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 NO. 1:09-md-2089-TCB ALL CASES

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

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I. INTRODUCTION

Plaintiffs moved to exclude three discrete opinions offered by Defendant AirTran's expert Dr. Marius Schwartz because they fail to comport with the requirements of *Daubert* and Fed. R. Evid. 702. First, Dr. Schwartz improperly offered an opinion regarding the relevant legal standard. Second, Dr. Schwartz offered testimony on theoretical base fare "offsets" that is irrelevant as a matter of law. Finally, Dr. Schwartz offered an opinion on alleged base fare reductions and other "benefits" that was based solely on "economic theory" without considering the unequivocal record evidence in this case that Defendants did not, in fact, reduce fares or open new routes as a result of the imposition of first bag fees.

In response, AirTran argues that Dr. Schwartz is not offering a legal opinion, but instead is merely providing economic testimony in the event the Court adopts AirTran's legal arguments regarding offsets. AirTran implicitly concedes that the Court should not consider Dr. Schwartz's opinions on whether offsets are legally relevant. AirTran also concedes that Dr. Schwartz did not consider the overwhelming documentary evidence produced by Defendants evidencing that they did not reduce base fares as a result of implementing first bag fees. Although AirTran argues that the Court should still consider Dr. Schwartz's opinions about what he "expects" would have happened to base fares and routes, this Court and the Eleventh Circuit have refused to allow experts to substitute their theories for the material facts.

II. ARGUMENT

A. The Court May Certify the Class Without Resolving the Parties' Competing *Daubert* Motions.

Plaintiffs have moved to exclude certain testimony by Defendants' experts, and Defendants have similarly moved to exclude the testimony of Plaintiffs' expert, Dr. Singer. As Plaintiffs noted in their opening brief, when a court "d[oes] not rely on the challenged expert evidence to resolve any [relevant class certification] issue, there [i]s no need to engage the *Daubert* analysis before resolving the class certification motion." *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014). Here, the Court may find that Plaintiffs have met their burden of establishing the Rule 23 requirements without relying upon disputed expert testimony to resolve any issue, in which case the Court need not address the pending *Daubert* motions until trial. *See generally* Vacated Order (#549) (certifying class without relying upon challenged expert evidence on any critical issues).[1]

[1] For example, Defendants concede that violation can be proven using common evidence and thus expert testimony on this overwhelmingly predominate issue is unnecessary. Vacated Order at 18 (#549). This straightforward *per se* price-fixing case is easily distinguishable from cases in which courts have found that resolving challenged expert testimony is required before ruling on class certification. *See* Pls.' Mem. in Opp. to Defs.' Mot. to Strike Class Cert. Testimony of Dr. Hal J. Singer ("Singer Class Cert. *Daubert* Opp'n") at 10-16 (#639) (explaining why Dr. Singer's opinions are not critical to disputed class certification criteria). Indeed, AirTran's primary case on this issue, *In re Blood Reagents Antitrust Litig.*, merely remanded the case so that the district court could "decide in the first instance which of

However, if the Court finds that challenged expert testimony is critical to class certification, and at trial, the Court should exclude certain opinions of Dr. Schwartz under *Daubert* and Fed. R. Evid. 702.

B. AirTran Does Not Dispute that Dr. Schwartz May Not Testify Regarding the Applicable Legal Standard.

The Eleventh Circuit has unequivocally held that an economist's opinion "regarding the legal standards applicable to the case are outside of his competence as an economist…and should be excluded." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 567 n.27 (11th Cir. 1998). AirTran does not dispute that Dr. Schwartz cannot testify to the relevant legal standards. *See* AirTran Response to Pls.' *Daubert* Mot. to Exclude the Opinions of Dr. M. Schwartz ("AirTran Response") at 10 (#637).

One of Dr. Schwartz's primary opinions is that the Court should apply a legal standard that assesses the economic harm from Defendants' first bag fee conspiracy "by comparing the total price paid against the 'but-for' fare that *would* have prevailed had AirTran not introduced the bag fee." Class Cert. Report of M. Schwartz ("Schwartz Report") ¶ 8(a) (Sept. 24, 2010) (#222-5). AirTran seeks to admit Dr. Schwartz's opinion on the appropriate legal standard by characterizing it

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[defendant's] reliability attacks, *if any*, challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23 and then, *if necessary*, to conduct a *Daubert* inquiry before assessing whether the requirements of Rule 23 have been met." 783 F.3d 183, 188 (3d Cir. 2015) (emphasis added).

as "economic analysis, not a legal opinion." AirTran Response at 10 (#637). But calling it "economic analysis" does not make it so. Rather, the question of whether purported base fare reductions are relevant to measuring antitrust damages is a matter of law for the court, not a matter of economics, and Dr. Schwartz's opinion on the relevant standard for measuring economic harm should be excluded.

C. Dr. Schwartz's Alleged Base-Fare Offsets and Other "Benefits" Are Irrelevant As a Matter of Law.

AirTran does not dispute that Dr. Schwartz's opinions on theoretical base-fare offsets and other alleged benefits should be excluded if the Court holds that offsets are irrelevant as a matter of law. Instead, AirTran repeats its arguments that offsets are legally cognizable and therefore Dr. Schwartz's unbundling opinions are "helpful." This is simply incorrect as made clear by the extensive briefing on this issue in Plaintiffs' opening brief and in the parties' class certification and Singer *Daubert* memoranda. *See* Singer Class Cert. *Daubert* Opp'n at 4 (#639) ("Defendants do not (and cannot) point the Court to a single case where the victims of a horizontal price-fixing scheme were forced to offset an antitrust overcharge to account for the 'benefits' of the defendant's illegal conduct."); *id.* at 12-16 (discussing case law holding that offsets to antitrust overcharges are legally irrelevant to injury and damages).[2]

[2] *See also* Pls.' Reply to Defs.' Supp. Class Cert. Brs. at 13-17 (#607); Pls.' Supp. Class Cert. Br. at 9-14 (#357); Pls.' Class Cert. Reply at 19-25 (#269); Pls.' Mem.

While AirTran argues that base fare offsets result in a fundamental conflict of interest, 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. Schwartz 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).

AirTran argues that even unintended and remote consequences from separate transactions need to be considered. But the law does not consider "remote consequences" or later events. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 490 n.8 (1968).

AirTran's most recent briefing regarding the appropriate legal standard adds nothing new.[3] For example, AirTran cites *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 385-86 (4th Cir. 1982). AirTran Response at 11 n.40 (#637). But

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in Support of Schwartz *Daubert* Mot. at 5-8 (#622).

[3] Plaintiffs have repeatedly addressed Defendants' improper reliance on *Valley Drug Co. v. Geneva Pharms.*, 350 F.3d 1181 (11th Cir. 2003) and related class-certification conflict case law and respectfully refer the Court to this briefing rather than repeating these arguments here. *See* Singer Class Cert. *Daubert* Opp'n at 12-16 (#639); Pls.' Supp. Class Cert. Br. at 10-13 (#357); Pls.' Class Cert. Reply at 19-25 (#269).

Burlington actually supports Plaintiffs' position. There, the Fourth Circuit found "that antitrust damages can only be approximated and that antitrust coconspirators should be prevented from unfairly exploiting the complexity of factual issues occasioned by their unlawful conduct," and further held "that the royalties actually paid may serve as a prima facie estimate or 'yardstick' of damages, which defendants must overcome with persuasive evidence." *Burlington Indus.*, 690 F.2d at 386. The court recognized that the measure of damages was the portion of the royalty that was an illegal overcharge as opposed to the total amount of the royalty. *Id.* As applied here, *Burlington* stands for the proposition that Defendants have the burden of presenting "persuasive evidence" that in the absence of the conspiracy, Defendants would have charged a first bag fee, and of presenting persuasive evidence of the amount of the but-for first bag fee.[4] *Id.*; *cf. Hawaii v. Standard Oil Co. of Cal.*, 405

[4] AirTran argues that *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) is inapposite because AirTran claims to have offered evidence that, "on average, 21% of its frequent fliers… and about 22% of its unique itineraries benefitted on net." AirTran Mem. at 16. This is incorrect. As previously explained by Plaintiffs and Dr. Singer, even if offsets were legally relevant, properly conducted regression analyses establish that Defendants' first bag fees did not cause base fare reductions. Pls.' Opp'n to Mot. to Strike Singer Class Cert. Testimony at 17-18 (#639). These analyses also establish that, even if Defendants' counter-factual argument regarding base-fare offsets is credited, any base-fare reductions would be less than the amount of the first bag fee. *Id.* at 26. Finally, Dr. Singer's alternate methodology—using the regression that is most generous to Defendants—shows that a class member would have to fly an unlikely 41 additional roundtrips without paying a first bag fee to offset a $30 roundtrip first bag charge. *Id.* at 27. In short, the record evidence and common sense do not support AirTran's "net benefit" argument.

U.S. 251, 262 n.14 (1972) ("[C]ourts will not go beyond the fact of this injury to determine whether the victim of an overcharge has partially recouped its loss in some other way[.]").

D. Dr. Schwartz's Opinions on Hypothetical Base-Fare Offsets and Other "Benefits" are Unreliable and Will Not Assist the Trier of Fact.

"The proponent of expert testimony always bears 'the burden to show that his expert is 'qualified to testify competently regarding the matters he intend[ed] to address; [] the methodology by which the expert reach[ed] his conclusions is sufficiently reliable; and [] the testimony assists the trier of fact.'" *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002)). The parties have not challenged the qualifications of each other's experts. AirTran invokes Dr. Schwartz's credentials as a talisman to avoid scrutiny of the factual foundations for his economic opinions. But the Eleventh Circuit has stressed that an expert's qualifications "'are by no means a guarantor of reliability….Our caselaw plainly establishes that one may be considered an expert but still offer unreliable testimony.' Quite simply, under Rule 702, the *reliability* criterion remains a discrete, independent, and important requirement for admissibility." *Id.* at 1261 (citation omitted). Regardless of an expert's experience or qualifications, the proponent of the testimony has the burden to explain "just how that experience was reliably applied *to the facts of the case*. Again, 'the court's gatekeeping function requires

more than simply 'taking the expert's word for it.'" *Id.* at 1265 (emphasis added).

1. Dr. Schwartz Ignores the Relevant Evidence

Dr. Schwartz's opinions about the theoretical possibilities of base-fare offsets, fare class allocations, and route expansions ignore the facts of this case and are therefore unreliable. As AirTran concedes: "Dr. Schwartz's predictions *do not* rely on the party's internal documents[.]" AirTran Response at 6 (#637) (emphasis added). A review of the "Materials Considered" appendices at the end of Dr. Schwartz's reports further confirms this point: Dr. Schwartz did not consider a single discovery document from Delta or AirTran in reaching his opinions. Schwartz Report at App. 2, pp. 47-51 (#222-5); Class Cert. Surreply Report of M. Schwartz at App. 1, pp. 23-24 (#638-5).[5] Dr. Schwartz also did not consider the testimony of

[5] AirTran attempts to salvage Dr. Schwartz's failure to ground his opinions in the record evidence by arguing that *two* AirTran documents from July and August 2009 support Dr. Schwartz's "predictions." AirTran Response at 6 (#637). Even if Dr. Schwartz had reviewed these documents (which he admittedly did not and therefore cannot be used as a basis for his opinions), they do not support AirTran's unbundling theory. First, the August 2009 AirTran e-mail chain actually shows that AirTran's base fares *increased* relative to Southwest's fares from the third quarter of 2008 (prior to AirTran implementing first bag fees) to the first quarter of 2009 (after AirTran's implementation). AIRTRAN 402704 (#269-2 at Ex. 31); Singer Class Cert. Reply Report ¶ 51 & n.53 (#269-1). As the AirTran analyst explains in his cover e-mail, the data shows market share shift of "$4.94 per P[assenger] in head to head markets." AIRTRAN 402702 (#269-2 at Ex. 31). The analyst also examined fares, and found that "some of these results would indicate that there was virtually no impact from the new fees." *Id.* Second, an analyst in the July 2009 e-mail chain simply asks "How much do we think ancillary is a cause of this [change in booking numbers]?" AIRTRAN 190715 (#403-7). He also asks if passengers book AirTran any time AirTran's fare is at all lower than Southwest, since they may not think to

AirTran and Delta executives that directly contradicts his economic theories regarding unbundling. *See, e.g.*, Singer Class Cert. *Daubert* Opp'n at 20-25 (#639) (quoting Defendants' documents and deposition testimony stating that Defendants did not lower base fares as a result of first bag fees).[6]

Dr. Schwartz's "opinions" on the possibility that an airline (not necessarily AirTran) may increase lower-fare seat allocations or expand routes as a result of implementing first bag fees also lack any factual basis. Dr. Schwartz fails to cite any record evidence to support his opinions on these issues. Schwartz Report ¶¶ 58-63

"add up what will be their total trip costs?" *Id.* He observes that Southwest has "been improving" its passenger revenue per available seat mile as a "benefit from no bags [fees]," *id.*, presumably from market share shift. He speculates that Southwest's overall passenger revenue would have improved more if it had implemented a bag fee. *Id.* These e-mails do not provide any basis to contradict the sworn testimony of AirTran executives and contemporaneous documents that implementation of the first bag fee did not cause a decline in base fares. Rather, the evidence shows that Defendants implemented first bag fees as a price increase.

[6] AirTran argues that "Dr. Schwartz's conclusions [] comport with the evidence" and that "Dr. Schwartz identified airline industry evidence verifying his opinion." AirTran Response at 5, 22 (#637). But in support of these assertions, AirTran can only cite: (1) a GAO study that cites self-serving hearsay statements by unnamed executives about unbundling among all airlines; (2) a news article discussing ultra-low cost carrier Spirit Airlines' public adoption of a strategy of imposing more ancillary fees and simultaneously cutting base fares (in contrast to AirTran and Delta, which never publicly claimed to have cut fares in response to fee increases); and (3) a statement by American Airlines about how much it would need to increase fares in order to reach break-even, and that American was cutting capacity to support price increases. Setting aside whether these three third party documents are relevant evidence in this case, they relate to airlines that unilaterally adopted first bag fees, and therefore do not provide any support for Dr. Schwartz's theories here.

(#222-5).[7] Again, AirTran tries to excuse Dr. Schwartz's failure to consider any facts by arguing that his opinions "are consistent with the record evidence." AirTran Response at 19 (#637).

In support of this assertion, AirTran only cites inapposite deposition testimony from two AirTran executives that do not support Dr. Schwartz's opinions. Mr. Klein's testimony about AirTran's revenue management policy says nothing about whether AirTran's implementation of first bag fees actually caused lower-fare seat allocations. Moreover, Mr. Healy's testimony regarding AirTran's decision to open new routes as a result of first bag fees actually contradicts Dr. Schwartz's theory that class members may have benefitted from alleged lower-fare seat allocations: Mr. Healy testified that AirTran generally made more money off of leisure passengers and that first bag fee revenues made it more profitable for AirTran to open up new markets that were "largely leisure-based" like "Cancun, San Juan, [and] Nassau" (which are irrelevant to this dispute over *domestic* bag fees). K. Healy 6/3/10 Tr. 75:10-11; 158:1-159:12 (#559). AirTran could make more money off of leisure passengers to these vacation destinations as a result of first bag fees only if the fees

[7] In fact, Dr. Schwartz does not offer any firm opinions on these issues, but instead is only willing to speculate that these alleged benefits are possible. *See id.* ¶ 58 ("Introduction of the first bag fee *can* also benefit some passengers….) (emphasis added); *id.* ¶ 62 ("Implementation of the first bag fee *can also be expected* to increase the number of flights….") (emphasis added). As discussed below, *Daubert* precludes such speculation.

did not significantly affect demand and if AirTran did not reduce fares by an offsetting amount.[8] Thus, even if Dr. Schwartz had considered this testimony (which he admittedly did not), it provides no support for his theories.[9]

The record evidence demonstrates that Defendants' imposition of first bag fees did not result in base-fare offsets or any other alleged "benefits." Having chosen to divorce himself from the facts of this case, Dr. Schwartz now seeks to speculate that "*[e]conomic theory* provides strong reasons . . . to *expect* that" Defendants' implementation of first bag fees "*will lead* to reductions in base fares." Schwartz Report ¶ 8(b) (#222-5) (emphasis added).[10] The "rigorous" gatekeeping requirement established by *Daubert* was created to prevent experts from engaging in such sophistry by substituting "theory" for the facts of the case: "[I]t remains a basic foundation for admissibility that 'proposed [expert] testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Frazier*, 387 F.3d at 1261 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590

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[8] If first bag fees actually led to base fare reductions, there would be greater fare reductions on such routes with more bag checkers. But the data shows no such correlation. Singer Class Cert. Reply Report ¶ 66 Figure 3 (#269-1).

[9] Dr. Schwartz also ignores that Mr. Healy testified that AirTran did not instruct its pricing employees to lower base fares following the implementation of the first bag fee. K. Healy 6/3/10 Tr. 55:12-15 (#559).

[10] AirTran's summary of Dr. Schwartz's proffered testimony makes clear that it is based on economic theory and is merely a "prediction": "*Based on economic theory*, AirTran's and Delta's adoptions of the first bag fee *would likely* cause their unbundled base fares to fall." AirTran Response at 13 (#637) (emphasis added).

(1993)) (alteration in original); *see also id.* at 1262 ("The trial judge in *all* cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.") (quoting Fed. R. Evid. 702 advisory committee's note (2000 amends.)).[11]

Dr. Schwartz predicts passengers will purchase less valuable tickets in lower fare buckets. Schwartz Report ¶ 59 (#222-5). AirTran disputes that lower fare buckets are "less valuable," and seeks to offset the entire fare difference. AirTran Response at 19 (#637). But Dr. Schwartz himself testified that "higher fare classes carry fewer restrictions, such as no penalty for changes," Schwartz Report ¶ 59 (#222-5), and business class seats are more spacious and unquestionably more desirable. While AirTran argues that consumers benefit from the option to choose a less expensive – and less valuable – product, this is not a cognizable economic offset to damages. *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293(DLC), 2014 WL 1282293, at *15 (S.D.N.Y. Mar. 28, 2014) (rejecting as offset that "free and self-published e-books were more available").[12]

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[11] *See also In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 284 (E.D.N.Y. 2007) ("Expert opinions based on insufficient facts or data, or on unsupported suppositions is not acceptable") (citing Fed. R. Evid. 702(1)); *LeClercq v. Lockformer Co.*, No. 00 C 7164, 2005 WL 1162979, at *4 (N.D. Ill. April 28, 2005) (expert's failure to address material facts amounted to "'cherry-pick[ing] the facts he considered to render his opinion, and such selective use of facts fail[s] to satisfy…*Daubert*'") (citation omitted).

[12] AirTran argues that consumers do not shift to lower fare buckets because of a price increase, AirTran Response at 19-20 (#637), but the $15 increase in the price of

2. Dr. Schwartz's Opinions Are Unreliable Speculation

Dr. Schwartz's opinions regarding unbundling are also inadmissible because they are speculative and therefore will not assist the trier of fact. *See McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) ("*Daubert* requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach the jury"); *Hull v. Merck & Co.*, 758 F.2d 1474, 1477 (11th Cir. 1985) (per curiam) (admission of speculative and "potentially confusing testimony is at odds with the purposes of expert testimony as envisioned in Fed. R. Evid. 702").

In fact, Dr. Schwartz's "opinions" are merely unspecified predictions of what he expects *could have* happened based on his economic theories. Dr. Schwartz admits that his theories predict that fares may *increase* instead of decrease under certain economic conditions, and he has not studied whether those conditions were present here. Schwartz 10/29/10 Tr. at 98:21-99:4, Ex. 1 (#622-1); Schwartz Report ¶ 38 (#222-5) ("under a range of plausible conditions, cost-based reasons suggest that an airline will wish to reduce its base fare"); Schwartz Class Cert. Surreply ¶ 45 (#222-24) ("A priori, it is ambiguous . . . whether the net effect of Delta's adoption of a bag fee will be to cause AirTran to increase its base fare, decrease it, or leave it

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checking a first bag is the basis of Dr. Schwartz's fare bucket theory. And regardless of the reason for shifting to less valuable products, class member benefits from a change in product mix to less valuable products cannot be measured as the change in fares. Moreover, Defendants have failed to provide any data regarding changes in the passenger mix in different fare buckets over time.

unchanged."). As Dr. Schwartz himself admitted, his theoretical predictions would be irrelevant in the face of an appropriate empirical analysis. Schwartz 10/29/10 Tr. 194:17-195:2 (#622-1). And contrary to AirTran's arguments, Dr. Singer properly conducted various multiple regression analyses, which demonstrated that Defendants' base fares did not decline as a result of first bag fees.[13] Courts have repeatedly accepted Dr. Singer's opinions on class certification.[14]

Similarly, Dr. Singer admits that his predictions would change if Defendants agreed to reduce capacity and maintain or increase fares. Schwartz 10/29/10 Tr. 95:20-96:11 (#622-1). And contrary to AirTran's arguments, Plaintiffs allege that Defendants conspired to restrain capacity and to increase prices.

The Eleventh Circuit has found inadmissible similarly speculative testimony about what an expert "expects" would have happened. In *Frazier*, the Eleventh Circuit affirmed this Court's exclusion of testimony where the expert testified that the recovery of certain evidence "would be expected." 387 F.3d at 1265.

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[13] Singer Class Cert. Reply Report at ¶¶ 22-50 (#269-1); Singer Class Cert. Opp. (#639); Pls.' Mem. in Opp. to Defs.' Mot. to Strike Merits Testimony of Dr. Hal J. Singer (#640). Dr. Singer also found that Defendants' fares did not decline on non-overlap routes, *id.*, contrary to AirTran's arguments. AirTran Response at 24-25.

[14] *See, e.g.*, *Johnson v. Ariz. Hosp. & Healthcare Ass'n*, No. CV 07-1292-PHX-SRB, 2009 WL 5031334, at *10 (D. Ariz. July 14, 2009); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 262 F.R.D. 58, 69-70 (D. Mass. 2008); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, No. 1:07cv0031 TCM, 2008 WL 4372741, at *7 (E.D. Mo. Sept. 22, 2008); *Meijer, Inc. v. Abbott Labs.*, No. C 07-5985 CW, 2008 WL 4065839, at *8-9 (N.D. Cal. Aug. 27, 2008).

Specifically, the Eleventh Circuit affirmed this Court's finding that the expert had failed to offer a reliable foundation for his opinion about what he "expected" would happen and that, without such a factual basis, his "opinion regarding 'expectation' would not aid the jury." *Id.* at 1266. The "reliability of [the expert's] 'expectancy' opinion was sufficiently slender to allow the district court to conclude that the trier of fact would not be *assisted* by the opinion." *Id.*

Dr. Schwartz failed to investigate or even consider the overwhelming record evidence in this case that Defendants did not reduce base fares as a result of implementing first bag fees. Rather than relying on facts, Dr. Schwartz instead offers speculative opinions about what he expects would have happened based solely on his economic theories. This Court and the Eleventh Circuit refused to allow such gamesmanship in *Frazier* and the same result is mandated here.

Moreover, Dr. Schwartz's opinion that base fares will decline after FBF are imposed is based upon the economic theory of third-degree price discrimination. Schwartz Class Cert. Surreply ¶ 12 (#222-24). But one of Defendants' own experts – Dr. Daniel Kasper – states that this theory does not apply to the facts here. Kasper Surrebuttal ¶ 10 (#224-3).

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted.

Respectfully submitted, Dated: December 18, 2015

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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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