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

AIRTRAN'S OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. ANDREW DICK

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Plaintiffs seek to exclude the testimony of AirTran's merits expert, Dr. Andrew Dick, a Ph.D. economist who served in senior positions with the DOJ Antitrust Division. Plaintiffs argue that Dr. Dick improperly opined on the legal standard for finding an anticompetitive agreement, but this is really a thinly disguised attempt to lessen the legal burden they bear to avoid summary judgment in this circuit. In any event, Dr. Dick's reports show he applies well-established economic principles and expressly disavows opining on legal standards.

Plaintiffs next dispute Dr. Dick's opinion that AirTran's public statements do not meet economic criteria for facilitating collusion, but concede that Dr. Dick's opinions are based on the well-established "cheap talk" framework. That alone should end their *Daubert* challenge. Dr. Dick also applies that framework to Plaintiffs' own expert's "game theory" model to show that his assumptions are inconsistent with collusion—an analysis that will also assist the factfinder.

Finally, in an attempt to counterbalance their own expert's improprieties, Plaintiffs accuse Dr. Dick of opining on non-economic factual issues, such as credibility determinations. This is untrue. Dr. Dick has applied mainstream, published economic principles to the evidence. Unlike Plaintiffs' expert, Dr. Dick does not opine that some evidence is more credible than other evidence.

I. FACTUAL BACKGROUND

AirTran intends to offer the testimony of Dr. Andrew Dick, an experienced antitrust economist specializing in industrial organization,[1] on economic issues related to Plaintiffs' claims of collusion. Dr. Dick holds Ph.D. and M.A. degrees in economics from the University of Chicago, and has published many articles on competition, market power, collusion, and other antitrust issues.[2] Dr. Dick served for seven years as an economist in the DOJ Antitrust Division, including as Assistant Chief and Acting Chief of the Competition Policy Section, where he oversaw economic analysis in numerous government investigations.[3]

In his expert report, Dr. Dick was clear: "While the question of whether two competitors entered into an illegal agreement to collude is, ultimately, a question to be resolved on the factual record based on applicable legal standards, economics offers guidance that can help inform the process."[4] Dr. Dick then addressed two economic issues: "First, were the introductions of first bag fees by AirTran and Delta consistent with the economics of unilateral conduct? Second, is the

[1] Dick Rpt. ¶ 2 (Ex. 1).
[2] *Id.*
[3] *Id.* ¶ 6.
[4] Dick Rpt. ¶ 4.

mechanism by which plaintiffs allege AirTran and Delta conspired over the introduction of first bag fees consistent with the economics of collusion?"[5]

Based on mainstream economic theory, including the economics of collusion, Dr. Dick reached the following conclusions, among others:

1. Defendants' "decisions to adopt first bag fees were consistent with the economic theories and principles identifying unilateral conduct."[6]

2. "The *mechanism* by which [P]laintiffs allege AirTran and Delta conspired over the introduction of first bag fees is inconsistent with the economics of collusion" because AirTran's public statements, on which Plaintiffs rely, "do not satisfy the economic criteria that the literature requires for forward-looking statements to facilitate collusion among competitors." That is because the statements were not "self-signaling or self-committing" and had "insufficient scope and specificity with respect to price (or non-price) competition."[7]

3. "Plaintiff's theory of collusion also fails as a matter of economics by its failure to consider the absence of credible mechanisms to monitor and punish defections from the alleged agreement."[8]

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[5] *Id.* (emphasis added).
[6] *Id.* at 5.
[7] *Id.* (emphasis added).
[8] *Id.*

4. "AirTran and Delta . . . continued to compete aggressively on overlapping routes after their respective adoptions of first bag fees," including by competing on capacity and price. "This ongoing competition," along with evidence that AirTran's and Delta's first bag fee amounts and policies diverged over time, "weigh[s] strongly against a collusion theory and in favor of unilateral conduct as the plausible explanation for AirTran's and Delta's actions."[9]

5. "None of [Plaintiffs' expert] Dr. Singer's economic analyses support his opinion that AirTran's and Delta's introductions of first bag fees could have been the result of collusion." For example, testing Dr. Singer's game theory predictions "demonstrate[s] that AirTran's and Delta's introductions of first bag fees were compatible with unilateral action and incompatible with collusion."[10]

II. ARGUMENT

A. Dr. Dick Provides Economic, Not Legal, Analysis.

1. Dr. Dick's opinions comport with well-established economics.

Plaintiffs argue that Dr. Dick has opined on the legal standard for proving collusion, but they are wrong. In his report, Dr. Dick describes and applies the well-established economic principles of collusion theory and explains that

[9] *Id.*
[10] Dick Rebuttal at 4 (Ex. 2).

economists would consider three criteria in assessing whether Plaintiffs' bag-fee conspiracy theory is economically rational: "[C]ould [AirTran and Delta] (i) identify terms of a cooperative understanding, (ii) detect deviations from those terms (with respect either to the application of first bag fees or any other price or non-price dimension whereby the carriers compete), and (iii) punish those deviations[?]"[11]

Dr. Dick applied an economic framework developed by Nobel Laureate George Stigler in a 1964 article, "A Theory of Oligopoly."[12] This framework is widely accepted by antitrust economists, including former chief economists of the DOJ Antitrust Division and the FTC and Judge Posner of the Seventh Circuit.[13] Dr. Baker, former chief economist of the FTC, has written that "Stigler's identification of the three problems a cartel must solve in order to cooperate successfully — identifying the terms of the cooperative understanding, detecting

[11] Dick Rpt. ¶ 36.
[12] *Id.* ¶¶ 32-35, Ex. 6.
[13] *Id.* (citing works by Dr. Jonathan Baker, former chief economist for the FTC, Dr. Carl Shapiro, former chief economist for the DOJ Antitrust Division, and Judge Posner); *see also* Jonathan B. Baker, "Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory," *Antitrust Bulletin*, Vol. 38, No. 1, at 143-219 (Spring 1993); Richard A. Posner, *Antitrust Law*, at 60-79 (2d Ed. 2001) (Ex. 16); Carl Shapiro, "Update from the Antitrust Division," Remarks Prepared for the American Bar Assoc. Section of Antitrust Law Fall Forum, at 27 (Nov. 18, 2010) (Ex. 8).

deviation from those terms, and punishing that deviation — remains the cornerstone of the economic analysis of what is now termed coordination."[14]

Plaintiffs accuse Dr. Dick of "manufactur[ing] criteria" that must be met to find collusion.[15] They quote part of his answer to a deposition question, but *omit* the sentences immediately before and after that testimony. The full passage:

> *Economics identifies essentially three pillars . . . that define or characterize collusion.* One is the mutual exchange of assurances leading to an agreement or its equivalent; second is that there has to be a means to detect deviations or cheating . . . from that agreement; and the third is that there has to be credible threats of punishment for deviations or cheating . . . from the agreement. *So those are the three criteria that economists have long recognized characterize or define collusion*.[16]

As the italicized testimony omitted by Plaintiffs shows, Dr. Dick was applying economic principles rather than opining about legal standards.

2. Neither Dr. Dick nor Defendants asserted a "heightened standard" to adjudge whether illicit collusion occurred.

Plaintiffs accuse Dr. Dick and Defendants of applying a "heightened standard" for finding an anticompetitive agreement, but this too is wrong. Dr. Dick opines that "[a]bsent direct evidence of an agreement between firms, the simple observance of interdependent or parallel actions or strategies does not, on

[14] Baker, *supra* note 13, at 152.
[15] Pls.' Mem. at 5.
[16] Dick Dep. Tr. 21:11-22:1, Feb. 25, 2011 (emphasis added).

its own, provide any assistance to an economist in distinguishing between conduct that is the result of collusion and conduct that simply reflects competition based on unilateral decision-making."[17] Accordingly, plaintiffs must "distinguish clearly the alleged collusive conduct from competitive interdependence and parallel conduct."[18] As Dr. Dick explains, economists use the Stigler framework to distinguish benign parallel conduct from improper collusion.[19]

Dr. Dick's testimony will assist a factfinder in applying the Eleventh Circuit's legal standard under which "a plaintiff seeking damages for a violation of Section 1 [of the Sherman Act] must present evidence that tends to exclude the possibility that the alleged conspirators acted independently,"[20] and therefore "must demonstrate the existence of 'plus factors' that remove their evidence from the realm of equipoise and render that evidence more probative of a conspiracy than of [lawful] conscious parallelism."[21] This "plus factors" approach comports with Dr. Stigler's view of an anticompetitive agreement, which Dr. Dick applied. As one authority explains:

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[17] Dick Rpt ¶ 43.
[18] *Id.*
[19] *Id.*
[20] *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 570 (11th Cir. 1998)); *see also* AirTran Mem. ISO Mot. for S.J. at 29, 35.
[21] *Williamson Oil*, 346 F.3d at 1301.

> [A]ntitrust law employed plus factors to operationalize the legal concept of an agreement. . . . [By doing so], antitrust law clarified that the idea of an agreement describes a *process* that firms engage in, not merely the outcome that they reach. Not every parallel pricing outcome constitutes an agreement because not every such outcome was reached through the *process* to which the law objects: a *negotiation* that concludes when the firms convey *mutual assurances* that the understanding they reached will be carried out.[22]

Thus, courts utilize the plus factors test to determine whether alleged conspirators have exchanged "mutual assurances" in violation of Section 1: "The plus factors suggestive of a secret agreement permit the inference that the parallel pricing resulted from firms interacting in the forbidden manner."[23]

Plaintiffs seize upon Dr. Dick's passing comment during his deposition that it must be "high[ly] likely" that the Stigler criteria are satisfied in order to find that Defendants colluded.[24] But Dr. Dick clarified in the very next sentence that he did not rely on a "high[ly] likely" standard. He testified that he "*has not found evidence that supports any of those three criteria having been met.*"[25] Plaintiffs' criticism is beside the point.

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[22] Baker, *supra* note 13, at 178-79 (emphasis added).
[23] *Id.*
[24] Pls.' Mem. at 6 (quoting Dick Dep. Tr. 22:5-8, Feb. 25, 2011).
[25] Dick Dep. Tr. 22:5-10, Feb. 25, 2011 (emphasis added). In any event the Court will instruct the jury on the applicable legal standard, which will obviate any concerns the Court may have about Dr. Dick's passing remark. *See Maiz v. Virani*, 253 F.3d 641, 667 (11th Cir. 2001) ("[A]n instruction may be used to prevent a jury from placing too much weight on an expert's legal conclusions.").

Plaintiffs also accuse Defendants of asserting a "heightened standard," but this is a thinly veiled effort to lower the summary judgment standard rather than a proper *Daubert* argument. Plaintiffs argue that a lower summary judgment standard should apply to allegations that are "economically sensible."[26] The applicable legal standards, however, do not turn on whether the alleged conspiracy is economically sensible. Rather, the Supreme Court has stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," such that Plaintiffs "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[27] Plaintiffs support their argument to cabin this rule by mashing together two *Williamson Oil* quotes that appear 13 pages apart.[28] The *Williamson Oil* court did *not* say that plaintiffs' evidence must tend to exclude the possibility of independent conduct only in "implausible" cases; plaintiffs' evidence must do so in *all* Section 1 cases, including this one.

In any event, as Dr. Dick's analysis shows, Plaintiffs' conspiracy allegations are themselves economically implausible. Defendants adopted first bag fees after almost every other major airline in the U.S. already had done so, all without any

[26] *Id.* at 8.
[27] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see also Williamson Oil*, 346 F.3d at 1300 (quoting *Matsushita*); AirTran Mem. ISO Mot. for S.J. at 28 (same).
[28] Pls.' Mem. at 6-7 (quoting *Williamson Oil*, 346 F.3d at 1310, 1323).

allegations of collusion. As Dr. Dick noted, Plaintiffs have no evidence that Defendants could monitor or punish potential cheating,[29] Defendants' first bag fees diverged in amount and applicability while the alleged conspiracy was ongoing,[30] and Defendants competed aggressively on both base fares and capacity following their alleged agreement.[31]

3. Plaintiffs' argument that "mutual assurances" are not required is mistaken.

Plaintiffs attack Dr. Dick's reliance on the "mutual assurances" criterion of the Stigler framework and argue that "the law does not require a mutual exchange of assurances in an antitrust conspiracy."[32] This is another summary judgment argument clothed as a *Daubert* challenge, and it is wrong. As a leading antitrust treatise explains, a "gentlemen's agreement" or other such "vague understanding between competitors on a common course of action involves both collective decision making on future behavior *and some degree of express mutual assurance*

[29] Dick Rpt. ¶¶ 132-135.
[30] *Id.* ¶¶ 126-131.
[31] *Id.* ¶¶ 136-141. It is undisputed that Defendants continued to compete vigorously for air travel. Plaintiffs' expert, Dr. Singer, testified, "I'm not aware of an agreement to increase base fares between Delta and AirTran" (H. Singer Dep. Tr. 452:2-4, Nov. 22, 2010 (Ex.5)), and Plaintiffs "abandoned any claim for relief based on an alleged contract, combination and/or conspiracy to reduce capacity." (Consent Order & Stip. ¶ 3, June 18, 2012, ECF No. 335.).
[32] Pls.' Mem. at 8.

of compliance with that collective decision."[33] Thus, courts have acknowledged the significance of evidence of "mutual assurances" in determining whether defendants conspired,[34] and have rejected conspiracy allegations that lack evidence of "mutual assurances" to act in concert.[35]

Plaintiffs also assert that "collusion occurs when an invitation to collude is accepted through a company's responsive business practices,"[36] but this is also incorrect. Evidence of "parallel conduct following an invitation to conspire, . . . without more, does not give rise to an inference of conspiracy."[37]

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[33] Areeda & Hovenkamp, ANTITRUST LAW, Vol. IIA § 1404 (2015).

[34] *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) ("The most important evidence [of an anticompetitive agreement] will generally be non-economic evidence that there was an actual, manifest agreement not to compete. That evidence may involve customary indications of traditional conspiracy, or proof that the defendants got together *and exchanged assurances of common action* or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.") (emphasis added; internal citations and quotation marks omitted).

[35] *See, e.g.*, *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175, 1188-89 (M.D. Ala. 2006) ("Although exchanges of information . . . among the defendants might have facilitated reaching agreements to act in concert as the plaintiffs have alleged, it *does not, itself, imply mutual assurances to use the information involved in any particular way*. There is no indication that such exchanges provided an enforcement mechanism for any conspiratorial agreement or that particular instances of parallel conduct may proximately be linked to the exchanges. On the facts presented, the fact that the defendants exchanged information does not suffice to indicate the conspiracy that the plaintiffs have alleged.") (emphasis added).

[36] Pls.' Mem. at 8.

[37] *AD/SAT v. Assoc. Press*, 181 F.3d 216, 236 (2d Cir. 1999).

Plaintiffs rely on *Esco Corp. v. United States*[38] and *In re Medical X-Ray Film Antitrust Litigation*,[39] but (unlike this case) both cases involved private meetings at which competitors expressly discussed pricing practices.[40] Plaintiffs also rely on *Interstate Circuit, Inc. v. United States* 306 U.S. 208, 227 (1939); , but it too is inapposite. As one court observed, "[i]n *Interstate*, . . . the situation was such that rational defendants would not have acted in the manner in which defendants did, in fact, act, if there had not been mutual assurances of common action."[41]

4. Case law contradicts Plaintiffs' claim that Dr. Dick's opinions go to a conspiracy's efficacy, not to its existence.

Plaintiffs argue that the means to detect and punish cheating relate not to a conspiracy but to its efficacy. But Plaintiffs allege a conspiracy lasting six years — from 2008 to 2014 — so their own theory requires efficacy. In any event, they are wrong. In *In re Baby Food Antitrust Litig.*,[42] the Third Circuit expressly relied on the lack of "any mechanism in place to detect conspirator cheating" in

[38] 340 F.2d 1000 (9th Cir. 1965).
[39] 946 F. Supp. 209 (E.D.N.Y. 1996).
[40] *See Esco Corp.*, 340 F.2d at 1002 (describing meetings where competitors agreed to reduce discounts to distributors); *X-Ray Film Antitrust Litig.*, 946 F. Supp. 2d at 218-19 (describing meetings among defendants).
[41] *AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 885 F. Supp. 511, 521 (S.D.N.Y. 1995), *aff'd*, *AD/SAT*, 181 F.2d 216.
[42] 166 F.3d 112 (3d Cir. 1999).

concluding that plaintiffs' evidence "falls far short of being probative proof of concerted action" and affirmed summary judgment for defendants.[43] Similarly, the Eighth Circuit has noted that "several commentators have suggested that the incentive to lower prices while other oligopolists maintain prices" — *i.e.*, to cheat on a supposed anticompetitive agreement — "*deters collusion in the first place*."[44]

Plaintiffs rely on *In re High Fructose Corn Syrup Antitrust Litigation*,[45] but there, the court did *not* reject evidence regarding the defendants' ability (or lack thereof) to detect or punish cheating in assessing whether such an agreement exists. To the contrary, the court credited as *highly relevant* an expert's opinion that market conditions were conducive to monitoring and punishment: "And if one [defendant] seller broke ranks, the others would quickly discover the fact, and so the seller would have gained little from cheating on his coconspirators; the threat of such discovery tends to shore up a cartel."[46]

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[43] *Id.* at 137.

[44] *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1038 n.9 (8th Cir. 2000) (emphasis added) (citing Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 Antitrust Bull. 143, at 151 (1993) (Ex. 7); George Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. Law Rev. 655, 660 (1962)) (Ex. 17).

[45] 295 F.3d 651 (7th Cir. 2002) (quoted in Pls.' Mem. at 9-10).

[46] *Id.*

Plaintiffs also rely on *In re Polyurethane Foam Antitrust Litigation*,[47] but it bears little resemblance to this case. There, the defendants' "most senior employees" engaged in non-public communications regarding prospective pricing decisions.[48] Here, by contrast, Plaintiffs rely on alleged private "collusive communications" between lower level AirTran and Delta employees or third-parties during an inconsequential time period, when the claims of their occurrence are dubious at best, and there is no evidence that any such attempted communications reached anyone at Delta even remotely connected with its bag fee decision.[49] And while the *Polyurethane Foam* defendants "allegedly shared information in a manner that would evade detection," such as using "a fax machine at a Comfort Inn or from an office supply store" to exchange pricing information,[50] here Plaintiffs' conspiracy theory depends on AirTran's statements during a public earnings call.[51] Regardless, the court in *Polyurethane Foam* relied on evidence that the defendants policed cheating: "there is evidence that when such alleged cheating came to the attention of senior Defendant employees, they would

[47] No. 1:10 MD 2196, 2015 WL 520930 (N.D. Ohio Feb. 9, 2015) (quoted in Pls.' Mem. at 10).
[48] *Id.* at *11-12.
[49] *See* Pls.' Opp'n to Defs.' Mots. for S.J. at 9-13, Sept. 11, 2015, ECF No. 554.
[50] *Polyurethane Foam Antitrust Litig.*, 2015 WL 520930, at *33.
[51] *See* Pls.' Opp'n to Defs.' Mots. for S.J. at 14-16, Sept. 11, 2015, ECF No. 554.

complain to counterparts at the low-ball pricing firm, using language that sharply departs from the language of competition."[52]

5. Dr. Dick's testimony is consistent.

Finally, Plaintiffs argue that Dr. Dick's testimony is "internally inconsistent." They contend that Dr. Dick first testified that evidence of all three Stigler criteria are necessary but later stated that "mutual assurances alone are sufficient."[53] This mischaracterizes Dr. Dick's testimony.

During his deposition, Plaintiffs asked, "Hypothetically, what if Mr. Fornaro for AirTran and Mr. Anderson for Delta met in a smoke-filled room and they both decided to impose a first bag fee."[54] Dr. Dick responded that "the way an economist would analyze this is there's a reasonable expectation if firms are exchanging ***explicit*** *mutual assurances*, that built into . . . those assurances would be a means to, or an expectation of a means to both detect . . . and to punish cheating."[55] Thus, Dr. Dick did *not* disregard means to detect and punish cheating

[52] *Polyurethane Foam*, 2015 WL 520930, at *22; *see also id.* at *12 ("On a number of occasions, a senior employee of one company would notify his counterpart at a competing firm that salesmen of the competing firm had been quoting 'low' prices. More often than not, the senior competitor employee would state or imply that he would 'check into' the prices being quoted by his salesmen.").
[53] Pls.' Mem. at 10.
[54] Dick Dep. Tr. 22:11-14, Feb. 25, 2011.
[55] *Id.* 24:4-9.

as "unnecessary"; instead, he explained that those criteria were satisfied under Plaintiffs' hypothetical.

B. Dr. Dick's Analysis of Whether AirTran's Public Statements Could Facilitate Collusion Is Based on a Reliable Method and Consistent with the Relevant Facts.

1. Dr. Dick applied a paradigm identified in economics literature to test the predictions of Plaintiffs' expert.

In his expert report, Dr. Dick analyzes whether AirTran's public earnings call answer regarding first bag fees could facilitate collusion between Defendants. Relying on peer-reviewed economics literature, he discusses "two conditions that must both be met . . . for non-binding forward-looking statements" to be more than "cheap talk," such that they can "influence strategic choices and facilitate reaching an agreement."[56] First, the statement must be "self-signaling" — *i.e.*, "the listener believes that the speaker wants to make the statement *if and only if* it is true."[57] Second, the statement must be "self-committing" — *i.e.*, "*if* the statement is

[56] Dick Rpt. ¶¶ 115-16. *See, e.g.*, Joseph Farrell and Matthew Rabin, "Cheap Talk," *Journal of Economic Perspectives*, Vol 10, No. 3, 103-118 at 112 (Summer 1996) (Ex. 9) ("A message that is both self-signaling and self-committing seems highly credible"); Urs Birchler and Monika Butler, *Information Economics* 190 (Routledge, 2007), at 189 http://down.cenet.org.cn/upfile/33/2009227234237141.pdf ("An announcement is credible if it is both self-signaling and self-committing") (Ex. 10).

[57] *Id.*

believed by the listener, *then* it creates incentives for the speaker to fulfill it."[58] If the speaker would benefit by making a false statement, or if the listener's acceptance of the statement "creates incentives for the speaker to take a contrary action" or "no incentives at all," then "a rational listener . . . will ignore it."[59] The "self-signaling/self-committing" paradigm reflects the common sense notion that AirTran would unambiguously benefit if Delta introduced a first bag fee regardless of what AirTran decided to do, and that Delta management would be well-aware of AirTran's incentives, suspicious of its motives, and would not count on AirTran to follow Delta's lead.

Dr. Dick applied this paradigm to the game theory, prisoner's dilemma model submitted by Plaintiffs' expert, Dr. Singer. First, using Dr. Singer's own assumptions, Dr. Dick explains that AirTran's earnings call statement was not self-signaling. Dr. Singer's model assumes that AirTran's "payoffs" would be $300 million if Delta adopted a first bag fee and AirTran declined to follow and $0 if neither airline adopted a first bag fee. This difference in payoffs creates a "unilateral incentive [for AirTran] to announce, in effect, 'If you lead [in adopting a first bag fee], we will follow.'"[60] But because AirTran would make this

[58] *Id.*
[59] *Id.*
[60] Dick Rpt. ¶ 119; Dick Rebuttal ¶ 22.

hypothetical statement even if untrue, it is not self-signaling, and therefore economic analysis shows that "Dr. Singer's own model rejects the hypothesis that AirTran provided an assurance to Delta."[61]

Second, Dr. Dick explains that Dr. Singer's model assumes a payoff of $300 million to AirTran if it forgoes a first bag fee after Delta adopts one, but only $70 million if it follows Delta's lead. As AirTran rationally prefers $300 million to $70 million, under Dr. Singer's model it would have an incentive to "reject a first bag fee even if (hypothetically) [it] had earlier communicated an invitation to Delta to lead [on first bag fees] and Delta had accepted this invitation."[62] Thus, because (under Dr. Singer's assumptions) AirTran could rationally decide not to adopt a first bag fee, its earnings call statement is not self-committing.[63]

2. Plaintiffs' challenge to Dr. Dick's testing of Dr. Singer's predictions lacks merit.

Plaintiffs' challenge Dr. Dick's application of the self-signaling, self-committing paradigm to test Dr. Singer's game theory predictions, but their attacks lack merit. They argue that the facts show that Delta did not ignore AirTran's earnings call remark and instead revised an internal analysis (the "Value Proposition") to reflect that AirTran was 90% likely to follow Delta's adoption of a

[61] Dick Rebuttal ¶ 21.
[62] Dick Rpt. ¶ 120.
[63] Dick Rebuttal ¶ 22.

first bag fee.[64] But Dr. Dick's opinion is rebuttal and tests whether Plaintiffs' own expert's game theory model is reliable and accurate under well-established economic theory. As Dr. Dick based his analysis on Dr. Singer's model and assumptions, Plaintiffs cannot reasonably claim that it does not fit the facts.

Moreover, Plaintiffs' real complaint is that Dr. Dick's opinion is inconsistent with their interpretation of the evidence. Plaintiffs characterize the Value Proposition as "Delta's . . . written analysis," even though the evidence shows: (i) it was created by one group within Delta to advocate against adopting a first bag fee; (ii) it still advocated against a first bag fee after changing the likelihood AirTran would follow; (iii) its market share and revenue assumptions were "sensitivity analyses," not projections; and (iv) Delta's key decision-makers neither agreed with the analysis nor relied on it.[65]

Plaintiffs also argue that Dr. Dick's opinion is not based on a reliable scientific methodology. To the contrary, Dr. Dick's "self-signaling/self-

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[64] Pls.' Mem. at 11-12.

[65] *See* Defs.' Mem. ISO Their Consol. Mot. to Exclude the Merits Testimony of Dr. Hal Singer at 15-17, Nov. 6, 2015, ECF No. 625-1. Even if Delta did consider AirTran's earnings call statement, it was free to do so. "[I]n competitive markets, particularly oligopolies, companies monitor each other's communications with the market in order to make their own strategic decisions." *Williamson Oil*, 346 F.3d at 1305 (quotation omitted); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874-75 (7th Cir. 2015) ("Competitors in concentrated markets watch each other like hawks.").

committing" paradigm is generally accepted in the field of economics, as reflected in the peer-reviewed economics literature that comports with Dr. Dick's explanations of these concepts.[66]

Plaintiffs cite three articles that purportedly reject Dr. Dick's "cheap talk" framework. Plaintiffs quote phrases of the articles out of context to argue that their economic theories are more reliable than Dr. Dick's, but it is not the Court's role on a *Daubert* motion to resolve debates in the economic literature. In any event, Plaintiffs misread the articles. They cite an article by Dr. Dennis Carlton, but like Dr. Dick's opinion, it says that statements by competitors — *e.g.*, "'if you raise price tomorrow we will follow the next day'" — may "reveal[] no verifiable information nor . . . signal information." [67] Similarly, Dr. Carlton observed that "an isolated statement like, 'we would be willing to go along with an industrywide price increase' may not provide any credible information to the recipient and may have no effect on the ability of firms to price cooperatively."[68]

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[66] Farrell and Rabin, *supra* note 56, at 104; Urs Birchler and Monika Butler, *supra* note 56 at 189 ("An announcement by Player 1 is *self-committing* if it is optimal for her to honor the announcement, if Player 2 believes and honors it. . . . An announcement by Player 1 is self-signaling if the sender wants the message to be believed, if, and only if, she is going to honor the message.").

[67] Dennis W. Carlton, et al., *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO.MASON L. REV. 423 at 435 (1997) (Ex. 11).

[68] *Id.* at 436.

Plaintiffs also cite an article by Dr. Bruce Chapman, but it too concerns "distinguishing effective signaling from cheap talk."[69] Plaintiffs' quote Dr. Chapman's statement that "talk is not cheap,"[70] but his context was not collusion theory. Instead, Dr. Chapman was discussing an accused criminal's preference to hire a lawyer to speak for him in the legal context.[71] Moreover, Dr. Chapman's article critiques game theory as a whole — not the self-signaling, self-committing paradigm that Dr. Dick applies.[72] Finally, Plaintiffs cite an article by Ginsburg and McAdams, but that article concerns compliance with international adjudicative bodies such as the International Court of Justice and therefore is irrelevant to the task at hand.[73]

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[69] Bruce Chapman, *Common Knowledge, Communication, and Public Reason*, 79 CHI.-KENT L. REV., 1151, 1169 (2004) (Ex. 12).
[70] Pls.' Mem. at 13.
[71] Chapman, *supra* note 69, at 184-85.
[72] *Id.* at 184 ("[G]ame theory is unable to comprehend not only the importance of committed talk for cooperation and coordination, but also the mechanisms that drive its own theory of rational signaling.").
[73] Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of Int'l Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1235 (2004) ("This Article seeks to explain why some states are willing to comply with their primary international obligations *only after* a third party adjudicator has articulated those obligations.") (emphasis in original) (Ex. 13).

C. Unlike Plaintiffs' Expert, Dr. Dick Has Not Opined on Non-Economic Issues or Witness Credibility.

Plaintiffs accuse Dr. Dick of opining on disputed factual issues without applying economic analysis and of making credibility determinations.[74] While AirTran agrees that it would be improper for an expert to weigh in on factual disputes or credibility issues, Dr. Dick has done nothing of the sort.

First, Plaintiffs attack Dr. Dick's statement that "Delta's impending merger with Northwest required harmonization of the merged entity's fee structure in the late fall of 2008" as a "conclusion" unsupported by analysis. But that statement is not a conclusion or opinion of Dr. Dick; it is one of many facts that inform his analysis of the economic conditions affecting Delta's first bag fee decision. Other facts Dr. Dick cited included the historically high fuel prices, Delta's declining demand and operating margin, and the regulatory review of its merger with Northwest.[75] If Plaintiffs dispute any facts reflected in Dr. Dick's analysis, they can present contrary evidence.

Second, Plaintiffs challenge Dr. Dick's statement that "AirTran's expansion into some leisure-oriented routes seems to have been facilitated by the introduction of the first bag fee" as unsupported by economic analysis. But Dr. Dick's report

[74] Pls.' Mem. at 15.
[75] Dick Rpt. ¶¶ 85-89.

provides the economic theory for this premise: "[U]nbundling ancillary services can stimulate demand for passenger air service by enabling a more efficient pricing structure in which each customer is charged only for the services that they consume," which in turn "can generate incremental passenger traffic and thereby higher revenue and profit."[76]

Third, Plaintiffs challenge Dr. Dick's opinion that "AirTran's forward-looking public statements lacked sufficient scope and specificity with respect to pricing" to lead to an agreement between Defendants.[77] Plaintiffs contend that this opinion is not supported by "any reliable economic test," but it rests on well-accepted economics literature, including Dr. Stigler's "classic article on collusion theory."[78] Plaintiffs also argue that Dr. Dick "ignores" AirTran's adoption of a first bag fee after Delta for the same amount and effective the same date,[79] but Dr. Dick explains, based on economic theory and the myriad ways in which Defendants

[76] Dick Rpt. ¶ 138. Dr. Dick quoted AirTran's Kevin Healy, who testified that "[w]ithout the unbundling, it's highly unlikely" AirTran would have entered certain routes. *Id.* (quoting K. Healy Dep. Tr. 158-59, June 3, 2010 (Ex. 4)).
[77] Pls.' Mem. at 16-17.
[78] *See* Dick Rpt. ¶ 122 (quoting Stigler, *supra* note 12, at 45-46 ("The colluding firms must agree upon the price structure appropriate to the transaction classes which they are prepared to recognize. A complete profit-maximizing price structure may have almost infinitely numerous price classes."); Kenneth G. Elzinga, "New Developments on the cartel front," *Antitrust Bulletin*, Vol. 29, No. 1, 3-26, at 7-8 (Spring 1984) ("The cartel agreement must embrace more than the price vector of business rivalry to be effective.") (Ex. 14).
[79] Pls.' Mem. at 16-17.

could and did continue to compete, "[t]he very narrow scope of the agreement alleged by [P]laintiffs would be insufficient to initiate price collusion."[80]

Fourth, Plaintiffs attack footnote 33 in Dr. Dick's report: "AirTran's CEO Robert Fornaro apparently disregarded certain e-mails from airport station employees as 'a bunch of chatter.'"[81] Dr. Dick cited to Mr. Fornaro's deposition, observing that his disregard of such emails comports with the economic concept of "signal-to-noise" ratio.[82] The evidence bears out this economic principle. While a summer 2008 internal AirTran email claimed that Delta's "functionality is ready to go live with 1st bag,"[83] Plaintiffs have asserted that, at the time of Delta's first bag fee decision, it "was technologically unprepared to implement the fee."[84]

Fifth, Plaintiffs contest Dr. Dick's statement that "Delta's incentives to adopt a first bag fee would not have been heavily influenced by AirTran's anticipated reaction."[85] But Dr. Dick's statement was based on his extensive, quantitative analysis of competitive overlaps between Delta-Northwest and other

[80] Dick Rpt. ¶ 125.
[81] Pls.' Mem. at 17.
[82] Dick Rpt. ¶ 42. In the cited passage, Mr. Fornaro exhibited an intuitive understanding that "airport chatter" is not self-signaling: "It's not information that you make decisions on because it's usually wrong, or usually it's guesses or people even making things up."
[83] S. Fasano Email to K. Healy, J. Smith, Aug. 5, 2008, Dick Dep. Ex. 15, Feb. 25, 2011, AIRTRAN00064686 (Ex. 15).
[84] Pls.' Opp'n to Defs.' Mots. for S.J. at 27, Sept. 11, 2015, ECF No. 554.
[85] Pls.' Mem. at 18.

airlines, concluding that "AirTran overlapped on only 6.1% of the merged Delta-Northwest's domestic routes in 2008 Q3."[86]

Finally, Plaintiffs challenge Dr. Dick's observations as to share shift due to unbundling of first bag fees.[87] But, again, Dr. Dick performed rigorous, quantitative analysis of public Department of Transportation data and observed that "any share shift was small or inconclusive."[88]

In sum, Dr. Dick's statements, observations, and opinions attacked by Plaintiffs were the product of economic analysis and therefore are helpful to the factfinder. Dr. Dick's analysis is very different from that of Dr. Singer, who offers subjective reliability and credibility judgments and opinions that some testimony and documents should be believed over other evidence.[89] Consequently, while the Court should exclude Dr. Singer's testimony as unreliable and unhelpful, Plaintiffs' motion to exclude Dr. Dick's testimony should be denied.

III. CONCLUSION

For the foregoing reasons, AirTran respectfully requests that the Court deny Plaintiffs' motion to exclude Dr. Dick's opinions and testimony.

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[86] Dick Rpt.¶ 90, Exs. 13a, 13b.
[87] Pls.' Mem. at 18-19.
[88] Dick Rpt. ¶ 81.
[89] *See* Defs.' Mem. ISO Their Consol. Mot. to Exclude the Merits Testimony of Dr. Hal Singer at 29-32, Nov. 6, 2015, ECF No. 625-1.

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Respectfully submitted,

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L.R. 7.1D CERTIFICATION AS TO FONT AND POINT SELECTION

The undersigned counsel hereby certifies that this AIRTRAN'S OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. ANDREW DICK, and accompanying attachments, has been prepared with Times New Roman, 14 point, which is one of the font and point selections approved by the Court in L.R. 5.1C.

/s/ Alden L. Atkins
Alden L. Atkins

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of December, 2015, I filed the foregoing AIRTRAN'S OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. ANDREW DICK, and accompanying attachments, with the Clerk of Court and caused the same to be delivered via email to the following attorneys of record:

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