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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB ALL CASES

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. DANIEL KASPER

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I. A *DAUBERT* ANALYSIS IS UNNECESSARY PRIOR TO CLASS CERTIFICATION

Dr. Daniel Kasper's testimony is not critical to class certification, and the present motion need not be decided at this stage, as Delta concedes. Mem. of Delta in Opp'n to Mot. to Exclude Kasper ("Delta Opp'n") at 3 n.4 (#635) ("Delta agrees."). Thus, this motion need not be decided prior to the Court ruling on class certification.

II. ARGUMENT

At trial, Dr. Kasper's opinions and testimony should be excluded because, as Plaintiffs' opening brief demonstrated: (a) Dr. Kasper's theory of base fare reductions does not fit the facts of this case because Dr. Kasper failed to account for actual market conditions; (b) Dr. Kasper's opinion about Delta's most significant competitors fails to analyze their significance to Delta's first bag fee ("FBF") decision; and (c) Dr. Kasper's theory of base fare reductions is not relevant as a matter of law.

A. Dr. Kasper's Opinions on Base Fare Reductions Do Not Fit the Facts of This Case

Although Dr. Kasper ignored the facts of this case, including, *e.g.*, evidence of Delta's collusion with AirTran, and instead assumed that normal market conditions applied, Delta offers three flawed arguments for why Dr. Kasper's opinions on theoretical base fare reductions should be admitted, namely that: (1) Dr. Kasper actually did consider the specific conditions Delta faced; (2) Dr. Kasper's

failure to consider contemporaneous documents is not a basis to exclude his opinions; and (3) Plaintiffs' arguments are merely a disagreement with the "correctness" of Dr. Kasper's conclusions.

First, Delta does not dispute that Dr. Kasper's opinion is not specific to Delta, and does not take into account the collusive agreement between Defendants. Delta argues, however, that Dr. Kasper considered costs related to increased carry-ons, increased boarding time, and delays. Delta Opp'n at 11 (citing Kasper Surrebuttal ¶¶ 9-11). But the portions of Dr. Kasper's Surrebuttal Report cited by Delta reflects that Dr. Kasper concluded that "these costs did not require further analysis" after considering only: the fact that no airline repealed its FBF; and selective portions of the self-serving testimony of a single Delta witness, Gil West. Kasper Surrebuttal ¶¶ 9, 11 & n.18, App. A (#224-3). But Southwest did, *in fact*, repeal AirTran's FBF. And Dr. Kasper misrepresents Gil West as saying that there was "not an ongoing cost" of charging FBF, when in fact he testified only that the initial programming costs were not ongoing.[1] To the contrary, West testified that 90% of the cost of a plane ticket is variable costs, including certain costs that would be associated with charging FBF and with increased carry-ons, such as costs associated with delays, accepting payment, "see[ing] an agent," "board[ing] the aircraft," and "TSA

[1] West 8/16/09 DOJ Tr. 223:18-224:14 (#369).

screening."[2] Dr. Kasper failed to consider these facts and a wealth of other documents and data regarding costs associated with FBF, and documents reflecting that FBF led to market share shift rather than fare declines. Without analyzing costs, economic theory does not predict whether fares will increase or decrease. Schwartz 10/29/10 Tr. 98:21-99:4 (#620-1). His opinion therefore lacks a reasonable factual basis.

Second, Delta argues that Dr. Kasper's failure to consider record evidence does not require exclusion. But as Delta pointed out in its *Daubert* motion directed at Dr. Singer, expert opinions must have a "sufficient factual basis." Dkt. #625-1 at 3 (citing, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (rejecting expert opinion where "not supported by sufficient facts to validate it in the eyes of the law" and "when indisputable record facts contradict or otherwise render the opinion unreasonable")).[3] Dr. Kasper's theoretical opinion is inadmissible because it fails to account for the conditions present here – a conspiracy to increase prices by charging FBF, and increased costs associated with charging FBF.

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[2] *Id.* 224:15-18, 226:3-227:15.

[3] Contrary to Delta's arguments, Plaintiffs do not suggest that experts should offer a non-economic opinion on witness credibility or the meaning of documents. Rather, the issue is that Dr. Kasper failed to account for relevant conditions at Delta at the time the FBF was imposed as reflected in contemporaneous documents and evidence.

Third, Dr. Kasper himself admitted that empirical analyses were more definitive than his theoretical opinions. Kasper 10/15/10 Tr. 47:1-14 (#572). In light of the empirical studies that have been conducted by other experts, the theoretical opinions are unhelpful, especially in light of the theoretical experts' failure to study conditions to determine whether economic theory would predict a decrease or an increase in fares.

Contrary to Delta's arguments that Plaintiffs are only challenging Dr. Kasper's results, Plaintiffs' challenge Dr. Kasper's methodology – relying on abstract theory divorced from the facts instead of relying on empirical evidence.

B. Dr. Kasper's Opinion That Legacy Carriers Were More Significant Competitors to Delta Than AirTran Does Not Fit the Facts of This Case

Dr. Kasper offered the opinion that legacy carriers were more "significant competitor[s]" to Delta than AirTran based on the percentage of overlapping routes. Kasper Report ¶¶ 26-32 (#224-1). But the relevant issue under the facts of this case is which airline was *most significant to Delta's consideration of FBF*, which Dr. Kasper did not analyze.[4] To address this deficiency, Delta claims in its brief that "Dr. Kasper concludes that the major legacy carriers were far more significant to Delta's consideration of a first bag fee than AirTran." Delta Opp'n at 17 & n.19 (citing

[4] Kasper 10/15/10 Tr. 124:21-25 ("Q. Is AirTran a significant competitor to Delta? A. It depends on how you define significant."); *id.* 132:16-23 (testifying that he examined "most significant competitor . . . in terms of the one Delta most overlaps with in competing for the traffic that it carries").

Kasper Report ¶ 29). But Dr. Kasper makes no such claim, and the portion of Dr. Kasper's Report cited by Delta only addresses the level of Delta's overlaps with other carriers in 2008. Kasper Report ¶ 29 (citing ¶ 28 Exhibit 3).

Moreover, even if Dr. Kasper had offered the opinion that AirTran was not the most significant consideration to Delta's FBF decision, his methodology is flawed, unreliable, and inconsistent with the record evidence. Dr. Kasper assumes that the only relevant factor is the percentage of overlapping routes. But he offers no economic analysis, methodology, or reasoning for why the percentage of overlapping routes alone makes a competitor significant to a FBF decision.

To the contrary, Delta's own internal analysis showed that legacy carriers were not a relevant variable in Delta's FBF decision because legacy carriers had already adopted FBF, so there was no question about whether they would match if Delta adopted the fee.[5] Further, the potential market share shift attributed to all legacy carriers combined was less than the potential market share shift to AirTran alone, which was by far the largest determinant of the profitability of FBF to Delta.[6]

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[5] Value Proposition at 16 (Oct. 24, 2008) (#556 at PX234).

[6] *Id.* Delta argues that Delta's decision-making CLT was not swayed by the October 23 earnings call statement. Delta Opp'n at 19 & n.22. But the majority of the CLT initially voted against FBF and changed course only after discussing AirTran's earnings call, the importance of AirTran to the profitability of FBF, and that the newfound profitability to Delta of charging FBF was more important to Delta's survival than Delta's desire to deprive AirTran of FBF revenue. Pls.' St. of Add'l Material Facts ¶¶ 201-08 (#554-3).

Dr. Kasper fails to "adequately account[] for [the] obvious alternative explanation[]" that potential market share shift made AirTran the most significant competitor in the first bag fee decision. Fed. R. Evid. 702, advisory committee's note to 2000 amendments.

Further, Delta made almost all of its domestic profits in 2008 from its Atlanta hub, where AirTran was Delta's most significant competitor and had the most overlapping routes, and Delta's strategy was to protect its Atlanta market share. Pls.' St. of Add'l Material Facts ¶¶ 295-301 (#554-3). The importance of the Atlanta hub to Delta's profitability made AirTran a more important competitor than total nationwide overlapping routes would suggest. *Id.*

In addition, the record contradicts Dr. Kasper's opinion (to the extent that he has one) on the most significant competitor to Delta's FBF decision, rendering his opinion unreliable and irrelevant.[7]

Thus, Dr. Kasper's opinion that AirTran was not Delta's most significant competitor is an unfounded opinion in the abstract rather than a well-founded opinion on the case facts, is not helpful on the issues presented here, is unreliable, and is likely to mislead the jury.

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[7] Value Proposition v1 at 2 (Oct. 14, 2008) (Dkt. #556 at PX195) ("Delta's main competitor, AirTran, does not have this fee."); Grimmett 9/28/10 Tr. 197:7-10 (#565); *Brooke Group*, 509 U.S. at 242 (rejecting expert opinion where "not supported by sufficient facts to validate it in the eyes of the law" and "when indisputable record facts contradict or otherwise render the opinion unreasonable").

C. Theoretical Offsets Are Irrelevant As a Matter of Law

Delta argues that offsetting benefits are central to the issues of injury and damages. Delta Opp'n at 5. But purported offsetting benefits are not relevant to antitrust injury or damages as a matter of law, as Plaintiffs have briefed extensively elsewhere. *See* Pls.' Reply to Defs'. Supp. Class Cert. Br. at 13-17 (#607); Pls.' Supp. Class Cert. Br. at 9-14 (#357); Pls.' Class Cert. Reply at 19-25 (Dkt. #269); Pls.' Mem. in Support of Kasper *Daubert* Mot. at 6-9 (#622). The Eleventh Circuit has held that purported offsetting benefits are irrelevant to injury and damages in a price-fixing case:

> [W]e read *Hanover Shoe* [*v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)] as directing a court to overlook the potential net gain, or conversely the potential absence of a net loss, that a direct purchaser may in fact have experienced for the purposes of providing the direct purchaser with standing to sue and a means for calculating damages in antitrust violation litigation.

Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1193 (11th Cir. 2003).

Moreover, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).[8] Plaintiffs have demonstrated that the questions of impact and damages are

[8] "If very few members of the class were harmed, that is 'an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate [defendants].'" *Suchanek v. Sturm Foods, Inc.*, 764 F.3d

"subject to generalized proof" – namely, each class member who paid a FBF was injured in the amount of the fee.[9]

Delta argues that base fare offsets result in a fundamental conflict of interest, but this court has previously found that "Plaintiffs have presented sufficient evidence that any potential conflict . . . does not rise to the level of being a fundamental conflict of interest." Vacated Order at 11-12 (#549). Moreover, Dr. Kasper offers testimony regarding only the theoretical possibility of a conflict, and courts have "decline[d] to find that the theoretical possibility of . . . conflicts is sufficient to preclude class certification under Rule 23(a)(4)." *In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1335 (N.D. Ga. 2007).

In support of Defendants' arguments that offsets are legally relevant, Delta does not offer any conflicting authority from antitrust cases. Instead, Delta attempts to distinguish Plaintiffs' citation to antitrust cases[10] and then tries to argue that an

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750, 758 (7th Cir. 2014) (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (Posner, J.)).

[9] *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260 (11th Cir. 2003); Singer Class Cert. Report ¶¶ 88-89 (#556 at PX363).

[10] For example, Delta attempts to distinguish *In re Airline Ticket Commission Antitrust Litigation* ("*ATC*") on grounds it "had nothing to do with class certification" and was decided prior to the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Delta Opp'n at 8. However, the *ATC* case specifically discusses damages in antitrust cases and Plaintiffs cited it for that principle, not for "class certification" principles.

employment case, two insurance cases, and two breach of contract cases are relevant to determining whether offsets are legally relevant to determining antitrust overcharge damages in a price-fixing case. Delta Opp'n at 6-9. Defendants cited the same five cases in briefing that preceded the vacated Order granting class certification (Delta Supp. Class Cert. Br. at 9-10, 13 (#401); AirTran Supp. Class Cert. Br. at 24 n.75 (#403)). In four of the five cases Delta relies on, class certification was denied, and in all four, there was no common evidence of liability. Here, by contrast Defendants conceded that the issue of violation will be proven using common evidence. Vacated Order at 18 (#549). The facts and legal issues in those four cases are therefore inapposite here.

First, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) the Supreme Court found that there was no common evidence of liability where female employees alleged gender discrimination in pay and promotions in violation of Title VII, but there was insufficient evidence of a company-wide policy. *Id*. at 2553-55. The Court emphasized that "'[w]hat matters'" in class certification is "'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" *Id*. at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, by contrast, there is no dispute that violation will be proven with class-wide evidence. Vacated Order at 18 (#549).

As the Tenth Circuit explained, *Wal-Mart* does not preclude class certification in a price-fixing conspiracy case:

> In price-fixing cases, *courts have regarded the existence of a conspiracy as the overriding issue* even when the market involves diversity in products, marketing, and prices. Therefore, the district court acted within its discretion by treating common issues (involving the existence of a conspiracy) as predominant over individualized issues (involving negotiated prices). With this determination, the district court acted within its discretion in certifying the class under Rule 23(b)(3), and nothing in *Wal-Mart* suggests an abuse of that discretion. In *Wal-Mart*, individualized proceedings were necessary because the common questions—the reasons for the pay and promotion disparities—could not yield a common answer "in one stroke." Here, however, there were two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact. The district court reasonably concluded that these questions drove the litigation and generated common answers that determined liability in a single "stroke."

In re Urethane Antitrust Litig., 768 F.3d 1245, 1255-56 (10th Cir. 2014) (emphasis added and internal citations omitted).

Second, Delta cites *Coastal Neurology, Inc. v. State Farm Mutual Automobile Insurance Co*., 458 F. App'x 793, 794 (11th Cir. 2012) (unpublished). In *Coastal Neurology*, there was again no common evidence of liability. Rather, the court found that although all of the class members "provided health care services to State Farm's insureds and that State Farm has automatically applied [certain] edits to reduce or deny their claims for reimbursement," this automatic application of edits to every bill did "nothing to establish that any individual provider was entitled to a

reimbursement on any particular occasion and that a NCCI edit improperly reduced that reimbursement."[11]

Third, Delta relies on *DWFII Corp. v. State Farm Mutual Automobile Insurance Co*., 469 Fed. App'x 762 (11th Cir. 2012) (unpublished). But contrary to Delta's characterization of the court's holding, the defendant did not assert, and the court did not recognize, any offsetting benefit. *Id.* Rather, the court denied certification because the named plaintiffs' claims were not typical of the claims or defenses of the class, and common issues did not predominate as to liability, where "each individual medical service provider in the class must still demonstrate that . . . the bill was properly completed . . . , the benefits of the insurance plan were not exhausted . . . , the recipient of the medical services had valid insurance coverage with State Farm, and the medical provider actually performed the services for which it [was] billed." *Id*. at 764-65.[12]

Fourth, *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc*., 601 F.3d 1159 (11th Cir. 2010) was a breach of contract action

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[11] *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co*., 271 F.R.D. 538, 544 (S.D. Fla. 2010). The issue was whether State Farm's use of certain edits to limit reimbursements to providers violated Florida's no fault insurance statute.

[12] While the court referenced in *dicta* that "unbundling or set off defenses" were relevant to the typicality inquiry under Rule 23(a), *id.* at 765, the court was referring to unbundling under Florida's no fault insurance statute, which provides that insurers need not pay two separate unbundled charges "when such treatment or services should be bundled" into a single charge. Fla. Stat. § 627.736(5)(b)(1)(e).

brought by hospitals against a health maintenance organization. The court observed that "claims for breach of contract are peculiarly driven by the terms of the parties' agreement, and common questions rarely will predominate if the relevant terms vary in substance among the contracts." *Id.* at 1171. The court found that individual issues predominated over common issues of liability where determining liability would require "examination of the varied individual contracts" and "examination of individualized extrinsic evidence." *Id.* at 1167-68. The court recognized that "the presence of individualized damages issues does not prevent a finding that the common issues . . . predominate," especially "where damages can be computed according to some formula [or] statistical analysis." *Id.* at 1178-79 (citations omitted).[13] This is particularly true in antitrust cases, as other courts recognize:

> Circuit courts have largely rejected the interpretation urged here by Defendants—that variations in damages calculations between and among class members defeat predominance. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 375 (3d Cir. 2015) ("it is a misreading of *Comcast* to interpret it as preclud[ing] certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement") (citation and quotation marks omitted); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("It would drive a stake through the heart of the class action device, in cases in which damages were sought ... to require that every member of the class have identical damages"); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18-19 (1st Cir. 2015) (limiting its interpretation of *Comcast* to the principle that the plaintiff's theory of impact must match his damages model); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (same); *In re Whirlpool Corp. Front*

[13] "[T]he presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Allapattah*, 333 F.3d at 1261.

> *Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (same); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (same). . . . Accordingly, *Comcast* has largely been limited to its unique set of facts, and interpreted as precluding class treatment where the class-wide measure of damages does not match the theory of antitrust impact.

King Drug Co. of Florence, Inc. v. Cephalon, Inc., 309 F.R.D. 195, 213 (E.D. Pa. 2015).

This court appropriately recognized and applied a similar analysis in its initial (vacated) order granting class certification. The court recognized and acknowledged Defendants' arguments regarding individualized issues relating to damages, but held that these did not defeat a finding of predominance given the other common questions in the case.[14] Nothing in the cases cited by Delta here suggests that the district court erred in that analysis. Delta's discussion of employment, insurance, and breach of contract cases has very little (if any) relevance to this antitrust case, and Delta has not demonstrated any persuasive reason why the principles of antitrust law discussed in Plaintiffs' opening brief do not apply here.

Fifth, Delta cites *Allapattah* for the proposition that "defendants have a right to an adversarial proceeding to present individualized offset defenses to class members' damages claims." Delta Opp'n at 8. But *Allapattah* recognized that set-offs against named parties must be asserted in the pleadings. 333 F.3d at 1259 n.14.

[14] Vacated Order at 21-23 (#549).

For unpleaded set-offs that are related only to unnamed class members rather than named plaintiffs, "the district court had discretion to decide whether [defendant] should be allowed to assert set-off claims," and the Eleventh Circuit found that set-off claims allowed by the district court could properly be addressed during the claims administration process after liability was established. *Id.* at 1259 & n.14. The court then affirmed the grant of class certification for breach of contract claims despite the existence of set-offs. *Id.* at 1261.

Here, Defendants seek to assert a set-off against all Plaintiffs, including the named Plaintiffs, and therefore were required to assert the set-offs in their answers. *See id.* at 1259 n.14. Moreover, the "affirmative defense of set-off . . . . do[es] not defeat certification," as "individual determinations of damages do not ordinarily preclude certification when liability can be established on a class-wide basis." *James D. Hinson Elec. Contracting Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 647-48 (M.D. Fla. 2011) (citing *Allapattah*, 333 F.3d at 1261).

Delta attempts to distinguish some of the extensive case law cited by Plaintiffs. Delta argues that *In re Electronic Books Antitrust Litigation* is distinguishable because some of the rejected offsets "do not directly relate to the transactions at issue," and that *In re Nexium Antitrust Litigation* is distinguishable because the offsets were based on "later savings" unrelated to the overcharge. Delta Opp'n at 9 (citing *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 DLC, 2014

WL 1282293, at *19 (S.D.N.Y. Mar. 28, 2014); *In re Nexium*, 777 F.3d at 27). But Delta similarly seeks to apply offsets that "do not directly relate" to the FBF transactions at issue, and to purported "later savings," *i.e.*, ticket purchases that often occurred weeks or months before FBFs were paid for the same trip, and ticket purchases for wholly separate itineraries that occurred weeks, months, or years before or after the payment of FBFs.[15]

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to exclude the testimony of Dr. Kasper should be granted.

Respectfully submitted,

Dated: December 18, 2015

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[15] Delta Class Cert. Opp'n Br. at 11-13 (#221).

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CERTIFICATION UNDER L.R. 7.1D

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned counsel hereby certifies that the above and foregoing is a computer document prepared in Times New Roman (14 point) font in accordance with Local Rule 5.1B.

So certified, this 18th day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day he electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to all attorneys of record who have appeared in the matter.

So certified, this 18th day of December, 2015.

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