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

MEMORANDUM OF DELTA AIR LINES, INC. IN OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. DENNIS CARLTON

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INTRODUCTION

Plaintiffs seek to exclude the opinions of Dr. Dennis Carlton, an esteemed Professor of Economics at the University of Chicago's Booth School of Business. In addition to decades of academic work with an emphasis on economics relevant to antitrust, Dr. Carlton has also served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the Department of Justice, as well as a Commissioner of the U.S. Antitrust Modernization Commission, and a consultant to both the Department of Justice and the Federal Trade Commission.

Although Plaintiffs do not challenge Dr. Carlton's qualifications or experience, they nevertheless seek to exclude his opinions that: (1) there were no anticompetitive effects from AirTran's October 23, 2008 public earnings call statement even assuming (contrary to fact) that it could be interpreted as an "invitation to collude" and that Delta relied upon it—indeed, according to Dr. Carlton, allowing companies to rely on public information is pro-competitive; (2) Delta had very substantial economic incentives to adopt a first bag fee quite apart from public information about AirTran's interest in itself adopting a first bag fee; and (3) Delta had economically rational business justifications for implementing a

first bag fee when it did so in late 2008.[1] For the reasons explained in detail below, Plaintiffs' arguments for excluding Dr. Carlton's testimony lack merit, and their motion should be denied.

ARGUMENT

This Court's gate-keeping function under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) is governed by a three-part inquiry that assesses: (1) the qualifications of the proffered expert; (2) the reliability of the expert's methodology; and (3) the helpfulness of the expert's opinion to the trier of fact. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562-63 (11th Cir. 1998) (citing *Daubert*, 509 U.S. at 589). Dr. Carlton opines on issues directly relevant to the merits of the case based on the reliable application of his unchallenged economic expertise.

A. Dr. Carlton's Opinions About the Competitive Implications of AirTran's Earnings Call Statement Should Not Be Excluded

Plaintiffs first seek to exclude Dr. Carlton's opinions about the competitive effects of allowing companies to act on public information. For purposes of these

[1] *See* Expert Report of Dennis W. Carlton ("Carlton Report") ¶ 5 (Jan. 7, 2011); *see also* Rebuttal Expert Report of Dennis W. Carlton ("Carlton Rebuttal") (Feb. 4, 2011). For expert reports cited in this brief, Delta refers the Court to its contemporaneously filed "Appendix of Exhibits," which includes a table identifying the cited reports already in the record.

opinions, Dr. Carlton assumed the worst about AirTran's October 23 earnings call statement and Delta's reaction to it. Thus, he accepted (for the sake of argument) Plaintiffs' contentions that AirTran intended the statement to be an "invitation to collude" and that Delta relied on it in making its decision to adopt a first bag fee. *See* Carlton Report ¶¶ 5, 18. He then applied principles of economics and his extensive economic training and experience—including as the chief economist in the DOJ's Antitrust Division—to determine whether the AirTran statement could have harmed competition and consumers. Dr. Carlton reached several conclusions, based on his training and experience as an economist:

- "Preventing a company from responding to an analyst's questions about factors affecting general profitability would inhibit the flow of information that investors need to make decisions and would prevent capital markets from operating smoothly" (Carlton Report ¶ 16);

- "Limitations on the transmission of information to investors would also adversely affect consumers, who value information about an airline's pricing, schedules, fees, and policies" (*id.* at ¶ 17);

- "To prohibit firms from acting to maximize profits using all of the information available to them would not be in consumers interests" because "it would create uncertainty for firms that would not know when they could act to maximize profits by better serving consumers and when they could not" (*id.* at ¶ 19); and

- "[I]f companies were prohibited from acting upon publicly available information, competitors could seek to prevent competitive responses from their rivals by announcing actions to

which the rival would be prohibited from responding" which might "blunt competition" (*id.* at ¶ 20).

All of these opinions were grounded in fundamental economic precepts and applied reliably to the factual assumptions Dr. Carlton was asked and entitled to make. Plaintiffs should have no complaint about Dr. Carlton's assumptions, since they are Plaintiffs' own allegations.

Overall, Dr. Carlton concluded that "the goal of maximizing welfare," which is at the heart of United States antitrust law and jurisprudence, would be undermined if statements such as that made by AirTran could lead to antitrust liability for Delta. Carlton Report ¶¶ 15, 19.[2] The standard he applied is not "contrary to law" as Plaintiffs contend, but is consistent with the longstanding judicial interpretation of the Sherman Act as a "'consumer welfare prescription.'" *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984) (quoting

[2] Dr. Carlton does not opine (and Delta does not contend), as Plaintiffs argue, that price-fixing conspiracies should get a "free pass" under the antitrust laws if reached through public communications. Plfs' Br. at 8-9. Dr. Carlton's point is that the economic effects of preventing Delta from being able to act on publicly available information "would be inconsistent with the goal of maximizing consumer welfare." Carlton Report ¶ 19. And as Delta has explained elsewhere, Plaintiffs have not cited any case holding that a public statement like AirTran's provides a basis for inferring an unlawful agreement under Sherman Act § 1, or any case in which a competitor was held to have violated *any antitrust law* by making a unilateral business decision in the wake of or even in direct reliance upon such a public statement by a competitor. *See* Dkt. 603, Delta Summ. J. Reply at 11-12.

Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)); *see also Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 366 (1982); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010).

Plaintiffs also assert that Dr. Carlton's opinions about the competitive effects of relying on public information should be excluded because they are "not based on a reliable methodology." Plfs' Mot. at 1; Plfs' Br. at 11. But they offer no explanation of why that is so, much less substantiate their claim of a methodological defect. The methodology applied by Dr. Carlton was to determine the impact on competition and consumers by applying economic principles to an assumed set of facts—where the assumed facts are those argued by Plaintiffs. This is just what expert economists are supposed to do and within the contemplation of Rule 702.

Finally, Plaintiffs contend that exclusion of these opinions is warranted because Dr. Carlton "failed to consider the majority of the evidence in this case." Plfs' Br. at 11. However, as Plaintiffs themselves acknowledge, Dr. Carlton was asked to make certain factual assumptions *favorable to Plaintiffs*—which he did. Dr. Carlton was asked to assume that AirTran's October 23, 2008 public earnings call statement was an attempt "to signal its willingness to adopt a bag fee if Delta did so first" (Carlton Report ¶ 18), and that Delta relied on AirTran's public

statement in making its decision to adopt the fee (*id.* at ¶¶ 5, 18). Thus, Dr. Carlton did not "intentionally ignore[] . . . evidence that AirTran intended to invite Delta to collude on AirTran's earnings call" (Plfs' Br. at 11); he *assumed* that to be the case for purposes of rendering his opinions.

Plaintiffs complain that Dr. Carlton did not "take into account" other information contested by the parties, such as Plaintiffs' alleged private "collusive communications." Plfs' Br. at 11-12.[3] But that is a topic for cross-examination if the case proceeds to trial—not a basis for excluding his testimony,[4] as is evident from Plaintiffs' failure to cite any case law supporting their claim. And while

[3] Plaintiffs also argue that Dr. Carlton "ignores evidence that Delta itself was using earnings calls to send and receive price-related signals." Plfs' Br. at 12. Plaintiffs do not identify the earnings call statements they characterize as "price related signals," and instead merely cite emails reflecting internal discussion of public statements. *Id.* at 4 n.4. But as the Court has correctly observed, "it is well settled that two competitors may lawfully observe each other's public statements and decisions without running afoul of the antitrust laws." Dkt. 137, Order at 32. Moreover, Dr. Carlton did not ignore Delta's earnings call statements; he reviewed the public statements by Delta identified by Plaintiffs in their complaint and explained why they were not anticompetitive. *See* Carlton Report ¶¶ 14-15.

[4] *See Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988) ("[W]eaknesses in the underpinnings of the expert's opinion go to its weight rather than its admissibility."); *see also Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 285 (S.D.N.Y. 2011) ("Questions over whether there is a sufficient factual basis for an expert's testimony may go to weight, not admissibility.") (quotation omitted); *McIntosh v. Monsanto Co.*, 462 F. Supp. 2d 1025, 1031-33 (E.D. Mo. 2006) (holding expert in antitrust case could not be excluded on basis that he relied on certain documents to exclusion of others).

Plaintiffs fault Dr. Carlton for not interpreting emails and assessing witness credibility, that is not the role of an expert, and not a basis for excluding Dr. Carlton's opinions, as Delta has explained in response to Plaintiffs' other *Daubert* motions.[5]

B. Dr. Carlton's Opinion That Delta Would Have Adopted a First Bag Fee Without Regard to AirTran Should Not Be Excluded

Dr. Carlton offered an opinion that Delta had strong economic incentives to adopt a first bag fee regardless of AirTran's statement. Dr. Carlton noted, based on publicly available objectively accurate data, that Delta faced much more competition from carriers already charging first bag fees than it did from carriers without first bag fees like AirTran. Carlton Report ¶¶ 21-22 & Chart 1; Carlton Rebuttal ¶ 14. By the time Delta implemented a first bag fee, the majority (65.8%) of *non-Delta revenue on Delta routes* was earned by airlines *with* first bag fees. Carlton Report ¶ 22. This means that the pricing model of Delta's closest competitors became increasingly one where those competitors charged first bag fees. *Id.*

Dr. Carlton explains that each of Delta's legacy competitors that had already adopted the fee faced much more competition than Delta from airlines not charging

[5] *See, e.g.*, Dkt. 625-1 at 18-21, 29-32.

a bag fee. In the fourth quarter of 2008, only 34.2% of non-Delta revenue on Delta domestic routes was earned by carriers *without* first bag fees. Carlton Rebuttal ¶ 14. However, 48.4% of the non-American Airlines' revenue on American Airlines routes was earned by carriers without bag fees; for US Airways, the figure was 49.6%; United Airlines, 46.7%; and Continental, 46.4%. *Id.* Yet while each of these legacy carriers was much more exposed than Delta to competition from carriers without first bag fees, they uniformly reported that the fee was generating hundreds of millions of dollars in revenue without any significant loss of market share, and none of them ever retracted the fee.[6]

Dr. Carlton's opinion is based on his analysis of widely-used and accepted government data.[7] Plaintiffs do not challenge the reliability of that data, or the methodology Dr. Carlton used to analyze it. Instead, Plaintiffs argue that he should have reached a different *conclusion* based on the same data. Plfs' Br. at 15 ("Dr. Carlton's own data contradicts his conclusion . . . ."). This is nothing more

[6] *See* Dkt. 350-60 (DX 43 (American) at DLTAPE-515, 527); Dkt. 350-61 (DX 44 (United) at DLTAPE-154, 156); Dkt. 350-62 (DX 45 (US Airways) at DLTAPE-263, 264, 272); Dkt. 350-64 (DX 47 (Northwest) at DLTAPE-374); Dkt. 350-73 (DX 56 (Continental) at DLBF-21565); Dkt. 350-101 (DX 84 (United) at DLTAPE-903); Dkt. 350-102 (DX 85 (Northwest) at DLTAPE-852); Dkt. 350-103 (DX 86 (US Airways) at DLTAPE-750, 753-54, 758); Carlton Report ¶¶ 23-24; Carlton Rebuttal ¶ 14.

[7] *See* Carlton Report, Appendix C Materials Considered, "Airline Data" (citing U.S. Department of Transportation, Bureau of Transportation Statistics).

than a challenge to the "'correctness of the expert's conclusions.'" *Plantation Pipe Line Co. v. Continental Cas. Co.*, 2006 WL 6106248, *12 (N.D. Ga. Sept. 25, 2006) (Hunt, J.) (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000)). Such a challenge is, at most, a "'factual matter[] to be determined by the trier of fact, or where appropriate, on summary judgment'"—not a basis for excluding Dr. Carlton's opinions. *Id.* (quoting *Smith*, 215 F.3d at 718); *see also Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK LTD.*, 326 F.3d 1333, 1345 (11th Cir. 2003) ("The alleged flaws in [the expert's] analysis are of a character that impugn the accuracy of his results, not the general scientific validity of his methods. The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination."); *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) ("In most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility").

Plaintiffs next argue that Dr. Carlton's opinion does not "fit the facts" because he "fails to account . . . for the higher level of low-cost carrier [LCC] competition faced by Delta compared to airlines that imposed and maintained first bag fees." Plfs' Br. at 16. But Dr. Carlton did "account" for the level of competition Delta faced from LCCs versus other carriers—indeed, that was the

purpose of his analysis, which showed that at the time Delta adopted a first bag fee, Delta faced more competition from carriers that had already adopted first bag fees (primarily the legacy carriers) than those without first bag fees. In support of their assertion to the contrary, Plaintiffs fault Dr. Carlton for not relying on the Value Proposition analysis prepared by Delta's Revenue Management group in opposing the first bag fee. Plfs' Br. at 16. But leaving aside that Delta's key decision-makers did not credit that analysis in deciding to adopt a first bag fee,[8] Dr. Carlton's reliance on objective, indisputable government data was entirely proper and his opinion should not be excluded because he chose not to base his opinions on his interpretation of certain documents or testimony. *See supra* at 6-7 & n.5.[9]

Plaintiffs' assertion that Dr. Carlton "fails to account" for Southwest's free first bag fee policy is also wrong. Dr. Carlton did address Southwest's "bag fly

[8] *See, e.g.*, Dkt. 351, Delta Summ. J. Br. at 31-35; Dkt. 603, Delta Summ. J. Reply at 30.

[9] Contrary to Plaintiffs' argument, Dr. Carlton did not concede that "if the competitive concerns described in Delta's internal Value Proposition analysis reflected the prevailing view, his opinion would be incorrect." Plfs' Br. at 16. Dr. Carlton explained merely that if the view expressed in the Value Proposition document prevailed —*i.e.*, that Delta should *not* adopt a first bag fee because of, among other reasons, Delta's exposure to LCC competition—then that result would be different than the result predicted by his analysis: that Delta would likely adopt the fee regardless of what AirTran did. Dkt. 631-3, Plfs' Ex. 3, Carlton Dep. 147:18-150:14. Of course, the concerns expressed in Value Proposition analysis, and its recommendation *against* adoption of the fee, did not "reflect the prevailing view"—as evidenced by Delta's adoption of the fee.

free" policy in his report. *See* Carlton Report ¶ 21-22 & n.33. Moreover, Plaintiffs fail to explain how Southwest's "bags fly free" policy in any way undermines Dr. Carlton's opinions, let alone requires their exclusion. To the contrary, Southwest's free first bag policy reinforces Dr. Carlton's point about the relative insignificance of AirTran (and other carriers without first bag fees, including Southwest) to Delta's first bag fee decision. While Plaintiffs' case rests on the fallacy that Delta would not have adopted a first bag fee unless AirTran did so too, they ignore that Delta has kept the fee even after Southwest (the nation's largest carrier in terms of originating domestic passengers) acquired AirTran and then eliminated AirTran's first bag fee.[10] That real-world evidence leads to the inescapable conclusion that Delta's adoption of the fee was in its interest no matter what AirTran did.[11]

C. Dr. Carlton's Opinions Concerning Why It Was Economically Rational for Delta to Adopt a First Bag Fee in Late 2008 Should Not Be Excluded

Dr. Carlton opines that Delta's merger with Northwest provided a legitimate business justification for Delta to adopt the fee when it did. *See* Carlton Report ¶¶

[10] *See* Dkt. 553-1, Tenley Decl. ¶¶ 5-14.

[11] Plaintiffs also criticize Dr. Carlton for not explaining why Delta did not adopt the fee earlier than it did "when most non-Delta passengers on Delta routes were flying on airlines charging first bag fees." Plfs' Br. at 16-17 (citing Carlton Report ¶ 22 Chart 1). But Dr. Carlton did explain why Delta had a legitimate business reason for adopting a first bag fee when it did: Delta's merger with Northwest. *See infra*, Section C; Carlton Report ¶¶ 25-26.

25-26. Plaintiffs argue Dr. Carlton's opinion should be excluded because it is based only on the "self-serving subjective opinions of two Delta executives," and "ignores" certain documents that Plaintiffs contend show "Delta was planning to withdraw the Northwest fee." Plfs' Br. at 18. But Dr. Carlton cited the testimony of Delta's three (not two) most senior executives—Delta's CEO Richard Anderson, President Ed Bastian and then-COO Steve Gorman. *See* Carlton Report ¶ 25 & nn. 41-43. And there is no genuine dispute that it was the "opinions" of those executives in favor of the fee that drove Delta's first bag fee decision.[12] Moreover, Dr. Carlton's opinion is not based only their testimony. Rather, Dr. Carlton's opinion that Delta had valid economic reasons for not maintaining separate fee structures following the merger is also based his analysis explained earlier in his report (discussed above) that Delta was far more likely to adopt the fee than eliminate Northwest's first bag fee when confronted with that choice, as it was

[12] *See, e.g.*, Dkt. 554-3, Plfs' Statement of Additional Facts ¶¶ 207-208. By contrast, none of the documents cited by Plaintiffs were even seen by Delta's key decision-makers. For example, Plaintiffs cite four drafts of a spreadsheet listing the dozens of fees that Delta was working to align as part of the merger. *See* Plfs' Br. at 18 n.24. In each of those drafts, the entry for the first bag fee indicated "free" for the "combined entity," which Plaintiffs cite as "evidence that Delta was planning to withdraw the Northwest fee." But when that spreadsheet was actually provided to Delta's senior executives at the October 27, 2008 CLT meeting where they discussed adoption of a first bag fee, that entry was changed to "1st Bag Combined Entity TBD." *See* Dkt. 557, PX243 at DLBF 35567-68.

upon consummation of the merger. *See* Carlton Report ¶ 26. In the end, though, Plaintiffs' criticism is nothing more than a disagreement about the facts, which is not a basis for excluding Dr. Carlton's opinions. *See supra* at 6 n.4.[13]

Finally, Plaintiffs argue that Dr. Carlton's opinion is "inconsistent with the empirical evidence" because "Southwest and AirTran maintained separate fee structures post-merger for 42 months." Plfs' Br. at 19. But Southwest and AirTran did not merge until May 2011—months after Dr. Carlton submitted his reports in this case. Dr. Carlton's failure to consider information that did not exist when he submitted his reports is not a basis for excluding them.

Moreover, Dr. Carlton does not opine that Delta could not have maintained separate fee structures; he opines that Delta had good economic reasons for choosing not to, and opting instead to unify its policies with Northwest quickly upon the merger's close. Carlton Report ¶¶ 25-26. And contrary to Plaintiffs' argument, a comparison of the Delta/Northwest and Southwest/AirTran merger experiences underscores his point. For months prior to its merger, Delta meticulously planned to harmonize its fees and policies with Northwest on

[13] *See also* Fed. R. Evid. 702, advisory committee note (2000 amendment) ("The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

"day 1."[14] As a result, Delta and Northwest "went through a relatively quick and painless integration process"[15]—one "[g]enerally considered the smoothest of all the big mergers."[16] By contrast, Southwest "decided on a go-slow approach,"[17] choosing to continue operating as separate brands until Southwest could convert AirTran's planes to Southwest's network and policies.[18] That process began in

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[14] Dkt. 350-66, Ex. 49, at DLBAG-994-1065, at 1000, 1008 (May 16, 2008 "Integration Planning" presentation slides regarding "Airport Customer Service . . . day 1 Goals . . . Fee / rule harmonization with effective date"); Dkt. 350-77, Ex. 60, at DLBF-36512-13 ("Richard [Anderson] wants to meet . . . to discuss the fee structure of the combined entity. Rather than waiting for the consummated merger date, he wants to determine the fee structure beforehand."); Dkt. 350-78, Ex. 61, at DLBF-82417 (Sept. 2, 2008 "Delta-Northwest Merger Summary of Decisions from Corporate Day 1": "Delta to determine Day 1 related policies and fees"); Dkt. 350-79, Ex. 62, at DLTAPE-8353 (Sept. 4, 2008 e-mail: "the objective of course is to identify where there are differences between DL/NW for harmonization for 'day 1'"); Dkt. 350-80, Ex. 63, at DLTAPE-6856 ("RA [Richard Anderson] 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."); Dkt. 350-136, Ex. 119, Jad Mouawad, Delta-Northwest Merger's Long and Complex Path, N.Y. Times (May 18, 2011) ("How to Merge Two Airlines: Delta and Northwest announced their merger in April 2008. They immediately began planning for what turned out to be an 18-month sprint to integrate 1,200 systems across the two airlines . . . .").

[15] Ex. 1, Susan Carey & Jack Nicas, "United Continental Is Still Shaky Five Years After Merger," The Wall Street Journal (July 8, 2015), at 3.

[16] Ex. 2, Scott McCartney, "Southwest and AirTran Airlines: Mergers & Aggravations," The Wall Street Journal (July 18, 2013), at 2 (graphic).

[17] *Id.* at 3; *see also* at 1 ("Frustrated Frequent Fliers Wait as Kinks Get Ironed Out . . . The wedding of Southwest and AirTran airlines is now in its third year. For many of the carriers' regular passengers, the honeymoon ended long ago.").

[18] Dkt. 553-1, Tenley Decl. ¶¶ 6-7.

February 2012 (almost a year after the merger closed), and at a pace of approximately five aircraft a month, took almost three years to complete.[19]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to exclude the opinions and testimony of Dr. Dennis Carlton.

[19] Dkt. 553-1, Tenley Decl. ¶¶ 6-7.

Dated: December 4, 2015

Respectfully submitted,[20]

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

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing MEMORANDUM OF DELTA AIR LINES, INC. IN OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. DENNIS CARLTON 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 4th day of December, 2015.

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