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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION NO. 1:09-md-2089-TCB ALL CASES

DEFENDANT AIRTRAN AIRWAYS, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

In its Opening Brief, AirTran demonstrated that the handful of well-pleaded factual allegations in the Consolidated Amended Complaint ("CAC"), considered in the context of the extraordinary business conditions airlines faced in 2008, are "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as with an alleged conspiracy. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Thus, Plaintiffs' attempt to impose a conclusory claim of Section 1 conspiracy on business actions essential to AirTran's survival in 2008 and on public disclosures consistent with AirTran's investor obligations as a public company is simply implausible. Plaintiffs also fail to plead any facts showing a specific intent to monopolize or the dangerous probability of monopolization of any market—critical elements required to sustain their Section 2 claim. And Plaintiffs' efforts to avoid the preclusion bar established by the Supreme Court in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), are undermined by their failure to plead facts showing that any of AirTran's public statements were something other than responses to, and specifically focused on, important investor interests. Thus, as more fully explained below, the CAC must be dismissed in its entirety.

ARGUMENT

I. PLAINTIFFS' OPPOSITION IGNORES THE 12(B)(6) STANDARDS ESTABLISHED BY *TWOMBLY* AND *IQBAL*.

In their Opposition Brief, Plaintiffs do not seriously contest judicially noticeable facts AirTran submitted concerning 2008's market conditions, or AirTran's context-based alternative explanations of the CAC's well-pleaded factual allegations. Instead, they argue that AirTran's motion to dismiss is "fundamentally flawed" in three ways:

> [AirTran] ignore[d] . . . fundamental principles governing Rule 12(b)(6) motions. They do not accept Plaintiffs' factual allegations as true. Instead, they provide their interpretation of quotes and facts in the CAC, [and] introduce new facts extraneous to the CAC.

(Plaintiffs' Opposition to Defendants' Motions to Dismiss ("Opp.") at 5, 10, 19, 25.) Each of these charges is without merit. Rather, it is Plaintiffs who fail to accept and follow the "fundamental principles" governing motions to dismiss established by the Supreme Court in *Twombly* and *Iqbal*, and just recently endorsed by this Circuit in *American Dental Association v. Cigna Corp.*, No. 09-12033, 2010 U.S. App. LEXIS 9928 (11th Cir. May 14, 2010).

A. AirTran Challenges Only Plaintiffs' Unwarranted Conclusions, Not Their Well-Pleaded Facts.

There is no dispute that well-pleaded *factual* allegations must be accepted as

true for 12(b)(6) purposes. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But Plaintiffs do not identify a single, specific, well-pleaded factual allegation that AirTran has disputed. Rather, AirTran permissibly has challenged only "legal conclusion[s] couched as a factual allegation," *Twombly*, 550 U.S. at 555, "unwarranted deductions of fact," *Sinaltrainal v. Coca Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009), and "labels and conclusions" and "naked assertions devoid of further factual enhancement," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).[1] "[J]udicial experience and common sense" must determine the plausibility of these allegations. *Id.* at 1950.

For example, Plaintiffs allege "collusive communications" followed by "responsive business practices" (Opp. at 2), but fail to recognize that "collusive" is a legal conclusion and "responsive" is a deduction that must be warranted by the facts alleged. Similarly, Plaintiffs' insistence that their allegation that Delta's explanation for initiating a first bag fee was "pretextual" must be taken as true (Opp. at 17-19) ignores the conclusory nature of the statement, the absence of any

[1] For the convenience of the Court, AirTran has attached as Exh. A, a red-line of the "Facts" put forward in Plaintiffs' Opposition Brief at 5-10. The redline separates the well-pleaded facts from the numerous conclusions, deductions, labels, and "naked assertions" Plaintiffs must rely on to construct the alleged Sherman Act violations.

supporting factual allegations, and an equally plausible alternative explanation.[2]

B. Defendants' Introduction of "New Facts" Was Entirely Proper.

To support its alternative interpretation of the CAC's well-pleaded facts, AirTran calls the Court's attention only to facts that are judicially noticeable for purposes of a motion to dismiss: the full text of the earnings call transcripts from which the CAC selectively quoted, required SEC filings, and a report by the U.S. Department of Transportation. *See* Appx. Exhs. 1-48. *Twombly* expressly sanctions examination of the full text of documents cited in a complaint. *See* 550 U.S. at 569 n. 13. In addition, under Federal Rule of Evidence 201, on a motion to dismiss, courts may take judicial notice of documents such as SEC filings, *see Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276-77 (11th Cir. 1999), and government reports, *see In re LTL Shipping Antitrust Litig.*, 08-MD-01895-WSD, 2009 U.S. Dist. LEXIS 14276, *34 (N.D. Ga. Jan. 28, 2009); *see also Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Thus, Plaintiffs'

[2] It is hardly surprising that the merged carrier would establish consistent fees and policies for its entire system, that the decisions about which fees and policies would apply system-wide would be announced to the traveling public promptly, and that in order to avoid "gun-jumping" allegations under the Hart-Scott-Rodino Premerger Notification Act, 15 U.S.C. § 18a ("HSR"), the decisions would not be made until *after* the DOJ had cleared the merger and the transaction had been consummated. *See United States v. Computer Assoc. Int'l, Inc.*, 2002-2 Trade Case ¶ 73,883 (D.D.C. 2002); *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120-ESH, 2010 U.S. Dist. LEXIS 13457 (D.D.C. Jan. 21, 2010). The DOJ announced it was clearing the merger on October 29, 2008, the transaction closed the same day, and the fee/policy harmonization press release issued a few days later on November 5, 2008, attached as Exhs. B and C.

attempt to have this Court ignore AirTran's contextual facts is inconsistent with governing law.

C. Alternative, Non-Collusive Explanations of a Complaint's Well-Pleaded Facts Are Not Only Proper But Encouraged.

In *Twombly*, the Supreme Court spent considerable time examining alternative, non-collusive explanations of the conduct alleged in the complaint. *See* 550 U.S. at 566-69. Thus, far from prohibiting defendants from providing alternative interpretations of a complaint's well-pleaded facts—as Plaintiffs would have it—the governing Rule 12(b)(6) standard permits, and even encourages, such explanations.[3] *See American Dental*, 2010 U.S. App. LEXIS 9928, at *15. Having invalidly argued that Defendants' alternative, non-collusive explanations of the CAC's well-pled factual allegations are somehow improper, Plaintiffs compound their error by largely not even attempting to rebut those explanations. (*See, e.g.*, Opp. at 27 ("Plaintiffs will not detail here the fallacies of AirTran's facts."); *id.* at 14 (claiming that AirTran's statements "can *only* be explained as signaling

[3] The sole case Plaintiffs cite in opposition to AirTran's alternative explanations—*In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004)—is not to the contrary. In that pre-*Twombly*, summary judgment case, the court rejected defendants' request that it disregard evidence if the court "could *feasibly* interpret it as consistent with the absence of an agreement to raise prices." *Id.* at 368 (emphasis added). The appeals court's rejection of a lower "feasibility" standard for alternative explanations has no bearing here, where AirTran seeks dismissal because the non-collusive interpretation is *equally* consistent with the facts alleged as is the Plaintiffs' collusive interpretation. *Twombly*, 550 U.S. at 554, 567; *American Dental*, 2010 U.S. App. LEXIS 9928, at *15.

collusion.") (emphasis added); *id*. at 16 (same)).)

In sum, the Court clearly may—and should—consider AirTran's alternative, pro-competitive explanation of the CAC's well-pleaded facts, as well as the supplemental contextual materials provided by AirTran, in assessing the plausibility of the CAC. *See Twombly*, 550 U.S. at 569.

II. PLAINTIFFS FAIL TO SHOW THAT THE CAC'S WELL-PLEADED FACTS PLAUSIBLY SUGGEST A SECTION 1 CONSPIRACY.

To determine whether Plaintiffs' Section 1 claim satisfies *Twombly*'s "plausibility" standard, the Court's "first task is to eliminate any allegations in Plaintiffs' complaint that are merely legal conclusions," *American Dental*, 2010 U.S. App. LEXIS 9928, at *26, and thus "not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950. When this is done, it is apparent that the well-pleaded facts alone, particularly considered in context, do not plausibly suggest a conspiracy.

A. Plaintiffs Impermissibly Rely on Conclusory Allegations to Support Their Conspiracy Claims.

Plaintiffs ask the Court to infer a conspiracy by alleging "collusive communications followed by responsive business practices, . . . actions that would have been against a corporation's economic self-interest if it had acted alone, and pretextual reasons offered for the changed business practices." (Opp. at 12.)

Looking past this "formulaic recitation of the elements of a [conspiracy claim]," *Twombly*, 550 U.S. at 555, however, the Court will find that the allegations of actual fact reflect only competitive, independent business behavior and good-faith adherence to SEC disclosure requirements.

As set forth in AirTran's opening brief, fuel prices in 2008 rose so precipitously, and demand fell so sharply, that the entire airline industry was forced to cut capacity. (DOT Report, Appx. Exh. 48 at 4.) In that "context," both "experience" and "common sense" demonstrate that AirTran's announced capacity actions, discussed in SEC filings and earnings calls, were "perfectly rational." *Twombly*, 550 U.S. at 554, *Iqbal*, 129 S. Ct. at 1950. Plaintiffs do not address; let alone rebut, this "common sense" explanation of AirTran's conduct.

Indeed, this Court in *LTL Shipping* rejected as implausible under *Twombly* the very inference Plaintiffs seek to draw here. *In re LTL Shipping Servs. Antitrust Litig.*, No. 08-MD-1895-WSD, 2009 U.S. Dist. LEXIS 14276, at *65 (N.D. Ga. Jan. 28, 2009). Plaintiffs attempt to distinguish *LTL Shipping* by comparing the levels of "factual specificity" in the two complaints. *See* Opp. at 28-29. But it is the reasonable inferences to be drawn from the facts pled, not mere "factual specificity" alone, that is material, and Plaintiffs fail to explain how *LTL Shipping's* holding—that one cannot infer conspiracy from parallel price increases

in response to a common fuel spike—does not apply to this case. [4]

Moreover, none of the cases cited by Plaintiffs support their argument that AirTran's statements were "collusive communications" showing a commitment to "responsive" business practices. And in each case cited, the alleged conduct was *inconsistent* with contemporaneous market conditions, and, in some instances, was *prima facie* collusive or involved private communications. (Opp. at 12-14.) In *Standard Iron Works*, for example, the defendants allegedly had departed from the historical norm of cutting prices when supply exceeded demand, and instead instituted parallel supply cuts even as pricing remained "well above cost and when domestic demand . . . far exceeded domestic supply." *Standard Iron Works v. Arcelormittal*, 639 F. Supp. 2d 877, 893, 896 (N.D. Ill. 2009).[5]

[4] Plaintiffs also make no specific allegations in the CAC that the Defendants in fact reduced capacity or increased prices in any particular markets or routes. For this reason alone, the allegations are insufficient for vagueness. *Sinaltrainal*, 578 F.3d at 1268 ("[V]ague and conclusory allegations [are] insufficient to state a claim for relief, and 'will not do.'") (quoting *Twombly* at 555).

[5] *See also Am. Tobacco Co. v. United States*, 328 U.S. 781, 804-808 (1946) (petitioners raised prices when costs for input were low and declining); *Boczar v. Manatee Hosp. & Health Sys.*, 993 F.2d 1514, 1517-1518 (11th Cir. 1993) (hospital acted contrary to self-interest by disciplining plaintiff obstetrician who had reported incidents of improper patient care, and charged lower fees than other obstetricians); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 935 (N.D Ill. 2009) (600% rise in price of potash over five year period without corresponding increase in costs); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1115-1116 (N.D. Cal. 2008) (despite entrance by new competitors and aging technology, prices had increased substantially); *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548 (11th Cir. 1998) (evidence of high incumbency in a market in which sellers submitted sealed bids that would not have existed but for an anticompetitive agreement).

Plaintiffs also argue that the Court must accept as true their contention that AirTran's and Delta's respective first bag fees were "counter to the competitors' individual economic interests." (Opp. at 16-17), once again confusing facts with conclusions and ignoring the relevant business context.

In 2008, several airlines—including AirTran—entered into fuel hedge agreements to protect against continuing fuel price increases. (Appx. Exh. 48 at 2; Appx. Exh. 42 at 11.) In the third quarter of 2008, when fuel prices began to decline, AirTran's fuel hedge agreements began to increase its fuel costs, and AirTran was forced to unwind some of those agreements, requiring substantial cash outlays and effectively locking in the hedged fuel price. (AirTran Oct. 24, 2008 Form 8-K, Appx. Exh. 42 at 12.)

Higher costs compel a rational business to consider new ways to generate revenue, such as the then-prevalent first bag fee. Plaintiffs cannot support the plausibility of their contention that AirTran's decision to impose a first bag fee after Delta had decided to charge one was contrary to AirTran's unilateral interest. Indeed, the October 23, 2008 earnings call transcript shows that industry analysts wondered why AirTran had not imposed a first bag fee earlier. (Oct. 23, 2008 Earnings Call, Appx. Exh. 41, at 60.)

In fact, Plaintiffs acknowledge that "[b]eginning in or around 2007, several

airlines instituted a first bag fee." *See* CAC ¶ 25. By the time Delta had announced its fee, virtually every other major airline already had imposed such a fee. *See* Appx. Exh. 48 at 12. It is implausible to infer that AirTran and Delta could only do by conspiracy what most other carriers in the airline industry had done earlier as a rational response to market conditions.[6]

B. Plaintiffs' Theory That AirTran and Delta "Conversed" Through Public Statements Is Implausible and Ignores Context.

1. Plaintiffs are mistaken about the time AirTran filed its April 22, 2008 registration statement.

Plaintiffs' "conversation" theory fails from the very first allegation, *i.e.*, that AirTran deliberately moved the date of its April 2008 earnings call from after to before Delta's scheduled call to initiate "communication" with Delta. *See* CAC ¶ 32. AirTran explained in its opening brief that the earnings call was moved to coincide with its $150 million securities filing, so that AirTran management could respond to investor inquiries on the filing during the earnings call. (AT Mem. at 15.) Ignoring the public record of the offering at the SEC, Plaintiffs' Opposition attempts to refute AirTran's plausible explanation by arguing that "AirTran's

[6] The cases cited by Plaintiffs are inapposite since they involved conduct such as increasing or stabilizing prices after costs *declined* or after new sellers entered the market, practices that are indeed plausibly against self-interest absent a conspiracy. *See* Opp. at 16; *see also* n. 2, *supra*. As detailed above, it was not against AirTran's self-interest to impose a first bag fee after its fuel costs rose dramatically during 2008 and it was locked into higher costs through fuel hedge agreements.

earnings call was held at 9:00 a.m. ET, and it appears that AirTran announced the filing of its registration statement at 5:05 p.m. ET." (Opp. at 26.) Challenged by AirTran, Plaintiffs now admit the registration statement was filed at the SEC *before* the earnings call, just as AirTran had said.[7] This threshold error casts doubt on Plaintiffs' entire "conversation theory" (Plaintiffs have no other explanation for how the "conversation" allegedly began), and reveals how hard Plaintiffs are straining to find any inference—plausible or not—to support their fanciful interpretation of ordinary business events.

2. Plaintiffs' conclusory allegation that AirTran and Delta use the term, "industry," to refer to each other should be rejected.

A crucial allegation in Plaintiffs' theory—premised only on "information and belief"—is that AirTran and Delta mean only each other when they use the word "industry" on earnings calls. (CAC ¶ 20.) The CAC is devoid of any facts that make Plaintiffs' novel interpretation more plausible than the ordinary meaning of the word, "industry." Without such facts, it is more likely AirTran and Delta meant what they said—"industry" means the "airline industry." *See Iqbal*, at 1950.

[7] *See* Letter from Daniel Kotchen, Plaintiffs' interim lead counsel, to David Flint (May 4, 2010) (advising of error in Plaintiffs' Opposition and requesting that it be brought to Court's attention and corrected in the record); *see also* Letter from Bert W. Rein, counsel for AirTran, to the Honorable Timothy C. Batten, United States District Judge (May 11, 2010). Both letters are attached for the Court's convenience as Exhs. D and E.

Moreover, the context of the earnings calls confirms this meaning, since the analysts who participated also used the term "industry," to refer to the airline industry. *See, e.g.*, Delta Oct. 15, 2008 earnings call, Appx. Exh. 40 at 14 (analyst C. Cuomo asks, "[W]hat's your view on the sustainability of the numerous additional fees the industry's charging; the baggage fees, the change fees[?]"); AirTran July 29, 2008 earnings call, Appx. Exh. 35 at 10 (analyst R. Niedl begins question, "And in this atmosphere with the industry shrinking . . . .").)

3. The cases cited by Plaintiffs provide no support for their theory that AirTran and Delta conspired through public statements.

In all of the cases Plaintiffs cite to support the proposition that conspiracy can be inferred from communications, the communications were direct and person-to-person.[8] (Opp. at 12.) The CAC alleges no such communications between

[8] *See Helicopter Support Sys. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987) (faxes between defendants plus direct evidence of agreement); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984) (the owner and district and store managers of a chain of optical stores conspired to file fraudulent Medicare claims through meetings and direct communications); *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) (group discussion among competing real estate agents about raising their commissions at a private dinner party); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009) (alleging "direct, in-person communications at trade meetings" and "private trade association meetings"); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-cv-3066-JEC, 2009 WL 856306, at *12-15 (N.D. Ga. Feb. 9, 2009) (defendant producers conspired with their largest buyer to give the buyer a price advantage over its competitors through emails and private discussions concerning pricing decisions); *TFT-LCD*, 586 F. Supp. 2d at 1116 (defendants conspired by "exchang[ing] numerous types of sensitive competitive information, including price information, through trade association meetings, private communications and published data."); *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, (D. Minn. 1995) (claiming defendants conspired

AirTran and Delta.

In fact, Plaintiffs fail to cite a single case in which a court held that a statement on an earnings call was deemed an invitation to collude. The closest they come is *In re Valassis Communications, Inc.*, which contained no claims under the Sherman Act and resulted in an administrative agency consent decree, not a court decision. Docket No. C-4160, 2006 FTC LEXIS 26 (Apr. 19, 2006). Further, as shown in AirTran's opening brief, the direct statements to a competitor in *Valassis* are more indicative of attempted collusion, while those alleged here announce scheduling decisions that would be communicated to the industry and traveling public long before their implementation. (AT Mem. at 27-28.)

4. Delta's and AirTran's earnings call answers to analysts' questions do not support a plausible inference of conspiracy.

In attempting to align this case with the authorities cited on page 12 of their Opposition, Plaintiffs focus on two particular answers to analysts' questions given during earnings calls by Robert Fornaro, AirTran's Chief Executive Officer, and Glen Hauenstein, Delta's Executive Vice President. Plaintiffs argue that these answers were "infused with a level of specificity concerning how to increase prices that can only be explained as signaling collusion." (Opp. at 14.) Plaintiffs' theory

through means such as "electronic communications," "private dinners," and "industry-bonding meetings at the Super Bowl and other locations.").

that these statements enabled a conspiracy is implausible for at least two reasons.

First, the CAC alleges that Messrs. Fornaro and Hauenstein responded to direct questions by analysts during public earnings calls, *see* CAC, ¶¶ 38, 55, not that they delivered preconceived, scripted statements designed to invite collusion as in the cases relied on by Plaintiffs, *see TFT-LCD*, 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008) (complaint alleged "keynote address" was "invitation[] to agree"); *Valassis*, 2006 FTC LEXIS 26, at *2 (respondent used prepared statement on earnings call to invite competitor to collude).

Second, contrary to Plaintiffs' characterization, Messrs. Hauenstein's and Fornaro's responses provided only general information about the carriers' future plans that could not form the basis for an agreement. In response to a question about whether AirTran would impose a first bag fee, Mr. Fornaro mainly explained an explanation of AirTran's *past* decisions and conduct regarding first bag fees, *i.e.*, that it had developed the technical capability to implement a first bag fee but had not implemented such a fee because Delta had not done so. He added only that AirTran would strongly *consider* a fee of some kind in the future only if and after Delta did so. (CAC ¶ 55.) Mr. Fornaro said nothing about how much AirTran would charge, or to which passengers or fare classes a fee would apply. (*Id*.) Likewise, Mr. Hauenstein seven months earlier—in response to an analyst's

question about the amount of capacity Delta believed it would have to shed before it returned to health—estimated 10%, *industry-wide*. (CAC ¶ 38.) Mr. Hauenstein suggested nothing about the amount of capacity that Delta would, or AirTran should, withdraw, even on a system-wide basis; he certainly did not suggest capacity reductions for either carrier in any specific city-pairs, or even in Atlanta generally. (*Id*.) Finally, since Messrs. Fornaro and Hauenstein were answering completely different inquiries, it is implausible that these two answers singled out by Plaintiffs were part of a "conversation" sufficient to achieve a "meeting of the minds in an unlawful agreement." (Opp. at 11 (citing *City of Tuscaloosa*, 158 F.2d at 469).)

5. Allegations that AirTran and Delta had opportunities to conspire are insufficient.

Plaintiffs also allege that AirTran and Delta participated in two industry conferences, the Merrill conference and the Calyon conference, during the alleged conspiracy period. (CAC ¶¶ 40, 51.) The CAC does not allege that there was anything unusual about industry executives addressing investment conferences. *See American Dental*, 2010 U.S. App. LEXIS 9928, at *32-34 (rejecting inference of conspiracy from "participation in trade associations and other professional groups"); *see also Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988) ("[A] trade association is not by its nature a 'walking

conspiracy'"). Plaintiffs allege only that Delta stated at the Merrill conference that it would wait to see what the market did before deciding whether to further reduce capacity (CAC ¶ 41), and that, at the Calyon conference, AirTran reiterated the 3-7% capacity cuts it had already disclosed, and predicted that oil prices would return to their 2007 levels. (CAC ¶ 51; *see aslo* Appx. Exh. 38 at 7.) Without a reasonable inference that what was said at the conferences plausibly suggests collusion, Plaintiffs have pled no more than the opportunity to collude, which does not cross the threshold of plausibility. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007).

Likewise, Plaintiffs allege that AirTran and Delta "coordinated gate lease negotiations with Hartsfield-Jackson to ensure, upon information and belief, that neither airline would disrupt their agreement by attempting to secure more . . . slots." (CAC ¶ 59.) In their Opposition, Plaintiffs now concede that these "coordinated negotiations" amounted to nothing more than "an *opportunity* to cement and ensure compliance with their conspiracy to increase prices . . . ." (Opp. at 46 (emphasis added).) Thus, these allegations also fail to support an inference of conspiracy. *See Travel Agent Comm'n*, 583 F.3d at 905; *Late Fee and Over-Limit Fee*, 528 F. Supp. 2d at 963.

III. PLAINTIFFS' OPPOSITION CANNOT SUSTAIN THE PLAUSIBILITY OF PLAINTIFFS' SECTION 2 CLAIM AGAINST AIRTRAN.

Plaintiffs' Opposition concedes, as it must, that a viable Section 2 complaint must plausibly allege: (1) anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Plaintiffs' assertion that each of these elements is pleaded plausibly lacks foundation both in the CAC itself and in governing Eleventh Circuit law.

To satisfy the "anticompetitive conduct" element, Plaintiffs rely on the same alleged "invitation to collude" that underlies their Section 1 claim. (Opp. at 32.) But their conclusory interpretation of AirTran's forward-looking earnings call statements is no more plausible in a Section 2 context than in a Section 1 context. Plaintiffs' invocation of *United States v. American Airlines* and *In re Valassis* in this connection fails because, in stark contrast to AirTran's general statements of unilateral future action, those cases involved disclosure of future actions specifically directed at competitors and conditioned on market reciprocity.

Plaintiffs' allegation of "specific intent" is pure *ipse dixit.* Plaintiffs point to no statement or action by AirTran that could have led to the across-the-board AirTran/Delta coordination necessary for the exercise of monopoly power. The

only concrete allegation of price coordination—AirTran following Delta's initiation of a first bag fee—relates to a single element of a complex pricing system, and applies only to certain passengers under differing air carrier rules. That element, even if coordinated, could not create a monopoly. Plaintiffs' CAC thus founders on the "axiom of antitrust law . . . that merely saying so [as to specific intent] does not make it so for pleading sufficiency purposes." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l Inc.*, No. 08-1693, 2010 U.S. App. LEXIS 7894, at *47 (3d Cir. Apr. 16, 2010); *accord City of Moundridge, KS v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 42-43 (D.D.C. 2007) (pre-*Iqbal*); *compare Andrx Pharm., Inc. v. Elan Corp., PLC*, 421 F.3d 1227 (11th Cir. 2005) (inferring pre-*Iqbal* specific intent from unilateral efforts to exclude all competitors).

Plaintiffs' efforts to resurrect their claim of "dangerous probability" (Opp. at 31-34) are similarly unavailing. Plaintiffs concede that they have failed to plead a meaningful "relevant market" in which AirTran has a greater than 50% market share, but leave it to Defendants to find one within the amorphous allegations that purportedly put Defendants on "inquiry notice." (Opp. at 34.) There is no case support for Plaintiffs' novel theory of "inquiry notice" and no excuse for Plaintiffs' failure to designate the markets where a dangerous probability of monopolization

allegedly arose for purposes of their Section 2 claim.[9]

In addition, Plaintiffs now concede that their Section 2 claim depends on the Court's willingness to entertain the theory of *attempted joint monopolization*. (Opp. at 24-35.) Given the 22% market share AirTran is alleged to possess in the narrowest of the route groupings proposed by Plaintiffs, and the absence of any alleged conduct by which AirTran could oust Delta from any route, AirTran could not unilaterally achieve monopoly power. Only by arguing that AirTran sought to enlist Delta into the functional equivalent of a cartel (*i.e.*, a conspiracy to monopolize) can Plaintiffs claim a dangerous probability of monopolization.

As pointed out in AirTran's initial memorandum (AT Mem. at 31), a Section 2 monopolization claim does not include an "attempt to conspire" offense,[10] and the only District Court to rule on the Plaintiffs' "shared monopoly" theory in this Circuit, has rejected it, as have other circuits. *JES Props., Inc. v. USA Equestrian, Inc.*, 02cv1585T24MAP, 2005 WL 1126665, at *18 (M.D. Fla. May 9, 2005), *aff'd*, 458 F.3d 1224 (11th Cir. 2006) ("Only section 2's conspiracy to monopolize claim targets concerted action."); *see also, e.g., ID Sec. Sys. Canada, Inc. v.*

[9] Plaintiffs contend, in the alternative, that they would be able to amend their complaint to specify relevant markets. (Opp. at 34, n. 12.) If the court dismisses, as it should, but grants leave to amend, the validity of this contention can then be tested.

[10] To be sure, there is a separate and distinct "conspiracy to monopolize" offense under Section 2, but that is not pleaded in the CAC.

Checkpoint Sys., Inc., 249 F. Supp. 2d 622, 646 (E.D. Pa. 2003) (rejecting § 2 claim "based on the alleged existence of a . . . duopoly").

Plaintiffs implicitly concede this point by relying on *conspiracy to monopolize* precedents to argue that Sherman Act § 2 is not limited to single entity offenses. *E.g.*, *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), *aff'd*, 146 F.3d 1088 (9th Cir. 1998); *Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F. Supp. 2d 600 (S.D.N.Y. 2002); *see also Springfield Terminal Ry. Co. v. Canadian Pac. Ltd.*, 133 F.3d 103 (1st Cir. 1997) (expressly rejecting reliance on *American Airlines*). But "conspiracy to monopolize" requires the same allegation of a meeting of the minds that Plaintiffs omit from their Section 1 count.

The few cases cited by Plaintiffs to claim that inducement is a proper foundation for a Section 2 claim involved facts that differ significantly from the facts alleged here and provide no basis for importing a "shared monopoly" theory into this Circuit. *American Airlines* and *In re Valassis*, on which Plaintiffs principally rely, rest on direct and unequivocal efforts to enlist competitors in working cartels. (AT Mem. at 27-28.)

IV. PLAINTIFFS' OPPOSITION FAILS TO OVERCOME THE NEED FOR DISMISSAL TO AVOID DIRECT CONFLICT BETWEEN SECURITIES LAW DISCLOSURE REQUIREMENTS AND PLAINTIFFS' ANTITRUST CLAIMS.

Plaintiffs mischaracterize AirTran's position as an attempt to "immunize

collusion from the antitrust laws when publicly-traded corporations collude through earnings calls and at industry conferences." (Opp. at 38.) Plaintiffs thus attempt to avoid confronting the conflict presented by their CAC between the Securities Law requirement that AirTran publicly disclose information that could also be of decisional value to competitors and the Antitrust Law prohibition of anticompetitive collusive conduct. The Supreme Court's four-part *Billing* test is designed to resolve that tension. *Billing* also embodies the "general standard" of the precedents on which Plaintiffs rely.[11] *See Billing*, 551 U.S. at 272. (Opp. at 38).

Despite the clear application of *Billing* to the conflict raised by the CAC, Plaintiffs contend that the Court must permit them to go forward under the antitrust laws because they have no remedy for the alleged misconduct under the Securities Laws. (Opp. at 38-40). This argument improperly limits preclusion to conduct that violates the Securities Laws instead of focusing on whether antitrust enforcement would unduly "inhibit permissible (and even beneficial) market behavior," which is the whole point of *Billing*. *Elec. Trading Group LLC v. Banc of Am. Sec.*, LLC, 588 F.3d 128, 136 (2d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 4102 (May 17, 2010) (citing *Billing*). The Supreme Court in *Billing* specifically recognized that

[11] Further, after *Billing*, Plaintiffs' citation of pre-*Billing* cases dealing with the reconciliation of antitrust policy with the policies of other federal regulatory regimes is immaterial.

there is "no practical way to confine" this type of antitrust suit solely to individual actions, and that a failure to recognize the inherent conflict would encroach upon the activities expressly encouraged by the Securities Laws. (Opp. at 38.) The *absence* of a Securities Law remedy for lawful public disclosure is the very reason why examination of the tension between Securities Law disclosure requirements and antitrust policy in the specific circumstances of this case is necessary.

When Plaintiffs attempt to grapple with *Billing's* four-part test, the weakness of their position becomes even more glaring. That attempt consists of little more than tendentiously describing the pertinent "activity," "practice," or "conduct" *Billing*, 551 U.S. at 276-78, as "collusion among competitors." (Opp. at 40.) But, as *Billing* makes clear, the activities and practices that are the concern of the four-part test are to be described much more generally and neutrally. *Billing*, 551 U.S. at 275-76 (describing "activities in question" as "the underwriters' efforts jointly to promote and to sell newly issued securities"); *id.* at 277 ("the SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue"). Thus, a better description of the "activity in question" here is "public disclosure of information useful to investors."

Plaintiffs cannot dispute that the SEC can and has regulated disclosures by public companies like AirTran, and that the CAC is based entirely on the

inferences they seek to draw from public disclosures. Applying the antitrust laws *in terrorem* to regulated public disclosures that necessarily inform investors—but, in the process, also inform competitors—of the disclosing company's financial strength, market perception, and strategic direction could seriously impair the SEC's objective of promoting a fully-informed capital market.

Plaintiffs rely on *Pennsylvania Avenue Funds* and *Hinds County* to argue that SEC disclosure regulation cannot preclude price-fixing claims. Plaintiffs' reliance is misplaced, as in those cases defendants sought to shield *past* anticompetitive activities from antitrust scrutiny by publicly disclosing those actions in an SEC regulated disclosure. *Pa. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008) (disclosure of an illegal price fixing arrangement); *Hinds County, Miss. v. Wachovia Bank N.A.*, Civil No. 08-2516, 2010 WL 1244765, at *18 (S.D.N.Y. Mar. 25, 2010) (disclosure of illegal manipulation of the municipal derivatives markets). By contrast, Plaintiffs here seek to premise their antitrust claims *directly* on AirTran's regulated disclosures.[12]

Finally, Plaintiffs once again invoke the FTC consent order in *Valassis* to claim that there would be no risk of conflicting requirements if antitrust liability

[12] As the Supreme Court pointed out in *Billing*, the SEC is required to "take account of competitive considerations when it creates securities-related policy" and must be deemed to have considered the obvious fact that competitors, as well as investors, could make use of public disclosures. 551 U.S. at 283.

were premised on AirTran's public disclosures, because AirTran's earnings call statements at issue were extraordinary, not required by the Securities Laws, and not important to investors. (Opp. at 42-44.) Notably, in their Opposition, Plaintiffs discuss only one AirTran October 23, 2008 earnings call statement on first bag fees—apparently conceding that AirTran's earlier general capacity and revenue strategy statements were critical to investors were also disclosed in AirTran's 10Q and 10K reports, and consistent with prevailing disclosure practice in the airline industry. *See* AT Mem. at 34-36. By contrast, the disclosures at issue in *Valassis* were extraordinary, of no value to investors, not reported in *Valassis'* quarterly or annual reports, and of value only to its sole competitor. FTC Analysis of Agreement to Aid Public Comment at 5 (Opp. Ex. B.)

The October 23 statement on first bag fees by Mr. Fornaro was a response to two analyst questions regarding what had become a common practice in the airline industry in 2008, that sought to probe AirTran's failure to pursue additional ancillary revenues in the face of its substantial losses. Unlike *Valassis*, AirTran's comments were of importance to investors, and their subject matter, ancillary fees, was routinely discussed in written filings. Even if it were arguable that Mr. Fornaro's candid October 23 responses to analysts' direct questions were not, strictly speaking, required by SEC guidelines, Plaintiffs' own statement of facts

now takes the position that they were not material because Delta already had decided to initiate a first bag fee before October 15. (Opp. at 8-9.)

Plaintiffs' failure to appreciate the importance of harmonizing Antitrust Law and Securities Law policies after *Billing* is further highlighted by their effort to enjoin AirTran from "sharing actual and potential future competitive actions concerning pricing and capacity cuts in forums monitored by its competitors." (CAC ¶¶ 93, 98.) This sweeping relief would clearly stifle meaningful disclosure of information critical to investors in SEC filings and contemporaneous earnings calls, distorting the efficient capital markets to which the Supreme Court has given primacy in *Billing*. This Court should not permit this antitrust case to go forward on a collision course with the nation's Securities Laws.

CONCLUSION

For the foregoing reasons, AirTran requests that the Court grant AirTran's Motion to Dismiss the Consolidated Amended Class Action Complaint.

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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION NO. 1:09-md-2089-TCB ALL CASES

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, I provided, via electronic mail and U.S. Mail, *Defendant AirTran's Reply Brief In Support of Its Motion to Dismiss the Consolidated Amended Complaint,* to the following attorneys of record:

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