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 DELTA AIR LINES, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiffs do not allege that Delta and AirTran directly or privately communicated with one another about either the imposition of a first bag fee or supposed changes in capacity. Nor do Plaintiffs allege that Delta and AirTran reached an *actual agreement* with one another about a first bag fee or capacity. Plaintiffs instead assert a violation of the Sherman Act based on the fact that during earning calls and meetings with the investment community, Delta and AirTran made public statements about their future business plans, and offered assessments of industry conditions.

Plaintiffs' theory of antitrust liability defies applicable Supreme Court and Eleventh Circuit precedents governing: (1) the requirements for stating a claim under Section 1 of the Sherman Act, (2) the requirements for stating a claim under Section 2 of the Sherman Act, (3) the requirements for stating a claim for injunctive relief, (4) the doctrine of implied preclusion, (5) and the *Noerr-Pennington* doctrine. Because Plaintiffs' Complaint fails to satisfy the standards established by controlling case law, it should be dismissed with prejudice.

ARGUMENT

I. COUNT ONE OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

Plaintiffs' Opposition does nothing to save the Complaint's failure to meet the "threshold requirement of every antitrust conspiracy claim" brought under Section 1 of the Sherman Act: to allege, and prove, "'an *agreement* to restrain trade.'" *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) (quoting *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991)). Long-established antitrust jurisprudence requires "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Seagood*, 924 F.2d at 1573 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (discussing necessity of "meeting of the minds" for Section 1 claim).

As set forth in Delta's opening brief, once Plaintiffs' conclusory labels (such as "conspiracy" and "collusion") are set aside,[1] it is clear the Complaint does not

[1] To survive a motion to dismiss, a complaint's allegations regarding an unlawful agreement must be "more than labels and conclusions." *Twombly*, 550 U.S. at 555; *see also American Dental Ass'n v. Cigna Corp.*, --- F.3d ---, 2010 WL 1930128 (11th Cir. May 14, 2010) ("In analyzing the conspiracy claim under the plausibility standard, *Iqbal* instructs us that our first task is to eliminate any allegations in

actually allege that Delta and AirTran had "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *See* Delta Br. at 2-3, 6-13. Plaintiffs' Opposition claims that the required "unity of purpose" or "common design and understanding" can be inferred from so-called "collusive communications." Pl. Opp. at 12. But Plaintiffs' theory of "collusive communications" fails in at least two respects.

First, although Plaintiffs assert that Delta and AirTran were communicating *with one another* when they made public statements to the investment community, Plaintiffs' Opposition does not point to any non-conclusory allegation in the Complaint providing a factual basis for that assertion.[2] Indeed, the Complaint concedes the absence of a factual foundation, qualifying the allegation that public references to the "industry" "typically are refer[ences] to each other" as based merely on "information and belief." Compl. ¶ 20. Yet, as the Eleventh Circuit has explained, "allegations of conspiracy [that] are based on information and belief, and fail to provide any factual content that allows [the court] to draw the

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Plaintiffs' complaint that are merely legal conclusions."); *id*. ("After eliminating the wholly conclusory allegations of conspiracy, we turn to Plaintiffs' remaining factual allegations.").

[2] As explained in Delta's opening brief, the notion that Delta and AirTran were communicating *with one another* through such public statements is contradicted by material upon which the Complaint relies. *See* Delta Br. at 15-17.

reasonable inference that the defendant is liable for the misconduct alleged . . . [are] insufficient to state a claim for relief, and will not do." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (internal quotations and citations omitted); *American Dental Ass'n v. Cigna Corp.*, --- F.3d ---, 2010 WL 1930128 (11th Cir. May 14, 2010) (citing and quoting *Sinaltrainal* in rejecting plaintiffs' factual deductions).

Second, Plaintiffs have yet to identify any way in which the Complaint alleges facts which could not "just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy." *Kendall v. Visa USA, Inc.,* 518 F.3d 1042, 1049 (9th Cir. 2008); *see also Twombly,* 550 U.S. at 554 ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior consistent with conspiracy, but just as much in line with a wide swath of rational competitive business strategy unilaterally prompted by common perceptions of the market.").

Plaintiffs now claim to allege a "single, *per se* unlawful conspiracy between Defendants to increase prices." Pl. Opp. at 1; *see also id*. at 5, 20. But the only "price increase" identified in either the Complaint or in Plaintiffs' Opposition is

the first bag fee adopted by Delta and AirTran in November of 2008.[3] Recognizing they must allege facts that tend to exclude the possibility of merely interdependent behavior, Plaintiffs strain to characterize the imposition of a first bag fee "during a recession" as being "counter to either Defendant's interest to increase prices unilaterally." Pl. Opp. at 1.

There are no *facts* alleged in the Complaint, however, that support Plaintiffs' characterization of Delta's conduct as inconsistent with its independent business interests. To the contrary, the Complaint itself references a powerful explanation why Delta's adoption of a first bag fee was entirely consistent with its independent economic interests – namely the merger with Northwest Airlines, which was consummated on October 29, only a few days before Delta implemented its first bag fee (harmonizing its policy with the pre-merger Northwest policy) on November 5. As explained in Delta's opening brief and reflected in the earnings call transcripts cited by Plaintiffs, Delta had committed to fully align the policies and practices of the two airlines. *See* Delta Br. at 10; Delta Br., Appx. Exh. 32, at 2. Because at the time of the merger Northwest charged a bag fee but Delta did not (*see* Compl. ¶ 45), the merger required Delta to make a decision about whether the

[3] *See* Delta Br. at 6-7; *id*. at 14 n.6 (noting "the Complaint does not describe any specific routes on which capacity allegedly was reduced, nor does it identify any time periods during which these alleged capacity reductions took place").

combined carrier would charge a first bag fee. Since Northwest was already charging a first bag fee, foregoing such a charge for the combined carrier would have meant not only sacrificing revenues that Delta would earn from the fee, but the revenues that Northwest was already earning. Moreover, *all other* legacy carriers – which compete with Delta across its entire system – had already adopted first bag fees. *See* Compl. ¶ 25. In these circumstances, Delta's decision to adopt such a fee can hardly be characterized as inconsistent with "rational, legal business behavior." *Cf. American Dental*, --- F.3d ---, 2010 WL 1930128 (11th Cir. May 14, 2010) ("Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.") (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009)).

Unable to point to any judicial decision applying the antitrust laws to condemn conduct remotely like that alleged here,[4] Plaintiffs repeatedly rely on an

[4] None of the judicial decisions cited by Plaintiffs (Pl. Opp. at 12-13) addressed claims anything like those asserted here, which are based exclusively on public statements during earning calls and meetings with the investment community. *See Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc*., 818 F.2d 1530, 1536 (11th Cir. 1987) ("the record in this case includes direct evidence of an agreement between Hughes and its foreign distributors to maintain resale prices"); *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) (agreement to fix prices reached

action by the Federal Trade Commission to support their novel view of the Sherman Act. *See* Pl. Opp. at 4, 14, 38, 50 (referring to *In the Matter of Valassis Communications, Inc.*, FTC File No. 0008, hereafter "*Valassis*"). That matter has no relevance here for several reasons.

First, the FTC action in *Valassis* was not brought under the Sherman Act, but under a different statute, unavailable to private plaintiffs, that proscribes a broader range of conduct than that condemned under the Sherman Act – Section 5 of the FTC Act, 15 U.S.C. § 45. *See, e.g.*, *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 empowers the FTC "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws"); *see also F.T.C. v. Indiana Federation of*

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during *private* meeting among competitors); *Columbus Drywall & Insulation, Inc. v. Masco Corp*., 2009 WL 856306 (N.D. Ga. Feb. 9, 2009) (discussing extensive evidence of a *direct* agreement to restrain trade); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 894 (N.D. Ill. 2009) (observing that "[p]ublic statements about output reduction, in the form of press releases or SEC filings, are fundamentally distinct from statement made a trade meetings *directly to* competing executives") (emphasis added); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008) ("The Complaint also alleges that defendants exchanged numerous types of sensitive competitive information, through trade association meetings, *private communications* and published data.") (emphasis added); *In re Travel Agency Comm'n Antitrust Litig*., 898 F. Supp. 685, 690 (D. Minn. 1995) (denying summary judgment where alleged conspiracy based on, *inter alia*, "private dinners for airline executives and attendant antitrust counsel, and industry-bonding meetings").

Dentists, 476 U.S. 447, 454-455 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.") (citations omitted).

Second, the *Valassis* decision relied on so heavily by Plaintiffs is a consent order – *i.e.*, a settlement – and nothing more. The respondent in that matter did not admit that its conduct violated any law, and the order does not constitute a finding of unlawful conduct.

Third, the facts alleged by the FTC in *Valassis* differ materially from the facts alleged here. Specifically, the FTC alleged that "Valassis' [public] statements described with precision the terms of its invitation to collude with News America." Pl. Ex. B at 3; *see also id*. at 4 ("Valassis communicated to rival News America proposed terms of coordination for the FSI market . . . and did so with extraordinary specificity"); *id*. at 5 ("Valassis *specified how it proposed to split the business of those customers it shared with News America* and explained what its pricing would be with regard to pending bids to four News America customers") (emphasis added). In contrast, none of Delta's general, public statements at issue

here can reasonably be interpreted as offers to collude, or otherwise violate the antitrust laws. Delta Br. at 8-10, 13-18.

Fourth, unlike Plaintiffs' theory here, the FTC consent order acknowledges the need to avoid chilling legitimate speech and frustrating the disclosure system governed by the securities laws. *See* Pl. Br., Ex. A at 3-4; *see also* Pl. Br., Ex. B at 5 & n.10. Indeed, recognizing that it was treading on ground covered by the securities laws, the FTC went out of its way to make clear the extraordinarily unusual nature of the conduct alleged. *See* Pl. Ex. B at 5 n.10 ("Here, the Commission has been cited to no other instance where a corporation disclosed publicly in securities filings or other fora the *detailed descriptions* of its future pricing plans and business strategies alleged in this complaint.") (emphasis added).

Finally, to the extent the *Valassis* consent order reflected the views of the FTC at that time about the outer edges of the law as it relates to enforcement actions based on public statements issued in the context of investor communications, this Court is not bound by the FTC's views. Indeed, numerous courts have rejected the FTC's views of the law and application of the law to specific facts. *See, e.g.*, *Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056 (11th Cir. 2005) (vacating FTC order that found "reverse payment" settlement agreements unreasonably restrained competition in violation of Section 1 of the Sherman Act);

Rambus Inc. v. F.T.C., 522 F.3d 456 (D.C. Cir. 2008) (vacating FTC order on the ground the Commission failed to demonstrate defendant's conduct had any anticompetitive effect and was therefore exclusionary, as required to establish violation of Section 2 of the Sherman Act); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008) (rejecting FTC's view that even in the absence of fraud or sham litigation a court should consider the validity of a patent when analyzing whether a "reverse payment" settlement agreement violates the antitrust laws); *In re Androgel Antitrust Litig. (No. II)*, --- F. Supp. 2d ---, 2010 WL 668291 (N.D. Ga. Feb. 22, 2010) (dismissing on Rule 12(b)(6) grounds FTC's and purchasers' complaint under the Sherman Act that patent infringement settlements between defendants exceeded scope of patent at issue). The judiciary, not enforcement agencies, are the authoritative interpreters of the antitrust laws. *See, e.g.*, *Rambus Inc. v. F.T.C.*, 522 F.3d 456, 462-63 (D.C. Cir. 2008) ("we review the Commission's construction and application of the antitrust laws *de novo*."); *see also Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056, 1063 (11th Cir. 2005) ("While we afford the FTC some deference as to its informed judgment that a particular commercial practice violates the FTC Act, we review issues of law de novo.").[5]

[5] Plaintiffs falsely represent to the Court that in "prior conspiracy cases involving

II. THE COMPLAINT SHOULD BE DISMISSED UNDER THE DOCTRINE OF IMPLIED PRECLUSION

Delta's opening brief explained that both Count I and Count III should be dismissed under the doctrine of implied preclusion because Plaintiffs' antitrust claims are incompatible with federal securities laws. *See* Delta Br. at 20-23.

The securities laws do not just permit, but encourage, truthful statements to the public and the investor community – including information about future plans

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Delta, Delta . . . has been deemed to have communicated and conspired with its competition." Pl. Opp. at 25. Plaintiffs' assertion is followed by references to two proceedings – *neither* of which resulted in Delta "ha[ving] been deemed to have . . . conspired with its competition," as Plaintiffs claim. The first, *United States v. Airline Tariff Publishing Co.*, was resolved by consent decree, without any admission or judicial determination of misconduct by Delta or any other defendant. The other, *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685 (D. Minn. 1995), is a district court decision denying a motion for summary judgment. That case was also settled, and there was never any factual determination of the conspiracy allegations by a judge or jury. *See In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280 (D. Minn. 1997). This is not the first time Plaintiffs' counsel have misrepresented facts about Delta's alleged conduct to the Court, or distorted the results of these two prior proceedings. *See* Dkt. 48 at 8-12, *Avery v. Delta Air Lines, Inc.*, No. 09-1391-TCB (N.D. Ga. July 1, 2009). Plaintiffs' reliance on the *Airline Tariff Publishing* is also misplaced because the final order in that case specifically permits conduct challenged by Plaintiffs here. *See* Final Judgment, § V, ¶¶ (D), (E), (G), *United States v. Airline Tariff Publishing Co.*, No. 92-2854 (D.D.C. Aug. 10, 1994) (attached hereto as Exhibit 1). Plaintiffs also attached a Competitive Impact Statement from the *Airline Tariff Publishing* case as Exhibit D to their brief, but they appear to have attached the wrong document, because it relates to a consent agreement reached by airlines other than Delta. The correct Competitive Impact Statement is attached hereto as Exhibit 2.

and expectations. *See, e.g.*, *Harris v. Ivax Corp.*, 182 F.3d 799, 806-07 (11th Cir. 1999) ("Congress enacted the safe-harbor provision [of the PSLRA] in order to loosen the 'muzzling effect' of potential liability for forward-looking statements, which often kept investors in the dark about what management foresaw for the company."); *In re Burlington Coat Factory Securities Litig.*, 114 F.3d 1410, 1433 (3d Cir. 1997) (Alito, J.) (observing that a "goal" of the disclosure rules under federal securities laws is to "encourag[e] the maximal disclosure of information useful to investors"). Plaintiffs nevertheless seek to impose antitrust liability on Delta and AirTran based on *truthful*, *public* statements made to the investment community about their respective business plans and views regarding the airline industry. However, imposing antitrust liability for such conduct would substantially undermine important objectives of the securities laws. *See* Delta Br. at 20-23. As the Eleventh Circuit has explained, "inhibit[ing] corporate officers from fully explaining their outlooks . . . would hamper the communications that Congress sought to foster." *Harris*, 182 F.3d at 806-07.

Plaintiffs seek to deflect attention from this tension between their antitrust theory and the securities laws by mischaracterizing Delta's position, claiming Delta argued that "the securities laws immunize collusion from the antitrust laws when publicly-traded corporations collude through earning calls and industry

conferences" (Pl. Opp. 38; *see also id*. at 3), and that Delta asks the Court to "give public companies a free pass to collude in public forums" (Pl. Opp. at 38). Neither characterization of Delta's position is accurate. The doctrine of implied preclusion certainly does not require the dismissal of an antitrust claim simply because the allegations mention earning calls or industry conferences. Application of the implied preclusion doctrine is case-specific. *See Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275 (2007) ("[W]hen a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint"); *see also Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 660 (1975) (finding implied preclusion to reconcile "the antitrust laws with a federal regulatory scheme *in the particular context* of the practice of the securities exchanges and their members of using fixed rates of commission") (emphasis added). The doctrine requires careful consideration of: (1) whether the area of conduct is within the "heartland" of securities regulation; (2) whether the SEC has clear and adequate authority to regulate; (3) whether there is active and ongoing SEC regulation; and (4) whether a "serious" conflict arises between antitrust law and securities regulation. *See Credit Suisse*, 551 U.S. at 285; *Electronic Trading Group, LLC v. Banc of America Sec. LLC*, 588 F.3d 128, 131

(2d Cir. 2009). As explained in Delta's opening brief, when the allegations in *this case* are evaluated under those standards, the incompatibility of Plaintiffs' claims with the securities laws is clear. *See* Delta Br. at 20-23.

Similarly beside the point are Plaintiffs' repeated observations that the SEC does not "regulate collusion" among competitors (Pl. Opp. at 40, 41, 45), and that Plaintiffs do not have a cause of action under the securities laws (Pl. Opp. at 3, 41). Both statements are true – and both statements are irrelevant to whether the Plaintiffs' case must be dismissed under the doctrine of implied preclusion.

The SEC does not regulate, and never has regulated, "collusion among competitors." If such regulation were a precondition for application of the doctrine of implied preclusion, there would be no such doctrine. *Cf. Electronic Trading Group*, 588 F.3d at 134 (looking to the "underlying market activity" to determine if there is a conflict between securities law and plaintiff's antitrust claim).

Nor, for the same reason, is the absence of any cause of action for collusion under the securities laws germane to whether the doctrine applies here. *See id.* at 136-37 (explaining that in ascertaining whether the "risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct" depends on "whether allowing antitrust liability for the conduct alleged to have the anticompetitive

effect would inhibit permissible (and even beneficial) market behavior"); *see also Credit Suisse,* 551 U.S. at 275-76 ("And the threat of antitrust mistakes, *i.e.,* results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).").[6]

[6] Plaintiffs' reliance on *Pa. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008) is misplaced. *Borey* differs fundamentally from this case because the SEC-regulated disclosures there had little or nothing to do with the basis for liability under the theory of the Complaint. Here, SEC-regulated disclosures are the core of the conduct upon which Plaintiffs seek to impose antitrust liability. Moreover, Plaintiffs' Opposition quotes from *Borey*, but fails to disclose that the court "decline[d] to decide whether securities law precludes Plaintiff's antitrust claim," dismissing plaintiff's claim on other grounds. *Id*. at 1132.

III. ALLEGATIONS ABOUT "JOINT" OR "COORDINATED" "NEGOTIATIONS" WITH HARTSFIELD-JACKSON AIRPORT SHOULD BE DISMISSED UNDER THE "*NOERR-PENNINGTON*" DOCTRINE

Plaintiffs advance two arguments in support of their claim that the *Noerr-Pennington* doctrine does not preclude their attempt to predicate liability on Defendants' "negotiations" with the City of Atlanta concerning the Hartsfield-Jackson Airport.

First, Plaintiffs invoke what is sometimes referred to as the "commercial exception" to *Noerr-Pennington* – that the doctrine "is not a defense for parties who seek to influence officials acting in a purely commercial, or proprietary, rather than 'governmental' capacity." Pl. Opp. at 45. But Plaintiffs fail to advise the Court of the Eleventh Circuit's decision in *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1573 (11th Cir. 1996), where it held the "district court's rejection of *Noerr/Pennington* immunity because of a perceived commercial exception was in error." *See also Santana Products, Inc. v. Bobrick Washroom Equip., Inc.*, 249 F. Supp. 2d 463, 491 (M.D. Pa. 2003) ("The weight of the authority plainly preponderates against recognition of a commercial exception to *Noerr/Pennington* immunity.").[7] Plaintiffs' failure to mention *TEC*

[7] Moreover, even if the Eleventh Circuit recognized a "commercial exception" to *Noerr-Pennington*, it has no bearing here because the City of Atlanta does not act

Cogeneration is even more remarkable given that in the decision the Eleventh Circuit rejected the district court's view that *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991), or *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667 (N.D. Ga. 1982) – the two cases upon which Plaintiffs rely (*see* Pl. Opp. at 45-46) – established any "commercial exception" to the *Noerr-Pennington* doctrine. 76 F.3d at 1582 ("We conclude that the district court's reliance in this case on . . . *Todorov* and *Hill Aircraft* to formulate a commercial exception to *Noerr/Pennington* as the law of this circuit is misplaced.").

Second, Plaintiffs assert *Noerr-Pennington* does not apply because they "do not seek to impose liability on Defendants for the *outcome* of their collusive negotiations with Hartsfield-Jackson." Pl. Opp. at 46 (emphasis added). However, this is precisely what Plaintiffs allege in their Complaint. Compl. ¶ 59 ("[T]he

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as a mere commercial participant in operating and managing the airport. It also establishes rules and regulations for use of the airport, including the leasing of gates. *Cf. E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52, 55 (1st Cir. 1966) (no antitrust liability where government body, "acting as an instrumentality or agency of the state," entered into lease for essential support services at Boston's Logan Airport); *Sea Air Shuttle Corp. v. Virgin Islands Port Auth.*, 782 F. Supp. 1070, 1077 (D.V.I. 1991) (holding defendant's negotiations with port authority for the lease of seaplane ramps were protected by the *Noerr-Pennington* doctrine).

airlines 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 than their allocated share of the gates* . . . and *to protect themselves from 'congestion'* (i.e., *lock other airlines out*).") (emphasis added). Plaintiffs now attempt to recast their allegation by stating that Defendants' negotiations with the airport merely "gave them an opportunity to cement and ensure compliance with their conspiracy to increase prices to consumers." Pl. Opp. at 46. Plaintiffs should not be permitted to mischaracterize their Complaint in an attempt to avoid *Noerr-Pennington*.

Accordingly, Count I of the Complaint must be dismissed to the extent it is predicated on Defendants' "negotiations" with the City of Atlanta concerning the Hartsfield-Jackson Airport.

IV. COUNT THREE OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A PROPER CLAIM FOR INJUNCTIVE RELIEF

The Complaint seeks to enjoin Delta from (1) "sharing actual and potential future competitive actions concerning pricing and capacity cuts in forums monitored by its competitors," and (2) "otherwise attempting to enter into combinations, contracts, and/or conspiracies that violate the Sherman Act." Compl. ¶ 98. Plaintiffs failed to address, let alone refute, most of Delta's

arguments explaining why neither of these two requests states a proper claim for injunctive relief – including failing to identify any conduct *by Delta* which could constitute a violation of Section 2 of the Sherman Act.[8]

For instance, with respect to the effort to enjoin Delta "from sharing actual and potential future competitive actions concerning pricing and capacity cuts in forums monitored by its competitors," Delta explained this is not a proper claim for injunctive relief because: (1) merely describing "actual" or "potential" "future competitive actions" in a public forum is not conduct the antitrust laws are designed to prevent; (2) the Speech Clause of the First Amendment precludes an interpretation of the Sherman Act which would render it unlawful for a company to disclose in public its "actual" or "potential" "future competitive actions"; and (3) describing "actual" or "potential" "future competitive actions" in a public forum cannot possibly give rise to "a dangerous probability of actual monopolization" – a requirement for establishing the offense of "attempted monopolization" under

[8] "Plaintiffs allege that, by inviting Delta to collude, *AirTran attempted to monopolize* the relevant market in violation of the Sherman Act § 2." Pl. Opp. at 31 (emphasis added). Plaintiffs are unable to identify any similar allegation regarding Delta's purported conduct.

Section 2 of the Sherman Act. *See* Delta Br. at 27-31. Plaintiffs declined to address any of these arguments.[9]

Instead, Plaintiffs focus their attention on convincing the Court it should ignore that the Complaint (1) specifically alleges Delta (and AirTran) resumed their adherence to the antitrust laws some time ago, and (2) fails to demonstrate any threat of *future* injury from any conduct by Delta. *See* Delta Br. at 24-27.

With respect to the former issue, Plaintiffs attempt to retreat from their pleading, claiming "[w]hile Plaintiffs allege that Delta has adhered to certain policies [after February 2009] that were not in place before, these policies appear to be directed to public disclosure of future fees." Pl. Opp. at 47. Plaintiffs, however, ignore their own allegation: "[A]fter implementing a substantial price increase [in November 2008] through collusion, both Delta and AirTran *have*

[9] Rather than address Delta's argument that Plaintiffs have not alleged facts which could result in a dangerous probability of actual monopolization, Plaintiffs refer the Court to the section of their Opposition responding to different arguments made by AirTran. *See* Pl. Opp. at 50 n.19. Plaintiffs simply never explain how Delta's conduct at issue could result in a dangerous probability of actual monopolization, and altogether ignore the fact that many of the public "disclosures" at issue were disclosed in prior or contemporaneous SEC filings (*see* Delta Br., Exhibit A), and therefore cannot have contributed to any risk of actual monopolization since the information supposedly communicated was otherwise available. *See* Delta Br. at 23 n.13. Plaintiffs also declined to address the fact that they lack standing to assert claims for injunctive relief related to Delta's capacity adjustments. *See* Delta Br. at 29 n.20.

subsequently adhered to antitrust compliance practices that were not in place when the airlines reached an agreement in 2008." *See* Compl. ¶ 64 (emphasis added); [10] *see also* Compl. ¶ 65 (citing April 2009 statements by AirTran which "demonstrate[d] a new-found commitment to antitrust compliance"). Plaintiffs should not be permitted to rewrite their Complaint through the briefing process.[11]

Even more problematic for Plaintiffs is that the Complaint fails to demonstrate any threat of *future* injury from any conduct by Delta. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (to pursue a claim for injunctive relief under the antitrust laws, a plaintiff must "demonstrate a significant threat of injury from an impending violation"); *United States v. Oregon*, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations."); *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III.

[10] The last public statement cited by the Complaint as a basis for liability occurred during 2008. *See* Compl. ¶ 57.

[11] Plaintiffs also attempt to rewrite their claim for injunctive relief itself, suggesting in their Opposition "an injunction can be entered that prevents either Defendant from publicly communicating that it will agree to cut capacity or raise prices if a competitor would also do the same." Pl. Opp. at 49-50. This proposed injunction not only differs from those requested in Plaintiffs' Complaint, but also departs from Plaintiffs' underlying factual allegations. Neither the Complaint nor any of the documents upon which it relies show that Delta ever communicated – publicly or otherwise – that it "will agree to cut capacity or raise prices if a competitor would do the same."

A threatened injury must be 'certainly impending' to constitute injury in fact."). On this point, Plaintiffs appear to misunderstand Delta's argument – claiming the "future" injury warranting an injunction is the possible payment of additional bag fees in the future. Pl. Opp. at 48 ("Plaintiffs here are airline passengers who are likely to continue purchasing airline passenger services on routes served by Defendants, including first bag fees."). But even assuming *arguendo* that an antitrust violation occurred, the payment of future bag fees would result from *past* conduct – *i.e.*, the allegedly unlawful past "agreement" – not future actions. That future bag fee payments are not the kind of *future* injury warranting injunctive relief is apparent from Plaintiffs' own request for relief: neither of the injunctions sought would address the imposition of future bag fees by Delta. *See* Compl. ¶ 98.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Delta's opening brief, Counts I and III of Plaintiffs' Complaint should be dismissed with prejudice.[12]

[12] Pursuant to Local Rule 7.1D, counsel for Delta certifies that this Reply was prepared with a font and point selection approved in Local Rule 5.1.

Dated: May 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, I electronically filed the foregoing DEFENDANT DELTA AIR LINES, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to counsel of record, and also served the foregoing via electronic mail to the following:

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