially for the company; that we're not divisionally – that's immaterial. It's really what's the best decision for the company."); G. West 5/11/12 Dep. Tr., PX416 at 67:23-25; S. Gorman 5/10/12 Dep. Tr., PX414 at 66:17-69:15.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

176. Delta's ACS division did not analyze share shift. M. Zessin 5/8/12 Dep. Tr., PX413 at 147:4-148:7; E-mail from G. West to M. Zessin (Sept. 5, 2008), PX145 at DLBAG 11940.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence shows only that Gil West did not ask ACS employee Mark Zessin to "analyze share shift," and does

not reflect that either Mr. West or anyone else in Delta's ACS Division "did not analyze share shift."

177. Delta's ACS division deferred to Revenue Management to analyze whether first bag fees would be profitable for Delta. M. Zessin 5/8/12 Dep. Tr., PX413 at 148:2-7 ("My mind was that because we [in ACS] were responsible only for operations, that our focus should be strictly on operations. . . . And [the e-mail from Gil West to Mark Zessin in PX145 at DLBAG 11940] was a reminder from my leader to stay focused on the logistics."); E-mail from M. Zessin to G. West, *et al*. (Oct. 23, 2008), PX215 at 1 ("Before recommending a decision [on first bag fees], I believe we [in ACS] need to review the marketing (book away) and AirTran impact data from Gail."); *id.* ("Gail [Grimmett of Revenue Management] has analyzed the book away sensitivity. . . . Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee."); M. Zessin 5/8/12 Dep. Tr., PX413 at 187:17-21 ("It's my understanding that, in terms of what he's saying here, if it was a net wash in terms of revenue, Gil's opinion is that . . . we would not be implementing a first bag fee . . . .").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not evidence that Gil West, the leader of ACS, or Steve Gorman, Delta's COO who oversees ACS, "deferred to Revenue Management to analyze whether first bag fees would be profitable for Delta."

178. In March 2008, Delta established a cross-divisional "fee team" to analyze and recommend ancillary fees for Delta. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 42:13-44:22.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

179. During 2008, Delta's fee team periodically circulated a fee matrix listing a variety of ancillary fees, including recommended fees. Meeting Invitation to Fee Team (May 27, 2008 meeting), PX32 at DLBF 35556 (attaching fee matrix, DLBF 35564); Fee Competitive Analysis/Summary (Sept. 23, 2008), PX169; E-mail from K. Howard to M. Zessin, *et al*. (Oct. 6, 2008), PX184 (attaching fee matrix); E-mail from E. Phillips to S. Springer (Oct. 16, 2008), PX201 (same); E-mail from M. Zessin to T. Keaveny (Oct. 24, 2008), PX228 (same).

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

180. ACS was responsible for the fee team's recommendation to the CLT regarding first bag fees, including the recommendation listed in the fee matrix. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 71:12-74:8, 81:10-82:16, 85:10-87:20, 327:21-328:10; Fee Competitive Analysis (March 2008), PX32 at DLBF 35564 (listing ACS as the "owner" of bag fees); Fees Combined Entity (Oct. 23, 2008), PX228 at DLBAG 11076 (same).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not evidence that the "fee team" made any recommendation to the CLT regarding first bag fees.

181. On September 2, 2008, Gil West, Senior Vice President of ACS, and Gail Grimmett, Senior Vice President of Revenue Management, were asked to recommend a fee structure for the combined Delta-Northwest entity. E-mail from G. West to G. Grimmett (Sept. 5, 2008), Delta Ex. 59; Delta-Northwest Merger, Summary of Decisions from Corporate Day 1 (Sept. 2, 2008), PX143 at DLBF 82417 ("Delta to determine Day 1 related policies and fees – Owners: Gil West and Gail Grimmett"); G. West 5/11/12 Dep. Tr., PX416 at 34:17-22.

Defendants' response:

The Court can properly consider the cited evidence for purposes of the summary judgment motions.

182. On September 5, 2008, Gil West stated that he intended "to propose the current DL bag fees [i.e., a free first bag fee] for the new DL," and Gail Grimmett supported that proposal. E-mails between G. West and G. Grimmett (Sept. 5, 2008), PX149; G. Grimmett 5/4/12 Dep. Tr., PX412 at 307:2-6.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited deposition testimony from Ms. Grimmett refers to a June 2008 email exchange (DLBAG-39194), not the September 5, 2008 email exchange. Mr. West's September 5, 2008 email does not specifically mention the issue of a first bag fee, and plaintiffs add "i.e., a free first bag fee" without citing evidence that Mr. West even considered that issue in making his more general statement in the email. Plaintiffs' stated fact is not material.

183. ACS maintained its recommendation that first bag fees should be free until after October 23, 2008, including its recommendation in the fee matrix. E-mail from G. West to G. Grimmett (Sept. 5, 2008), Delta Ex. 59 ("I plan to propose the current DL bag fees for the new DL."); Fee Competitive Analysis/Summary (Sept. 23, 2008), PX169 at DLBF 36434 ("ACS: 1st Bag Combined Entity Free"); E-mail from G. West to M. Zessin (Sept. 23, 2008), PX168 (discussing PX169 "fee matrix we reviewed with Gail" that was to be discussed at "my meeting with Glenn and Steve today"); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 156:9-20 ("Q. So is this the recommendation of ACS at this point [in early October 2008] . . . a free first bag? A. Yes."); E-mail from K. Howard to M. Zessin, *et al*. (Oct. 6, 2008), PX184 at DLBAG 11006-07 ("I updated this matrix . . . . ACS: 1st Bag Combined Entity Free."); E-mail from E. Phillips to S. Springer (Oct. 16, 2008), PX201 at DLBAG 8939-40 (attaching "Updated Fee worksheet" reflecting "ACS: 1st Bag Combined Entity Free"); E-mail from M. Zessin to T. Keaveny (Oct. 24, 2008), PX228 at DLBAG 11075-76 ("The most up-to-date fee comparison . . . . ACS: Combined Entity 1st Bag Free").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of Plaintiffs' citations establish their assumption that the first bag fee box in the "fee matrix" was the recommendation of ACS regarding the adoption of a first bag fee. Plaintiffs selectively omit citation to their own PX208, which reflects that on October 21, 2008 it was reported that there was not

agreement among Mr. West (ACS) and Ms. Grimmett (RM) on the first bag fee - it was "[t]he one loose end" of the post-closing fee structure.

184. Delta's fee team held a meeting on the afternoon of Friday, October 24, 2008, to finalize the fee proposals. E-mails between E. Phillips and M. Holt (Oct. 17, 2008) , PX204 at DLTAPE 8534 (scheduling "Fee Revenue Meeting" for October 24, 2008 to "finalize the combined entity's fee structure"); Fee Revenue Meeting Invitation (Oct. 24, 2008 meeting), PX233; E-mail from M. Zessin to G. West, *et al*. (Oct. 23, 2008), PX215 at 1.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations reflect that the first bag fee was to be discussed at the following Monday's CLT meeting, and thus would not be finalized at the October 24, 2008 fee team meeting. PX215 at 1. Plaintiffs' stated fact is not material.

185. On the morning of October 23, 2008, Mark Zessin e-mailed Gil West a "Request for Feedback in Prep for Friday's Fee Review," asking: "[g]oing into the fee review meeting on Friday, what are your thoughts concerning the current fee structure?"; and stating that Mr.

Zessin's position on the first bag fee was that "[b]efore recommending a decision, I believe we need to review the marketing (book away) and Air Tran impact data from Gail." E-mail message from M. Zessin to G. West, et al. (Oct. 23, 2008), PX215 at 1.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs selectively omit Mr. Zessin's observations that a first bag fee had an estimated "$250M annual revenue impact" and that "[n]umber of people not checking bags has remained independent of our changes in bag fees." PX215 at 1. Mr. Zessin also included a chart in his email reflecting that the percentage of Delta passenger's checking a first bag declined from July 2008 to September 2008 (and the percentage of passengers checking zero bags increased), even though Delta had not adopted a first bag fee. PX215 at 3. Plaintiffs' stated fact is not material.

186. At 8:50 a.m. on October 23, 2008, shortly before AirTran's earnings call, Mr. West responded to Mr. Zessin's request for guidance regarding the position ACS should take at the next day's fee review meeting regarding first bag fees, stating: "Gail has analyzed the book away sensitivity. She just forwarded me a rough draft of the analysis. Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee." E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1; E-mail from T. Keaveny to J. Hausner (Oct. 24, 2008), PX224 at DLTAPE 7281 (forwarding same "[f]or today's meeting").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs statement is based on the unsupported premises that Mr. Zessin's email contained a "request for guidance regarding the position ACS should take at the next day's fee review meeting regarding first bag fees" and that Mr. West responded by providing the position ACS should take at the meeting. Moreover, the relevant portion of the email from Mr. West states, "Gail has analyzed the book away sensitivity. She just forwarded me a rough draft of the analysis. Sounds like its about a was in terms of net revenue which would mean we would not implement 1st bag fee. *This will be discussed on Monday's CLT*." PX215 at 1 (emphasis added). Plaintiffs' stated fact is not material.

187. Mr. West further explained to Mr. Zessin that "[i]n general the exercise [for Friday's fee review] is to finalize what the combined fees with NW are going to be. We are going to review with the CLT on Monday." E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1; E-mail from G. Grimmett to J. Frank (Oct. 24, 2008), PX237 ("Re: Fee mtg today. . . . [W]e will send minutes, but we are presenting to the CLT on Monday and want[] to make sure we have all info.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, while Mr. West's email states that "[i]n general the exercise is to finalize what the combined fees with NW are going to be," his email states that, with respect to the first bag fee specifically, it "will be discussed on Monday's CLT." PX215 at 1. Plaintiffs' stated fact is not material.

188. Consistent with Mr. West's guidance to Mr. Zessin (in PX215 at 1), the fee matrix discussed at the October 24, 2008 fee team meeting – which Mr. Zessin described on October 24 as "the most up-to-date fee comparison" – reflected that ACS was still recommending against a first bag fee. E-mail from E. Phillips to R. Smith (Oct. 24, 2008), PX236 at DLTAPE 8573-74 ("Can you print 20 copies of the attached for my 2:30 [fee team] meeting?" . . . . "ACS: Combined Entity 1st Bag Free"); E-mail from M. Zessin to G. West, *et al*. (Oct. 23, 2008), PX215 at 1.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' statement also assumes the validity of Plaintiffs' preceding statements and citations, and thus the evidence upon which Plaintiffs rely does not support the stated fact.

189. During the October 24, 2008 fee team meeting, Mr. Zessin "[c]ompleted as directed" Mr. West's instructions, which included maintaining ACS's recommendation that first bag fees should be free.

E-mail from M. Zessin to G. West (Oct. 24, 2008), PX229; E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1; E-mail from T. Keaveny to J. Hausner (Oct. 24, 2008), PX224 at DLTAPE 7281.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited email from Mr. Zessin to Mr. West reflects that there was still a disagreement between ACS and Revenue Management regarding the first bag fee, and that Mr. Zessin advocated to Ms. Grimmett that the first bag fee had an estimated revenue impact of $250M. PX229 ("Also, as a fyi, curbside checked bag fee is estimated at $8 m by Matt. If 1st bag fee is implemented, Gail understands that fee will be eliminated, and also agrees to leave est impact at $250 m."). Plaintiffs' stated fact is not material.

190. On October 24, 2008, a revised Value Proposition analysis was sent to Mr. West changing the likelihood of AirTran matching a first bag fee to 75% based on Mr. Fornaro's October 23, 2008 earnings call statement, and reflecting that the likelihood of share shift to AirTran was therefore diminished. E-mail from E. Phillips to G. West (Oct. 24, 2008), PX230 at 9956, 9971-72; S. Springer 6/16/09 DOJ Dep. Tr.,

PX343 at 170:22-172:9; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 204:17-210:15; E-mail from S. Springer to E. Phillips (Oct. 23, 2008), PX225 ("fourth paragraph from the bottom [of an article about AirTran's earnings call] – I think our 75% number [in the October 23 draft Value Proposition estimating the likelihood that AirTran would match Delta on first bag fees] is about right").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact. The Court can properly consider for purposes of summary judgment that [i] on October 24, 2008, Mr. Phillips sent Mr. West a version of the Value Proposition document that reflected for AirTran a 75% "Probability to Match," and [ii] that Mr. Springer wrote to Mr. Phillips on October 23, 2008 (PX225) apparently referencing an article about AirTran's earnings call and stated "I think our 75% number is about right."

191. Sometime after ACS received the revised Value Proposition that incorporated changes based on Mr. Fornaro's earnings call statements, but before the October 27, 2008 CLT meeting, ACS directed that its recommendation to the CLT in the fee matrix be revised from "free" to "TBD" (as reflected in the fee matrix that was presented to the CLT). E-mail from E. Phillips to J. Robertson, *et al.* (Oct. 28, 2008), PX243 at

DLBF 35567-68 ("Yesterday afternoon, we had our fee discussion with the CLT and provided them with the attached fee matrix" which stated "ACS: 1st Bag Combined Entity TBD."); E-mail from E. Phillips to M. Zessin (Oct. 28, 2008), PX241 at DLBAG 11095; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 85:10-87:13, 327:21-328:10; Fee Competitive Analysis/Summary (October 27, 2008), PX238 at DLBAG 7991.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations do not support that ACS changed its recommendation after Mr. Fornaro's statement nor that the change in the fee matrix was related to Mr. Fornaro's statement. The "TBD" is consistent with the emails discussed above reflecting that the first bag fee was the "one loose end" for the fee team and was not going to be resolved at the October 24, 2008 fee team meeting. The cited testimony from Mr. Phillips reflects that he (a Revenue Management employee) might have changed the matrix to "TBD" but he could not recall.

192. The Value Proposition was revised again on October 24, 2008, based on

AirTran's earnings call statement, to reflect a 90% likelihood that AirTran would match the first bag fee (rather than 50% or 75%) and to reflect for the first time that it was expected to be revenue positive. Value Proposition (Oct. 24, 2008), PX234 at 15-16 (90% likelihood that AirTran matches); G. Hauenstein 9/30/10 Dep. Tr., PX371 at 125:7-11; G. Hauenstein 5/10/12 Dep. Tr., PX415 at 43:14-17; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 225:8-18, 226:9-13; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 292:2-12.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations reflect that while the October 24, 2008 version of the Value Proposition document reflected positive revenue for its "Mid-Range Estimate," other lines in that document reflected positive revenue in prior versions as well, and also reflected that revenue would be positive under various share shift assumptions. The Court may properly consider for purposes of summary judgment that the Value Proposition document was revised on October 24, 2008, including a revision of the "Probability to Match" for AirTran from 75% to 90%, a change that Mr. Hauenstein testified he suggested in light of the statement on AirTran's earnings call which indicated a high probability of their matching but not a certainty of their matching.

193. **[i]** After receiving the final version of the Value Proposition, ACS changed its position from "TBD," and **[ii]** at the CLT meeting advocated in favor of the first bag fee. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 280:16-22.

Defendants' Response:

Defendants object. Plaintiffs' statement **[i]** that ACS changed its position is not supported by any cited evidence. Regarding statement **[ii]**, the Court may properly consider for purposes of summary judgment that Mr. West and Mr. Gorman at the October 27, 2008 CLT meeting advocated in favor of the first bag fee.

194. The members of Delta's CLT were responsible for approving the first bag fee. Response of Delta Air Lines, Inc. to Civil Investigative Demand No. 25324 (Mar. 3, 2009), PX332 at DLBF 35287-88 ("The Corporate Leadership Team (CLT) was responsible for approving [bag fee] changes"); G. West 8/16/09 DOJ Dep. Tr., PX351 at 22:4-5; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 10:25-11:2; E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 11:9-11, 12:1-7, 12:17-19, 20:9-13; G. Grimmett 5/4/12 Dep. Tr., PX412 at 294:13-16, 322:23-323:3; M. Zessin 5/8/12 Dep. Tr., PX413 at 31:17-24; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 39:1-4; Delta 30(b)(6) S. McClain 10/7/10 Dep. Tr., PX373 at 62:9-17.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' stated fact is supported by citation to a pleading. The evidence upon which Plaintiffs rely does not support the stated fact. The Court may

properly consider for purposes of summary judgment that Delta's CLT had responsibility for approving the first bag fee decision in 2008.

195. The CLT decides matters by consensus. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 12:1-7, 12:17-19 ("We [the CLT] attempt to get to a consensual agreement. Obviously that's not always possible. I can't ever recall us taking a vote . . . . But it's general sentiment. Most matters . . . are decided on consensually. . . . I've never seen Richard come in and unilaterally try to make a decision on his own without the team support.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

196. Ultimately, the board of directors has final authority to determine Delta policies, including first bag fees. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 11:18-19 ("Obviously all our decisions are subject to the board of directors at Delta.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

197. The CLT's first bag fee decision was approved by the Board of Directors, if at all, after AirTran's October 23, 2008 earnings call. S. McClain 8/30/12 Dep. Tr., PX421 at 182:7-12; Board of Directors Telephone Meeting Invitation (Oct. 29, 2008 meeting), PX249.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in

violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. The evidence upon which Plaintiffs rely does not support the stated fact.

198. Even after AirTran's assurance that it would follow Delta's lead in implementing a first bag fee, the decision to implement the fee was a "tough" decision. E-mail from R. Anderson to J. Pavoni (Nov. 11, 2008), PX288 ("First bag fee was a tough decision."); E-mail from S. Gorman to S. Mackie (Nov. 12, 2008), PX298 at DLTAPE 3644 ("The decision to adjust the bag fees was a tough decision after a healthy debate of the pros and cons.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cite no evidence in support of their argumentative assertion of an "assurance" by AirTran.

199. The CLT discussed whether to charge a first bag fee at an October 27, 2008 meeting. E-mail from B. Presley to G. Grimmett, *et al.* (Oct. 24, 2008), PX231; Delta Memo to DOJ (July 13, 2011), PX404 at DLBF 107891.

Defendants' response:

The Court can properly consider this statement for purposes of summary judgment.

200. During the October 27, 2008 meeting, every attendee voiced an

opinion on whether to implement a first bag fee. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 281:4-5.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. The stated fact is not material.

201. During the October 27, 2008 meeting, the first bag fee was initially opposed by the majority of attendees, including Eric Phillips, Gail Grimmett, Glen Hauenstein, Hank Halter, Mike Campbell, and Ned Walker. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 276:17-280:13 ("Q. So you said you were against it? A. I did. . . . And [Gail Grimmett] was against it. . . . Q. What about Hauenstein? A. He was against. . . . Q. Okay. What about Hank Halter? A. Hank was against it. . . . Q. Okay. What about [Mike] Campbell? A. He was against."); *id.* at 287:10-14 ("Everybody else . . . you're all against the first-bag fee? A. Yeah. On the initial kind of round the room."); G. West 8/16/09 DOJ Dep. Tr., PX351 at 178:18-180:10 ("So he started with Revenue Management and with Gail and the folks that were there, including Glen . . . all of which I recommend not adopting the bag fee . . . . [A]nd some of the other folks weighed in. At that point when it got to me everybody was not for adopting a bag fee."); G. West 5/11/12 Dep. Tr., PX416 at 29:18-19 ("My recollection is Mr. Halter did not support a first bag fee."); *id.* at 88:11-12 ("Many people [at the CLT] thought we should not have a bag fee."); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 77:22-78:5; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 128:13-14, 131:19-133:7 ("And Eric [Phillips] gave the presentation and the recommendation for us not to do a bag fee. I think Ned Walker weighed in not to have a bag fee. Mike Campbell initially weighed in not to have a bag fee[.] . . . I would say until we got to Ed that the general tonality of the room was that there was – I would have bet that we would have gotten all the way around and we would have chosen not to adopt a bag fee."); G. Grimmett 5/4/12 Dep. Tr., PX412 at 314:5-15.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, it does not establish who all was present at the meeting and therefore cannot establish that the identified individuals constituted a "majority" of all attendees.

202. While Revenue Management had previously recommended against the fee mainly because of the negative expected impact on profits (PX213 at 15-16), during the October 27, 2008 meeting, Revenue Management opposed a first bag fee because it viewed the expected revenue gain as negligible compared to the disadvantage associated with providing AirTran a substantial benefit from the joint imposition of first bag fees, which would help AirTran survive and compete against Delta. Value Proposition (Oct. 24, 2008), PX234 at 8, 16 (mid-range estimate of $26M gain); G. Hauenstein 9/30/10 Dep. Tr., PX371 at 125:20-24 ("Q. So is the best estimate of your team at this point that a first bag fee would be revenue accretive? A. I would say revenue neutral. $26 million on a $35 billion company is – you know, the margin of error is zero."); *id.* at 134:23-25; E-mail from G. Hauenstein to E. Bastian (Oct. 31, 2008), PX256 ("I [t]hought we kind of agreed that for [Delta] it is a wash."); PX234 at 16 (projecting $70 million benefit to AirTran); G. Grimmett 5/4/12 Dep. Tr., PX412 at 320:10-12 ("Revenue management did not want to do anything to help AirTran"); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 76:21-771 ("there was a point of view that Airtran was struggling and . . . this [fee] would actually provide a revenue source for a struggling carrier"); PX234 at 11 (projecting $70 million benefit to AirTran); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 29:9-11 ("we had concerns about making LCCs a more viable competitors against us."); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 63:14-64:2 (testifying to Delta's concern that first bag fees would help AirTran "get a lot of revenue that would help them compete more effectively against us.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' statement contradicts their own assertions that Revenue Management and its Value Proposition presentation argued against first bag fee based on share shift concerns.

203. During the October 27, 2008 CLT meeting, Delta discussed the revenue risks of implementing a first bag fee, and the initial discussion focused on two vastly divergent outcomes: first, if AirTran followed, which was projected to result in a net gain of $56 million; and second, if AirTran did not follow, which was projected to result in a net loss of $244 million. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 69:15-19 ("The revenue folks . . . talked to their concern about share shift"); G. West 8/16/09 DOJ Dep. Tr., PX351 at 179:22-180:4 ("[T]hey were generally concerned with the book-away effect."), *id.* at 188:1-6. ("there's a slide in [the Value Proposition] that if AirTran matches, if they don't match, what the scenarios look like. I think that was probably where most of the discussion happened initially when Revenue Management was going through the presentation."); Value Proposition (Oct. 24, 2008), PX234 at 16 (providing mid-range estimate that assumes a $300 million swing depending on whether AirTran matched).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not

support the stated fact because, *inter alia*, this statement and evidence contradict previous of Plaintiffs' statements. The evidence reflects only that the Revenue Management division discussed such risks, and that the financial information presented were not "projections" but merely a range of potential revenue sensitivities.

204. During the October 27, 2008 CLT meeting, Delta discussed the statement made by Mr. Fornaro on the earnings call. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 76:13-14, 77:6-9 ("Q. Going back to the discussion at the [October 27] meeting for a moment . . . . Was there any mention of statements that Mr. Fornaro had made a few days previously? A. I believe somebody indicating that that had come up on the call.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

205. During the October 27, 2008 CLT meeting, Delta discussed the likelihood that AirTran would match a first bag fee, which was affected by AirTran's earnings call. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 76:15-19 ("We talked about all of the carriers that had matched and that hadn't matched. So AirTran came up"); E. Bastian 9/17/10 Dep. Tr., PX367 at 103:6-14, 104:24-105:4 ("Q. Do you recall saying anything about AirTran at the October 27th, 2008 meeting? A. I recall when we were talking about the potential decisions and actions by our competitors as indicated and I thought AirTran would likely – would likely match."); G. West 8/16/09 DOJ Dep. Tr., PX351 at 186:5-188:6; Value Proposition (Oct. 24, 2008), PX234 at 15-16 (90% likelihood that AirTran matches).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

206. During the October 27, 2008 CLT meeting, several individuals pointed out that – after taking into consideration the likelihood that AirTran would match the first bag fee – there was a significant revenue opportunity for Delta in imposing the first bag fee. H. Halter 5/17/12 Dep. Tr., PX417 at 51:18-21 ("I do recall individuals saying [at the CLT meeting] that the analysis shows there's significant revenue opportunity if a fee were implemented.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cited evidence does not tie the revenue opportunity for Delta to the likelihood that AirTran would match the first bag fee.

207. During the October 27, 2008 CLT meeting, Ed Bastian spoke in favor of the fee because he "was worried about Delta surviving and no one else," and Delta needed all the incremental revenue it could get in order to fund pensions and other financial obligations. E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 71:13-72:15 ("I said . . . not that I didn't believe the [Value Proposition] analysis, but I didn't believe this was a revenue opportunity that we could pass on."), 77:2-4; E. Bastian 9/17/10 Dep. Tr., PX367 at 46:8-49:6 (testifying that he favored first bag fees on October 27, 2008 because of "the positive revenue implications" of the fee); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 281:5-18 ("Ed said . . . . we've got a whole lot of funding obligations that we have to take into account over the course of the next months, mainly pension, and to walk away from a fee like this is basically . . .

irresponsible.").

Defendants' response:

The Court may properly consider this statement for purposes of summary judgment.

208. After Ed Bastian spoke about the likelihood of AirTran matching and stressed the importance of any incremental revenue to fund pensions and other obligations, some CLT members changed positions, and the CLT agreed to charge a first bag fee. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 133:6-7 ("I'd say [Ed Bastian] was persuasive. So he essentially cast the deciding ballot."); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 287:15-20 ("[A]fter Ed threw out the pension obligations I think everyone kind of – there was that again kind of open forum of discussion. And then Hank changed to a yes, and I think Campbell did as well based on that."); *id.* at 288:3-4 ("What [Richard] said was, Ed, you raise a very good point about what this company is facing."); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 74:5-6 ("After I spoke [Richard Anderson] chimed in and he agreed with me.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, none of Plaintiffs' citations evidence that Mr. Bastian spoke about the likelihood of AirTran matching. Rather, Plaintiffs' prior statements of fact (*e.g.*, #207) and citations show that Mr. Bastian was not concerned with any other airline and, in particular, viewed AirTran's potential response as irrelevant.

209. Delta approved the first bag fee at the October 27, 2008 CLT meeting.

E-mail from G. West to S. Gorman (Oct. 27, 2008), Delta Ex. 94 (indicating that decision had just been made); E-mail from S. Gorman to G. West (Oct. 28, 2008), PX242 ("With the decision yesterday on 1st . . . bag fee . . . ."); G. Grimmett 9/28/10 Dep. Tr., PX370 at 217:12-21; E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 75:13-17; G. West 8/16/09 DOJ Dep. Tr., PX351 at 197:9-11; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 136:18-20; Delta Memo to DOJ (July 13, 2011), PX404 at DLBF 107891 ("Delta's decision to adopt a first bag fee [was] made initially during the CLT's October 27, 2008 CLT meeting, and then finalized on November 3, 2008.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The Court can properly consider for purposes of summary judgment that the pre-merger Delta CLT initially approved the first bag fee at the October 27, 2008 CLT meeting but did not formalize the decision on a post-merger fee structure, including a first bag fee, until after the close of the merger so that Delta could assess how other fees might be adjusted to account for a first bag fee and obtain input from Northwest executives.

210. Delta vetted the first bag fee again at the November 3, 2008 CLT meeting, shortly after the Delta-Northwest merger closed. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 367:16-368:4 ("Q. And did Anderson say that, We are doing it? Did he announce it or – A. Yeah,

or it was kind of like: We're all in agreement that we are going to do the first bag. Q. And there were a bunch of nods? A. Yes . . . . A collective [nod]."); E. Phillips 5/17/12 Dep. Tr., PX418 at 27:21-28:6; E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 76:2-12; Delta Memo to DOJ (July 13, 2011), PX404 at DLBF 107891 ("Delta's decision to adopt a first bag fee [was] made initially during the CLT's October 27, 2008 CLT meeting, and then finalized on November 3, 2008.").

Defendants' response:

The Court may properly consider for purposes of summary judgment that the harmonized fee structure for the combined post-merger entity, including the first bag fee, was finalized at the November 3, 2008 CLT meeting.

211. Delta's decision to impose a first bag fee was based on the expectation that the fee would be profitable for Delta. E. Bastian 9/17/10 Dep. Tr., PX367 at 46:8-49:6 (testifying that he spoke in favor of first bag fees at the October 27, 2008 CLT meeting because he expected the fee to be profitable); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 71:13-16; R. Anderson 10/6/10 Dep. Tr., PX372 at 61:18-62:3, 87:9-13; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 346:8-13; Value Proposition (Oct. 24, 2008), PX234 at 16; H. Halter 5/17/12 Dep. Tr., PX417 at 51:18-21.

Defendants' response:

The Court may properly consider this statement for purposes of summary judgment.

212. When AirTran announced its first bag fee shortly after Delta, Delta was unsurprised and pleased. E-mail from G. West to M. Medeiros (Nov. 12, 2008), PX294 ("No surprise."); E-mail from G. Hauenstein to P. Dailey, *et al.* (Nov. 12, 2008), PX292 (stating sarcastically: "What a surprise!!!!"); E-mail from G. Hauenstein to S. Gorman, *et al.* (Nov. 12,

2008), PX295 (stating sarcastically: "What a surprise."); G. Hauenstein 5/10/12 Dep. Tr., PX415 at 47:12-13 ("sorry for the sarcasm . . . I don't think it was a surprise"); E-mail from T. Bach to G. Hauenstein (Nov. 12, 2008), PX296 ("This is big money in the bank. Really good news."); Email from T. Bach to P. Dailey (Nov. 12, 2008), PX293 ("Yee-ha! Good news.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' evidence does not show that "Delta," nor all Delta employees, or even all of the executives involved in the CLT, had the stated response. Plaintiffs' stated fact is not material.

213. Following its October 27, 2008 CLT meeting, Delta rushed to implement the fee because "[l]osing a week of new fees could be millions." E-mail from E. Bastian to E. Phillips, *et al.* (Oct. 31, 2008) PX255 at DLBF 35579.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not evidence that "Delta rushed." Moreover, the cited evidence relates to the entire new fee

structure (e.g., "various bag fee changes," "confirm we will get Res Fees and Skymiles fees completed by Wednesday."), not just the first bag fee. Plaintiffs' stated fact is not material.

214. Delta's technology vendor, Travelport, was unprepared to implement the fee on Delta's timetable because it was "the first [it had] heard about implementing 1st bag fee," thereby delaying implementation of the fee until December 5, 2008. E-mail from P. Keller, Travelport to S. Henderson, *et al.* (Nov. 4, 2008), PX265 at DLBF 3595 (P. Keller: "[T]his is the first we've heard about implementing 1st bag fee — so very surprised by the comment about doing it tomorrow."); E-mail from R. Creekmore to S. Henderson, *et al*. (Nov. 4, 2008), PX265 at DLBF 3595 ("[T]he effective date has not been determined as of yet. That will depend greatly upon . . . how long it will take [Travelport] for programming changes."); E-mail from R. Creekmore to M. Zessin (Nov. 4, 2008), PX264; Delta/Northwest Day One Customer Handling (Oct. 2, 2008), PX183 at DLBF PD 88 ("Changing fees quickly is constrained by automation timelines...."); E-mail from P. Keller, Travelport to R. Creekmore, *et al.* (Nov. 5, 2008), PX276 ("[W]e feel we can complete 1st bag fee [programming] by 12/4."); Status Update (Dec. 15, 2008), PX310 at 5; E-mail from M. Zessin to G. Grimmett (Oct. 29, 2008), PX248 at DLTAPE 7304 ("[I]t will take approximately 30 days to complete the programming changes.").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

The evidence upon which Plaintiffs rely does not support the stated fact

because, *inter alia*, Plaintiffs' cited evidence contradicts their statement, reflecting instead that Delta employees expected programming changes to take approximately 30 days, and Travelport agreed it could meet Delta's "12/4" effective date. Plaintiffs' stated fact is not material.

215. AirTran would have benefited more by not charging a first bag fee and Delta charging a first bag fee. Value Proposition (Oct. 24, 2008), PX234 at 11 (predicting a $295 million increase in revenue from share shift to AirTran if AirTran did not match Delta's first bag fee compared to a $70 million increase in revenue from first bag fees if AirTran did match Delta); H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 36-37, 42-44, 50-52.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants also object to Plaintiffs' Exhibit PX234 as it lacks the proper foundation for the facts cited.

216. AirTran did not evaluate share shift related to first bag fees. M. Klein 11/17/10 Dep. Tr., PX383 at 195:16-17 ("[AirTran] didn't really evaluate share shift").

Defendants' response:

Defendants object. The cited evidence does not support the stated fact.

217. Kevin Healy recognized that not charging a first bag fee after Delta started charging the fee could provide a competitive advantage for AirTran that would outweigh the revenue from the bag fee. J. Smith 11/15/10 Dep. Tr., PX381 at 91:17-21 ("Q. Do you recall specifically who opposed a first bag fee [on a November 7, 2008 conference call / meeting]? A. Well, Kevin [Healy] . . . was the main one"); J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 129:7-16, 131:6-13; E-mail from J. Smith to K. Brulisauer (Nov. 7, 2008), PX281; E-mail from K. Healy to R. Wiggins (Aug. 21, 2008), PX138 at AIRTRAN 54727 ("I'm leaning towards not doing 1st bag even if DL does."); E-mail from K. Healy to M. Klein (Sept. 15, 2008), PX153.

Defendants' response:

Defendants object because the evidence upon which the Plaintiffs rely does not support Plaintiffs' assertion that a competitive advantage for AirTran would outweigh the revenue from the bag fee.

218. Despite the advantages of not charging a first bag fee and without conducting a share shift analysis, AirTran imposed a first bag fee because Mr. Fornaro had already agreed in the October 23, 2008 earnings call that he would do so if Delta acted first. AirTran Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264; E-mail from A. Haak to K. Healy (Nov. 6, 2008), PX278 at AIRTRAN 64716 ("I think we have already decided this"); E-mail from S. Fasano to N. McLoughlin (Nov. 5, 2008), PX269 ("We will announce 1st bag this week."); David Field, *Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4 ("Bob Fornaro says: 'We were waiting for Delta . . . .'").

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, because *inter alia*, Mr. Fornaro had not "already agreed" to

anything in the October 23, 2008 earnings call. Defendants also object because Plaintiffs' stated fact states a legal conclusion. Defendants object to Plaintiffs' Exhibit PX311 because it is inadmissible hearsay.

219. It would be economically appropriate to penalize AirTran if its public statements altered Delta's behavior and caused a price increase. D. Carlton 2/24/11 Dep. Tr., PX402 at 37:11-20 ("if . . . AirTran makes a particular statement and then that alters the behavior that would otherwise occur and, as a result, prices go up, from an economic point of view . . . I might find that action undesirable and, therefore, the appropriate way to prevent such action is to penalize the person making the communication, AirTran.").

Defendants' response:

Defendants object because Plaintiffs' statement is an argumentative legal conclusion. Plaintiffs' statement is also not material.

220. In October 2008, Delta analyzed share shift that occurred during the three months after US Airways implemented a first bag fee compared to the three months before the fee and found that Delta had gained $470 million in annualized share shift (after reductions to control for capacity changes and general system improvement) from US Airways while Delta was not charging a first bag fee, amounting to an increase in market share for Delta of almost 5%. Value Proposition (Oct. 24, 2008), PX234 at 10 (reflecting that Delta gained 1.2 points of market share over its original 12.1 points of market share after US Airways implemented a first bag fee, which was 0.6 points more than the share gain by US Airways, or a relative increase of almost 5%, *i.e.*, 0.6 / 12.1 = 4.96%); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 88:1-95:15, 151:14-152:12.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence does not support at 5% shift in market share, and Plaintiffs' evidence shows the actual increase in market share was 0.6%. The cited document does not evidence that the 0.6% increase was attributable to first bag fee related share-shift, and speculates that less than half of the increase could have been related to it. The cited evidence also does not support the assertion that the Value Proposition was "Delta's" analysis. Plaintiffs' stated fact is not material.

221. In October 2008, Delta understood that Northwest was experiencing lost market share after imposing a first bag fee. Value Proposition (Oct. 24, 2008), PX234 at 17 ("Share down for NW in MSP, DTW and MEM for SEP (DL has slight gains) . . . Recent announcement by Southwest to start service to MSP will put additional share at risk . . . Southwest's recent share spike in DTW coincides with Northwest implementing a first bag fee . . . These are early results and will most likely be more dramatic with Southwest's advertising campaign . . . Early results show that Southwest is picking up share in DTW where Northwest is uncompetitive"); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 188:1-11 ("it looks like [the first bag fee] was having an impact [on market share], yes.").

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs citations show that a Delta employee opposed to the first bag fee, who was one of the authors of the Value

Proposition slides, believed that first bag fee impacted Northwest's market share. The evidence does not establish that "Delta understood." Plaintiffs' stated fact is not material.

222. Delta understood that low-cost carrier overlap posed a greater constraint on Delta than it did on Northwest. E-mails between G. Gorman to G. Hauenstein (Sept. 18, 2008), PX157 (Gorman: "I will say that [Northwest's] competitive situation out of MSP and DTW is quite a bit different than [Delta's]." Hauenstein: "You bet it is. If we did not have the [low-cost carrier] exposure I would be all over this."); Value Proposition (Oct. 24, 2008), PX234 at 4 ("Delta much more exposed to [low-cost carriers]" than Northwest); *id.* at 18 (Delta is the network with the "most [low-cost carrier] overlap" and Northwest is the "least exposed network" in terms of low-cost carrier overlap).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

223. In October 2008, Delta did not conduct an analysis of share shift from other legacy carriers besides US Airways because Delta "didn't have time...." S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 54:6-55:12.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited testimony only reflects that Mr. Springer did not conduct such an analysis because of a lack of time.

224. In analyzing whether the first bag fee would be profitable, Delta's Value

Proposition analysis conservatively assumed that first bag fees caused only $83 million in share shift from all legacy carriers, even though this figure represented a very conservative estimate, as it considered only U.S. Airways and not other legacy carriers, and assumed that only 18% of the share shift that occurred after U.S. Airways imposed a first bag fee was attributable to the first bag fee rather than other factors. Value Proposition (Oct. 24, 2008), PX234 at 10, 15 ($47 to $118 million range of share shift (with an average of $83 million) based on 10-25% "Attributable to Lack of First Bag Fee"); Value Proposition v2 (Oct. 14, 2008), PX196 at 4 ("$54-$108M is a conservative estimate (only 10-20% of total share shift attributed to lack of bag fee) based on an analysis of D[elta] share shift from US Airways *only*"); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 54:22-56:5, 197:8-198:7.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the figures were ranges and estimates based on guesses of a few individuals, and Plaintiffs' statement refers to language that appeared only in an earlier version of the Value Proposition slides.

225. Delta had substantially more direct domestic overlap with low-cost carriers than any other major legacy carrier. Value Proposition (Oct. 24, 2008), PX234 at 18 (reflecting that Delta had 48% overlap, United 37%, US Airways 27%, American 16%, Northwest 12%, and Continental 12%).

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document argued that Delta had a higher domestic overlap on an available-seat-miles basis based solely on the

airline schedules of the first quarter of 2008, and reflects that Delta's domestic overlap on an available-seat-miles basis for that quarter was close to or the same as other of the major legacy carriers when multi-airport cities (e.g., New York, Chicago, Houston, and Dallas) were considered. Plaintiffs' stated fact is not material.

226. Delta estimated that if its low-cost carrier competitors did not match Delta's first bag fee, it could lose $330 million in revenue to AirTran in Atlanta overlap markets alone, $70 million to JetBlue in JFK overlap markets, and $30 million to Southwest in Salt Lake City overlap markets. Value Proposition (Oct. 24, 2008), PX234 at 16.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cite no evidence that "Delta" made any such estimates. The cited document, presented by employees of the Revenue Management division of Delta, did not estimate or predict a specific amount of market share or revenue loss that would occur if its low-cost carrier competitors did not match Delta's first bag fee. Plaintiffs restate the "Worst Case" estimate from one slide of the document and inaccurately cast it as "Delta's estimate[]."

227. Delta expected that, if AirTran did not follow Delta in imposing a first bag fee, Delta's imposition of a first bag fee would cause Delta to lose

money because of share shift. Value Proposition v4 (Oct. 22, 2008), PX213 at 11, 15 (estimating $300 million loss due to share shift to AirTran); Value Proposition (Oct. 24, 2008), PX234 at 11, 16 (estimating $330 million loss due to share shift to AirTran); Email from P. Elledge to G. Hauenstein (Sept. 30, 2008), PX180 at DLTAPE 6394 ("majority of [agents'] customers know Delta is different on the $15 bag fee," which can be "a tiebreaker"); E-mail from G. Grimmett to R. Ioriatti, *et al.* (Oct. 7, 2008), PX186; E-mail from S. Springer to M. Clark, *et al.* (Oct. 14, 2008), PX193 at DLBAG 7911; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 106:13-107:10, 184:6-186:2; E-mail from S. Gorman to S. Mackie (Nov. 12, 2008), PX298 at DLTAPE 3645; E-mail from R. Anderson to S. Mackie (Nov. 20, 2008), PX301 at DLBF 49485; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 70:11-16, 221:12-13, 250:10-13; E-mail from S. Slater to C. Phillips, *et al.* (Sept. 30, 2008), PX177 at DLBF 106399; Delta Baggage Handling Study (Sept. 2008), PX181 at DLBAG 10966 (customers "will actively seek out airlines that do not pass on [bag fees]").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cite a number of emails and deposition excerpts that do not discuss whether AirTran will match. Some of the cited documents were written after AirTran had already matched. Some of the documents also note that the first bag fee was not among customers' primary drivers when selecting an

airline. The citations to two version of the Value Proposition slides do not evidence what "Delta" "expected," as discussed above.

228. Delta expected that, if AirTran matched a first bag fee, Delta's imposition of a first bag fee would be profitable for Delta. Value Proposition v4 (Oct. 22, 2008), PX213 at 15; Value Proposition (Oct. 24, 2008), PX234 at 16; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 128:2-22.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited evidence only shows that certain employees who prepared the Value Proposition slides to advocate against the adoption of a first bag fee conceded that it would be "net revenue gain" if AirTran matched. The Value Proposition slides do not evidence what "Delta expected," as discussed above.

229. According to Plaintiffs' economic expert, Dr. Hal Singer, and his application of economic game theory using Defendants' own economic analysis, "it would have been economically irrational for either Defendant to have unilaterally adopted a first bag fee . . . ." H. Singer Am. Merits Report, (Feb. 22, 2011), PX398 at ¶¶ 2, 25-55 (analyzing Value Propositions); H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 26-40 (analyzing Value Propositions).

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to

Dr. Singer's merits opinions. Dkt. 551 at 3. Plaintiffs' statement is not a statement of material fact, it is a statement of Plaintiffs' expert's opinion which then cites to Plaintiffs' expert's opinion.

230. AirTran never performed a share shift analysis even though AirTran recognized that a share shift analysis was an important factor in a unilateral decision to charge a first bag fee. E-mail from K. Healy to M. Klein, *et al.* (Nov. 5, 2008), PX270 at AIRTRAN 64714 ("In your valuation, we have to make some estimate for the value of not implementing the first bag fee – share shift, good will"); M. Klein 11/17/10 Dep. Tr., PX383 at 195:16-18 ("No, we didn't really . . . evaluate share shift...."); E-mail from M. Klein to K. Healy, *et al.* (Nov. 5, 2008), PX268.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact because *inter alia*, PX268 shows an estimate of share shift by M. Klein that was dwarfed by anticipated bag fee revenues.

231. AirTran roughly estimated that, if Delta charged a first bag fee but not AirTran, AirTran could gain $3 to $4 million per month just from replacing connecting passengers with higher-margin local Atlanta customers who had previously been lost to competitors. E-mail from

M. Klein to K. Healy, *et al.* (Nov. 5, 2008), PX268; M. Klein 11/17/10 Dep. Tr., PX383 at 195:13-17, 200:9-201:3, 211:6-10 (admitting that his share shift estimate was not comprehensive).

Defendants' response:

Defendants object because the statement is not material.

232. In contrast to AirTran's rough estimate described in Paragraph 230 above and as Delta's analysis found, share shift to AirTran would have substantially exceeded first bag fee revenue to AirTran if AirTran's share shift analysis had included: (1) increased revenues from all potential passengers on AirTran routes, including connecting passengers; (2) non-Atlanta routes; (3) local Atlanta passengers that had not previously been lost by AirTran; and (4) share shift related to airlines other than Delta. Value Proposition (Oct. 24, 2008), PX234 at 11, 16 (projecting up to $330 million in market share shift to AirTran for Atlanta alone); M. Credeur, *Southwest Sees $1 Billion Atlanta Revenue Gain on AirTran Merger*, Bloomberg (Oct. 6, 2011), PX405 at 2 (stating that 65% of AirTran's traffic is connecting traffic); D. Kasper 10/15/10 Dep. Tr., PX375 at 131:2-4 ("Atlanta has a high, high proportion, significantly over 50 percent the last time I looked, of connecting traffic."); AirTran Raymond James Growth Airline Conference Tr. (Feb. 5, 2009), PX326 at 3 ("Atlanta is about 62% of our network."); 2008 AirTran Annual Report, SEC Form 10-K, PX328 at 3 (stating that approximately 38% of AirTran's daily operations were outside Atlanta); H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶ 38.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants object to Plaintiffs' Exhibit PX234 as it lacks the proper foundation to support the stated fact. Defendants object to Plaintiffs' Exhibit PX405 because it is inadmissible hearsay.

233. The price of oil represented a substantial portion of AirTran and Delta's costs in the summer of 2008. Offsite Discussion Outline (June 11, 2008), PX38 at AIRTRAN 37355 (stating that oil "represents 50% +/- of [AirTran's] costs."); E-mail from R. Fornaro to Board of Directors (July 3, 2009), PX344 at 490866 ("Energy . . . is our largest cost driver."); AirTran Statement of Facts ¶ 12; Delta 2008 Annual Report, SEC Form 10-K (Mar. 2, 2009), PX331 at 6 ("Our results of operations are significantly impacted by changes in the price and availability of aircraft fuel. ... Percentage of Total Operating Expense 2008: 38%").

Defendants' response:

The Court may properly consider the cited evidence for purposes of summary judgment.

234. In the first half of 2008, oil prices increased substantially. A. Dick Report (Jan. 7, 2011), EX27 at Exhibit 3; 2008 Crude Oil Prices (Dec. 5, 2008), PX306 at 1-3; U.S. Gulf Coast Jet Fuel Spot Price FOB, PX448 at 5.

Defendants' response:

The court may consider for purposes of the summary judgment motions that in the first half of 2008, oil prices increased substantially.

235. A number of airlines, including Delta and AirTran, attributed their imposition of second bag fees to the high price of oil. AirTran Second Bag Fee Press Release (April 11, 2008), PX19 at AIRTRAN 54401 ("in the face of record fuel costs, it is necessary to charge a nominal fee for passengers choosing to check a second bag"); Delta Second Bag Fee Announcement (March 28, 2008), PX17 at DLBF 31940-41 ("Due to rising fuel costs and business decisions reflecting today's competitive landscape, Delta will begin charging $25 for a second checked bag").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The court may consider for purposes of the summary judgment motions that Delta and AirTran attributed, in part, their imposition of second bag fees to the high price of oil.

236. On May 21, 2008, American Airlines announced that, in light of the increase in oil prices, it would impose a $15 first bag fee. American Airlines Press Release (May 21, 2008), PX24 at DLBAG 8521.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in

violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

237. Several other airlines imposed first bag fees in the summer of 2008 and cited the high cost of fuel in explaining their decision to charge the fee. Northwest News Release (July 9, 2008), Delta Ex. 46 at DLTAPE 1758-59 (announcing first bag fee "to address the unprecedented run-up in oil prices"); US Airways Accelerates Business Model Transformation (June 12, 2008), Delta Ex. 35 at DLBF 2415, 2418; M. Ramsey, United Sets $15 Fee for First Bag (June 12, 2008), Delta Ex. 36 at DLBF 17878; D. Koenig, Continental Airlines to Charge $15 for 1st Checked Bag (Sept. 5, 2008), Delta Ex. 56 at DLBF 21565; E-mail from P. Elledge to G. Hauenstein, *et al.* (Sep. 30, 2008), PX179 at DLTAPE 3978-79 ("would be more appropriate to match at a time when fuel cost is over the top, comparable to O[ther] A[irlines'] timing when they implemented").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

238. Fuel costs declined dramatically in the second half of 2008, from approximately $3.89 per gallon in July 2008, to $2.32 in October, to $1.88 in November, and to $1.38 in December. U.S. Gulf Coast Jet Fuel Spot Price FOB, PX448 at 5; A. Dick Expert Report (Jan. 7, 2011), EX27 at Exhibit 3; 2008 Crude Oil Prices (Dec. 5, 2008), PX306; E-mail from A. Haak to S. Rosenkranz, *et al.* (Nov. 12, 2008),

PX289 at AirTran 16524060 (commenting on the "continued drop in fuel prices"); J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 118:4-6; Value Proposition (Oct. 24, 2008), Delta Ex. 83 at DLBF 35119 (S. Gorman's notes: "Low fuel. Did we miss the window of opp[ortunity]?"); Delta Q3 2008 Earnings Call Tr. (Oct. 15, 2008), Delta Ex. 82 at DLBF 38179 ("The dropping oil prices in recent weeks clearly provides upside to our liquidity position ...."); AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3270 ("oil's come down quite a bit"); Delta Air Lines Analyst Meeting Tr. (Dec. 9, 2008), PX308 at DLBF 188559 (Bastian: "we're looking at an unprecedented fall in fuel prices").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited evidence shows that fuel costs did not decline every month during the second half of 2008 (September increased compared to August), and also shows that daily prices were volatile in both directions during that time (at times, increasing by several dollars from one day to the next). Plaintiffs stated fact is not material.

239. Delta's merger with Northwest led to a substantial decline in annual operating expenses. E. Bastian, Finance Committee Presentation (Oct. 27, 2008), PX240 at DLBF PD 2666 ("Merger . . . Provides

unparalleled synergies in excess of $2B"); R. Anderson, Delta: One Great Airline Presentation (Feb. 26, 2009), PX330 at DLBF 193394 ("Fuel price decline, capacity savings and merger synergies provide $6+ billion improvement over 2008").

Defendants' response:

Defendants' object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

240. Plaintiffs' economic expert, Dr. Hal Singer, determined that "the unilateral adoption of first bag fees by Delta or AirTran during the fourth quarter of 2008 would have run counter to each firm's independent business interests." H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶ 75.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to the Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants further object because the evidence upon which Plaintiffs rely does not support the stated fact.

241. Increasing prices when costs are declining is contrary to a company's economic self-interest. H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 78-81, 86-88; G. Grimmett 9/28/10 Dep. Tr., PX370 at 180:6-17; A. Dick 2/25/11 Dep. Tr., PX403 at 162:14-17 ("As a

general proposition, everything else held equal, lower input costs generally will be followed over some time period by – by a reduction in price. Competition will lead to that outcome."); D. Lee 10/14/10 Dep. Tr., PX374 at 25:13-17 ("when fuel prices are very, very high, airlines essentially to cover the cost of that fuel and their prices tend to get elevated and when prices go down, they tend to come down as well."); D. Carlton 2/24/11 Dep. Tr., PX402 at 145:4-6 ("in a competitive market, . . . as costs fall, I would expect prices to fall"); Value Proposition v1 (Oct. 14, 2008), PX195 at 7 ("Current fuel trends do not lend themselves easily to increased fees"); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 73:1-8; S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 91:10-92:6.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to the Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants further object because the cited evidence does not support the stated fact that under all circumstances this is true and does not consider other factors that would lead a rational company to raise fees. Plaintiffs' statement is also a legal conclusion.

242. The imposition of a first bag fee constituted a price increase for those customers who checked bags. D. Kasper 10/15/10 Dep. Tr., PX375 at 63:20-22; H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶ 78; H. Singer Class Cert. Reply Report (Nov. 8, 2010), PX378 at ¶¶ 78-82.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to the Defendants' *Daubert* motion related to Dr. Singer's opinions. Defendants further object that the cited evidence does not support the stated fact because the net effect on different customers varied considerably.

243. Delta and AirTran understood that unilaterally imposing a first bag fee when fuel costs were declining was not feasible because it would create negative publicity and a backlash from customers. S. Fasano 12/1/10 Dep. Tr., PX387 at 33:7-21; S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 91:10-92:6 ("The prospect of now implementing a fee [after oil prices dropped], it was a customer service disaster. It was suicide."); E-mail from P. Elledge to G. Hauenstein (Sept. 30, 2008), PX179 at DLTAPE 3978-79 ("From a visibility standpoint, would be more appropriate to match at a time when fuel cost is over the top, comparable to [other airlines] timing when they implemented vs announcing when fuel is below $100."); Value Proposition v1 (Oct. 14, 2008), PX195 at 7 ("Current fuel trends do not lend themselves easily to increased fees"); E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 320:4-321:12; E-mail from L. Holly to J. Cigola (Nov. 13, 2008), PX297 at AIRTRAN 4296.

Defendants' response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, does not establish that "Delta" or "AirTran" "understood" what Plaintiffs assert, and Plaintiffs' evidence is inadmissible because it lacks a

proper foundation. Defendants also object because Plaintiffs' stated fact is not material.

244. Starting with the crash of Lehman Brothers in September 2008, the U.S. economy was mired in a severe recession. AirTran 30(b)(6) K. Healy 6/3/10 Dep. Tr., PX360 at 40:18-24; D. Carlton 2/24/11 Dep. Tr., PX402 at 136:22-137:3 ("Q. By late October of 2008 . . . was the country mired in a severe recession? A. In the latter part of 2008, yes."); Delta Press Release (Apr. 21, 2009), PX338 at AirTran 27004325 ("worst economic recession in our lifetime"); D. Lee Surrebuttal Report (Dec. 8, 2010), PX392 at 5; E. Bastian, Finance Committee Presentation (Oct. 27, 2008), PX240 at DLBF PD 2666 ("Domestic economy now entrenched in recessionary cycle"); Delta Air Lines Analyst Meeting Tr. (Dec. 9, 2008), PX308 at DLBF 188565 (E. Bastian: "[T]his is the most difficult revenue environment any of us in our collective experience has seen").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

245. The recession reduced demand for Delta and AirTran's services. AirTran Answer ¶ 60 (Dkt. #146); AirTran 30(b)(6) K. Healy 6/3/2010 Dep. Tr., PX360 at 40:12-24; E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 59:17-19 ("[T]he economy was collapsing, and we were seeing a tremendous amount of reductions in terms of bookings."); Delta: One Great Airline – 2008 Investor Day (Dec. 9, 2008), PX307 at 41558.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

246. Increasing prices when demand is declining is contrary to a company's economic self-interest. H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 75-77; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶¶ 28-29; D. Carlton 2/24/11 Dep. Tr., PX402 at 139:4-6, 12-19 ("during a period in which demand is declining, I would expect total price to be falling"); E-mail from M. Klein to K. Healy, *et al*. (Jan. 31, 2008), PX12 at AIRTRAN 40308 ("I'm somewhat afraid of charging for checking bags ... in this upcoming revenue environment I'm not sure we want to do anything that portrays us in a negative way."); Value Proposition v4 (Oct. 22, 2008), PX213 at 16 ("The current economic environment has affected demand, and is not conducive to increasing or implementing new fees"); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 196:1-12, 276:8-16 (". . . I told [Richard at the October 27, 2008 CLT meeting] that I recommended against it. . . . [B]ased on what we were seeing with demand moving forward that it wasn't a good time to implement the fee."); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 46:19-47:10, 72:4-22 ("we were . . . against having a first-bag fee [because] we were already starting to see the demand softening"); A. Dick 2/25/11 Dep. Tr., PX403 at 171:7-9 ("[E]verything else held constant, generally a decline in demand will lead to a – or be associated with a decline in price."); D. Lee 10/14/10 Dep. Tr., PX374 at 212:1-5 ("[A]ll other things equal . . . in a period of . . . declining demand . . . you would try to stimulate demand by lowering your fares."); P. Elledge 5/2/12 Dep. Tr., PX409 at 73:11-75:16, 82:2-8; Delta Finance Committee, Fuel Hedging Discussion (May 15, 2009), PX341 at DLBF 48170 ("Since airlines are largely price-takers, fare increases (ancillary and/or fuel surcharges) are only possible in a strong revenue environment"); H. Halter 5/17/12 Dep. Tr., PX417 at 64:22-65:11 ("Q. What other environment [besides a

strong revenue environment] would fare increases be possible. [A.] I honestly don't know[.]").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to the Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants further object because the cited evidence does not support the stated fact that under all circumstances this is true and does not consider other factors that would lead a rational company to raise fees.

247. According to Defendants' experts, it would be contrary to an airline's economic interests to maintain or increase base fares after unbundling base fares and first bag fees absent a conspiracy. E. Gaier 2/22/11 Dep. Tr., PX401 at 53:22-54:7 ("I don't think that would, under the standard assumptions, be in economic interest to raise the base fares [after unbundling]. Q. Would it also be contrary to Delta and AirTran's economic interest to keep fares unchanged after unbundling first bag fees from base fares? A. Yes, I think [it] would."); D. Lee Expert Report (Sept. 24, 2010), PX369 at ¶ 15 (opining that imposing bag fees "without a resulting decline in base fares is inconsistent with the constraints imposed by competition in the domestic U.S. airline industry"); D. Kasper Expert Report (Sept. 24, 2010), Delta Ex. 3 at ¶

26 ("Dr. Singer's argument that Delta could increase the price of one component of the service it offers to some passengers without a resulting reduction in base fares is also inconsistent with the degree of competition Delta faces across its system[.]"); A. Dick 2/25/11 Dep. Tr., PX403 at 41:18-42:16 ("[T]he outcome [*i.e.*, the impact to consumers in terms of paying a higher price] will not be the same" if the fee were imposed unilaterally versus collusively).

Defendants' response:

Defendants object because the evidence cited by Plaintiffs does not support the stated fact because the evidence does not show that "absent a conspiracy" it would be contrary to economic interest to maintain or increase base fares (*i.e.*, that it would be against economic interest in all other circumstances).

248. Delta and AirTran maintained or increased fares relative to other airlines after Delta and AirTran started charging first bag fees. H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 94-95; H. Singer Class Cert. Reply Report (Nov. 8, 2010), PX378 at ¶¶ 25, 27, 35, 50; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 132-144; J. Smith 11/15/10 Dep. Tr., PX381 at 50:4-7; R. Anderson 10/6/10 Dep. Tr., PX372 at 101:18-102:7 ("I don't think it's had any impact on average fares"); P. Dailey 6/10/10 Dep. Tr., PX362 at 17:4-6 ("At the time the fee was implemented, we didn't make an immediate corresponding reduction in price."); E-mail from B. Munson to K. Healy (Aug. 27, 2009), PX352 (analysis of "FL v SW head-to-head average fares" reflecting that AirTran fares increased relative to Southwest fares after AirTran's introduction of first bag fees).

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' *Daubert* motions related to Dr. Singer's opinions. Moreover, Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact.

249. After imposing first bag fees, Delta and AirTran generated a higher percentage of revenue from ancillary fees than any other major airlines. Airline Revenue Tables Q3 2009, PX358 at AIRTRAN 592940 (Table 1B: Ancillary Fee Revenue Compared to Total Operating Revenue).

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the Plaintiffs' stated fact is not material. Plaintiffs' cited evidence also does not support the stated fact because, *inter alia*, the evidence shows that Delta's percentage was the same as US Airways' percentage on the cited table for the first quarter of 2009 and US Airways' percentage was the highest for the fourth quarter of 2008.

250. AirTran gained record profits in 2009 driven in part by ancillary revenue. AirTran 2009 Finance Review and 2010 Outlook (Feb. 2010), PX359 at AIRTRAN 2070724 ("What Drove Our Record Profits in 2009? . . . Ancillary revenue initiatives").

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12

Defendants object because Plaintiffs' stated fact is not material.

251. In justifying its adoption of a first bag fee, Delta issued a press release stating that it was "aligning" its first bag fee to match Northwest "to ensure a seamless and consistent customer experience," and "to simplify the travel experience." Delta Press Release (Nov. 5, 2008), PX272.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' statement does not accurately quote Delta's press release, which addressed numerous policies and fees. Plaintiffs' statement grafts together words from the first sentence of the press release, which was not specific to the first bag fee, and words from a quote several paragraphs later.

252. Delta carried almost twice as many domestic passengers as Northwest from Q1 2007 to Q3 2008. Delta Response to Pls.' 2d Interrogatories, No. 2 (Sept. 21, 2010), PX368; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 139:9-11.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citation reflects that Delta carried 167,612,627 passengers during that period, and Northwest carried 98,918,902 during that period. Plaintiffs' stated fact is not material.

253. Until after AirTran's October 23, 2008 earnings call, Delta planned to align the first bag fees of the combined carrier by repealing Northwest's fee. E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1; West to G. Grimmett (Sept. 5, 2008), PX149; Fees Combined Entity (Oct. 23, 2008), PX228 at DLBAG 11076; Fee Competitive Analysis/Summary (Sept. 23, 2008), PX169 at DLBF 36434; Fees Combined Entity (Oct. 6, 2008), PX184 at DLBAG 11007; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 156:9-20; Fee Competitive Analysis/Summary (Oct. 16, 2008), PX201 at DLBAG 8940.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact.

254. Delta chose to adopt the fee for the combined carrier to increase profits after reaching a common understanding with AirTran to charge first bag fees, not to simplify customers' travel experience. *Compare* Value Proposition v4 (Oct. 22, 2008), PX213 at 15 (projecting likely net loss), *with* Value Proposition (Oct. 24, 2008), PX234 at 16

(projecting likely net gain based on understanding that AirTran would match).

Defendants' response:

Defendants object. Plaintiffs' statement asserts an improper legal conclusion that Defendants reached a common understanding. The evidence upon which Plaintiffs rely also does not support the statement.

255. Imposing a first bag fee "was a complication during the boarding process," not a simplification. S. Gorman 12/10/10 Dep. Tr., PX393 at 122:13-123:21.

Defendants' response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited testimony states, "The primary context of that press release was that we were in the process of merging two airlines. At the -- in the airports with the customers and on board and on the Web sites and everything else and anything that aligned policies, procedures, fees, anything else simplified the experience for the customer. And as a very small subset within that very general context of what that press release was really about, which was all of those factors, not just first bag fees, I still will tell you I think in general, yes, that the fees were a part of a simplification of the overall experience even though it was a complication during the boarding process. Because if nothing else, it would have been extremely difficult and nearly impossible to have two

different sets of bag fees for customers depending upon whether they went out to nwa.com or delta.com to buy their tickets." Plaintiffs' statement also is not material.

256. In justifying its adoption of a first bag fee, Delta stated that "[t]he increase in bags being carried on board Delta aircraft this year tells us that customers are not differentiating Delta as the only major airline not charging for a first checked bag." Delta Press Release (Nov. 5, 2008), PX272 at AIRTRAN 7013 (quoting Steve Gorman); Draft Press Release (Nov. 4, 2008), PX263 at DLBF 115202 (substantially similar quote in Q&As section); *id.* at DLBF 115203 (substantially similar quote in Media Statements section); *id.* at DLBF 115204 (substantially similar quote in Customer Care section).

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The Court may properly consider for purposes of summary judgment that in the cited press release, Delta executive Steve Gorman was quoted as saying "The increase in bags being carried on board Delta aircraft this year tells us that customers are not differentiating Delta as the only major airline not charging for a first checked bag."

257. Numerous Delta employees reviewed the draft press release before it was issued. E-mail from K. Connell to S. McClain, *et al.* (Nov. 4, 2008), PX262; E-mail from K. Connell to E. Bastian, *et al.* (Nov. 4, 2008), PX267; H. Halter 5/17/12 Dep. Tr., PX417 at 58:18-59:12, 61:23-62:14.

Defendants' response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12. Plaintiffs' stated fact is not material.

258. Delta knew that an increase in bags being carried on board Delta aircraft in 2008 was caused by Delta's imposition and increase in its second bag fee. S. Gorman 5/10/12 Dep. Tr., PX414 at 57:2-8 ("I think people . . . carried on when they normally on a long trip would check two. They now carried on one, plus the briefcase or purse to try to avoid the second bag fee."); *id.* at 57:12-22 ("Q. When Delta increased its second bag fee to $50, did you expect that the second bag volume would drop again? A. . . . second bag particularly, I think . . . a lot of people carried on that they maybe wouldn't have carried on."); Bags per Passenger PowerPoint, PX445 (reflecting that number of checked bags per passenger was correlated with Delta second bag fees); S. Gorman 5/10/12 Dep. Tr., PX414 at 83:7-88:22 (discussing PX445); E-mail from M. Rogers to M. Clark, *et al.* (Nov. 5, 2008), PX274; E-mail from B. Cummings to G. West, *et al*. (July 22, 2008), PX95 at DLBF PD 2455 ("Starting May 5, we saw a 15% YOY reduction for second bags checked. June decline nearly doubled at 27%.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, nearly all of Plaintiffs' citations relate to checked-bag statistics rather than carry-on bags and the cited evidence does not establish that "Delta knew" what Plaintiffs' statement asserts. Plaintiffs' stated fact is not material.

259. Delta knew that customers were differentiating between airlines that charged bag fees. S. Almeida 12/3/10 Dep. Tr., PX389 at 47:2-53:12, 88:4-90:3; G. Grimmett 9/28/10 Dep. Tr., PX370 at 124:18-128:4; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 48:18-49:16, 88:1-89:19, 245:17-21; E-mail from S. Almeida to G. West (Aug. 11, 2008), PX130 at DLBF 36508 ("In recently conducted brand tracking studies, 'not charging for the 1st checked bag' was given as a primary reason for choosing to book Delta[.]"); Delta Baggage Handling Study (Sept. 2008), PX181 at DLBAG 10956 ("once [travelers] identify the airlines that do charge [bag fees], they avoid those airlines going forward"); *id.* at DLBAG 10966 ("While customers understand the necessity of charging for bags, they will actively seek out airlines that do not pass on such charges."); E-mail from P. Brooks to T. Keaveny (Oct. 22, 2008), PX211 (forwarding PX181 – Delta Baggage Handling Study); Value Proposition (Oct. 24, 2008), PX234 at 10 (recognizing Delta share shift gains from US Airways); *id.* at 17 (recognizing Northwest share shift losses due to its first bag fee); *id.* at 19 ("Adopting a first bag fee would negatively impact our already middle-of-the-road standing in customer preference"); G. Hauenstein 9/30/10 Dep. Tr., PX371 at 70:10-18; G. Grimmett 5/4/12 Dep. Tr., PX412 at 299:8-18; M. Zessin 5/8/12 Dep. Tr., PX413 at 176:2-3.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not

support the stated fact because, *inter alia*, Plaintiffs' cited evidence also states "Respondents are confused as to which airlines are charging for bags and which are not …" (PX181 at DLBAG-00010956) and the cited evidence does not establish that "Delta knew" what Plaintiffs' statement asserts. Plaintiffs' stated fact regarding bag fees generally is not material.

260. In September 2008, Delta's Customer Insight and Analytics group completed a Baggage Handling Study, which reported that customers "prefer the 'bag charge' to be included in the ticket price," and "will actively seek out airlines that do not pass on [bag] charges." Delta Baggage Handling Study (Sept. 2008), PX181 at DLBAG 10965-66.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the document cited by Plaintiffs states at the outset that survey participants were confused about which airlines charge for bags, and also reflects that customer reactions to bag fees varied. Plaintiffs' stated fact is not material.

261. In Delta's Brand Tracking Studies, "'not charging for the 1st checked bag' was given as a primary reason for choosing to book Delta." 1st Bag Analysis (Aug. 11, 2008), PX137 at DLBAG 12217.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the evidence does not show that the

"brand tracking studies" referenced in the cited Delta powerpoint were "brand tracking studies" conducted by Delta. The cited quote is also inadmissible hearsay. Plaintiffs' stated fact is also not material.

262. Delta knew that all of its bag fees caused an increase in carry-ons, including second bag fees. S. Gorman 12/10/10 Dep. Tr., PX393 at 104:17-25 ("I think it's a product of the bag fees in general, whether it's the first bag fee, the second bag fee, the three to five, the greater than five . . . the oversize, the overweight . . . means that they're trying to carry on more."); G. West 5/11/12 Dep. Tr., PX416 at 73:24-74:2; Northwest CSA Policy Task Force Meeting Minutes (Oct. 13, 2008), PX299 at DLBAG 39348 ("Carry-on volume continues to grow and strain boarding process [on Northwest].").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is also not material.

263. Delta anticipated that the imposition of a first bag fee would cause an increase in the volume of carry-on bags. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 383:7-12; G. West 5/11/12 Dep. Tr., PX416 at 13:12-19; E-mail from M. Carney to M. Zessin, *et al*. (Oct. 30, 2008), Delta Ex. 103 at DLBAG 9914.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations only reflect that certain Delta employees anticipated that the imposition of a first bag fee could cause an increase in the volume of carry-on bags (not that "Delta anticipated"), and that post-merger a Northwest employee reported that Northwest had experienced an increase with the adoption of a first bag fee but not a second bag fee. Plaintiffs' stated fact is also not material.

264. Delta projected a 150% increase in delays related to loading of bags from the imposition of a first bag fee. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 71:19-72:2; 1st Bag Analysis (Aug. 11, 2008), PX129 at DLBF 35051.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the August 2008 document at issue in Plaintiffs' citations contains a potential range of 10% to 150%. Plaintiffs' stated fact is also not material.

265. Delta expected that first bag fees would hurt consumer perception of their brand. E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 320:4-10; E-mail from S. Slater to C. Phillips, *et al*. (Sept. 30, 2008), PX177 at DLBF 106399; Value Proposition (Oct. 24, 2008), PX234 at 19 ("Adopting a first bag fee would negatively impact our already middle-of-the-road standing in customer preference").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cite an email chain that states a first bag fee is "probably not a primary driver" and that "price, sked [schedule], FF [frequent flyer] loyalty are still the primary carrier choice drivers so this [first bag fee] is a 'tie breaker' element. The deposition citation contains a witness' 'um-hmm' identification of an email. The third citation is to the Value Proposition document discussed above, which is not evidence of what "Delta" "expected." Plaintiffs' stated fact is also not material.

266. AirTran justified imposing a first bag fee by explaining that it was still recovering from the effects of fuel prices. E-mail from C. Tinsley-Douglas to J. Graham-Weaver (Dec. 31, 2008), PX313; AirTran Draft Press Release (Nov. 10, 2008), PX284 at AirTran 3025211; David

Field, *Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4.

Defendants' Response:

Defendants object to Plaintiffs' Exhibit PX311 because it is inadmissible hearsay. The court may consider for purposes of the summary judgment motions that AirTran justified imposing a first bag fee by explaining that it was still recovering from the effects of fuel prices.

267. AirTran's fuel cost when its first bag fee went into effect was at its lowest level since June 2005. H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶ 27.

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

268. AirTran's unhedged fuel savings was more than offsetting revenue softness. Email from R. Fornaro to W. Skowronski (Nov. 21, 2008), PX302; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶ 19-21.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

269. AirTran blamed its imposition of a first bag fee on declining demand. D. Field, *Airline Bag Fees: Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4 ("Bob Fornaro says: . . . 'Certainly at first fuel costs were the reason, and now it's declining demand.'").

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material. Defendants object to Plaintiffs' Exhibit PX311 because it is inadmissible hearsay.

270. As reflected in a draft press release that was subsequently changed, AirTran's real reason for adopting a first bag fee was to "join with its largest competitor, Delta-Northwest." Draft Press Release (Nov. 10, 2008), PX285 at AIRTRAN 6740; *see also* David Field, *Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4 ("Bob Fornaro says: 'We were waiting for Delta . . . .'").

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants object to PX311 because it is inadmissible hearsay.

271. AirTran's imposition of first bag fees when fuel prices were falling was the result of **[1]** collusion, and its claim that fuel costs were to blame was **[2]** pretextual. H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶ 27.

Defendants' Response:

Defendants object to **[1]** because Plaintiffs' stated fact states a legal conclusion. Defendants also object to **[1]** because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3. Defendants object to **[2]** because Plaintiffs' stated fact states a legal conclusion. Defendants also object to **[2]** because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

272. Delta executives initially testified that Delta would not make a first bag fee decision until after the closing of the merger with Northwest because Delta wanted input from Northwest. R. Anderson 10/6/10 Dep. Tr., PX372 at 60:13-19 ("So we were waiting because Northwest was in a different position than we were and we couldn't talk to any of the executives there about what their experience had been. And so ultimately we needed to get past the actual closing of the merger to be able to really analyze whether we were going to put in a first bag fee or not."); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 39:8-12 ("So we needed to get the data, have the facts in front of us, but could not and would not make a decision until we absolutely got to a point where we could include the Northwest people into the conversation."); E. Bastian 9/17/10 Dep. Tr., PX367 at 45:6-8 ("[W]e couldn't conclude, we didn't want to conclude, until we had [Northwest's] point of view.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' selective and incomplete citations to deposition testimony are contradicted by other of their Statements of Fact and their interpretations of testimony from the same Delta executives' testimony. See e.g., ¶¶ 208, 209; PX355 at 75:13-19 (Mr. Bastian testifying regarding the pre-merger October 27, 2008 CLT meeting, "I don't know if we made a final decision. Clearly the - - we all left the room with the view that we were going to implement, But we couldn't implement until we had the Northwest point of view in the room."). The Court can properly consider for purposes of summary judgment that Delta did not formalize the decision on a post-merger fee structure, including a first bag fee, until after the close of the merger so that Delta could assess how other fees might be adjusted to account for a first bag fee and obtain input from Northwest executives.

273. Delta's argument that it did not make the first bag fee decision until after the Northwest merger closed was intended to demonstrate a lack of pretext with regard to the timing of Delta's decision. Mem. in Supp. of Delta's Mot. to Dismiss at 10 (Dkt. #73-2); Hr'g Tr. 56:11-16 (Jan. 27, 2011) (Dkt. #264).

Defendants' Response:

Defendants object. Plaintiffs' statement is an improper legal conclusion

related to argument from the briefing on a motion to dismiss in this case. Plaintiffs' statement also cites to a pleading and a hearing transcript rather than to evidence.

274. But, despite its initial position, Delta later unequivocally asserted that it did not seek or receive input from Northwest regarding the first bag fee prior to making its decision. R. Anderson 5/3/12 Dep. Tr., PX410 at 204:8-10 ("Q. Before making a decision on first bag fees, did Delta receive any input from Northwest Airlines? A. None at all."); P. Dailey 12/12/10 Dep. Tr., PX394 at 66:5-67:7; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 367:5-9; Phillips 12/7/10 Dep. Tr., PX390 at 35:2-9; E-mail from D. Huseth to S. McClain (Feb. 11, 2009), PX327 ("[Northwest] had no visibility to the decision by [Delta] to adopt the first bag fee . . . . We attempted to share information regarding the NW collections – but decision was made faster than that information could be provided."); E-mail from R. Kassner to P. Dailey (Nov. 4, 2008), PX261 at DLBAG 399 ("I don't think we ever thought the first [Northwest] would hear of [Delta's first bag fee decision] was in a press release, that is crazy."); E-mail from E. Phillips to D. Thompson (Nov. 3, 2008), PX260 at DLTAPE 8906 ("As you know, we haven't been able to communicate anything related to fees until the merger closed, so Tom (or anyone at NW) doesn't even know about the fee changes.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' statement is improper argument of counsel and a legal conclusion.

Also, the evidence upon which Plaintiffs rely does not support the statement (the next question in the deposition elicited testimony about post-merger input from Northwest executives about the first bag fee). Plaintiffs' statement refers to their argument regarding Delta's alleged "initial position" in the preceding paragraphs, and Delta incorporates its objections to those paragraphs.

275. Contemporaneous documents indicate that Delta made its decision to impose first bag fees on October 27, 2008, two days before the Northwest merger closed. E-mail from G. West to S. Gorman (Oct. 27, 2008), Delta Ex. 94 (indicating that decision had just been made); E-mail from S. Gorman to G. West (Oct. 28, 2008), PX242 (referencing "decision yesterday"); G. Grimmett 9/28/10 Dep. Tr., PX370 at 217:12-21; G. West 8/16/09 DOJ Dep. Tr., PX351 at 197:9-11; G. Hauenstein 9/30/10 Dep. Tr., PX371 at 136:18-20; ; S. Carey, *et al.*, *Delta Air Lines, Northwest Complete Merger*, Wall St. J. (Oct. 30, 2008), Delta Ex. 99 at DLBF 23688.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' statement is improper argument of counsel and a legal conclusion. The Court can properly consider for purposes of summary judgment that at the October 27, 2008 meeting, the CLT reached a consensus that charging the fee was

the right course.

276. Delta claimed that it needed to align fees immediately after the Northwest merger closed. R. Anderson 10/6/10 Dep. Tr., PX372 at 60:25-61:5, 66:11-14.

Defendants' Response:

Defendants object. Plaintiffs' statement is improper argument of counsel.

277. But airlines can maintain separate fee structures after a merger, just as Southwest and AirTran did. F. Cannon 3/22/12 Dep. Tr., PX406 at 83:9-20 (admitting that Southwest and AirTran maintained different first bag fee policies and that there was "[n]othing that I know of" that would prevent the continuation of different first bag fee policies).

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material. Defendants also object to Plaintiffs' Exhibit 406 because it is inadmissible for lack of proper foundation. Plaintiffs' statement is also improper argument of counsel ("But…").

278. Delta did not want to implement first bag fees during the peak summer travel season. E-mail from S. Gorman to B. Presley, *et al.* (May 27, 2008), Delta Ex. 32 ("I think we should not reconsider it until after the summer peak."); Baggage Steering Committee (July 18, 2008), PX91 at DLBF 36503 ("1st Bag Checked . . . Recommendation . . . continue to monitor AA through end of the summer and re-evaluate."); CLT Baggage Service Review (June 16, 2008), Delta Ex. 37 at DLBF 35301 ("continue to monitor OA through end of the summer").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence

should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

279. The peak travel season ended at the beginning of September, but Delta did not impose the first bag fee then. R. Anderson 5/3/12 Dep. Tr., PX410 at 187:19-23.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

280. After determining that first bag fees would be profitable, Delta rushed to announce and implement the fee. E-mail from E. Bastian to E. Phillips, *et al.* (Oct. 31, 2008), PX255 at DLBF 35579 ("Losing a week of new fees could be millions.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not evidence that "Delta rushed." Moreover, the cited evidence relates to the entire new fee structure (e.g., "various bag fee changes," "confirm we will get Res Fees and Skymiles fees completed by Wednesday."), not just the first bag fee. Plaintiffs' stated fact is not material.

281. Delta recognized that if it decided to charge a first bag fee – which Northwest already charged, there was no reason to wait until after the Northwest merger closed. E-mail from P. Elledge to C. Phillips, *et al.* (Sept. 29, 2008), PX172 ("Even though we were originally advised in

another exec meeting final decision would be delayed until closing, this is not necessarily the case, unless we can quantify the risk.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact.

282. One of Delta's technology vendors, Travelport, was unprepared to implement a first bag fee when Delta told Travelport of its decision on November 3, 2008, delaying implementation until December 5, which is when Travelport was able to commit to completing the necessary programming. E-mail from P. Keller, Travelport to S. Henderson, *et al.* (Nov. 4, 2008), PX265 at DLBF 3595 ("[T]his is the first we've heard about implementing 1st bag fee . . . 4, 2008), PX265 at DLBF 3595 ("[T]he effective date has not been determined as of yet. That will depend greatly upon . . . how long it will take [Travelport] for programming changes."); E-mail from R. Creekmore to M. Zessin (Nov. 4, 2008), PX264; Delta/Northwest Day One Customer Handling (Oct. 2, 2008), PX183 at DLBF PD 88 ("Automation timeline is a barrier to a successful implementation"); Meeting Invitation from R. Creekmore (Nov. 4, 2008 meeting), PX266; E-mail from P. Keller, Travelport to R. Creekmore, *et al.* (Nov. 5, 2008), PX276; Status Update (Dec. 15, 2008), PX310 at 5; E-mail from M. Zessin to G. Grimmett (Oct. 29, 2008), PX248 at DLTAPE 7304.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact

because, *inter alia*, Plaintiffs' cited evidence contradicts their statement, reflecting instead that Delta employees expected programming changes to take approximately 30 days, and Travelport agreed it could meet Delta's "12/4" effective date. Plaintiffs' stated fact is not material.

283. Factors that facilitate collusion include: an oligopolistic industry; homogeneity of products; transparent pricing; and substantial barriers to entry. H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶ 69 ("[T]he domestic airline market is characterized by several factors that facilitate the establishment of monopoly power through collusion: (a) high market concentration (that is, a small number of dominant firms), (b) homogeneity of products, (c) transparent pricing by firms, and (d) high barriers to entry.").

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' *Daubert* motion related to Dr. Singer's opinions. Dkt. 551 at 3. Defendants further object that the stated "fact" is a legal conclusion.

284. AirTran and Delta operate in an oligopoly industry. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 70-72; A. Dick Expert Report ¶ 25 (Jan. 7, 2011), Delta Ex. 2 ("The airline industry is generally regarded by economists as an example of an oligopolistic market."); E. Gaier 2/22/11 Dep. Tr., PX401 at 16:16-17:1; Delta Mem. in Support of Mot. to Dismiss at 12 (Dkt. #73-2).

Defendants' Response:

The Court can properly consider the stated fact for purposes of summary

judgment.

285. Air travel is a commodity business. A. Haak, Confessions of a Low Cost Carrier, ATA Internal Audit Conference (April2009), PX335 at AIRTRAN 2069981 ("This is a commodity business."); A. Haak 11/16/10 Dep. Tr., PX382 at 98:16-100:5; H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶ 73; D. Lee 10/14/10 Dep. Tr., PX374 at 33:8-18 ("the purchase decision is driven for some subset of passengers . . . primarily by price").

Defendants' Response:

Defendants object that the cited evidence does not support the stated fact that air travel is a commodity business for all passengers. Plaintiffs' stated fact is not material.

286. Airline pricing is highly transparent. Singer Class Cert. Report (June 30, 2010), PX363 at ¶ 74; D. Lee 10/14/10 Dep. Tr., PX374 at 22:18-23 ("[T]he Internet . . . has led to what economists would refer to as price transparency."); *id.* at 58:7-59:3; E. Gaier 2/22/11 Dep. Tr., PX401 at 21:1-2 ("So I would say it's among the more transparent industr[ies] in terms of base fares.").

Defendants' Response:

The Court can properly consider the stated fact for purposes of summary judgment.

287. Substantial barriers to entry existed in the airline industry. H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 75-76; E. Gaier 2/22/11 Dep. Tr., PX401 at 14:20-15:10 ("[T]here certainly are barriers to entry in the form of the capital to start up an airline. . . . [T]here are . . . network-type barriers to entry as well."); AirTran

2008 Airline Industry Review (Jan. 13, 2009), PX316 at AirTran 15443314 ("Tight credit makes it difficult to attain capital.").

Defendants' Response:

Defendants object that the cited evidence does not support the stated fact that there are "substantial" barriers to entry. Plaintiffs' stated fact is not material.

288. The airline industry has high fixed costs. E. Gaier 2/22/11 Dep. Tr., PX401 at 13:15-21 ("very high fixed costs, it's a capital-intensive industry").

Defendants' Response:

The Court can properly consider the stated fact for purposes of summary judgment.

289. The industry had excess capacity in 2008. E. Bastian, Financial Update (June 3, 2008), PX36 at 34628 ("continuing excess capacity"); Delta Q2 2008 Earnings Call Tr. (July 16, 2008), PX85 at DLTAPE 4450 ("more industry capacity has to come out"); Delta Answer ¶ 41 (Dkt. #147); AirTran Q2 2008 Earnings Call Tr. (July 29, 2008), PX101 at DLTAPE 4128 ("our capacity needs to be reduced"); AirTran Tr. of Calyon Securities Airline Conference (Sept. 18, 2008), PX164 at DLBF PD 6588 ("What has been missing is the capacity reduction to support these fare increases.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' statement is a broad and vague assertion about the entire airline industry for an entire calendar year, but

Plaintiffs' citations are limited to statements made in or about the second and third quarters of 2008 and from only two airlines. Plaintiffs' stated fact is not material.

290. Delta and AirTran have millions of customers. H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 84-85.

Defendants' Response:

The Court can properly consider for purposes of summary judgment that Delta and AirTran have provided airline service to millions of customers.

291. Delta, Northwest, and other airlines have previously conspired to fix prices. *See* Competitive Impact Statement, *United States v. Airline Tariff Publ'g Co.*, No. 92-2854 (D.D.C. filed Mar. 17, 1994), PX1 at 9-25 (DOJ finding that Delta and other airlines conspired to fix prices through the use of computerized fare dissemination services); Plea Agreement, *United States v. Northwest Airlines LLC*, No. CR-10-204-JDB (Aug. 27, 2010), PX366 at ¶ 4 (guilty plea of Delta subsidiary to price-fixing); *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 691 (D. Minn. 1995) (denying summary judgment because Plaintiffs had "come forward with sufficient credible evidence from which reasonable inferences can be drawn to support their anticompetitive theory").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

292. Delta, Southwest, and other airlines are currently being investigated for collusion via public statements and communications through Wall Street analysts. *See* T. Maxon, *Justice Is Looking Into Airline Collusion on Holding Down Capacity*, Airline Biz Blog, Dallas Morning News

(July 1, 2015), PX439.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely is not admissible pursuant to FRE 401 and 403, and because PX439 is inadmissible hearsay. Plaintiffs' stated fact is not material.

293. In calling for an investigation into collusion, Senator Blumenthal noted the "history of collusive behavior" that has plagued the airline industry. Letter from Sen. Blumenthal to W. Baer, Assistant Attorney General, Antitrust Division, DOJ (June 17, 2015), PX438 at 3.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely is not admissible pursuant to FRE 401 and 403, and because PX439 is inadmissible hearsay. Plaintiffs' stated fact is not material.

294. Delta is AirTran's closest competitor. Draft AirTran Press Release (Nov. 10, 2008), PX285 at AIRTRAN 6740 ("AirTran . . . has decided to join with its largest competitor, Delta-Northwest, and modify its policy for checked bags."); Haak 11/16/10 Dep. Tr., PX382 at 30:8-13; R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 45:15-21 ("[Delta was] our No. 1 competitor. At this time we competed on every single route . . . ."); R. Fornaro 11/18/10 Dep. Tr., PX384 at 88:20-22; M. Klein 11/17/10 Dep. Tr., PX383 at 29:21-24; A. Dick 2/25/11 Dep. Tr., PX403 at 91:19-21.

Defendants' Response:

The Court may consider Plaintiffs' cited evidence for purposes of the summary judgment motions.

295. In 2008, AirTran was Delta's main domestic competitor. G. Grimmett 9/28/10 Dep. Tr., PX370 at 197:7-10 ("Q. Was [Scott Springer] accurate in his conclusion that AirTran was Delta's biggest competitor? A. AirTran, yeah."); Value Proposition v1 (Oct. 14, 2008), PX195 at 2 ("Delta's main competitor, AirTran, does not have this fee.").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely is not admissible. The evidence upon which Plaintiffs rely also does not support the stated fact. Plaintiffs cite a draft version of the Value Proposition document because the cited sentence was deleted from the later version (and final version) of that document. This undermines rather than supports Plaintiffs' statement, and the cited language in the draft is hearsay and lacks foundation. Neither the cited deposition testimony ("AirTran, yeah. You know, AirTran is a huge competitor of

Delta") nor the cited draft document ("Delta's main competitor, Airtran…") state AirTran was Delta's "main domestic competitor," nor do they otherwise specify the scope of the cited statement (*e.g.*, in Atlanta or some other market). There is substantial evidence in the record regarding Delta's level of competition with multiple airlines on multiple metrics, none of which is cited by Plaintiffs in support of their statement, which is broad and vague. Plaintiffs' stated fact is not material.

296. Hartsfield-Jackson Atlanta International Airport is Delta's main hub. Delta Domestic Strategy PowerPoint (Jan. 2009), PX315 at DLBF 186444 ("Atlanta: ... #1 carrier with 63% revenue share"); S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 66:14-15 ("[AirTran] ha[s] a significant operation in our [Delta's] main hub . . . .").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

297. The majority of Delta's system capacity is in Atlanta. G. Hauenstein, Revenue Performance (Aug. 15, 2008), PX135 at DLBF 106127.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact. Plaintiffs' stated fact is not material.

298. Delta's Atlanta hub accounts for the vast majority of Delta's profits from domestic passenger routes. December 2008 Financial Update (Jan. 18, 2008), PX10 at DLBAG 13288; June 2008 Financial Update (July 10, 2008), PX68 at DLTAPE 2934; February 2009 Financial Update (Mar. 16, 2009), PX333 at DLBAG 12913; H. Halter 5/17/12 Dep. Tr., PX417 at 67:2-16, 68:23-69:17.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs cite quarter-specific or month-specific financial documents from several years ago in support of a general statement about Delta's current financial situation. Plaintiffs' stated fact is not material.

299. Over half of AirTran's operations in 2008 were in Atlanta. AirTran Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264 ("[I]n Atlanta . . . we have 60% of our flights . . . ."); J. Trubey, *AirTran to Cut Capacity, Hartsfield Hub Not Immune*, Atl. Business Chronicle (July 29, 2008), PX100 at 2 ("'[T]hroughout our history . . . Atlanta represents two-thirds of our total operations . . . ,' [Kevin] Healy said."); Delta Domestic Strategy PowerPoint (Jan. 2009), PX315 at DLBF 186444 ("Atlanta: . . #1 carrier with 63% revenue share"); AirTran at Raymond James Growth Airline Conference Tr. (Feb. 5, 2009), PX326 at 3 ("Atlanta is about 62% of our network.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The court may consider for purposes of the summary judgement motions that over half of AirTran's operations in 2008 were in Atlanta. Defendants object to Plaintiffs' Exhibit PX100 because it is inadmissible hearsay.

300. In October 2008, Delta held 56% of Atlanta market share, and AirTran held 23%, for a combined 79% market share. Value Proposition (Oct. 24, 2008), PX234 at 4.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the cited document does not state the applicable time period for its market share figures while Plaintiffs' statement asserts they were the market share percentages specifically as of October 2008. Plaintiffs' stated fact is not material.

301. Delta's strategy was to protect its market share in Atlanta. Delta Domestic Strategy PowerPoint (Jan. 2009), PX315 at DLBF 186520 ("Winning Strategy: Protect DL's strongholds in MSP, DTW, and *ATL*.") (emphasis added).

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited document (which on its face was authored by the Domestic Network and Planning division) states that one of five strategies as of the time of the January 2009 document was to protect "strongholds" in multiple hubs. Plaintiffs' statement is also not material.

302. Delta considered (but rejected) the possibility of charging fees only on routes on which AirTran did not compete. G. Hauenstein 9/30/10 Dep. Tr., PX371 at 140:14-141:1; Fee Revenue Update, Combined Entity Structure (Oct. 27, 2008), PX259 at DLBF 35362 ("Ticket Change Fees . . . Initially considered excluding tickets sold on AirTran overlap markets . . .").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact

because, *inter alia*, Plaintiffs' cited testimony says consideration about not charging first bag fee on LCC overlap routes was not "about AirTran specifically." The quote from PX259 is explicitly about ticket change fees not first bag fees. Plaintiffs' statement is also not material.

303. Customers had negative emotional reactions to first bag fees. G. West 5/11/12 Dep. Tr., PX416 at 53:9-16 ("There was emotion around bag fees. Certainly...I don't think anybody likes to pay for something that was previously free...."); E-mail from S. Slater to B. Somers, *et al.* (July 10, 2008), PX67 at DLBF 106309 ("the first bag fee is the move the customers hate the most").

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' cited deposition states that Mr. West had not heard comments from customers that they would seek out airlines that were not charging for bags. He then said "There was emotion around bag fees. Certainly, again, I don't think anybody like to pay for something that was free, but in terms of selecting an airline based on that, my view is still people don't factor that in at the point of sale decision for an airline ticket." Plaintiffs document citation is inadmissible hearsay ("Based on the feedback I'm hearing") and lacks foundation.

304. AirTran decided not to impose a first bag fee until after Delta

announced a first bag fee because it would be contrary to AirTran's economic interests to do so due to market share shift and decreased customer satisfaction. E-mail from M. Klein to K. Healy (July 28, 2008), PX98 ("[W]hen is DL going to announce 1st bag already?"); E-mail from R. Fornaro to K. Healy, *et al.* (Aug. 8, 2008), PX128 (Fornaro: "We are not going to do 1st bag unless Delta does."); E-mail from M. Klein to R. Fornaro, *et al.* (July 24, 2008), PX96 ("DL being the holdup right now"); E-mail from M. Klein to J. Smith, *et al.* (July 10, 2008), PX65 ("If the concern is 'book away' from customers if we launch and DL doesn't launch[,] then I think that happens as soon as we charge anyone for 1st bag."); T. Reed, *Airlines Slow to Get on Board with Bag Fees*, TheStreet.com (June 19, 2008), PX50 at 64398 ("AirTran CEO Bob Fornaro said . . . his airline has not instituted the fee because it would be 'pretty uncomfortable' competing in Atlanta with Delta, which doesn't charge the fee."); AirTran Responses to 1st RFAs, No. 2 (Dec. 13, 2010), PX395; E-mail from H. Johnson to J. Graham-Weaver (July 18, 2008), PX87 at AIRTRAN 5630 ("just waiting on DL"); E-mail from S. Fasano to J. Smith (July 31, 2008), PX112 ("We are in a stand-off. DL is carefully watching us waiting for a move on 1st bag."); D. Field, *Airline Bag Fees: Irksome, But Eternal*, Airline Business (Dec. 19, 2008), PX311 at 4 ("Fornaro says: 'We were waiting for Delta . . . .'"); E-mail from M. Klein to E. Francis (Sept. 6, 2008), PX150; AirTran Q3 2008 Earnings Call Tr. (Oct. 23, 2008), PX223 at DLTAPE 3264; K. Healy 7/16/09 DOJ Dep. Tr., PX347 at 203:12-21; E-mail from R. Fornaro to K. Healy, *et al.* (Aug. 8, 2008), PX128; J. Smith 9/15/09 DOJ Dep. Tr., PX353 at 106:13-107:4, 111:22-113:5; J. Smith 11/15/10 Dep. Tr., PX381 at 66:3-10; S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 68:15-69:3, 71:19-72:1; S. Fasano 12/1/10 Dep. Tr., PX387 at 35:23-36:7, 68:14-22, 89:1-7; R. Fornaro 7/15/09 DOJ Dep. Tr., PX346 at 44:8-45:14 ("we would never charge . . . this fee if Delta wasn't charging"), *id.* at 49:17-53:3, 53:22-56:19, 118:4-17, 148:2-7; R. Fornaro 11/18/10 Dep. Tr., PX384 at 26:20-27:9, 28:1-5, 29:7-13, 35:8-36:1, 71:18-24, 80:11-81:7; M. Klein 11/17/10 Dep. Tr., PX383 at 179:12-14; H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 83, 92; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶¶ 9, 22-24.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object to Plaintiffs' Exhibits PX50 and PX311 because they are inadmissible hearsay. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

305. AirTran considered – but decided against – announcing a first bag fee for a future date and retracting the fee if Delta did not follow as a way to "test the water" and see if Delta would join AirTran in imposing a first bag fee. E-mail from K. Healy to R. Fornaro, *et al.* (July 10, 2008), PX66 ("We are debating announcing for a future date and backoff if they don't follow."); E-mail from J. Smith to K. Healy, *et al.* (July 10, 2008), PX66 ("[W]ould it make sense for us to test the water, by charging for the first bag...?").

Defendants' Response:

Defendants object because Plaintiffs' stated fact is not material.

306. Neither AirTran nor Delta wanted to announce a first bag fee before the other committed to the fee because, even if the first mover decided that it would retract the fee if the other airline did not follow, there would be a substantial cost from a brand and customer relations standpoint. K. Healy 7/16/09 DOJ Dep. Tr., PX347 at 63:4-64:4, 81:3-82:11 ("The likelihood of us going forward and back off is . . . infinitesimally

small. And the main reason being is, once you go out you've taken all the spears, arrows, whatever you want to call it, hits. You know, from a PR perspective, the fundamental shift occurs once you say you do it. So . . . first guy to hit the beach very rarely survives."), 199:10-18, 205:15-206:2; E-mail from M. Klein to J. Smith, *et al.* (July 10, 2008), PX65; H. Singer Class Cert. Report (June 30, 2010), PX363 at ¶¶ 45-51.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants also object because the evidence upon which Plaintiffs rely is not admissible and is subject to Defendants' *Daubert* motion related to Dr. Singer's opinions.

307. Delta did not want to impose a first bag fee unilaterally without an announcement or commitment from AirTran that AirTran would also impose the fee because of concerns about market share shift to AirTran and decreased customer satisfaction. E-mail from R. Anderson to S. Gorman, *et al.* (May 28, 2008), Delta Ex. 32 ("The level [of] cust[omer] dissatisfaction is too high[.]"); E-mail from G. Hauenstein to G. Grimmett (July 18, 2008), PX89 at DLBAG 1067 ("[W]e do not charge for the first bag domestically (do not want to create preference to AirTran/JetBlue/Continental) . . . ."); E-mail from G. Hauenstein to R. Anderson, *et al.* (May 28, 2008), Delta Ex. 67 ("I think we are all in synch [sic] on this one. . . . Our fee structure is already not competitive

with FL and B6 and . . . potentially create a revenue challenge in our competitive local markets. I would be the last in if the industry moves this direction."); E-mail from S. Fasano to J. Smith (July 31, 2008), PX112 ("We are in a stand-off. DL is carefully watching us waiting for a move on 1st bag."); E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126 ("They [Delta] want us [AirTran] to jump first."); E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("I still do not recommend first bag fee. . . . [W]e are concerned competitively with CO, JetBlue and AirTran domestically on the 1st bag fee[.]"); E-mail from G. West to S. Gorman (Sept. 5, 2008), PX148 at DLBF 187470 ("I assume we still want to hold until airtran moves?"); E-mail from G. West to N. Shah, *et al.* (Sept. 5, 2008), PX146 at DLBAG 9724 ("Airtran and jetblue don't charge and they are our key competitors in our main hubs."); E-mail from G. West to M. Zessin (Sept. 19, 2008), PX165 at DLBAG 9801; E-mail from S. Springer to D. Elkon, *et al.* (Sept. 24, 2008), PX170 (requesting analysis of: "How much share could we potentially lose to [AirTran] if we implement [first bag fee]?"); E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 106:13-107:10, 144:8-146:11, 149:19-150:21, 268:13-269:4; Value Proposition v4 (Oct. 22, 2008), PX213 at 15 (estimating a share shift of $300 million to AirTran if AirTran did not match Delta); *id.* at 16 ("Adopting a first bag fee would negatively impact our already middle-of-the-road standing in customer preference"); G. West 8/16/09 DOJ Dep. Tr., PX351 at 95:17-22; 143:8-14; G. Grimmett 9/28/10 Dep. Tr., PX370 at 150:18-151:11; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 49:11-16, 118:12-119:5, 130:19-131:13, 134:2-12, 136:9-11, 142:10-22; E-mail from M. Brawner to J. Majumdar, *et al.* (Oct. 30, 2008), PX250 at DLBAG 11122 (ACS analysis recognizing "customer migration" as a "key risk" of charging first bag fee); E-mail from G. West to A. Martin, *et al.* (Nov. 5, 2008), PX273 ("[W]e recognize that this is not a customer friendly move. That's one of the main reasons why we have held off implementing."); Delta Internal Memorandum from G. West to Customer Service Colleagues (Nov. 5, 2008), PX275 at DLBF 36486 ("charging for the first bag won't be popular"); H. Singer Am. Merits Report (Feb. 22, 2011), PX398 at ¶¶ 84, 93-105; H. Singer Am. Merits Rebuttal Report (Feb. 22, 2011), PX400 at ¶¶ 12-15.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations do not evidence a company-wide view, much less the view of a single one of Delta's top executives, that Delta should not adopt a first bag fee without an announcement or commitment from AirTran. Evidence upon which Plaintiffs rely is also not admissible and is subject to Defendants' forthcoming *Daubert* motion related to Dr. Singer's merits opinions. Dkt. 551 at 3.

308. Historically, Delta and AirTran competed intensely on price, and Delta could not count on AirTran to follow "legacy [price] increases." E-mail from T. Hutcheson to M. Klein (June 22, 2007), PX4 at AIRTRAN 2451177 ("We are following tradition . . . do not match legacy increases."); E-mail from M. Klein to S. Johnson, *et al.* (Sept. 7, 2007) PX6 at AIRTRAN 2453109 ("DL increased fares by $5 one-way last night – we are not matching the increase"); CEO Forum, Hank Halter – Senior Vice President and Controller (June 17, 2008), PX47 at DLTAPE 15454 ("AirTran for example won't go along with most fare increases because it's more damaging to them to allow a flight to leave with empty seats."); E-mail from J. Greer to J. Baker, JP Morgan (Nov. 12, 2007), PX7 ("Have you heard anything from USAirways on why they only matched the fuel surcharge on a

limited basis? . . . (jeez, even AirTran is in!).").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because Plaintiffs' stated fact is not material.

309. No major low-cost carrier charged a first bag fee before AirTran. Delta SOF ¶ 34 Table 2 (citing D. Carlton Report (Jan. 7, 2011), Delta Ex. 1 at 14, Table 1; A. Dick Report (Jan. 7, 2011), Delta Ex. 2 at Exhibit 6).

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact, as it does not specify what is a "major low-cost carrier." Defendants further object because Plaintiffs' stated fact is not material.

310. After Northwest Airlines announced first bag fees on July 9, 2008, AirTran was initially hopeful that Delta would follow in imposing a first bag fee. E-mail from J. Smith to G. Sayler (July 9, 2008), PX60 ("I hope that DL is right behind them."); E-mail from K. Healy to R. Fornaro, *et al.* (July 10, 2008), PX66 ("[W]e're preparing to go if DL does."); E-mails between M. Klein and K. Brulisauer, *et al.* (July 9, 2008), PX57 (Klein: "I've been banging the drum on my side." Bewley: "Doesn't Delta announce within days?"); E-mail from K. Healy to T. Hutchins (May 22, 2008), PX29.

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object because Plaintiffs' stated fact is not material. Whether or not AirTran was "initially hopeful that Delta would follow [Northwest] in imposing a first bag fee" has no bearing on whether or not Delta and AirTran reached an agreement to implement a first bag fee. Defendants also object because the evidence upon which Plaintiffs rely does not support the stated fact, as that evidence does not differentiate between "AirTran" and a small number of individuals within AirTran.

311. **[1]** Delta did not promptly follow Northwest Airlines in imposing a first bag fee, and **[2]** AirTran came to understand that Delta was not planning to unilaterally impose a first bag fee, but that Delta was waiting for AirTran to do so first. E-mail from S. Fasano to J. Smith (July 31, 2008), PX109 ("We are in a stand-off. D[elta] is carefully watching us waiting for a move on 1st bag."); E-mail from S. Fasano to J. Smith (July 31, 2008), PX106 ("I spoke with two more people over there [at Delta]. They are holding and our name has been included in every conversation."); E-mail from S. Fasano to K. Healy, *et al.* (Aug. 5, 2008), PX126 ("They [Delta] want us [AirTran] to jump first"); E-mail from K. Healy to R. Fornaro, *et al.* (July 29, 2008), PX99 ("This may be their compromise, jack up . . . 2nd bag as an offset to not doing first.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Defendants object to **[1]** because the evidence upon which Plaintiffs rely does not support the stated fact that "Delta did not promptly follow Northwest Airlines in imposing a first bag fee."

Defendants object to **[2]** because the evidence upon which Plaintiffs rely does not support the stated fact that "AirTran" came to an understanding about Delta's plans. The rumors that AirTran had heard were not accurate.

Finally, Defendants object to **[2]** because the stated fact is not material.

312. AirTran was in desperate financial condition in 2008, incurring a net loss of $273.8 million, and an operating loss of $72 million. 2008 AirTran Annual Report, SEC Form 10-K (Feb. 13, 2009), PX328 at 36; E-mail from M. Klein to T. Hutchins, *et al*. (July 12, 2008), PX73 ("We are in desperate need of revenue right now . . . . we're taking pay cuts and laying off staff."); E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 68:24-25, 76:22-25; S. Springer 6/16/09 DOJ Dep. Tr., PX343 at 165:7-10.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Defendants object because Plaintiffs' stated fact is not

material. Defendants further object that the testimony by Mr. Bastian and Mr. Springer is inadmissible hearsay and lacks foundation for the stated fact.

313. AirTran had concerns about the potential for bankruptcy as it incurred substantial losses in 2008. Memo from M. Osterberg, Management's Assessment of AirTran as a Going Concern (Jan. 15, 2009), PX317 at AirTran 24025162 ("Management has deemed it necessary to evaluate whether there is substantial doubt about AirTran's ability to continue as a going concern...."); J. Smith 11/15/10 Dep. Tr., PX381 at 80:16-81:6 ("We lost our shirt in the third quarter of 2008. . . . Q. After oil prices came down, were there still concerns about whether AirTran would survive? A. In my opinion, yes, because we had lost so much money."); S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 74:5-8 ("It was widely known . . . everyone had said we were teetering on the edge of bankruptcy."); S. Fasano 12/1/10 Dep. Tr., PX387 at 90:1-92:3; E-mail from S. Fasano to R. Magurno (Apr. 20, 2009), PX337 at AirTran 25922939 ("in the 4th quarter . . . we [AirTran] were withholding all 'non-critical' payments [to vendors]."); E-mail from R. Fornaro to L. Jordan (July 3, 2009), PX344 at AIRTRAN 490865 ("We could have lost this Company last year...."); A. Dick Expert Report (Jan. 7, 2011), Delta Ex. 2 at ¶ 75.

Defendants' Response:

Defendants concede that the Court can properly consider the stated fact for purposes of summary judgment.

314. Delta incurred billions of dollars in losses in 2008. Delta 2008 Annual Report, SEC Form 10-K (March 2, 2009), PX331 at 30 (reporting $8.9 billion net loss in 2008, including impairment, merger, and other special charges); Delta Press Release (Jan. 27, 2009), PX320 at 1 (reporting $8.9 billion net loss for 2008, or $503 million net loss excluding special items and fuel hedge losses); December Quarter Action Plan Draft (Sept. 29, 2008), Delta Ex. 77 at DLTAPE 17704 (projecting $252

million pre-tax loss for the fourth quarter of 2008).

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Plaintiffs' citations reflect that Delta's net loss for 2008 was $503 million excluding certain special items, including a $7.3 billion non-cash charge and a $900 million non-cash charge related to the Northwest merger.

315. In late October 2008, Delta had imminent cash requirements, including funding employee pensions, and was "worried about Delta surviving." E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 71:17-72:15, 77:3-4; E. Phillips 8/15/09 DOJ Dep. Tr., PX350 at 281:11-18.

Defendants' Response:

Defendants object. The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, Mr. Bastian's testimony was that in looking at the first bag fee issue, he was unconcerned with other airlines and instead only considering the financial well-being of Delta. The Court can properly consider for purposes of summary judgment that in late October 2008, Delta had imminent cash requirements, including funding employee pensions.

316. Delta executives wanted to increase Delta's revenues because of their personal stake in Delta's profitability, which would enable them to, *e.g.*, buy Porsches or decorate a vacation house. E-mails between G. Hauenstein, G. Grimmett, and L. Macenczak (June 12-13, 2008), PX40 at DLTAPE 5620 ("I really want our stock to be worth a lot [because I] have some major decorating to do in Miami! . . . I still want a Porsche. . . . If we can convince wall st[reet] we are not going back into [Chapter] 11 we can each have one.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

The evidence upon which Plaintiffs rely does not support the stated fact because, *inter alia*, the email chain cited by Plaintiffs reflects that certain Delta executives had multiple motivations – beyond any individual financial incentives – for increasing the company's revenues, and wanted Delta's fees and policies to reflect the new economic realities of the airline industry in 2008. Plaintiffs' stated fact is not material.

317. Deposition testimony of Gil West, head of Delta's Airport Customer Service group, is contradicted by late-produced documents. For example, Mr. West testified that he and Mr. Gorman favored first bag fees prior to September 2008, but late-produced contemporaneous documents reflect that he opposed first bag fees until after October 23, 2008. *Compare* G. West 8/16/09 DOJ Dep. Tr., PX351 at 116:2-117:9

(stating that Mr. West and Mr. Gorman favored a bag fee beginning *before September 2008*), *with* E-mail from G. West to G. Grimmett (Sept. 5, 2008), PX149 (proposing that combined entity adopt Delta fees), E-mail from G. West to M. Zessin (Sept. 5, 2008), PX146 at DLBAG 9724 (opposing bag fee), E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("I still do not recommend first bag fee."); E-mail from G. West to S. Gorman (Sept. 5, 2008), PX148 at DLBF 187470 (suggesting that Delta hold until after AirTran moves), *and* E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1 ("Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee.").

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and to the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

318. Mr. West testified that he did not believe share shift was relevant to Delta's first bag fee decision, but late-produced contemporaneous documents demonstrate that Mr. West recognized the importance of share shift in the first bag fee decision. *Compare* G. West 5/11/12 Dep. Tr., PX416 at 45:3-5 ("Q. You didn't think that share shift was relevant to the decision at all? A. No."), *with* E-mail from G. West to

G. Hauenstein (July 18, 2008), PX90 at DLBAG 9622 ("Strong argument [about share shift being relevant to bag fees]. Thanks for perspective."), *and* E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1 ("Gail has analyzed the book away sensitivity. She just forwarded me a rough draft of the analysis. Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee.").

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

319. Gil West's testimony is internally inconsistent. For example, Mr. West testified in 2009 that the CLT was responsible for the first bag fee decision, but changed his testimony in 2012 to state that Mr. Anderson made the first bag fee decision. *Compare* G. West 8/16/09 DOJ Dep. Tr., PX351 at 22:4-5 ("I think ultimately the CLT holds the responsibility [for making the decision to change baggage fees]."), *and id.* at 71:20-72:4, 146:11-15, 154:7-11, 155:17-22, *with* G. West 5/11/12 Dep. Tr., PX416 at 29:4-5 ("first bag fee . . . was a decision Richard Anderson made"), *and id.* at 87:12-19, 88:18-21 ("Q. In terms

> of issues brought before the CLT, are there any of those issues that [Anderson] does not reserve for himself? . . . A. Yes. I think it depends on the topic." . . . . Q. Did [Anderson] state that he was reserving the [first bag fee] decision for himself? A. I don't recall exactly what he said, or even, for that matter, when he made up his mind.").

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

320. Deposition testimony of Steve Gorman, Delta's Executive Vice President of Operations, is also contradicted by late-produced contemporaneous documents. For example, Mr. Gorman testified that, by mid-July, he, Mr. West, and ACS strongly favored imposing first bag fees at the end of the summer, but contemporaneous documents reflect that ACS and Mr. Gorman continued to oppose first bag fees in mid-July, August, September, and October. *Compare* S. Gorman 12/10/10 Dep. Tr., PX393 at 40:13-17 (testifying that *by mid-July 2008*, he "took a very strong position, as did ACS, that we need to implement the first bag fee"), *id*. at 43:13-14, 9-22 ("The three of us

> [West, Keaveny, and Gorman] were very, very strongly aligned. . . . [W]e believe[d] that we should, as soon as we got through the summer peak, put in the first bag fee."), *with* ACS July Fee Recommendations (July 16, 2008), PX83 at DLBAG 39218-19 ("1st Bag: No Fee"), E-mail from S. Gorman to G. West (July 16, 2008), PX84 (discussing recommendation of free first bag fee and suggesting "a good communication script to help C[ustomer] S[ervice] A[gents] (no 1st bag fee because part of ticket price . . . .)"), E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("I still do not recommend first bag fee . . . [W]e are concerned competitively with CO, Jet Blue and AirTran domestically on the 1st bag fee . . . ."); E-mail From G. West to S. Gorman (Sept. 5, 2008), PX148 at DLBF 187470 ("I assume we still want to hold until airtran moves?"), E-mail from G. West to G. Grimmett (Sept. 5, 2008), PX149 ("I just plan to propose the current DL bag fees [including a free first bag] for the new DL."), E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1 ("Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee."), *and* E-mail from G. West to N. Shah, *et al*. (Sept. 5, 2008), PX146 at DLBAG 9724 ("Airtran and jetblue don't charge and they are our key competitors in our main hubs.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship

between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

321. Mr. Gorman testified that AirTran was not a consideration in Delta's first bag fee decision, but late-produced contemporaneous documents reflect that Mr. Gorman understood and believed that AirTran was a relevant consideration in Delta's first bag fee decision. *Compare* S. Gorman 12/10/10 Dep. Tr., PX393 at 44:11-45:2 ("Q. [W]as there any discussion . . . about AirTran or what AirTran's position would be . . . on a first bag fee? A. [A]ll along we knew there was three other carriers for sure that did not have a bag fee.... [A]nd frankly that didn't even enter into our consideration set."), *with* E-mail from S. Gorman to H. Halter (Aug. 22, 2008), PX142 at DLTAPE 3404 ("I still do not recommend first bag fee. . . we are concerned competitively with CO, JetBlue and AirTran domestically on the 1st bag fee."), E-mails between G. West and S. Gorman (Sept. 5, 2008), PX148 at DLBF 187470 (West: "I assume we still want to hold until AirTran moves?" Gorman: "Have not talked to R[ichard] A[nderson] yet"), E-mail from S. Gorman to G. Hauenstein (Sept. 18, 2008), PX157 ("I will say [Northwest's] competitive situation out of MSP and DTW is quite a bit different from ours."), *and* E-mail from S. Gorman to G. Hauenstein (Aug. 21, 2008), PX139 at 33 ("I gave the example of our reluctance to implement a first bag fee in the U.S. because of CO, Airtran, and JetBlue.").

Defendants' Response:

Defendants object. Plaintiffs cite evidence that was not cited in their brief in

violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

322. Richard Anderson's testimony about ACS's position on first bag fees is contradicted by late-produced contemporaneous documents. *Compare* R. Anderson 10/6/10 Dep. Tr., PX372 at 47:16-20 (testifying that in June 2008, "[t]he ACS folks were of the view that we should introduce it"), *id.* at 48:6-8 ("Gil [West] was clearly an advocate toward imposing the bag fee way back at the beginning."), *and id.* at 51:10-20 (testifying that at the time of Northwest's July 9, 2008 announcement, "the airport customer service group thought we should impose the bag fee"), *with* E-mail from S. Gorman to H. Halter, *et al.* (June 13, 2008), PX43 at DLTAPE 3694 ("My recommendation to CLT is we not take this action at this time and have DL as the lone major not charging for the first bag be a differentiator."), E-mails between G. West and M. Zessin, *et al.* (Sept. 5, 2008), PX146 at

DLBAG 9724 (stating that there was "[n]o need" to review the free first bag policy after Continental's announcement because "Airtran and jetblue don't charge and they are our key competitors in our main hubs"), E-mail from G. West to G. Grimmett (Sept. 5, 2008), PX149 (proposing on behalf of ACS that combined entity adopt Delta free first bag fee), *and* E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1.

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

323. Richard Anderson's 2012 testimony that Delta decided to impose a first bag fee before September 28, 2008, is contradicted by Mr. Anderson's 2010 testimony, the 2009, 2010, 2011, and 2012 testimony of Delta executives and Delta's corporate representative, Delta's representations to DOJ and the Court, and contemporaneous documents reflecting that the decision was made on or after October 27, 2008. *Compare* R. Anderson 5/3/12 Dep. Tr., PX410 at 227:13-16 ("[W]e had already made the decision we were going to impose a first bag fee on Sunday, September 28, 2008 . . . ."), *and id.* at 233:17-20 ("We had a series of

conversations, Ed and I, prior to [] September 28th where we had agreed that we needed to impose the first bag fee and that we were going to impose the first bag fee."), *with* R. Anderson 10/6/10 Dep. Tr., PX372 at 60:25-61:5 ("Q. So, Mr. Anderson, when ultimately did you decide to impose a first bag fee? A. It was after the – I believe it was after we closed the merger with Northwest [on October 29, 2008]."), *id.* at 66:25-67:1 ("we got to the decision in early November"), *id.* at 88:5-6 ("So we would have made the final decision sometime after the merger closed."), *id.* at 90:10-11 ("I believe that we made the decision finally at this [November 3, 2008] meeting."), E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 44:13-18 ("Q. [L]ate October of [2008], just before the merger of Northwest was consummated, where was Delta on its consideration of a first-bag fee? A. Well, we knew we needed to make a decision . . . ."), *id.* at 61:13-22 ("[Richard Anderson] and I both wanted to hear the views of our teams, because we were aware that there were differing opinions within our respective . . . organizations. And we wanted to hear the views before we made that final decision. So we were trying to keep our mind somewhat open to the views of the organization, because we hadn't had the full debate yet at that time."), E-mail from R. Anderson to B. Craig (Oct. 10, 2008), PX191 ("We have not adopted first bag fee – still studying."), Delta Memo to DOJ (July 13, 2011), PX404 at DLBF 107891 ("Delta's decision to adopt a first bag fee [was] made initially during the CLT's October 27, 2008 CLT meeting, and then finalized on November 3, 2008."), G. Hauenstein 9/30/10 Dep. Tr., PX371 at 136:18-20 ("Q. At this meeting, the October 27th meeting, was a decision made to implement the first bag fee? A. I believe, yes."), Hr'g Tr. 50:11-14, 55:11-16, 60:15-25 (Jan. 27, 2011) (Dkt. #264), E-mail from E. Phillips to K. Connell, *et al.* (Oct. 28, 2008), PX245 at 1 ("Richard and the CLT want to revisit the fee structure next week . . . ."), E-mail from G. West to C. Knotek (Oct. 31, 2008), PX254 ("The first bag fee keeps flopping around, still not 100% good to go yet . . . ."), E-mail from S. McClain to R. Anderson, *et al.* (Feb. 3, 2009), PX325 ("[T]he Nov[ember] [20]08 fee change decision was ultimately brought to the CLT . . . ."); Delta 30(b)(6) S. McClain 8/30/12 Dep. Tr., PX421 at 32:16-17 ("November 4th, 2008, was the date that the bag fee decision was made"), A. Dick Expert Report (Jan. 7, 2011), Delta Ex. 2 ¶ 89 ("[Delta]'s decision [to charge a first bag fee] actually was

made post-merger."), G. Grimmett 5/4/12 Dep. Tr., PX412 at 289:17-19 ("We did not have plans at this point in time [on October 9, 2008] to charge for the first bag fee."), E-mail from T. Soulimiotis to M. Carney (Oct. 31, 2008), PX257 ("The CLT . . . has not signed off on . . . the 1st bag fee."), E-mail from P. Elledge to C. Phillips, *et al.* (Sept. 29, 2008), PX172 ("As a follow up to the Finance review session today [September 29, 2008], the 1st domestic bag fee at $15 . . . [is] under review."), Invitation to 9/29/08 Meeting re: 4Q 08 Cost Action Item Follow-Up (Sept. Anderson), Hr'g Tr. 35:7-15 (Nov. 8, 2010) (Dkt. #200), *and* Letter from DOJ to Delta (Oct. 2, 2012), PX422 at 3 ("[W]e have difficulty crediting Mr. Anderson's emphatic testimony on May 3, 2012 to the effect that he had made a decision prior to the AirTran earnings call given his failure to offer this version of events at his deposition on October 6, 2010.").

Defendants' Response: Objection.

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their

statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

324. Richard Anderson's 2012 testimony that Delta made the first bag fee decision without seeking any input from Northwest contradicts his 2010 testimony that Delta received Northwest's input before making the decision. *Compare* R. Anderson 5/3/12 Dep. Tr., PX410 at 204:8-10 ("Q. Before making a decision on first bag fees, did Delta receive any input from Northwest Airlines? A. None at all."), *with* R. Anderson 10/6/10 Dep. Tr., PX372 at 60:14-19 ("Northwest was in a different position than we were and we couldn't talk to any of the executives there about what their experience had been. And so ultimately we needed to get past the actual closing of the merger to be able to really analyze whether we were going to put in a first bag fee or not."), *id.* at 62:3-6, *and id.* at 87:14-21.

Defendants' Response: Objection.

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

325. Richard Anderson's 2012 testimony that he made the first bag fee decision alone and never conducted a review of first bag fees with anyone is inconsistent with his own testimony that the CLT reviewed first bag fees and that Delta makes "decisions collectively as a team." *Compare* R. Anderson 5/3/12 Dep. Tr., PX410 at 207:18-22 ("Ultimately the CEO of the airline and the president of the airline are responsible for making the decision, and Ed and I had made the decision . . . sometime between late September and October 21st."), *id.* at 238:6-11 ("The CEO had already decided and communicated to the COO and the president that we were going to impose a first bag fee. . . . The CEO decides."), *and id.* at 237:19-22 ("There was no review of the [first bag fee] decision, because the decision was taken. We had already made the decision to impose the first bag fee. That's what Exhibit 48 [dated September 28, 2008] tells you."), *with* R. Anderson 5/3/12 Dep. Tr., PX410 at 172:11-173:13 ("Those were the issues that we had discussed as a team and come to the conclusion [in June 2008] . . . that we would not impose the first bag fee. . . . I would acknowledge that we – we make – make those decisions collectively as a team and . . . I respect the decision-making process within the organization . . . ."), *id.* at 189:4-22 ("Q. If you look at [deposition exhibit 40:] . . . 'we have a fair agreement with our customers, and that is every customer gets . . . one [free] checked bag' . . . . Q. Is that a statement you agreed with at the time? A. That was the policy that we had adopted as the CLT at that time."), R. Anderson 10/6/10 Dep. Tr., PX372 at 56:16-23 ("Q. Was this [October 2008 Value Proposition analysis] presented to the CLT in the context of making a decision on the first bag fee? A. I believe it was."), *id.* at 85:22-24 ("[W]e would have had the first joint [Delta/Northwest] CLT [on November 3, 2008] and that was the – that was the point in time when we needed to make a decision[.]"), *id.* at 88:16-19 ("typically what we do at the CLT is we have a lot of debate and then we sort of kind of have a dialectic that gets down to a collective decision-making process."), *id.* at 66:12-13 ("this [FBF] debate . . . went on from May until after we closed the Northwest merger"), E-mail from P. Elledge to C. Phillips, *et al*. (Sept. 29, 2008), PX172 ("As a follow up to the Finance review session today [September 29, 2008], the 1st domestic bag fee at $15 . . . [is] under review."), Invitation to 9/29/08 Meeting re: 4Q 08 Cost Action Item

Follow-up (Sept. 19, 2008), PX174 at DLBF 89356 (R. Anderson), Invitation to 9/29/08 Meeting re: 4Q 08 Cost Action Item Follow-up (Sept. 19, 2008), PX175 (Bastian), *and* Invitation to 9/29/08 Meeting re: 4Q 08 Cost Action Item Follow-up (Sept. 19, 2008), PX176 (Hauenstein).

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

326. Richard Anderson's 2012 testimony that he made the first bag fee decision alone contradicts Delta documents and testimony of executives who stated that the CLT made the decision. *Compare* R. Anderson 5/3/12 Dep. Tr., PX410 at 238:6-11 ("The CEO had already decided and communicated to the COO and the president that we were going to impose a first bag fee. . . . The CEO decides."), *and id.* at 207:18-20 ("Ultimately the CEO of the airline and the president of the airline are responsible for making the decision, and Ed and I had made the decision . . . ."), *with* E. Bastian 10/27/09 DOJ Dep. Tr., PX355 at 11:18-19 ("Obviously all our decisions are subject to the board of directors at Delta."), *id.* at 20:10-12 ("any significant, material change

> to a fee needs to be brought through the CLT"), *id.* at 12:17-19 ("So I've never seen Richard come in and unilaterally try to make a decision on his own without the team support."), *id.* at 19:19-23 ("Q. And are changes to ancillary fees . . . something that would come to the CLT? A. Generally, yes."), E-mail from S. McClain to R. Anderson, *et al*. (Feb. 3, 2009), PX325 ("the Nov[ember] [20]08 fee change decision was ultimately brought to the CLT"), Delta Memo to DOJ (July 13, 2011), PX404 at DLBF 107891 ("Delta's decision to adopt a first bag fee [was] made initially during the CLT's October 27, 2008 CLT meeting, and then finalized on November 3, 2008."), *and* E-mail from E. Phillips to K. Landers (Oct. 15, 2008), PX199 ("[T]he CLT hasn't fully vetted the first bag fee or made a decision.").

Defendants' Response: Objection.

Defendants object. Plaintiffs cite evidence that was not cited in their brief in violation of this Court's instruction that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief,

Defendants address them in their reply briefs.

327. Richard Anderson's testimony that he told Gil West that Anderson had already made a decision to charge a first bag fee is inconsistent with contemporaneous documents, including Mr. West's October 23 e-mail stating that Delta would not charge a first bag fee. *Compare* R. Anderson 5/3/12 Dep. Tr., PX410 at 211:2-8 ("Q. Did you tell Mr. West that [first bag fee] was not a loose end . . . [?] A. I'm certain we had that conversation."), *with* E-mail from G. West to M. Zessin, *et al*. (Oct. 23, 2008), PX215 at 1 ("Sounds like its [sic] about a was[h] in terms of net revenue which would mean we would not implement 1st bag fee."), *and* E-mail from G .West to L. Liu, *et al.* (Nov. 14, 2008), Delta Ex. 63 ("R[ichard]A[nderson] gave Gail and I clear direction to determine the aligned fees, get CLT approval and press-on as soon as we closed, which we did.").

Defendants' Response:

Defendants object. Plaintiffs' paragraphs numbered 317 through 327 are the arguments of counsel. They are not statements of material fact. Instead they offer plaintiffs' interpretation of selective deposition excerpts and argument about the relationship between the selected excerpt and other testimony or documents. These are not statements of fact pursuant to LR 56.1, but rather are argument that should only be considered by the Court if they are raised in Plaintiffs' brief. Plaintiffs' arguments are disputed, and the evidence upon which Plaintiffs rely does not support their statements. To the extent these arguments are raised in Plaintiffs' brief, Defendants address them in their reply briefs.

328. A key AirTran witness, Scott Fasano, admitted to lying about communications regarding first bag fees. S. Fasano 12/1/10 Dep. Tr., PX387 at 118:24-119:3, 149:13-150:9.

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact that Mr. Fasano was a "key AirTran witness." Subject to that objection, Defendants concede that the Court may consider that Mr. Fasano's emails were not truthful.

329. Witnesses offered directly contradictory testimony about communications in 2008 between AirTran and Delta concerning first bag fees. *Compare* S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 46:7-47:10, 48:14-49:16, 52:20-53:9, 66:17-67:10, 67:16-68:10 (testifying that he spoke to Rossano and Ringler about first bag fees), *with* M. Rossano 11/5/10 Dep. Tr., PX377 at 75:12-24, 79:21-25 (testifying that his only contact with Fasano after Fasano left Delta in 2005 was a single phone call unrelated to bag fees), M. Ringler 11/12/10 Dep. Tr., PX380 at 58:12-59:12 (denying that he spoke to Fasano between 2005 and 2009). *Compare* S. Fasano 7/17/09 DOJ Dep. Tr., PX348 at 83:2-11 (admitting that Fasano and Rary discussed first bag fees at a meeting on or around August 5, 2008), *with* P. Rary 11/9/10 Dep. Tr., PX379 at 53:17-55:17, 75:13-79:15, 81:12-19 (denying that he has ever spoken to or met Fasano).

Defendants' Response:

Defendants object because the evidence upon which Plaintiffs rely does not support the stated fact. Further, Plaintiffs' previous statement (#328) asserts that Fasano lied about communications regarding first bag fees. Defendants further object because Plaintiffs' stated fact is not material.

In the footnote to Plaintiffs' stated fact, Plaintiffs attempt to "incorporate by reference the evidence presented in their prior filings." In so doing, Plaintiffs cite numerous exhibits that were not in their brief in violation of this Court's instructions that "[a]ll citations to the record evidence should appear in each party's brief, not just in the party's statement of undisputed (or disputed) facts." Dkt. 49 at 12.

Table 1: Plaintiffs' Exhibits not cited in Opposition Brief

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Dated: October 2, 2015

Respectfully submitted,[5]

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[5] Pursuant to L.R. 7.1D, counsel for Defendants certify that this document was prepared with a font and point selection approved in L.R. 5.1B.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS 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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