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 RESPONSE TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. MARIUS SCHWARTZ

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GLOSSARY

AirTran	AirTran Airways, Inc.
Delta	Delta Air Lines, Inc.
AirTran MTS	Memorandum of AirTran Airways, Inc. in Support of Its Motion to Strike Class Certification testimony of Dr. Hal J. Singer, Oct. 25, 2013, ECF No. 399
Delta Br.	Defendant Delta Air Lines, Inc.'s Brief Joining and Supplementing AirTran's Motion to Exclude the Class Certification Testimony of Dr. Hal Singer, Oct. 23, 2013, ECF No. 611
Pls.' Mem.	Plaintiffs' Memorandum in Support of *Daubert* Motion to Exclude the Opinions and Testimony of Dr. Marius Schwartz, Oct. 23, 2013, ECF No. 622
AirTran Class Cert. Opp'n	AirTran's Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, Dec. 8, 2010, ECF No. 227
AirTran Supp. Class Cert. Opp'n	AirTran's Supplemental Brief in Opposition to Motion for Class Certification, Oct. 25, 2013, ECF No. 403
Pls. Class Cert. Br.	Plaintiffs' Memorandum in Support of Their Motion for Class Certification and Appointment of Class Counsel, June 30, 2010, ECF No. 124
Schwartz-I	Class Certification Report of Marius Schwartz, Ph.D., Sept. 24, 2010
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Gaier-III	Feb. 4, 2011 Merits Reply Report of Eric M. Gaier, Ph.D.
Singer Class Cert. Rpt.	Class Certification Report of Hal J. Singer, Ph.D., June 30, 2010, ECF No. 403-14
Singer Reply Rpt.	Class Certification Reply Report of Hal J. Singer, Ph.D., Nov. 8, 2010, ECF No. 403-5

Plaintiffs seek to exclude the testimony of all of Defendants' experts, including AirTran's economics expert Dr. Marius Schwartz, a Georgetown University professor who served as chief economist of the U.S. DOJ Antitrust Division and the FCC. Dr. Schwartz opines that fundamental economic theory predicts that AirTran's and Delta's unbundling of first bag fees would lead them to reduce their base airfares, impacting the total price paid for travel. He also opines that this impact will vary across routes and over time, preventing the Plaintiffs from using common evidence to prove that particular class members were harmed by the Defendants' unbundling. These opinions comport with mainstream economics and are confirmed by Defendants' other experts' econometric analysis.

Plaintiffs nevertheless raise a slew of challenges to Dr. Schwartz's testimony—undoubtedly to provide a counterweight to Defendants' challenges to their economist, Dr. Singer[1]—but these challenges are unavailing. Plaintiffs accuse Dr. Schwartz of opining on the legal standard, but their own discussion shows that he offers only an economic analysis. Plaintiffs also argue that Dr. Schwartz's opinions on base fare reductions are irrelevant, but this is contrary to Eleventh Circuit precedent that requires the net impact of alleged violations to be

[1] Courts repeatedly have rejected Dr. Singer's class certification analyses. Delta Br. at 1.

considered on class certification. Finally, Plaintiffs argue that Dr. Schwartz's opinions do not fit the facts of this case, but rely on misstatements of the evidence.

I. FACTUAL BACKGROUND

A. Plaintiffs' Unreliable Expert Opinions on Class Certification

Plaintiffs have moved to certify a class comprising "[a]ll persons or entities in the United States and its territories that directly paid Delta and/or AirTran one or more first bag fees on domestic flights from December 5, 2008 through November 1, 2014."[2] In support, Plaintiffs rely on the testimony of Dr. Hal J. Singer.[3]

Dr. Singer opines that Plaintiffs can prove injury in fact and damages using evidence common to the class.[4] Contrary to standard economics and the Court's recognition that first bag fees are "only a small part of the total price paid for air travel,"[5] Dr. Singer asserts: (i) Plaintiffs can prove class-wide injury by defining the class as those who paid AirTran or Delta a first bag fee and summing the first bag fees paid to Defendants;[6] and (ii) offsetting benefits received by class members, such as reduced ticket prices (or, "base fares"), can be ignored.[7]

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[2] Pls.' Reply to Defs.' Supp. Class Cert. Brs. at 31, Oct. 13, 2015, ECF No. 607.
[3] Pls.' Class Cert. Br. at 3.
[4] Singer Class Cert. Rpt. ¶¶ 90-97, June 30, 2010.
[5] Order at 41, Aug. 2, 2010, ECF No. 137.
[6] Singer Class Cert. Rpt. ¶ 78 ("[I]f Plaintiffs succeed in establishing proof of violation, then it follows that by the definition of the proposed class, all members of the class were adversely impacted by Defendants' conduct."); *id.* ¶ 89 ("For

Dr. Singer also offers an alternative method that attempts to prove class-wide impact and damages in which he would (i) calculate the total first bag fees paid to Defendants by the class and (ii) subtract the average base fare offset per flight multiplied by the number of flights taken by class members.[8] This method produces, at best, only a class-wide average damage figure and fails to establish whether *each class member* was injured and, if so, by how much.[9] Moreover, Dr. Singer admits that this method produces false positives, as it "would incorporate individuals who paid less, in the aggregate, as a result of the challenged conduct—that is, individuals for whom total offsets exceed total first bag fees."[10] For those and other reasons, Defendants have moved to exclude Dr. Singer's testimony.

B. Dr. Schwartz's Class Certification Opinions

If the Court allows Dr. Singer's class certification testimony, AirTran will offer rebuttal expert testimony from Dr. Marius Schwartz, a Georgetown University Professor of Economics who holds a Ph.D. in economics and publishes

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each class member, damages would equal the sum of any bag fees paid to Defendants during the class period.").

[7] Singer Reply Rpt. ¶¶ 84-85.

[8] *Id.* ¶¶ 94, 98-99.

[9] AirTran MTS at 12; Delta Br. at 7-8.

[10] Singer Reply Rpt. ¶ 108.

extensively on industrial organization, the study of competition and regulation.[11] Dr. Schwartz was Senior Economist on the President's Council of Economic Advisors and chief economist of the DOJ Antitrust Division and the FCC.[12]

Dr. Schwartz considered two questions: (1) whether all (or even virtually all) putative class members suffered net economic harm from AirTran's and Delta's unbundling of first bag fees; and (2) whether the harm to any particular class member could be measured reliably using common evidence.[13] In analyzing these questions, Dr. Schwartz relied on the economic literature on unbundling,[14] the competitive conditions in the airline industry at the time AirTran and Delta adopted first bag fees,[15] and the specific circumstances AirTran and Delta faced.[16]

Dr. Schwartz answered these questions in the negative. He explained:

> The relevant price for assessing the economic impact on any putative class member is not the first bag fee, but the *total price*—the sum of the bag fee and the [base] fare, . . . [which requires] comparing the total price paid against the 'but-for' fare that *would* have prevailed had AirTran not introduced the bag fee. . . .

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[11] Schwartz-I ¶ 1 (Ex. 4).
[12] *See, e.g.*, Schwartz-I ¶ 2 (summarizing qualifications as of 2010).
[13] Schwartz-II ¶ 1 (Ex. 5).
[14] *See, e.g.*, Schwartz Rpt. ¶ 24 (discussing wide recognition in economics of "the potential efficiencies from charging separate prices for distinct services").
[15] *See, e.g.*, *id.* ¶¶ 10-18, 59 (discussing airline industry pricing and conditions).
[16] *See, e.g.*, *id.* ¶¶ 16, 52 (discussing the extent of competition between AirTran and Delta), ¶¶ 22, 35 n.25, 48 (discussing AirTran's "average number of checked bags per enplaned passenger"), ¶ 59 (discussing AirTran "fare buckets").

> The first bag fee *unbundled* the price for a checked bag from the base fare, which previously was uniform regardless of whether a passenger checked a bag or not. . . .
>
> Economic theory provides strong reasons, based on both cost and demand factors, to expect that such unbundling will lead to reductions in base fares. . . .
>
> Determining . . . the net impact of the alleged conduct on any particular passenger . . . is likely to require numerous distinct inquiries [and] will depend on factors[,] such as the proportion of bag checkers [on a route], that vary considerably across routes and over time. [17]

C. Dr. Schwartz's Opinions Are Consistent with, and Supported by, Mainstream Economics and Record Evidence.

Dr. Schwartz's conclusions comport with mainstream economics. Economic literature on price discrimination, including the leading graduate textbook on industrial organization theory agrees that lower base fares is the expected effect of unbundling first bag fees.[18] And at least one peer-reviewed econometric study reached consistent conclusions on the effects of airline fee unbundling.[19]

Dr. Schwartz's conclusions also comport with the evidence. A U.S. Government Accountability Office study reports "that by charging fees for

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[17] Schwartz-I ¶ 8(a)-(c); Schwartz-II ¶ 2 pt.3.

[18] Schwartz-II ¶ 13 (quoting Jean Tirole, *The Theory of Industrial Organization* at 137-138 (Boston: MIT Press, 1998). Price discrimination applies here because airlines wish to charge different prices to bag checkers and non-bag checkers. *See id*. ¶ 12.

[19] *See* Jan K. Brueckner, et al., *Product Unbundling in the Travel Industry: The Economics of Airline Bag Fees*, 24 J. ECON. & MGMT. STRATEGY 457 (2015) (Ex. 6). Darin N. Lee, a co-author of the study, serves as Delta's expert in this case.

services, [airlines] are able to keep fares lower than if fares were inclusive of checked baggage and other services as they had been in the past."[20] And certain airlines publicly acknowledged a connection between bag fees and lower fares.[21]

While Dr. Schwartz's predictions do not rely on the party's internal documents, such evidence nevertheless confirms them. An Airtran internal pricing analysis conducted in August 2009 shows that, after AirTran adopted a first bag fee, its base fares were lower than Southwest's by an average of $3, year-over-year, on select overlap routes, although the price differential varied across the routes.[22] Consistent with this analysis, a July 2009 email exchange between AirTran employees suggests that AirTran's and Southwest's base fares might differ because customers "add up what will be their total trip costs," including any applicable bag fees.[23]

The parties' other experts have performed rigorous econometric analysis that verify Dr. Schwartz's predictions.[24] Likewise, Dr. Singer concurs that economists

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[20] U.S. Gov't Accountability Office, *Commercial Aviation: Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees*, at 13, July 2010, ECF No. 403-9.
[21] Schwartz-I ¶ 26 n.19 (quoting Andrew Vanacore, "Spirit Airlines: No Hitch with Carry-on Fees," Yahoo! News, Assoc. Press (Aug. 2, 2010); Schwartz-II ¶ 16 n.23 (quoting AMR Earnings Teleconference, July 16, 2008).
[22] Healy Dep. Ex. 24, Nov. 19, 2010, AIRTRAN402702–703, ECF No. 403-4.
[23] AIRTRAN00190715, ECF No. 403-7.
[24] *See, e.g.*, Gaier-I ¶¶ 14, 16 (Ex. 1); Gaier-II ¶¶ 17, 47, 51 (Ex. 2).

typically would expect unbundling to reduce base fares,[25] and his regressions confirm that other airlines that adopted first bag fees reduced their base fares.[26]

II. PLAINTIFFS' *DAUBERT* CHALLENGE TO DR. SCHWARTZ'S TESTIMONY LACKS MERIT.

Dr. Schwartz's testimony easily meets the standard for admissibility under *Daubert*. Plaintiffs do not challenge Dr. Schwartz's qualifications or methods. Instead, Plaintiffs argue that Dr. Schwartz's testimony would not be helpful, asserting that the Court did not rely on Dr. Schwartz's opinions in its vacated class certification order and supposedly "found that changes in base fares were irrelevant for multiple reasons."[27] But Plaintiffs mischaracterize the Court's description of their arguments as "findings," omitting the phrases "Plaintiffs argue that" and "[Plaintiffs] assert that" from their quotation of the order.[28] Nothing in the vacated

[25] H. Singer Dep. Tr. 714:1-8, Nov. 23, 2010 (Ex. 10) ("[I]f you were in equilibrium and you unilaterally raise the cost of traveling by $30 to your subscribers, there's a good chance that there would be a share shift or defection from your customers—from your airline to you rival's airline, in which case you be required to provide an offset on your base fare.").

[26] Singer Reply Rpt. ¶ 34, Table 1 (unbundling first bag fees caused other airlines' base fares to fall 2.37%); *see also* H. Singer Dep. Tr. 386:18-24, 387:24-388:14, Nov. 22, 2010 (Ex. 9).

[27] Pls.' Mem. at 1.

[28] *Compare id.* at 2 *with* Order at 11, Oct. 7, 2014 ECF No. 549.

order rejected Defendants' experts. Rather, the Court noted that "it is likely inevitable that individualized proof [of damages] will be presented in this case."[29]

A. The Court May Deny Class Certification without Deciding Whether to Admit Dr. Schwartz's Testimony.

Plaintiffs first argue that "it is unnecessary [for the Court] to consider this *Daubert* motion prior to ruling on class certification."[30] Plaintiffs are only partially correct. The Court need not consider whether to admit Dr. Schwartz's opinion if it (a) denies class certification on grounds that do not require economic analysis[31] or (b) determines not to admit the testimony of *Plaintiffs' expert*, Dr. Singer.[32]

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[29] Order at 21, Oct. 7, 2014 ECF No. 549. Plaintiffs contend that Defendants' base fare reduction evidence is foreclosed because they have not pleaded a "set-off" defense, but this is contrary to Eleventh Circuit precedent. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1259 (11th Cir. 2003) (a defendant is "not required to assert its set-off claims in its answer" before a class has been certified).

[30] Pls.' Mem. at 2.

[31] *See Roberts v. Scott Fetzer Co.*, No. 4:07-CV-80, 2010 WL 3937312, at *1 (M.D. Ga. Sept. 30, 2010) ("In light of the Court's ruling [denying] Plaintiff's motion for class certification, Defendant's motion to exclude the testimony of Plaintiff's experts . . . is denied as moot.").

[32] *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("[A] plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*"); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (plaintiffs must "affirmatively demonstrate" compliance with Rule 23 for class certification) (citation and quotation marks omitted); *Valley Drug Co. v. Geneva Pharms.*, 350 F.3d 1181, 1187 (11th Cir.2003) ("The burden of proof to establish the propriety of class certification rests with the advocate of the class.").

Plaintiffs rely on Dr. Singer in attempt to satisfy Rule 23's "predominance" requirement.[33] His opinions therefore are "critical to class certification"; accordingly, the Court "must conclusively rule on any challenge to . . . [his] submissions prior to ruling on a class certification motion."[34] This includes "perform[ing] a full *Daubert* analysis before certifying the class."[35] If the Court agrees that Dr. Singer's opinions are inadmissible, then Plaintiffs cannot carry their burden under Rule 23, and class certification must be denied.[36] If, however, the Court decides that Dr. Singer's opinions can be admitted, then it must consider Dr. Schwartz's rebuttal as part of its rigorous analysis under Rule 23.

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[33] Order at 16, Aug. 5, 2015, ECF No. 549; *see also* Order at 1, Aug. 17, 2015, ECF No. 550 (vacating Aug. 5, 2015 Order).

[34] *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

[35] *Id.* at 816; *see also Sher v. Raytheon Co.*, 419 F. Appx. 887, 890 (11th Cir. 2011) (approving of *American Honda Motor Co.* and concluding that "in its Rule 23 analysis, . . . the district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification").

[36] *Comcast*, 133 S. Ct. at 1433-34 (concluding plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement due to flaws in their expert's analysis); *Blood Reagents*, 783 F.3d at 187 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied."); *In re Photochromic Lens Antitrust Litig.*, No. 8:10-CV-00984-T-27EA, 2014 WL 1338605, at *23-25 (M.D. Fla. Apr. 3, 2014) (concluding that plaintiffs failed to satisfy Rule 23's predominance requirement because Dr. Singer's class certification opinions were "insufficient" and "legally deficient"); *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 685-86 (S.D. Fla. 2012) (concluding that "the entire basis for Dr. Singer's opinion is grounded on a faulty premise" and therefore denying class certification).

B. Plaintiffs' Argument that Dr. Schwartz Opined on the Applicable Legal Standards Is Internally Contradictory.

Plaintiffs assert that Dr. Schwartz impermissibly opined on the applicable legal standards, but the only language that Plaintiffs quote from Dr. Schwartz's expert reports shows that he offers economic analysis, not a legal opinion: "The ***economic effect*** on an individual class member must be measured by comparing the total price paid against the 'but-for' fare that *would* have prevailed had AirTran not introduced the bag fee."[37] Plaintiffs then criticize Dr. Schwartz's lack of knowledge of legal precedents,[38] but this shows that he is opining on *economics*, not law. As Dr. Schwartz testified, "I'm not a lawyer, I don't follow the cases, and I haven't seen it one way or another. . . . I defer to the lawyers on that."[39]

C. Plaintiffs' Argument that Dr. Schwartz's Opinions Are Irrelevant Misstates the Law.

1. Under well-settled law requiring comparison of the actual and "but for" prices, Dr. Schwartz's opinions are helpful.

Plaintiffs argue that the Court should look no further than "payment of the first bag fee" to assess injury and damages and thus should dismiss as irrelevant Dr. Schwartz's opinion that unbundling first bag fees would lead to lower base fares. But the applicable case law mandates Dr. Schwartz's analysis.

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[37] Pls.' Mem. at 2 (quoting Schwartz-I ¶ 8(a) (emphasis adSchwartz-Ided)).
[38] *Id.*
[39] M. Schwartz Dep. Tr. 88:8-24, Dec. 21, 2010 (Ex. 15) (cited in Pls.' Mem. at 2).

"[I]n a price-fixing case[,] [p]laintiffs are entitled to recover the overcharge stemming from the illegal combination—*i.e.*, the difference between the prices actually paid and the prices that would have been paid absent the conspiracy."[40] Where, as here, the allegedly fixed price is "only a small part of the total price paid," comparing the "actual" and "but for" prices requires considering how the challenged conduct affected the other elements of the total price.[41]

Moreover, Eleventh Circuit precedent prevents courts from certifying a class comprising some members who benefited from the same conduct alleged to have harmed other members.[42] In such situations, a "fundamental conflict" exists

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[40] *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 385-386 (4th Cir. 1982) (holding trial court erred by calculating damages based only on price-fixed royalties because "royalties were essentially deferred components of a comprehensive sales price, which also included an initial lump-sum payment," and that, but for the collusion on royalties, that "lump sum might have been increased to make up for a loss of royalties."); *see also* Areeda & Hovenkamp, Antitrust Law (4th ed., 2013) Vol. IIA § 340B1 at 157 ("After an illegal price fixing conspiracy, one would compare the agreed price, or the actual price resulting from an agreed formula or other misbehavior, with the price that would have prevailed in the absence of the illegal conduct.").

[41] *Id.* at 385-86; *see also id.* at 386 (directing the trial court on remand to "permit reasonable discovery and conduct a thorough factual inquiry into the difference, if any, between the *overall price* which [plaintiffs] were required to pay in the context of the royalty-maintenance conspiracy and the *overall price* they would have paid in an untainted market.") (emphasis added).

[42] *Valley Drug*, 350 F.3d at 1190-91 (holding that the trial court erred by certifying a class where some putative class members realized net benefits from allegedly anticompetitive conduct in separate, subsequent transactions); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("[A] class cannot be certified

between the class representatives and class-members who benefited on net because "their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members," such that they cannot establish "adequacy."[43] Moreover, the presence of such net "winners" in a class indicates that Plaintiffs here cannot prove class-wide injury through common evidence, and therefore cannot show "predominance."[44]

Dr. Schwartz's testimony goes directly to whether comparing the "actual" to "but for" total price paid for air travel will show some class members to have benefited on net from the challenged conduct—AirTran's and Delta's unbundling

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when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.").

[43] *Valley Drug*, 350 F.3d at 1189.

[44] *See Photochromic Lens*, 2014 WL 1338605, at *22 ("Eleventh Circuit precedent on predominance requires a methodology capable of showing that *every class member* was impacted by the antitrust violation.") (emphasis in original); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013) (predominance requires "plaintiffs . . . [to] show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."); *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."); *Photochromic Lens*, 2014 WL 1338605, at *10 ("[A] class cannot be certified when some members of the class benefitted from the alleged wrongful conduct, such that the proposed class consists of winners and losers.").

of first bag fees—such that a "fundamental conflict" will exist and common questions will not predominate. He opines:

- To assess the economic effect of that conduct, one would compare the total price paid by class members (base fare + first bag fee) to the but-for price (the bundled fare that otherwise would have applied).
- Based on economic theory, AirTran's and Delta's adoptions of the first bag fee would likely cause their unbundled base fares to fall.
- The amount by which base fares fall will vary across routes and over time based on factors such as the route traveled, the number of competitors on the route, the percentage of bag-checkers on the route, the fare class, and the season, day of the week, and time of day of the flight.
- Therefore, determining the fact and amount of harm to any particular class member would require "numerous distinct inquiries," with some class members likely to have benefited on net depending on the unique facts of their travel on AirTran and Delta flights.[45]

These opinions will assist the Court by putting into context the ample evidence (discussed above and in AirTran's class certification briefs) that the average base fares charged by AirTran and Delta fell following their unbundling of

[45] Schwartz-I ¶¶ 66, 57; Schwartz-II ¶ 2 pt.4.

first bag fees.[46] Dr. Schwartz's analysis shows that, in the standard case, such reductions are the predicted response, and thus are directly related, to these decisions to unbundle. Dr. Schwartz's analysis also supports the econometric analysis from AirTran expert, Dr. Eric Gaier, showing that the amount of such reductions varied across routes and over time, consistent with standard economic theory on unbundled pricing. Accordingly, Dr. Schwartz's testimony is helpful to the Court's assessment of Plaintiffs' fulfillment of Rule 23's adequacy and predominance requirements, and Plaintiffs' *Daubert* motion should be denied.[47]

2. Plaintiffs' reliance on "indirect purchaser" and out-of-circuit case law is misplaced.

Plaintiffs try to re-characterize the issue with cases addressing standing rather than class certification. They rely on *Hanover Shoe*, *Illinois Brick*, and other cases holding that the proper party to enforce an antitrust claim is one who directly pays an overcharge due to an alleged antitrust violation—the "direct purchaser"—rather than downstream "indirect purchasers" who may have indirectly paid an

[46] *See* AirTran Class Cert. Opp'n at 8-13; AirTran Supp. Class Cert. Opp'n at 18-20.

[47] *See Kottaras v. Whole Foods Market*, 281 F.R.D. 16, 25 (D.D.C. 2012), (rejecting motion to strike expert testimony that offsetting benefits prevented proof of class-wide injury through common evidence because such benefits must be considered in assessing antitrust injury).

alleged overcharge.[48] But the Eleventh Circuit has rejected conflating antitrust standing with the requirements of class certification. It has explained that "neither *Hanover Shoe* nor *Illinois Brick* addressed a party's burden to satisfy the class certification prerequisites established by Rule 23(a)" because *antitrust standing* is a "distinctly separate question from the issue of whether class certification is appropriate where a fundamental conflict exists among the named and unnamed members of a class."[49] The Eleventh Circuit continued:

> [W]e read *Hanover Shoe* 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. *Hanover Shoe* does not hold that this net economic gain must be ignored or overlooked by a court when determining whether Rule 23 has been satisfied.[50]

Thus, although a direct purchaser who passed on an overcharge and one who did not both would have antitrust standing, the fact that both paid the alleged overcharge does not create "an automatic right to certify a class."[51] Because the "economic reality of the situation [may] reveal that a fundamental conflict may

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[48] Pls.' Mem. at 6-9 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977), *Kan. v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283 (D. Minn. 1996)).
[49] *Valley Drug*, 350 F.3d at 1192.
[50] *Id.* at 1193 (emphasis added).
[51] *Id.*

exist among the class members because of their different economic circumstances and different economic interests,"[52] courts must consider subsequent, offsetting benefits in deciding whether plaintiffs have met their burden under Rule 23.

Plaintiffs also rely on in *In re Nexium Antitrust Litigation*,[53] an out of circuit case that is inapposite. There, the defendants offered evidence that 5.8 percent of relevant transactions were not subject to an overcharge, without estimating "the number or percentage of uninjured *class members*."[54] Here, by contrast, AirTran has offered evidence that, on average, 21% of its frequent flyers (about 100,000 passengers) and about 22% of its unique itineraries (over 750,000) benefited on net.[55] Further, because this evidence is limited to AirTran frequent flyers, that evidence understates the number of class members likely to have benefited.

3. Plaintiffs' argument that base fare reductions received in "separate transactions" should be ignored is unsupported.

Plaintiffs also argue that the Court should exclude Dr. Schwartz's testimony because bag fees and base fares were paid in "separate transactions."[56] But the Eleventh Circuit has held that offsetting benefits must be considered under Rule 23

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[52] *Id.*
[53] Pls.' Mem. at 6 (quoting *Nexium*, 777 F.3d 9, 27 (1st Cir. 2015)).
[54] *Nexium*, 777 F.3d at 27.
[55] AirTran Class Cert. Opp'n at 12.
[56] Pls.' Mem. at 7-8.

even when they are realized through separate transactions.[57] In *Valley Drug*, the plaintiffs alleged that the defendants conspired to suppress generic competition against a branded drug, thus inflating the branded drug price, and defined the class as direct purchasers of the branded drug. The Eleventh Circuit observed that certain class members benefited from the challenged conduct because they charged the same fixed percentage mark-up on both branded and generic drugs, which meant that the overcharge enabled them to realize greater profits when reselling the branded drug than they would have in the "but for" world. Although these class members' purchases (on which the alleged overcharge was paid) and their resales of the same drug were separate transactions, the Eleventh Circuit considered them in assessing whether Rule 23 was satisfied.[58]

Further, Plaintiffs' assertion that "[p]assengers generally paid for airfares and bag fees in separate transactions" is incorrect. A first bag fee cannot be paid unless a base fare also is paid. As the Court has observed, a first bag fee is "only a small part of the total price paid for air travel."[59] Plaintiffs' expert Dr. Singer considers the "total price . . . of travel to include the base fare and the bag fee."[60]

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[57] *See Valley Drug*, 350 F.3d at 1190-91.
[58] *Id.*
[59] Order at 41, Aug. 2, 2010, ECF No. 137.
[60] H. Singer Dep. Tr. 730:14-16, Nov. 23, 2010 (Ex. 10).

Plaintiffs also assert that class members only could benefit on net from reduced base fares if they flew multiple times.[61] While benefits realized over multiple flights are relevant under *Valley Drug*, Plaintiffs' premise is wrong. On average, a class member who paid base fares for two passengers traveling on the same itinerary would benefit if he paid only a single $15 first bag fee.[62] So too would a class member who paid a first bag fee, but only on one leg of a roundtrip itinerary.[63] Plaintiffs ignore these single-transaction circumstances and have not proposed any common method of assessing injury for those class members.

4. Plaintiffs' characterizations of certain offsets as "remote consequences" do not justify excluding contrary testimony.

Plaintiffs challenge Dr. Schwartz's opinions that, in addition to overt reductions in base fares, unbundling of first bag fees can lead to other benefits, including "inducing an airline to reallocate some seats ('inventory') to lower fare-classes from higher fare-classes"[64] and to expand service, such as by beginning to serve new routes.[65] Plaintiffs argue that these opinions should be excluded because, they contend, such benefits are "remote consequences" of unbundling the

[61] Pls.' Mem. at 7-8.
[62] AirTran Class Cert. Opp'n at 13; AirTran Supp. Class Cert. Opp'n at 13.
[63] AirTran Class Cert. Opp'n at 12; AirTran Supp. Class Cert. Opp'n at 13.
[64] Schwartz-I ¶¶ 58-61.
[65] *Id.* ¶¶ 62-63.

first bag fee.[66] But Dr. Schwartz's opinions about the nexus between these benefits and unbundling rest on sound economics and are consistent with record evidence.[67]

Plaintiffs also argue that class members who received lower base fares from inventory management reallocation of seats to lower fare buckets did not receive a benefit at all.[68] But, as Dr. Schwartz explained, passengers who, in the "but for" world, would have paid a higher fare or would not have flown at all benefited from the reallocation.[69] Plaintiffs contend that these passengers have purchased something "less valuable," but they cite no evidence.[70] Instead, Plaintiffs offer a hypothetical in which Apple customers shift from newer, more desirable iPhones to older, less expensive models in response to an overcharge for the newer model. Plaintiffs' analogy is inapt. Consumers shift to lower fare buckets not because of a

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[66] Pls.' Mem. at 7-8.

[67] *See, e.g.*, K. Healy Dep. Tr. 9:2-23 75:6-11, 158:20-159:12, June 3, 2010, ECF No. 227-6 (discussing AirTran's entry into routes that had become profitable due to unbundling of the first bag fee); M. Klein Dep. Tr. 118:20-24, 159:23-161:22, Nov. 17, 2010, ECF No. 222-10 (discussing AirTran's efforts to reduce fares through revenue management policy); *see also* AirTran Class Cert. Opp'n at 5-6.

[68] Pls.' Mem. at 9-10.

[69] Schwartz-I ¶ 61.

[70] That inventory management systems reallocate seats to lower fare buckets due to weak demand does *not* prevent passengers who desire seats in higher fare buckets with fewer restrictions (*e.g.*, business travelers) from purchasing them. Plaintiffs imply that passengers who wish to purchase less restricted seats in higher fare buckets will be unable to do if more seats are reallocated to lower fare buckets, but this is false. The more expensive, less restricted fares remain available to those who prefer them.

price increase for higher fare buckets, but because inventory management has increased the supply of lower priced seats.[71] Passengers who prefer less expensive seats instead of more expensive ones unambiguously benefit from the choice.

Finally, Plaintiffs argue that the Court should ignore base fares reductions due to Defendants' inventory management systems opening up more seats in lower fare buckets because the benefits were "unintended,"[72] but cite no case stating that offsetting benefits are cognizable only if they were intended. To the contrary, in *Valley Drug*, the Eleventh Circuit regarded customers' increased profits on resales of branded drugs on which they had paid on overcharge as an offsetting benefit without considering whether the defendants intended for that benefit to occur.

In the end, Plaintiffs are arguing that Dr. Schwartz's opinions should be excluded because they disagree with his conclusion about the nexus between unbundling and the reductions in base fares paid by class members. This disagreement with Dr. Schwartz's opinions is not enough to exclude them.[73]

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[71] Schwartz-I¶ 61.
[72] Pls.' Mem. at 10.
[73] *See, e.g.*, *Loewen v. Wyeth, Inc.*, No. CV 03-J-2166-S, 2011 WL 6140889, at *5 (N.D. Ala. Nov. 14, 2011) ("If the standard for admissibility were that any given expert's theories of causation must definitively rule out all other possible causes, no experts' testimony would be admissible.").

Plaintiffs cite *Electronic Books*,[74] an unreported opinion from the Southern District of New York, but it is inapposite. While this case concerns reductions in base fares that affected the total price paid by class members, *Electronic Books* concerned various alleged "procompetitive benefits," such as lower-priced and free e-books *from third parties*,[75] that were speculative and unsupported.[76] The court acknowledged that "plaintiffs claim no damages [from purchases of the defendants' price-fixed e-books] unless they can demonstrate that the conspiracy created a higher price for an e-book than would otherwise have existed,"[77] consistent with Dr. Schwartz's analysis.

D. Plaintiffs' Argument that Dr. Schwartz's Opinions Do Not Fit the Facts of this Case Lacks Merit.

1. Plaintiffs misstate Dr. Schwartz's opinion that base fare reductions are the "norm" and ignore consistent evidence.

Plaintiffs assert that Dr. Schwartz admitted that unbundling the first bag fee would increase base fares under certain conditions.[78] But Dr. Schwartz explained:

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[74] *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 (DLC), 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014) (discussed in Pls.' Mem. at 10-11).
[75] *See, e.g.*, *id.* at *19-20.
[76] *See id.*
[77] *Id.* at *19.
[78] Pls.' Mem. at 8-9.

(i) the "norm" is for base fares to fall due to unbundling the first bag fee;[79] but (ii) "idiosyncratic" conditions may lead base fares to rise (or fall by an amount greater than the first bag fee) due to unbundling,[80] and Dr. Schwartz observed "no evidence that such conditions should be expected as the norm in the airline industry";[81] and (iii) whether unbundling will lead base fares to rise or fall "depend[s] on the specific pricing conditions on individual routes," further "undercut[ting] the claim of common impact."[82]

Plaintiffs claim that neither Dr. Schwartz nor any other expert analyzed the conditions facing AirTran and Delta, but Dr. Schwartz identified airline industry evidence verifying his opinion,[83] including Dr. Singer's own analysis.[84] And AirTran's expert Dr. Gaier tested and confirmed Dr. Schwartz's predictions by performing a rigorous econometric analysis demonstrating that AirTran's adoption of a first bag fee was associated with reduced base fares.[85]

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[79] M. Schwartz Dep. Tr. 17:22-18:4, Dec. 21, 2010; *see also id.* 36:3-7 (explaining that reduced base fares are the "more likely case[,] [t]he more predominant case").
[80] *Id.* at 17:22-25; *see also* Schwartz-II ¶¶ 7, 14, 22, 24.
[81] *Id.* ¶ 23.
[82] *Id.* ¶ 27.
[83] Schwartz-I ¶ 26 n.19; Schwartz-II ¶¶ 16-17.
[84] Singer Reply Rpt. ¶ 34, Table 1 (unbundling first bag fees caused other airlines' base fares to fall 2.37%); *see also* n.27, *supra*.
[85] *See, e.g.*, Gaier-I ¶¶ 14, 16 (Ex. 1); Gaier-II ¶¶ 17, 47, 51 (Ex. 2).

2. Dr. Singer's unreliable empirical analysis provides no basis for excluding Dr. Schwartz's testimony.

Plaintiffs argue that Dr. Schwartz's testimony is irrelevant because he acknowledged that damages could be calculated as the total bag fees paid by the class if a properly executed empirical study showed no correlation between unbundling the first bag fee and a decrease in base fares.[86] They hold up Dr. Singer's regression analysis as a supposedly "appropriate empirical analysis."[87]

But Dr. Singer's regressions are flawed and his conclusions spurious. While a properly specified regression produces consistent results as additional data are included, Dr. Singer's regression does not. Its results diverge wildly and at least one of its predictive variables becomes statistically insignificant with another year of data added.[88]

Dr. Singer also failed to perform a properly controlled experiment. Such an experiment designed to study whether AirTran's base fares decreased due to unbundling of a first bag fee would compare AirTran's unbundled fares to the fares of a "control" group consisting of carriers who did not adopt a first bag fee—*i.e.*,

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[86] Pls.' Mem. at 12 (citing M. Schwartz Dep. Tr. 194:17-195:2, Oct. 29, 2010 (Ex. 14).

[87] *Id.*

[88] *See* Gaier-II ¶ 29 (Ex. 2). Dr. Gaier's regression holds up to the extra data, with his estimated average fare reduction changing negligibly from $16.91 to $17.24.

JetBlue and Southwest.[89] Although Dr. Singer agreed that JetBlue was a "valid control-group carrier,"[90] he included it *not* in the "control" group with Southwest but in the "treatment" group with AirTran.[91] This destabilized his model, switching estimates from negative to positive without improved predictive power.[92]

And Dr. Singer's regression failed to withstand sensitivity checks, with the tests causing his calculations to change from positive to negative and by amounts ranging from less than $16 to nearly $70.[93] As these tests confirm that Dr. Singer's model is unreliable, it cannot justify excluding Dr. Schwartz's testimony.

3. Plaintiffs' circular hypothetical that base fares would not fall if Defendants agreed not to reduce them is irrelevant.

Plaintiffs argue that Dr. Schwartz "admitted" that he would not expect base fares to fall if, counter-factually, Defendants agreed not to reduce them.[94] That hypothetical is little more than a tautology. In any event, Plaintiffs concede it would *not* apply to class members who traveled routes on which AirTran and Delta did not compete with each other.[95] Dr. Singer testified:

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[89] *See id.* ¶¶ 31-37.
[90] H. Singer Dep. Tr. 484:4-11, Nov. 22, 2010 (Ex. 9).
[91] *Id.* ¶ 31.
[92] Gaier-III ¶¶ 47-50 (Ex. 3).
[93] Gaier-II ¶¶ 39-40 (Ex. 2).
[94] Pls.' Mem. at 12-13.
[95] Schwartz-II ¶¶ 28-30 (Ex. 5). About half of AirTran's passengers and more than two-thirds of Delta's traveled on such "non-overlap" routes. *Id.* ¶ 28.

> Q. Would you agree with me that with respect to the setting of base fares . . . the fact of coordination in the adoption of the first bag fee, which we'll assume exists, would not decrease competition on routes where the two carriers don't compete?
>
> A. *I think that that's fair. . . . [T]hat is the more likely place where you'd expect to see a base fare decline*.[96]

Plaintiffs have never argued or offered evidence that there was an agreement on base fares. *Even Dr. Singer* conceded that there is no evidence of any agreement as to base fares: "Just to be clear, I'm not aware of an agreement to increase base fares between Delta and AirTran."[97] While Dr. Singer was hesitant "to give up or disavow what Plaintiffs perceive to be an important avenue of connecting agreements on capacity reductions to base fares,"[98] Plaintiffs "abandoned any claim for relief based on an alleged contract, combination and/or conspiracy to reduce capacity."[99]

III. CONCLUSION

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

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[96] H. Singer Dep. Tr. 715:6-18, Nov. 23, 2010 (emphasis added) (Ex. 10).
[97] H. Singer Dep. Tr. 452:2-4, Nov. 22, 2010 (Ex. 9).
[98] *Id.* 452:8-11.
[99] Consent Order & Stip. ¶ 3, June 18, 2012, ECF No. 335.

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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 RESPONSE TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. MARIUS SCHWARTZ, 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 24th day of November, 2015, I filed the foregoing AIRTRAN'S RESPONSE TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. MARIUS SCHWARTZ, 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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