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 DANIEL M. KASPER

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INTRODUCTION

Daniel Kasper is a leading authority in economics, finance and competition in the airline industry. He served as Director of International Aviation in the United States Civil Aeronautics Board and on the congressionally-created National Commission to Ensure a Strong and Competitive Airline Industry. He has been a consultant on various airline industry matters to the United States Department of Transportation, Department of Defense, and State Department.[1] In the present case, Mr. Kasper offers reliable, relevant opinions well within his expertise that directly rebut erroneous claims made by Plaintiffs' proffered expert Dr. Hal Singer.

First, Dr. Singer opines that payors of a first bag fee did not receive any offsetting benefits in the form of lower fares and that every class member who paid a first bag fee was, by definition, injured in some amount.[2] Contrary to Dr. Singer, and relying on his extensive experience and background in the economics and

[1] Mr. Kasper, a former faculty member at Harvard Business School, has testified as an expert before many federal courts (in addition to administrative agencies and legislative bodies). Expert Report of Daniel M. Kasper ("Kasper Report") ¶ 1 (Sept. 24, 2010). For expert reports cited in this brief, Defendants refer the Court to their contemporaneously filed "*Appendix of Exhibits*," which includes a table identifying the cited reports already in the record.

[2] *See* Class Certification Reply Report of Hal J. Singer ("Singer Class Reply") ¶ 22 (Nov. 8, 2010) ("In my opening report, I concluded that there was no sound evidence that the challenged conduct caused either Defendant to discount its base fares, and as a result . . . all Class Members paid artificially inflated prices for air travel by the amount of first bag fees.").

operation of the airline business, Kasper explained that basic economics dictates that introduction of a first bag fee would cause some reduction in base fares. He further explained that this reduction in base fares would likely come about through the operation of Delta's inventory management system, which automatically opens for sale more low fare seats when demand drops off. This reduces the actual fares paid by passengers below what they would have been absent the first bag fee. As Kasper explained, even if Delta's management did not change the filed fares, the inventory management system would cause actual fares to go down as more seats are sold at lower fares. It was not even necessary, therefore, for Delta to have intended to lower its filed fares for there to have been a reduction in actual fares as Dr. Singer erroneously contends. *See* Kasper Report ¶¶ 3-4, 6-15.

Second, Dr. Singer contends that AirTran was Delta's main competitor.[3] Based on widely accepted data collected by the Department of Transportation and used by both government and industry, Kasper demonstrated that Delta was substantially more exposed to competition from other carriers, including legacy carriers that had adopted first bag fees, than it was to competition from AirTran. *Id.* at ¶¶ 28-29 & Ex. 3.

[3] *See* Class Certification Report of Hal J. Singer ("Singer Class Report") ¶ 2 (June 30, 2010) ("Delta and AirTran are each other's primary competitors in the supply of domestic air travel.") (citations omitted).

Plaintiffs seek exclusion of Kasper's proffered testimony based on arguments of "relevance" and "fit." Kasper's opinions are plainly "relevant"—indeed, they directly rebut Dr. Singer's opinions. His opinions also "fit" the facts. Plaintiffs' Motion does not challenge the accuracy of Kasper's description of the operation of inventory management systems in response to reduced demand. Plaintiffs argue instead that Delta did not specifically plan to reduce its fares. But that is immaterial to whether base fares *actually* fell as a result of a first bag fee. Kasper explains why the robust econometric analysis of other experts shows that actual fares declined, even if Delta did not intend to take any direct action to change fares. And Kasper's opinion that AirTran was not, by a wide margin, Delta's most significant competitor is based on indisputable government data. Plaintiffs' Motion should therefore be denied.[4]

ARGUMENT

This Court's gatekeeping 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

[4] Plaintiffs' Motion and supporting Brief both argue that Plaintiffs' Motion need not be considered at this stage. As explained below, Delta agrees. But regardless of when it is considered, Plaintiffs' Motion is without merit and should be denied.

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).

As set forth above, Kasper is well-qualified to offer expert testimony on the economics and operation of the airline industry, and Plaintiffs do not challenge his qualifications. Instead, Plaintiffs challenge the relevance of Kasper's opinions to Plaintiffs' views about antitrust impact and damages, and the "fit" of his opinion to their interpretation of various documents.[5]

A. Kasper's Opinions Regarding Base Fare Reductions Are Relevant to Issues of Antitrust Injury and Damages

Plaintiffs' first argument is that Kasper's opinions regarding ticket price or base fare offsets are irrelevant as matter of law to issues of injury and damages. Contrary to Plaintiffs' argument, however, both Supreme Court and Eleventh

[5] Plaintiffs argue that the Court does not need to consider their Motion prior to ruling on the issue of class certification. Delta agrees that Kasper's opinions are not indispensable to the denial of class certification. For example, Plaintiffs' failure to establish the ascertainability of putative class members, and Plaintiffs' inability to prove injury or damages using classwide evidence given the reimbursement of likely millions of class members—each of which is sufficient by itself to prevent the class from being certified—do not depend on Kasper's opinions. By contrast, Plaintiffs' motion for class certification could not be granted without resolving Defendants' *Daubert* motion on Dr. Singer's class certification opinions—Plaintiffs rely virtually exclusively on Dr. Singer to argue, *inter alia*, that individualized issues concerning injury and damages do not predominate under Rule 23(b)(3). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433-34 (2013); *Sher v. Raytheon Co.*, 419 F. App'x 887, 888 (11th Cir. 2011).

Circuit precedent requires the Court to consider at class certification whether each class member's claim of injury and damages can be proven with evidence that is common to the class. Kasper's opinion that passengers paid lower ticket prices as the result of the first bag fee and his explanation of the mechanism by which that occurred are central to the question of whether injury and damages to each class member can be properly established.

As explained in Delta's briefs opposing Plaintiffs' motion for class certification, Plaintiffs must show they can prove—through common evidence—that *each member* of the putative class suffered injury-in-fact (often referred to as "impact").[6] Plaintiffs attempt to meet their burden by simply defining the class to include persons who paid a first bag fee. But that is the start, not the end of the inquiry. The fact of injury and damages requires a comparison of the amount Plaintiffs paid with what they would have paid "but for" the alleged antitrust violation. That "but for" analysis requires a comparison of the total amounts each class member actually paid for airfare plus bag fees with what they would have paid for airfare if bag fees were still bundled with the base fare. Defendants have presented extensive evidence that the difference between the actual payments and the "but for" payments is not simply the amount of the first bag fee, and that many

[6] Dkt. 221 at 6-8; Dkt. 401 at 7-8; Dkt. 611 at 4-5 & n.3.

class members were not harmed by the first bag fee and may have benefited from its adoption.[7]

As made clear by recent Supreme Court and Eleventh Circuit law, Delta has a right to contest each class member's claim to injury and damages on that basis and that right must be taken into account in determining whether the proposed class can be certified. *See e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' . . . a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory *defenses to individual claims*.") (emphasis added); *see also id.* at 2560 ("Wal-Mart is entitled

[7] Dkt. 221 at 8-18; Dkt. 222 at 8-14, 25-35. Plaintiffs criticize Kasper for supposedly "assum[ing] that passengers receive a legally relevant offsetting benefit in the amount of the alleged base fare reduction from being sold a *less valuable ticket* (*i.e.*, tickets with 'more restrictions' . . .)." Plfs' Br. at 8. However, Kasper does not assume or opine on the relative "value" of different tickets in different fare buckets. In addition, Plaintiffs' argument assumes that passengers prefer *more expensive* tickets with fewer restrictions over *less expensive* tickets with more restrictions—an assumption for which Plaintiffs provide no evidence and that contradicts their theory of injury: that Plaintiffs were harmed by paying "increased prices." Moreover, when the inventory management system opens up more seats in lower fare buckets, the passenger can still pay more for fewer restrictions. Thus, even under Plaintiffs' unsupported theory, passengers have *more choices* and *more opportunities to pay lower fares*. At bottom, Plaintiffs' critique is nothing but disagreement with Kasper's opinions (which are supported by basic economics and the econometric work of respected airline economist Darin Lee) and in no way supports exclusion of Kasper's opinions.

to individualized determinations of each employee's eligibility for backpay."); *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co.*, 458 Fed. App'x 793, 794 (11th Cir. 2012) (rejecting the argument that the district court should not have taken the defendants' defenses into account in assessing the predominance requirement of Rule 23: "In performing its Rule 23(b)(3) predominance analysis, the district court did not err in considering the individualized defenses that State Farm would have to the proposed class members' claims."); *DWFII Corp. v. State Farm Mut. Auto. Ins. Co.*, 469 Fed. App'x 762, 765 (11th Cir. 2012) (affirming denial of class certification because the defendant is "entitled to present any *unbundling or set off defenses* that would allow it to properly reduce the amount" due to each plaintiff) (emphasis added); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010) (reversing order granting class certification, and criticizing the district court for "minimiz[ing] the impact of Humana's defenses on the outcome of the predominance inquiry").[8]

Plaintiffs also argue that "offsets to an antitrust overcharge do not . . . affect damages calculations." Plfs' Br. at 8. This is wrong. Even if Plaintiffs could meet

[8] *See also Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges in defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.").

their burden on class certification, the Eleventh Circuit has held that defendants have a right to an adversarial proceeding to present individualized offset defenses to class members' damages claims. *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1259 (11th Cir. 2003). *Allapattah* makes clear that any given class member cannot recover more than his or her own damages. *Id.* at 1257-58.[9]

Contrary to these authorities, Plaintiffs rely on outdated or inapposite case law from outside the Eleventh Circuit. Plaintiffs cite *In re Airline Ticket Commission Antitrust Litigation* (*"ATC"*), 918 F. Supp. 283 (D. Minn. 1996) for the premise that "mitigation and offset generally do not affect the ultimate measure of damages." *Id*. at 286-87. But *ATC*—a district court case from another circuit—was decided nearly 15 years 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). And it had nothing to do with class certification. *ATC*, 918 F. Supp. at 285. The *ATC* court discussed the relevance of offsets to antitrust injury where a defendant sought discovery concerning a "pass-on" defense—and did not address whether offsets needed to be considered as part of the "but for" analysis in

[9] Plaintiffs' previous argument that a set-off defense must be pled in a defendant's answer is directly contrary to Eleventh Circuit law. *Allapattah*, 333 F.3d at 1259-60 ("We . . . find that [defendant] was not required to assert its set-off claims in its answer.").

the class certification context. *Id.* at 286. The offsets addressed by Kasper—*i.e.*, offsetting benefits in the form of lower base fares—have nothing to do with a "pass-on" defense, which relates to whether a plaintiff who has passed on an overcharge to its customer nonetheless has suffered antitrust injury.

Plaintiffs also rely on the First Circuit's divided panel opinion in *In re Nexium Antitrust Litigation* ("*Nexium*"), 777 F.3d 9 (1st Cir. 2015), and *In re Elec. Books Antitrust Litig.*, 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014), for the proposition that offsets are not relevant to injury or damages. But in *In re Elec. Books*, 2014 WL 1282293 at *19-20, the court found the claimed offsets "do not directly relate to the transactions at issue" and were "rooted in rank speculation." And in *Nexium*, 777 F.3d at 27, the court rejected the claimed offsets because they were found to have affected a *de minimis* number of class members, were unsupported by evidence, and based on "later savings" unrelated to the alleged overcharges. Here, by contrast, the relevant transaction or "price" is the total cost of travel (including base fares, not just the first bag fee),[10] and there is substantial

[10] As Delta previously explained (*see* Dkt. 611 at 5-6), Plaintiffs have alleged a conspiracy to "increase prices" for "domestic airline passenger service." Dkt. 53, Consol. Am. Compl. ¶¶ 1, 28, 83. Plaintiffs' expert Dr. Singer also describes the case as about whether class members "paid artificially inflated *prices for air travel*," or "more in *total airfare*." Singer Class Reply ¶¶ 22, 77 (emphasis added). Plaintiffs reiterate those allegations in their recent filings: "Plaintiffs allege that

evidence that base fare reductions occurred as a direct result of the adoption of first bag fees and occurred extensively across the putative class. *See* Dkt. 221 at 8-13.[11]

In reviewing Plaintiffs' claims of injury and damages, the Court must review both the benefits as well as Plaintiffs' allegations of harm to compare the actual and "but for" prices and thus to assess whether the transaction was in fact harmful to each class member. Particularly for this purpose, Kasper's opinions are relevant and helpful.

B. Kasper's Opinions Concerning Base Fare Reductions "Fit" the Facts and Should Not Be Excluded

Plaintiffs next argue that Kasper's opinions concerning base fare reductions should be excluded because (1) Kasper's "opinion is not specific to Delta or AirTran or the conditions they faced," (2) he "did not consider contemporaneous documents" and deposition testimony supposedly "contradicting his conclusions," and (3) the "empirical evidence demonstrates that bag fees did not cause fare reductions." Plfs' Br. at 9-11. Plaintiffs' arguments should be rejected.

Defendants agreed to 'coordinate business strategies to increase prices to consumers." Dkt. 622, Plfs' Schwartz Br. at 13 (citing Consol. Am. Compl. ¶ 1).

[11] Plaintiffs' reliance on *Nexium* is particularly misplaced in moving to exclude Kasper's opinion. In determining whether the *Nexium* class included a *de minimis* number of uninjured members, the First Circuit conducted "a *detailed inquiry* into the parties' and *experts' economics analyses* . . . ." 777 F.3d at 25 (emphasis added). *Nexium* therefore contradicts Plaintiffs' argument that Kasper's opinions regarding injury (or lack thereof) should be ignored at the class stage.

First, Plaintiffs are wrong that Kasper did not consider the specific conditions faced by Delta or AirTran. Plfs' Br. at 9 & n.13. Plaintiffs' expert leveled the same criticism against Kasper, which Kasper addressed in detail in his Surrebuttal Report, but which Plaintiffs ignore. *See* Surrebuttal Report of Daniel M. Kasper ("Kasper Surrebuttal") ¶¶ 9-11 (Dec. 8, 2010). For example, Plaintiffs argue Kasper did not examine whether Delta would have *increased* base fares, as opposed to reducing them, in the face of increased costs associated with adopting the fee, such as "an increase in carry-ons and related increase in boarding time and delays." Plfs' Br. at 9 n.12. But in his reports Kasper explained there is no evidence that any supposed variable cost increase associated with adopting the fee would be significant enough to lead to increases in fares. Bag fee revenues far exceeded those costs—as evidenced by the public reports of the carriers which had adopted the fee before Delta, and by the fact that no airline which adopted the fee subsequently abandoned it. Kasper Report ¶¶ 20-21 & Exhibits 1-2; Kasper Surrebuttal ¶ 11.

Second, whether Kasper considered certain "contemporaneous documents" and witness testimony that Plaintiffs contend show Delta executives did not believe that base fares fell upon adopting a first bag fee does not provide a basis for excluding Kasper's opinions. For example, Plaintiffs contend Kasper's opinions

are contradicted by an alleged "admission by Delta CEO Richard Anderson that he did not believe that the first bag fee 'had any impact on average fares." Plfs' Br. at 10 (quoting Anderson Dep. 102:5-6). However, the relevant question for class certification is whether the first bag fee led to an *actual* reduction in base fares. What Delta's CEO may have "believed" does not answer that question—especially since he testified that **"we haven't done that analysis**," which Plaintiffs ignore. Ex. 1, Anderson Dep. 102:5-7 (emphasis added).

Moreover, Kasper addresses the issue that Plaintiffs say he ignores. He explains why it was not necessary for Delta executives to consciously reduce fares to achieve a reduction in base fares. Rather, the bag fee would lead to a reduction in fares through the operation of Delta's inventory management system, which automatically opens for sale more low fare seats when demand decreases, lowering actual fares paid by passengers. Kasper Report ¶¶ 7-15. Thus, Kasper explains why other experts' robust econometric analyses show that base fares declined, even if Delta's management did not consciously intend to change base fares as a result of first bag fees. Kasper Surrebuttal ¶¶ 13, 22; *see also* Expert Report of Darin N. Lee ("Lee Class Report") ¶¶ 9-45 (Sept. 24, 2010); Surrebuttal Report of Darin N. Lee (Lee Class Surrebuttal") ¶¶ 8-28 (Dec. 8, 2010).

Plaintiffs' claim that Kasper should have put his own gloss on testimony or documents—as their own witness Singer did[12]—is wrong for another reason. Interpreting documents and assessing witness credibility is the exclusive domain of the fact finder, not an expert. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 567 n.27 (11th Cir. 1998) (holding that an expert's "characterizations of pieces of documentary evidence as tending to show collusion" should be excluded because "such judgments are for the court to make at summary judgment and for the trier of fact to make at trial").[13] An expert's interpretation of documents and assessment of witness credibility does not involve the application of *any* "scientific, technical, or other specialized knowledge," adds nothing of value to the fact finder, and is therefore inadmissible. Fed. R. Evid. 702; *Harcros*, 158 F.3d at 562, 567.

[12] *See* Dkt. 625-1 at 18-21, 28-32.

[13] *See also United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997); *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996); *see also United States v. Libby*, 461 F. Supp. 2d 3, 7 (D.D.C. 2006) ("Expert testimony will also be precluded if [it] would usurp the jury's role as the final arbiter of the facts, such as testimony on witness credibility and state of mind."); *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1289 (N.D. Ga. 2002) (deeming inadmissible expert's testimony that he found it "hard to credit" the defendants' justifications for certain conduct, because that testimony goes to credibility issues reserved for the trier of fact); Wright & Gold, 29 Fed. Prac. & Proc. Evid. § 6262 (1st ed.) (explaining that one of the goals of Rule 702 is "to preserve the trier of fact's traditional powers to decide the meaning of evidence and the credibility of witnesses.").

And while Plaintiffs fault Kasper for not assessing the evidence and opining on Delta's subjective intent—as Dr. Singer did[14]—the law is clear that an expert may not offer an opinion on a party's intent or motives. *See, e.g.*, *S.E.C. v. Johnson*, 525 F. Supp. 2d 70, 78-79 (D.D.C. 2007) ("Defendants accurately observe that several of [the expert's] opinions do invade the jury's province, specifically by making assumptions as to the intent of certain witnesses. Determinations of individuals' intent is a quintessential jury question."); *In re Trasylol Products Liab. Litig.*, 709 F. Supp. 2d 1323, 1338 (S.D. Fla. 2010) ("[C]ourts have held that the question of (corporate) intent or motive is a classic jury question and not one for experts.").[15]

Third, Plaintiffs' argument that Kasper's opinions are irrelevant because they are inconsistent with their own expert's "empirical analysis" is nothing more than a challenge to the "'correctness of the expert's conclusions.'" *Plantation Pipe*

[14] *See* Singer Class Reply ¶ 124.

[15] *See also Kaufman v. Pfizer Pharm., Inc.*, 2011 WL 7659333, at *9 n.8 (S.D. Fla. Aug. 4, 2011) (excluding "all of [the expert's] opinions about Defendants' motives and state of mind, regardless of where or how they appear in her expert report."); *In re Rezullin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004) ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony," and excluding expert testimony "on the intent, motives or states of mind of corporations, regulatory agencies and others" because the testimony "ha[s] no basis in any relevant body of knowledge or expertise" and because allowing such testimony would allow experts to "improperly . . . assume the role of advocates for the plaintiffs' case").

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 Kasper'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").

C. Kasper's Opinion That Delta Faced More Competition from Carriers Other Than AirTran Is Based on Widely Used and Accepted Government Data

Plaintiffs contend that Delta would not have adopted a first bag fee unless AirTran did so too. To bolster this theory, Plaintiffs have argued that AirTran was Delta's "main competitor," and was "a much more significant consideration to

Delta in charging a first bag fee than legacy carriers." Plfs' Br. at 11, 13; *see also* Dkt. 554, Plfs' Summ. J. Opp. at 7, 30-31.[16]

Delta's most significant competition can be determined empirically and objectively using industry data, which is just what Kasper did. Kasper performed an analysis based upon widely used and publicly available data which showed that "AirTran is not Delta's most significant competitor," and that "when Delta adopted a fee for first checked bags, it had more—and more significant—competitive overlaps with carriers that had already imposed fees for first checked bags than it had with AirTran." Kasper Report ¶¶ 28-29. Based on his analysis of passenger data from the United States Department of Transportation,[17] Kasper explained that at the time Delta instituted a first bag fee "over 87% of Delta's passengers flew on routes served by airline(s) other than AirTran, including 77% who flew on routes served by other [legacy] carriers"—American, Continental, Northwest, United, and US Airways—*all of which had already implemented first bag fees*. Kasper Report

[16] In support of that assertion, Plaintiffs rely in part on Dr. Singer, who opines "that the primary constraint on Delta's imposition of a first bag fee was AirTran." Singer Am. Merits Report ¶ 97; *id.* at ¶ 93; *see also* Dkt. 554, Plfs' Summ. J. Opp. at 64 n.256 (citing Singer Am. Merits Report (PX 398) ¶¶ 2, 25-55, 90-119).

[17] *See, e.g.*, Kasper Report Ex. 3 (p. 16) ("Sources: US DOT O&D Survey").

¶ 29 & Ex. 3.[18] Based on this data, Kasper concludes that the major legacy carriers were far more significant to Delta's consideration of a first bag fee than AirTran.[19]

Plaintiffs contend that Kasper's opinions about the competition faced by Delta from other carriers (rather than AirTran) should be excluded as irrelevant because it does not "fit the facts of the case." What they really mean is that his opinions do not fit their spin on certain documents. Regardless, Plaintiffs do not challenge the *reliability* of Kasper's opinion, the *methodology* he employed to reach his conclusions, or the accuracy of the government data which empirically supports his opinion.

As they have done repeatedly in challenging Defendants' experts, Plaintiffs argue that Kasper's opinion should be excluded because he did not interpret certain "contemporaneous documents."[20] But Kasper's reliance on hard data rather than

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[18] The data also show that in 2009, approximately 73% of Delta's passengers flew on U.S. domestic city pairs where the largest top competitor was a carrier *other than AirTran*. By contrast, AirTran was the top competitor in only 22% of city-pairs served by Delta. Kasper Surrebuttal ¶ 21 & Rebuttal Ex. 2 (p. 16).

[19] Plaintiffs argue that Kasper ignored the relevant issue—"which airlines were most relevant to Delta's consideration of whether to charge a first bag fee" (Plfs' Br. at 12)—but that is precisely the issue on which Kasper offers his opinion: "*when Delta adopted a fee for first checked bags*, it had more—and more significant—competitive overlaps with carriers that had already imposed fees for first checked bags than it had with AirTran." Kasper Report ¶ 29.

[20] Plaintiffs also argue that Kasper's opinion about the significance of legacy carriers is irrelevant because he analyzed "international routes not at issue here."

his own interpretation of "contemporaneous documents" (unlike Dr. Singer) was entirely appropriate to his professional expertise and his role as an expert. Contrary to Plaintiffs' argument, the role of an expert is not to offer factual opinions based on his interpretation of documents and testimony. As already discussed, that is the exclusive domain of the finder of fact. *See supra* at 13-14. Kasper's reliance on objective, indisputable government data was thus entirely proper and his opinion should not be excluded because he chose not to base his opinions on his interpretation of "contemporaneous" documents and testimony.[21]

Moreover, none of the "contemporaneous documents" that Plaintiffs say Kasper should have considered in fact stand for the proposition that "Delta" believed "AirTran was a much more significant consideration to Delta in charging

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Plfs' Br. at 12. This is incorrect. Kasper's analysis was limited to domestic routes—as stated in the "Notes" under each of the exhibits in his report. *See, e.g.*, Kasper Report Exhibit 3 (p. 16) ("Sources: U.S. DOT O&D Survey, 2008. Notes: *Domestic* . . . .") (emphasis added).

[21] Even if it had somehow been appropriate for Kasper to consider documents, rather than objective data, Plaintiffs' criticism goes to the *weight*, not the admissibility of Kasper's opinion. *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).

a first bag fee than legacy carriers." Plfs' Br. at 14. There is no genuine dispute that the views of Delta's two most senior executives—CEO Richard Anderson and President Ed Bastian—drove Delta's decision to adopt the fee.[22] However, three "contemporaneous documents" Plaintiffs cite in their brief as supposedly reflecting the views of "Delta" were never even seen by Mr. Anderson or Mr. Bastian.[23] And contrary to Plaintiffs' argument (but consistent with Kasper's analysis of the data), Anderson and Bastian each testified that the other legacy carriers' publicly

[22] *See, e.g.*, Dkt. 554-3, Plfs' Statement of Additional Facts ("Plfs' SOAF") ¶¶ 207-208. According to Plaintiffs' own description of the October 27, 2008 Delta CLT meeting where Delta's adoption of a first bag fee was discussed, most of the executives at that meeting opposed the fee initially—*not swayed by AirTran's October 23 earnings call statements four days earlier*—and "reversed course" only after Ed Bastian spoke to explain that Delta needed "every dollar of incremental profit" to "fund impending pension obligations." Dkt. 554, Plfs' Summ. J. Opp. at 26; *see also* Plfs' SOAF ¶¶ 207-208.

[23] For example, in support of their assertion that "contemporaneous business documents specifically recognized AirTran as being 'Delta's main competitor,'" Plaintiffs cite only the *first draft* of the Value Proposition Document prepared by Delta's Revenue Management group to oppose adoption of the fee. Plfs' Br. at 12 (citing "*Value Proposition v1* (Oct. 14, 2008, at 2 (Dkt. #556 at PX195)") (emphasis added). But there is no dispute that subsequent versions of the presentation removed that language, and that no one at Delta ever saw the first draft other than the few Revenue Management employees involved in creating the slides. No reasonable person could conclude the slide set forth "*Delta's*" view as a company about the competitive importance of AirTran.

reported success in adopting first bag fees without any meaningful share loss was far more important to them than AirTran in deciding Delta should adopt the fee.[24]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to exclude the opinions and testimony of Daniel M. Kasper.

[24] Ex. 1, Anderson (2010) Dep. 66:8-67:10, 72:8-12, 104:23-105:5; Ex. 2, Bastian DOJ Dep. 56:8-57:14, 58:15-59:14, 61:25-63:2, 75:9-12; 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).

Dated: November 24, 2015

Respectfully submitted,[25]

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[25] 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 DANIEL M. KASPER 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 24th day of November, 2015.

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