

EXHIBIT A

Red - Purely Conclusory Assertions: Not to be accepted as true.

Yellow - Conclusory Inferences and Unwarranted Deductions of Fact: The Court should not accept these statements as true but should determine, drawing on judicial experience and common sense, whether they are plausible within the full context.

Green - Allegations of Fact: While not necessarily conceded by AirTran, these statements are appropriately accepted as true on a Rule 12 motion.

II. STATEMENT OF FACTS

Plaintiffs challenge a single, *per se* unlawful conspiracy between Defendants. See CAC ¶¶ 1, 28, 58, 83. Defendants' conspiracy was reached in three ways: through (1) communications with each other on quarterly earnings calls;¹ (2) speeches and attendances at industry conferences; and (3) coordination in negotiating contracts with Hartsfield-Jackson. *Id.* ¶¶ 29-31.

AirTran first invited Delta to collude on its April 22, 2008 earnings call that Delta monitored. *Id.* ¶ 32. AirTran had rescheduled this call from a later date so that the call would occur one day prior to Delta's April 23, 2008 earnings call. *Id.* This gave Delta an opportunity to respond to AirTran's invitation to collude. *Id.*

During its April 22 earnings call, AirTran announced that it was "resetting its priorities to be highly profitable" and that it "strongly believe[d]" that AirTran and its competitors in the industry – *i.e.*, Delta – needed to reduce capacity in order "to get average prices up[.]" *Id.* ¶¶ 33-34. AirTran stated that Delta's elimination

¹ Notably, Delta admitted in its initial answer that it routinely monitors competitors' earnings calls. See Delta Answer ¶ 20, *Avery v. Delta Air Lines*, No. 09-1391, Dkt. #57 ("Delta admits...that Delta routinely monitors the analyst calls of its competitors").

of capacity was “long overdue” and announced that AirTran itself was revising its capacity growth plan: instead of growing ten percent in the fourth quarter of 2008, AirTran’s capacity would remain flat (compared to 2007). *Id.* ¶¶ 34-35.

The following day – on April 23, 2008 – Delta held its first quarter earnings call. *Id.* ¶ 37. During this call, Delta emphasized that it was committed to eliminating capacity and “pushing fare increases and fee increases,” and would monitor its competition to determine if “additional capacity reductions are warranted for the fall and winter seasons.” *Id.* Delta used its earnings call to articulate a specific expectation about the level of capacity the industry – *i.e.*, AirTran – needed to cut so that Delta could work “in conjunction with other carriers” to “remedy the industry woes:”

[Q:] If you priced the product such that you could be profitable, how much capacity would you actually need to take out?

...

[A:] Certainly, Bill. I think Delta can’t do it alone. We have to do it in conjunction with the other carriers because certainly the capacity cuts that we can do on our own, while they will help us, will not remedy the industry’s woes. So, as we look forward, we’re hopeful that the other carriers act responsibly and look at the demand profiles as we move into the fall. And I would say if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we’d be in pretty [good] shape, given today’s fuel environment.

Id. ¶ 38 (quoting Glen Hauenstein, Delta Exec. VP).

Delta's explicit invitation of a ten percent reduction in capacity in the fourth quarter (compared to 2007) was far below AirTran's announcement the day before that its fourth quarter capacity would remain flat compared to 2007. *Id.* ¶ 39.

Delta held its second quarter earnings call on July 16, 2008. *Id.* ¶ 42. By this time, AirTran had not sufficiently committed to capacity cuts that would satisfy Delta. *Id.* Until AirTran demonstrated this commitment, Delta planned to maintain an increased level of capacity in Atlanta – Delta's "core strength market." *Id.* Delta emphasized that it was "still in the planning process for '09" and would be willing to make further capacity cuts after it analyzed what capacity cuts the industry – *i.e.*, AirTran – make in the fall as they "come to the party." *Id.* ¶¶ 43-44. Delta believed that "the whole industry model has got to evolve much more quickly," particularly with regard to eliminating capacity for "low end traffic" to which certain industry participants – *i.e.*, AirTran – catered. *Id.* ¶ 43. Finally, with regard to any plan to implement a first bag fee in connection with its merger with Northwest (as Northwest had a first bag fee), Delta said that it had "no plans to implement it at this point[.]" *Id.* ¶ 45.

AirTran held its second quarter earnings call on July 29, 2008 – thirteen days after Delta's earnings call. *Id.* ¶ 46. AirTran's call served, effectively as a *mea culpa* to Delta for creating a market in Atlanta for low fares – *i.e.*, "low end traffic" in Delta's parlance – and an assurance that the fares will increase:

[W]e created the market in Atlanta for low fare, for close-[in] reasonable 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.

Id. ¶ 46 (quoting Robert Fornaro, AirTran CEO). Unlike its last earnings call – in which AirTran committed to keeping capacity flat in the fourth quarter of 2008 (a level that Delta did not believe was low enough) – AirTran responded to Delta’s invitation to cut capacity and “accelerated the amount of capacity” it planned to remove from the market to “support price increases.” *Id.* ¶ 47. Rather than keeping capacity flat in the last quarter of 2008 (as AirTran had committed on its April 22, 2008 call), it now planned “capacity to be down 7% to 8% in the September through December period.” *Id.*

Also during this call, AirTran emphasized that its focus was “going to be almost entirely on the balance sheet” to ensure profitability and wanted to improve the performance of “new ancillary revenues initiatives,” such as revenues earned from baggage fees. *Id.* ¶ 48.

After AirTran’s second quarter earnings call in which it demonstrated to Delta a commitment to accelerate capacity cuts and increase prices in Atlanta, Delta no longer felt constrained by vigorous competition from AirTran. *Id.* ¶ 49. For example, after this call and by the time Delta held its third quarter earnings call – on October 15, 2008 – Delta decided to cut capacity in Atlanta and stated that it

was now willing to increase ancillary fees – *i.e.*, first bag fees – because “strategically going forward [a la carte] pricing is where we need to go as an industry[.]” *Id.* ¶ 52 (quoting Richard Anderson, Delta CEO). Collusion with AirTran had fundamentally changed Delta’s business strategies. *Id.*

AirTran held its third quarter earnings call on October 23, 2008. *Id.* ¶ 53.

On that call, AirTran assured Delta that – even though “the consumers got in their minds that airfares are through the roof” – it would nonetheless follow Delta’s lead in implementing 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 [*i.e.*, Delta], 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.

Id. ¶¶ 54-55 (quoting Robert Fornaro, AirTran CEO).

Less than two weeks after AirTran’s third quarter earnings call, on November 5, 2008, Delta announced that it would begin charging passengers a \$15 first bag fee, effective December 5, 2008. *Id.* ¶ 56. The next day – on November 6 – AirTran confirmed the agreement with a public statement that it would make an announcement regarding a new first bag fee policy the following week. *Id.* ¶ 57.

On November 12, 2008, AirTran announced that it would impose a \$15 first bag fee, effective December 5, 2008 – which was the exact same fee as Delta’s with the exact same effective date. *Id.*

III. ARGUMENT

“[W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Factual allegations are considered in the light most favorable to the plaintiff. *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007). “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson*, 551 U.S. at 93 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A motion to dismiss is futile if a plaintiff alleges “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 555.

In moving to dismiss Plaintiffs’ CAC, Defendants ignore these fundamental principles governing a Rule 12(b)(6) motion. They do not accept Plaintiffs’ factual allegations as true. Instead, they provide their interpretation of quotes and facts in the CAC (often with extraneous facts not included in the CAC), ignore facts inconsistent with their own theories, and then make flawed legal arguments premised on faulty interpretations of the facts.