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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION TO STRIKE MERITS TESTIMONY OF DR. HAL SINGER

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ABBREVIATIONS

Abbreviation	Document / Docket Entry
AirTran	AirTran Airways, Inc.
Defs.' Mem.	Defendants' Memorandum in Support of Their Consolidated Motion to Exclude the Merits Testimony of Dr. Hal Singer (#625-1)
Delta	Delta Air Lines, Inc.
FBF	first bag fees
Lee Merits Rebuttal Report	Merits Rebuttal Report of Darin Lee (Feb. 4, 2011) (#611-3)
Pls.' Response to DSOF	Pls.' Response to Delta Statement of Facts (#554-1)
PSOF	Plaintiffs' Statement of Additional Material Facts (#554-3).
PX	Plaintiffs Exhibits in Opposition to Defendants' Motions for Summary Judgment (#556, 557)
Singer 2/10/11 Tr.	Transcript of the Deposition of Hal Singer (Feb. 10, 2011) (#626-4)
Singer 2/11/11 Tr.	Transcript of the Deposition of Hal Singer (Feb. 11, 2011) (#626-5)
Singer 3/11/11 Tr.	Transcript of the Deposition of Hal Singer (Mar. 11, 2011) (#626-6)
Singer Class Cert. Report	Class Certification Report of Hal J. Singer, Ph.D. (June 30, 2010) (#124-1)

Singer Class Cert. Reply	Class Certification Reply Report of Hal J. Singer, Ph.D. (Nov. 8, 2010) (#269-1)
Singer Merits	Amended Merits Report of Hal J. Singer, Ph.D. (#353-50)
Singer Rebuttal	Amended Merits Rebuttal Report of Hal J. Singer, Ph.D. (#556 at PX400)
Singer Supp.	Supplement to Merits Report of Hal J. Singer, Ph.D. (#556 at PX399)

I. INTRODUCTION

Defendants AirTran and Delta have moved to strike merits testimony of Plaintiffs' economic expert, Dr. Hal J. Singer. Dr. Singer's opinions and methodologies are reliable and relevant to the issues to be tried in this case. Accordingly, his testimony is admissible and Defendants' motion should be denied.

II. PRELIMINARY STATEMENT

Plaintiffs allege that Defendants conspired to impose first bag fees ("FBF"). In the first half of 2008, fuel prices increased, and several airlines adopted FBF in response. AirTran and Delta, however, concluded that they could not profitably impose FBF without the other. AirTran recognized that it would benefit more from both airlines charging FBF than neither airline charging FBF, so AirTran decided to communicate to Delta that it would follow if Delta moved first. In a series of private collusive communications, AirTran informed Delta that it was working on the technology to impose FBF, and that it was waiting on Delta. Delta responded that it wanted AirTran to "jump first" and – by August – felt "pressure" about imposing FBF due to "negative public perception" from falling oil prices. Delta's position on FBF changed from "[n]o way, no how," "[i]ssue closed" in the spring and summer, to asking if we "still want to hold until airtran moves?" by September, and requesting

a FBF recommendation and analysis in September and October.[1]

Defendants also used earnings calls and analysts to send and receive signals to each other. AirTran decided to invite Delta to collude on its October 23, 2008 earnings call. AirTran's earnings call caused Delta to revise its internal Value Proposition analysis, which analyzed whether FBF would be profitable for Delta considering the expected market share shift caused by FBF. Based on AirTran's invitation to collude, the expected profitability of FBF was reversed from unprofitable to profitable, and Delta decided to adopt FBF two business days after AirTran's earnings call. As promised, AirTran followed, imposing FBF in the same amount on the same effective date.

Dr. Hal Singer is an economist with a Ph.D. from Johns Hopkins University, and has served as a professor at Georgetown University. He has published numerous articles and has repeatedly served as an expert witness on antitrust issues. Here, Dr. Singer conducted a game theory analysis to determine whether it would have been in each Defendant's unilateral economic interests to adopt FBF. In his analysis, Dr. Singer incorporated Delta's expectations on the profitability of imposing FBF that were reflected in Delta's Value Proposition. Dr. Singer concluded that "it would have been economically irrational for either Defendant to have unilaterally adopted

[1] *See generally* Pls.' Opp'n to Defs.' Mot. for Summ. J. at 7-35 (#554) (summarizing key evidence).

a first bag fee,"[2] including through conscious parallelism.[3]

When Defendants imposed FBF on December 5, 2008, fuel costs had fallen dramatically, and the economy was in the worst recession in recent history. Internal Delta documents recognized that economic conditions were not favorable to adopting FBF, and one AirTran witness testified that it would have been "suicide" to unilaterally adopt FBF under these conditions.[4] Dr. Singer opined that "basic economic principles dictate that the unilateral adoption of first bag fees by Delta or AirTran during the fourth quarter of 2008 would have run counter to each firm's independent business interests" because Defendants' costs had declined substantially and demand was falling.[5] Defendants' own experts admit that enacting a price increase during a severe recession with falling oil prices – as was the case in fall 2008 – would be inconsistent with rational unilateral actions.[6] Dr. Singer found that the record evidence was consistent with his economic analyses.

III. LEGAL STANDARDS

[2] Am. Merits Report of H. Singer, Ph.D. ("Singer Merits") ¶ 2 (#353-50); *accord id.* at ¶¶ 25-55.

[3] *Id.* ¶¶ 52, 119; Singer 3/11/11 Tr. 115:21-116:4 (#626-6).

[4] Value Proposition v1 (Oct. 14, 2008) (#556 at PX195, p. 7); Fasano 7/17/09 Tr. 91:14-92:1 (#363) ("customer service disaster," "suicide").

[5] Singer Merits ¶ 75; *accord id.* at ¶¶ 76-81.

[6] Dick 2/25/11 Tr. 162:14-17 (#593); Lee 10/14/10 Tr. 25:13-17 (#571); Carlton 2/24/11 Tr. 145:4-6 (#592).

> Expert testimony may be admissible under Fed. R. Evid. 702 if:
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> > (1) the expert is *qualified* to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently *reliable* as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony *assists the trier of fact*, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (emphasis added). While the trial court serves as a gatekeeper, "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence," or "'to supplant the adversary system or the role of the jury.'" *Quiet Tech. DC–8, Inc. v. Hurel–Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (quoting *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001)). If expert testimony meets the basic admissibility requirements of *Daubert* and Rule 702, disputes over the persuasiveness of the evidence must be addressed through "'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id.* (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)).

Judicial deference to expert testimony is "particularly appropriate" where it concerns "soft sciences" like economics. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175(JG)(VVP), 2014 WL 7882100, at *8 (E.D.N.Y. Oct. 15, 2014) ("Because these disciplines 'require the use of professional judgment,' expert testimony is less likely to be excluded because 'challenges may ultimately be viewed

as matters in which reasonable experts may differ.'").

IV. ARGUMENT

Defendants ask the Court to strike Dr. Singer's testimony because, they contend: (a) he improperly offers an opinion that Defendants colluded, which is a jury question, and improperly defines collusion; (b) his economic analysis finding that Defendants' actions were contrary to unilateral economic self-interest lacks adequate factual support; and (c) he improperly finds that Defendants' witnesses and factual assertions are not credible. These arguments rest largely on mischaracterizations of Dr. Singer's analyses and of the factual record.

A. Dr. Singer's Testimony on Whether Evidence is More Consistent with Collusion than with Independent Decision-Making is Admissible.

Based on his economic analysis, Dr. Singer found that "the facts and the evidence in this case, when analyzed under the proper economic lens, is more consistent with plaintiff's allegations of a conspiracy than it is with the alternative hypothesis of unilateral conduct or . . . conscious parallelism."[7] Defendants seek to exclude Dr. Singer's opinion, claiming that: (1) Dr. Singer fails to distinguish between conspiracy and conscious parallelism; and (2) parties cannot "use economic expert testimony to opine on the existence of [a] conspiracy."[8]

[7] Singer 3/11/11 Tr. 115:21-116:4.

[8] Defs.' Mem. in Support of Their Consolidated Mot. to Exclude the Merits Test. of Dr. Hal Singer (#625-1) ("Defs.' Mem.") at 8, 11.

1. Dr. Singer Properly Distinguishes Between Conscious Parallelism and Conspiracy.

Dr. Singer has offered the opinion, based on his economic analyses of the evidence, that Defendants' conduct was more consistent with "conspiracy than it is with . . . unilateral conduct or . . . conscious parallelism."[9] He testified at length to the distinctions between "conscious parallelism" or "interdependence," "unilateral conduct," and "conspiracy."[10]

For example, Dr. Singer recognized that before Defendants' collusive communications, AirTran's and Delta's analyses of whether to impose FBF reflected conscious parallelism.[11] Under conscious parallelism, neither Defendant chose to impose FBF. After costs and demand both fell due to falling oil prices and an economic recession, Dr. Singer found that it would have been contrary to Defendants' economic interests to impose FBF, even factoring in conscious parallelism.[12]

Similarly, Delta's Value Proposition analysis before AirTran's October 23, 2008 invitation to collude reflected conscious parallelism, as it factored in the likelihood of other airlines matching if Delta imposed FBF.[13] And as reflected in the

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[9] Singer 3/11/11 Tr. 116:2-4.

[10] *Id.* at 115:17-124:16, 127:10-20; Singer 2/11/11 Tr. 1040:3-20 (#626-5).

[11] Singer 2/11/11 Tr. 1040:3-20.

[12] Singer 3/11/11 Tr. 115:17-116:4.

[13] Singer 2/11/11 Tr. 1040:3-20.

Value Proposition analysis, the economic incentives presented under conscious parallelism weighed against imposing FBF.[14] It was only after AirTran's agreement to follow if Delta imposed FBF that it became economically rational for Delta to impose FBF.[15] Dr. Singer conducted a game theory analysis using Delta's own expectations for the profitability of charging FBF, and found that imposing FBF would not be economically rational based on conscious parallelism or unilateral action. Singer Merits ¶¶ 33, 52, 55.

Defendants assert that Dr. Singer does not know the difference between conscious parallelism and conspiracy, and that his opinion that Defendants' conduct was more consistent with collusion than unilateral conduct would condemn conscious parallelism. Defs.' Mem. at 8-10. But as detailed above, this is simply untrue. In their brief, Defendants mischaracterize Dr. Singer's opinion by stringing together snippets of Dr. Singer's testimony out of context. But even those excerpts reveal that Dr. Singer properly distinguishes between conscious parallelism and conspiracy, as they show that Dr. Singer recognizes that coordinated interaction only constitutes collusion if Defendants "'act[ed] jointly only as a result of a prior assurance between firms.'" Defs.' Mem. at 8 (quoting Singer Class Cert. Report ¶

[14] Singer Merits ¶¶ 35-37, 40; Value Proposition v4 at 15 (#556 at PX213).

[15] Singer Merits ¶ 65; Value Proposition at 16 (#556 at PX234).

19 (#124-1))[16]; *see also* Singer 3/11/11 Tr. 118:5-11 (testifying that collusion requires prior assurances or agreement); Singer Class Cert. Report ¶ 19 ("[n]ot all types of coordinated interaction are illegal").[17]

In sum, Dr. Singer does not conflate collusion and conscious parallelism, and at trial Plaintiffs will not present any opinions from Dr. Singer that would seek to condemn conscious parallelism.

2. Economists May Properly Testify That Evidence Is More Consistent with Collusion Than Conscious Parallelism or Unilateral Conduct.

Defendants contend that Dr. Singer's opinions and testimony should be excluded because he intends "to opine on the existence of conspiracy." Defs.' Mem.

[16] Defendants misleadingly cite to excerpts of Dr. Singer's testimony for the proposition that Dr. Singer would condemn acting on *any* public statement made by a competitor, including a pricing announcement, but he offered no such opinion. *See* Singer 2/11/11 Tr. 1160:20-1161:15 (discussing AirTran's October 23 invitation to collude, not a public pricing announcement) (cited in Defs.' Mem. at 8); Singer 2/10/11 Tr. 773:17-774:2 (#626-4) (discussing AirTran's October 23 invitation to collude along with other prior communications) (cited in Defs.' Mem. at 8). Defendants cite Dr. Singer's answer to a follow-up question (Singer 2/11/11 Tr. at 1109:11-14, cited in Defs.' Mem. at 8), but ignore that the context of the previous question makes clear that he was discussing "a solicitation or . . . a contingent offer," not just any public statement. *Id.* at 1108:20-21.

[17] In his Class Certification Report, Dr. Singer restates the Department of Justice and Federal Trade Commission's definition of "coordinated interaction" from the Horizontal Merger Guidelines, then draws a distinction between collusive action and otherwise benign forms of coordinated interaction (*i.e.* conscious parallelism). Singer Class Cert. Report ¶ 19 (citing DOJ & FTC, Horizontal Merger Guidelines).

at 11.[18] But this is inaccurate, as Plaintiffs will not elicit Dr. Singer's opinion on the existence of a conspiracy. While some discussions in Dr. Singer's original Merits Report were inartfully phrased so as to give that impression, Dr. Singer amended his reports to make clear that he was not offering an opinion on the legal issue of whether Defendants colluded. Supp. to Singer Merits Report ("Singer Supp.") ¶ 5 (#556 at PX399). In his supplemental report, Dr. Singer explicitly disclaimed any intent to testify on the existence of collusion, stating: "I do not intend to testify at trial that there was collusion." *Id.*[19]

Instead, Dr. Singer "intend[s] to testify that, applying economic principles and analysis, [he] find[s] that the evidence [he] reviewed is more consistent with

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[18] But expert testimony "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704.

[19] *See also* Singer Supp. ¶ 5 ("[M]y testimony at trial will focus on whether Defendants' conduct was consistent with anticompetitive coordination, as opposed to whether Defendants in fact 'colluded.'"); Singer 3/11/11 Tr. 115:9-116:3 ("Q. [C]an you now clearly summarize the opinions you intend to offer if this case goes to trial? A. …I would offer testimony that would demonstrate that the facts and the evidence in this case, when analyzed under the proper economic lens, is more consistent with plaintiff's allegations of a conspiracy than it is with…unilateral conduct"); Singer Merits ¶ 2; ("My analysis suggests that Defendants' actions are more consistent with a conspiracy…than with unilateral conduct."); *id.* ¶ 23 ("Based on my economic analysis, I conclude that Delta's and AirTran's actions…are consistent with Plaintiffs' allegations of conspiracy."); Singer 2/10/11 Tr. 760:7-9 ("The evidence that I reviewed was certainly more consistent with collusive behavior than independent decision making."); *id.* at 763:15-18 ("The evidence that I've reviewed…is certainly more consistent with collusion than with independent decision making."); Singer 2/11/11 Tr. 979:9-11 ("I ultimately interpret the totality of the evidence [] as being consistent with a theory of collusion").

anticompetitive coordination than independent decision-making." *Id.* Expert testimony is appropriately admitted on the issue of whether certain economic evidence is "consistent with a finding that defendants engaged in a conspiracy to fix prices," *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1355 (N.D. Ga. 2000), or that conduct is inconsistent with a party acting according to its unilateral economic interests, *see, e.g.*, *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015) ("An economic expert may permissibly testify as to whether certain conduct is consistent with collusion or an entity or individual's self-interest").

In antitrust cases, courts have repeatedly admitted testimony from economic experts as to whether certain evidence is consistent with collusion and inconsistent with competitive conduct. *See, e.g.*, *In re Titanium Dioxide Antitrust Litig.*, No. CIV.A. RDB-10-0318, 2013 WL 1855980, at *4 (D. Md. May 1, 2013) ("Courts regularly admit expert testimony regarding 'whether conduct is indicative of collusion.'"); *In re Urethane Antitrust Litig.*, MDL No. 1616, 2012 WL 6681783, at *3 (D. Kan. Dec. 21, 2012) (permitting expert testimony that "certain events are consistent with collusion"); *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1355 (finding that an expert's testimony that economic factors were consistent with a conspiracy would be helpful to the trier of fact).

The cases cited by Defendants (Defs.' Mem. at 11 & n.10) on the exclusion

of economists' testimony regarding conspiracy are either irrelevant to the facts of this case, or support the admission of Dr. Singer's testimony. *See City of Tuscaloosa*, 158 F.3d at 562 (observing that defendants did not appeal district court's denial of motion to exclude testimony of plaintiff's economist);[20] *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union Number 3, AFL-CIO*, 313 F. Supp. 2d 213, 240 (S.D.N.Y. 2004) (permitting economist to "point to factors that would tend to show anticompetitive conduct" and to "indicate whether he believed those factors existed . . . and what the economic significance of those factors would be," and stating that "[e]conomists often explain whether conduct is indicative of collusion."); *Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1254 (S.D. Ohio 1996) (permitting experts "[to] testify [as to] how their

[20] "Dr. Robert Lanzillotti . . . [opined about] the likelihood, from an economic standpoint, that a price-fixing conspiracy existed in that market. . . . The defendants do not challenge the district court's denial of their motion to exclude Lanzillotti's testimony." *Id.* While the Eleventh Circuit noted in *dicta* that some of Lanzillotti's testimony might warrant exclusion, the Eleventh Circuit did not criticize, *e.g.*, Lanzillotti's testimony that "based on straight economic analysis and empirical pricing data, the price-cost margin reflected in the . . . industry was noncompetitive." *City of Tuscaloosa v. Harcros Chems., Inc.*, 877 F. Supp. 1504, 1514 (N.D. Ala. 1995), *rev'd in part on other grounds*, 158 F.3d 548. The *City of Tuscaloosa* court reversed the exclusion of the testimony of a certified public accountant, and reversed in part the exclusion of a statistician's testimony, affirming exclusion in part because "portions . . . lie outside his competence as a statistician and . . . the methodology of a small portion of [his] data and testimony is fundamentally flawed." 158 F.3d at 563.

analyses are consistent with the other evidence of conspiracy").[21]

B. Defendants' Numerous Challenges to Dr. Singer's Game Theory Model and His Discussion of Economic Conditions are Factual Disputes for the Jury to Resolve.

Defendants disagree with Dr. Singer's understanding and assumptions regarding the factual underpinnings of his economic analysis, and seek to exclude his testimony based on these disagreements. But an expert may rely on facts that are in dispute, as long as the expert's testimony has adequate foundational support:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in [Rule 702] on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Fed. R. Evid. 702, 2000 advisory committee's note. For example, when an expert uses disputed numbers in performing a "method that, in the abstract, is reliable," the dispute goes to weight, not admissibility, and is most appropriately addressed on

[21] *See also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1323 (11th Cir. 2003) (excluding expert testimony where the expert sought to draw the ultimate *legal* conclusion that a conspiracy existed, while defining collusion in a way that conflicted with antitrust law). Defendants conveniently ignore the distinction between the pricing behavior the Eleventh Circuit found to be lawful in *Williamson Oil* and the conduct at issue here, *i.e.*, Defendants' *contingent pricing communications*. The same holds true for Defendants' misguided reliance on *In re Text Messaging Antitrust Litigation*, 782 F.3d 867 (7th Cir. 2015). In the latter, Judge Posner in no way condones communicating to a competitor a commitment to raise prices *if* that competitor moves first. He was simply discussing airline competitors' propensity to observe and independently react to each other's *independent* announcements of pricing decisions.

cross-examination. *Quiet Tech. DC-8*, 326 F.3d at 1345.[22]

Thus, "where the expert's testimony has a *reasonable factual basis*, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert's factual basis." *United States v. 0.161 Acres of Land, more or less, situated in City of Birmingham, Jefferson County, Ala.*, 837 F.2d 1036, 1040 (11th Cir. 1988) (emphasis added).[23]

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[22] *See also Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1335, 1341, 1347 (S.D. Fla. 1999) (holding both experts' testimony admissible where parties' opposing damages experts reached "directly opposite conclusions" using the same price data, while noting the court could not exclude one expert "[m]erely because two qualified experts reach directly opposite conclusions using similar, if not identical, data bases, or disagree over which data to use or the manner in which the data should be evaluated"); *In re Blood Reagents Antitrust Litig.*, MDL No. 09-2081, 2015 WL 6123211, at *14 (E.D. Pa. Oct. 19, 2015) ("To satisfy *Daubert*, '[a]n expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere weaknesses in the factual basis of an expert witness' opinion...bear on the weight of the evidence rather than on its admissibility.'") (quoting *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000)); *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1360-63 (admitting expert testimony even though the expert's factual assumptions were disputed); *Walker v. Soo Line R. Co.*, 208 F.3d 581, 589 (7th Cir. 2000) ("That two different experts reach opposing conclusions from the same information does not render their opinions inadmissible."); *In re Urethane*, 2012 WL 6681783, at *3 (rejecting motion to exclude expert on the ground that he "only considered evidence 'cherry-picked' by counsel without considering contrary evidence," holding "[t]he extent to which Dr. Solow considered the entirety of the evidence in the case is a matter for cross-examination."); *Johnson v. Vane Line Bunkering, Inc.*, Civ.A. 01-5819, 2003 WL 23162433, at *6 n.3 (E.D. Pa. Dec. 30, 2003) ("If disagreements on particular points between proposed experts and others in their field were a proper basis for questioning the reliability and relevance of the methods employed by the experts, it is likely that very few expert opinions would be admissible in trial.").

[23] The cases Defendants cite do not require exclusion of expert testimony where the expert had a reasonable basis for his assumptions, but only require exclusion

where the expert had no factual foundation whatsoever for his or her work, or the expert's factual assumptions or conclusions were directly contradicted by central, indisputable facts. *See Brooke Group. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993) (expert opinion that defendant could recoup predatory pricing was based on activities Court held were legally insufficient to show competitive injury); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 134-35 (3d Cir. 1999) (expert "never made any reference to the evidence in this case" or cited evidence that was legally insufficient to show collusion); *Virnetx, Inc. v. Cisco Sys., Inc*., 767 F.3d 1308, 1332-33 (Fed. Cir. 2014) (finding damages expert's decision to apply particular royalty rate was based on "conclusory" assumption rather than record facts); *Evers v. Gen. Motors Corp*., 770 F.2d 984, 986 (11th Cir. 1985) (expert's affidavit consisted of conclusory allegations rather than specific facts); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (finding plaintiffs' expert's opinion that defendant boat engine manufacturer's discount program discouraged boat builders from buying engines from other sources was contradicted by irrefutable fact that many boat builders chose to purchase 100% of their engines (above the minimum required for discount) from Brunswick, and expert's finding of overcharge whenever Brunswick's market share exceeded 50% could not be reconciled with Brunswick's 75% market share before it began the challenged discount program); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1038 (8th Cir. 2000) (en banc) (damages expert failed to account for "dramatic" market events even though it was "beyond dispute that even without collusion, those events would have led to higher potash prices" and "relie[d] almost exclusively on evidence . . . that is not probative of collusion as a matter of law."); *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1288 (N.D. Ga. 2002), *aff'd sub nom. Williamson Oil Co.*, 346 F.3d 1287 (expert admitted he was "mistaken" about timing of one defendant's adoption of information-sharing program that plaintiffs alleged was adopted in furtherance of price-fixing conspiracy).

Two other cases do not involve the exclusion of expert testimony. The Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, did not "affirm[ ] [the] district court's finding that [the] expert report was inadmissible," Defs.' Mem. at 14; rather, the Supreme Court noted that the court of appeals had *reversed* that finding, but nonetheless found the study had "little probative value," essentially adopting "the District Court's analysis of the factors that substantially undermine the probative value of that evidence." 475 U.S. 574, 594 n.19 (1986). Similarly, the language Defendants cite from *In re Citric Acid Litigation* addresses the plaintiff's attempt to "get [a] document in through the back door," that was not properly made

Defendants disagree with Dr. Singer's reliance on evidence unfavorable to Defendants' case in forming his assumptions and opinions, challenging, *e.g.*: (1) his reliance on Delta's "Value Proposition" analysis; (2) his assumptions about the information available to Defendants about each other's expected FBF risks and payoffs; (3) his treatment of Defendants' FBF decision-making process as simultaneous; (4) his assumption that Defendants did not view their FBF decision-making as an infinitely repeating process; (5) his discussion of why economic conditions at the time disfavored unilateral adoption of a FBF; and (6) the adequacy of his accounting for obvious alternative explanations. Dr. Singer's testimony is admissible because he has a "reasonable factual basis" for each of his opinions and analyses. *0.161 Acres of Land*, 837 F.2d at 1040.

1. The Record Supports Dr. Singer's Use of Delta's Value Proposition Analysis in His Economic Game Theory Model.

"[G]ame theory analysis . . . [and] regression analysis . . . . are textbook economic methodologies which are generally accepted and widely used by economists[.]" *Grand River Enters. Six Nations, Ltd. v. King*, 783 F. Supp. 2d 516, 527 (S.D.N.Y. 2011). Dr. Singer's economic game theory model outlines the expected costs and payoffs to Delta depending on whether AirTran and/or Delta adopted FBF. Singer Merits ¶ 36. Dr. Singer found, based on his game theory

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part of the summary judgment record before the court by citing his expert's reliance on it. 191 F.3d 1090, 1102 (9th Cir. 1999).

analysis, that "it would have been economically irrational for either Defendant to have unilaterally adopted a first bag fee without prior assurances that the other would do the same." *Id.* ¶ 2. Defendants do not challenge Dr. Singer's methodology, but instead challenge his use of Delta's own internal Value Proposition analysis of the expected profitability of FBF as inputs in his game theory analysis.

As Dr. Singer observed based on his review of uncontroverted evidence, the Value Proposition was prepared at the request of top executives by Delta's Revenue Management department for the Corporate Leadership Team ("CLT"), incorporated input from at least one other Delta department, was updated and revised several times based on input from Delta executives, and was the only written analysis Delta conducted of the potential revenue impact of FBF.[24]

Defendants make three arguments against Dr. Singer's use of the economic assumptions reflected in the Value Proposition. Defs.' Mem. at 15-17. First, Defendants assert that "the evidence is uniform" that the Value Proposition was not "intended to be Delta's estimates of revenues that might be gained or lost if Delta implemented [FBF]." *Id.* at 15. Defendants rely on Glen Hauenstein's testimony that the "predicted share [shift] range of four to five . . . was kind of a gut feel," and that

[24] Singer Merits ¶¶ 34-35, 57-59, 62-68; Singer Am. Merits Rebuttal Report ¶¶ 40-42 (#556 at PX400) ("Singer Rebuttal") (citing evidence); Pls.' Statement of Additional Material Facts ("PSOF") ¶¶ 150-51, 163, 168-72, 190-93 (#554-3); Grimmett 5/4/12 Tr. 322:23-323:3 (#566); Pls.' Response to Delta Statement of Facts ¶ 55 (#554-1) ("Pls.' Response to DSOF").

the Value Proposition also provided sensitivities for a range of one to ten percent share shift. *Id.* at 17. But Mr. Hauenstein's testimony lacks any discernible foundation, as he admitted that he: did not author the Value Proposition; does not know who authored it; and cannot speak for its author.[25] Admissions of the author of the Value Proposition (Scott Springer), his direct supervisor (Eric Phillips), and contemporaneous documents reflect that the Value Proposition was, in fact, intended to reflect Delta's "best estimate," or "best approximation" of revenues likely to be gained or lost from FBF.[26] And the 4-5% share shift estimate was based on the observed 4.96% market share shift in U.S. Airways overlap markets.[27]

Second, Defendants argue that sometime before AirTran's October 23, 2008 earnings call, three members of the ten-member decision-making CLT[28] rejected the premise that adopting FBF would cause material share shift. Defs.' Mem. at 16 (selectively citing testimony). But contemporaneous documents and admissions

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[25] Hauenstein 9/30/10 Tr. 81:16-82:2, 96:7-17, 114:22-24 (#567).

[26] PSOF ¶ 162 (citing Springer 6/16/09 Tr. 45:11-17, 56:1-5, 58:4-5, 186:18-19 (#368); Phillips 8/15/09 Tr. 283:14-284:6 (#367); Bastian 10/27/09 Tr. 64:1-2 (#366))), ¶ 224 (citing evidence that estimates were conservative); Pls.' Response to AirTran Statement of Facts ¶¶ 65-66 (#554-2); Pls.' Response to DSOF ¶ 74.

[27] Pls.' Response to DSOF ¶ 74; PSOF ¶ 220.

Defendants also argue that the Value Proposition's choice of 4-5% share shift simply reflects "the amount necessary to offset the fee revenue." Defs.' Mem. at 17 n.16. But if that were true, the 4-5% range would have been adjusted upwards in the final version of the Value Proposition to a level that offset fee revenue.

[28] #557 at PX332, at DLBF 35288 (identifying ten CLT members).

reflect that even those three individuals – Anderson, Bastian, and Gorman – did not reject the Value Proposition's analysis of the risk of share shift. *See, e.g.*, Bastian 10/27/09 Tr. 68:15-16 (#366) ("There was clearly some risk [of share shift], no question about it."); E-mail from B. Morey to R. Anderson (Oct. 1, 2008) (#557 at PX182, p. 2) (memorializing statement made by Anderson that imposing FBF "could negatively affect our customers and revenue"); E-mail from S. Gorman to H. Halter (Aug. 22, 2008) (#557 at PX142, p. DLTAPE 3404) ("I still do not recommend first bag fee. . . . [W]e are concerned competitively with CO, JetBlue and AirTran domestically on the 1st bag fee[.]").[29] Indeed, these executives participated in a meeting in late September 2008 at which the Value Proposition was explicitly requested. Pls.' Response to DSOF ¶ 55 (#554-1).

Third, Defendants argue that Dr. Singer cannot rely on the Value Proposition without improperly weighing witness credibility and other evidence. Defs.' Mem. at 18-21. But Dr. Singer does not intend to testify to his assessments of witness credibility or his weighing of the evidence. Singer Supp. ¶ 3 ("I do not, however, intend to offer an opinion at trial specifically regarding the credibility of any witnesses."); Singer 2/11/11 Tr. 1178:11-18 ("I think you'd have to weigh the

[29] *See also* Bastian 10/27/09 Tr. 71:13-72:15 (#366); Pls.' Response to DSOF ¶¶ 68, 70, 77, 81 (citing evidence); Anderson 10/6/10 Tr. 62:4-6 (#569) ("what was insightful after [October 27, 2008] was to get the take of the Northwest executives on whether or not they had seen share shift.").

evidence there. . . . [I]t is not up to me to make that determination."). And in order to permissibly rely on factual assumptions, Dr. Singer only needs a "reasonable factual basis." *0.161 Acres of Land*, 837 F.2d at 1040. Here, this requirement is more than satisfied, as Dr. Singer's reliance on the Value Proposition is supported by the weight of the evidence, and his opinion is admissible. *Id.*

2. Dr. Singer's Use of Delta's Own Estimates in Modeling Delta's Decision-Making Was Appropriate and Is Admissible.

Defendants argue that, in modeling Delta's decision-making process in his economic game theory analysis, Dr. Singer improperly assumed that AirTran and Delta had complete information about each other's "internal workings" and assumptions about each other's payoffs, and that if the game theory analysis had not assumed complete information, the result would have been reversed. Defs.' Mem. at 21. But this is inaccurate for at least four reasons. First, Dr. Singer did not assume Defendants had complete information about each other's expected payoffs. Rather, he appropriately modeled Delta's decision-making process using Delta's contemporaneous estimates from the October 22, 2008 draft Value Proposition analysis of AirTran's expected payoffs.[30] Second, based on the assumption that

[30] Singer Merits ¶¶ 37-38; Singer 2/11/11 Tr. 1070:23-1071:2 ("It's closer to complete [information] in the sense that the path matrix was populated by Delta's estimates. [I]t might not satisfy all of the requirements of a complete information game[.]"), 1071:20-23 ("...I was trying to model decision making process of Delta as best as I could given the information that was available to Delta at the time."); *see also* Singer 2/11/11 Tr. 1071:4-14 (distinguishing "complete information game").

Defendants lacked internal information about each other's payoffs (as Defendants concede is appropriate), Dr. Singer's game theory analysis demonstrates that it would not have been rational for Defendants to independently adopt FBF. Singer Merits ¶¶ 40-42.[31] Third, AirTran never analyzed the expected costs and benefits of charging FBF, so there was no internal AirTran estimate to use.[32] Fourth, disputes about the appropriate numerical inputs into the game theory analysis go to the weight of Dr. Singer's opinion, not its admissibility. *Quiet Tech. DC-8*, 326 F.3d at 1345; *Allapattah Servs.*, 61 F. Supp. 2d at 1350, 1353-54; Fed. R. Evid. 702, 2000 advisory

[31] While Defendants cite to Dr. Lee's report to suggest that Defendants' incomplete information would lead to a different outcome, Dr. Lee does not offer such an opinion. Defs.' Mem. at 21 (citing Lee Merits Rebuttal Report ¶ 42). Specifically, Dr. Lee states that Defendants could have adopted FBF consistent with economic self-interests "if . . . Delta was uncertain as to which are AirTran's payoffs (i.e., they could be either [profitable or unprofitable for AirTran to match Delta in charging FBF])." Lee Merits Rebuttal Report ¶ 42 (#611-3). But there is no evidence that Delta's estimate of AirTran's payoffs was anything other than the estimate used by Dr. Singer (at least until after AirTran's invitation to collude), or that they were uncertain whether AirTran expected FBF to be profitable. And Dr. Lee's opinion is inconsistent with the fact that Delta waited to impose a FBF until after it received assurances from AirTran. Under Dr. Lee's theory, this delay would have cost Delta millions of dollars in FBF revenue.

[32] PSOF ¶ 230; #556 at PX268 ("this analysis does not take into account . . . share shift"); M. Klein 11/17/10 Tr. at 195:13-18 (#579). If Dr. Singer had extrapolated an estimate using AirTran's internal information, the result of his game theory analysis would have been the same. AirTran estimated that, from a subset of less than 10 to 20% of the market subject to share shift, AirTran would gain $36 to $48 million a year from Delta by not charging a first bag fee if Delta charged. PSOF ¶¶ 231-32. If AirTran expanded its analysis to all passengers and airlines, its expectation of the benefits of not charging FBF would have exceeded its expected gain from charging FBF. *Id.* ¶ 232.

committee's note.

3. Dr. Singer's Decision to Model His Game Theory Analysis as a Simultaneous Rather Than Sequential Game Makes No Difference to His Opinions, and Is an Appropriate Model.

Defendants argue that Dr. Singer's game theory models a simultaneous game, and that the analysis is inadmissible because AirTran and Delta did not simultaneously decide to impose FBF. Defs.' Mem. at 22.

But Dr. Singer's opinions are not reliant on simultaneous rather than sequential decision-making. First, Dr. Singer finds that absent collusion, AirTran would have chosen not to impose FBF even after Delta had already announced a decision to charge FBF: "[r]egardless of [Delta's FBF decision], the payoff structure dictates that AirTran will be better off choosing *not to impose the bag fee*" absent collusion. Singer Merits ¶ 42 ("not imposing the baggage fee is a 'strictly dominating strategy' for AirTran").

Second, Dr. Singer appropriately assumes, consistent with the facts here, that AirTran would not impose FBF before Delta, and analyzes whether Delta would rationally impose FBF without a prior agreement with AirTran: "Given that AirTran made it abundantly clear (in both private and public communications) that it would not adopt a first bag fee unless Delta did so first, the purpose of the model is to test whether, from Delta's perspective, adopting a first bag fee would be rational absent AirTran's prior assurance that it would match." Singer Merits ¶ 32. Dr. Singer

testified that, "when you look at the payoff structure in the scenarios that Delta was playing out . . . you could arrive at . . . any of those scenarios if you were considering these choices as simultaneous or sequential." Singer 2/11/11 Tr. 1097:25-1098:4.[33] Thus, Defendants' criticism about sequential decision-making is irrelevant to Dr. Singer's opinions.[34]

Moreover, Dr. Singer had a reasonable factual basis for choosing to model his game theory analysis as a simultaneous game. Singer 2/11/11 Tr. 1095:22-1096:5 (explaining why he chose to model a simultaneous game).

4. The Record Supports Dr. Singer's Modeling of Defendants' Decision-Making as a One-Time or Finite Decision.

Defendants argue that Dr. Singer improperly modeled Defendants' decision-making "as if the decision could not later be changed." Defs.' Mem. at 23. But Defendants' argument is flawed because they misrepresent Dr. Singer's game theory

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[33] Defendants argue that Delta would have made a different prediction of AirTran's economic incentives after AirTran's invitation to collude. Defs.' Mem. at 23 ("the information that Dr. Singer says was available to Delta would have led it to predict that AirTran would be better off by adopting a first bag fee too"). But the fact that Delta would predict that AirTran would follow through on its agreement to impose FBF if Delta acted first is irrelevant to Dr. Singer's analysis of Defendants' unilateral economic self-interests absent collusion.

While Defendants argue that AirTran was not bound to its commitment to join Delta in imposing a first bag fee, Defs.' Mem. at 23 n.21, antitrust law does not require a binding agreement, and such an unlawful agreement would be unenforceable.

[34] *Cf.* Singer 2/11/11 Tr. 1099:23-1100:2 ("I have a feeling that if sequential . . . would have radically altered the opinion, I would have seen that in the opinions of the opposing experts.").

models and because Dr. Singer has a reasonable factual basis for his modeling assumptions.

Contrary to Defendants' assertion, Dr. Singer modeled his game theory analysis not only as a one-time decision, but also in the alternative as involving repeated, finite decision-making. Singer Merits ¶¶ 27, 45-52. Both models yielded the same result and support Dr. Singer's opinion that Defendants' adoption of FBF was more consistent with collusion than unilateral conduct. *Id.* ¶¶ 33, 52.

Dr. Singer has a reasonable factual basis for assuming that Defendants' FBF decision-making could not be infinitely repeated. In his report, Dr. Singer relies on internal documents, emails, and deposition testimony in finding that there were multiple factors leading Delta and AirTran to approach the imposition of FBF as a step that needed to be taken over a short time horizon, including: falling fuel prices increasing the risk of customer backlash; a weakening economy; the Northwest merger providing a one-time justification for adopting FBF, and an urgent need to generate revenue. Singer Merits ¶¶ 46-48.[35]

Contrary to Defendants' arguments, subsequent events confirm Dr. Singer's

[35] *See also* Singer Merits ¶ 51 ("[I]n the absence of explicit collusion, it would take time for such an equilibrium to be established, and each firm would risk losses during the initial 'trial and error' process. And in a myopic environment, the collusive outcome cannot be sustained through threat of future punishment."); Singer 2/11/11 Tr. at 1097:2-5 ("I kind of consider them to be one shot in the sense that if you do something that's radical to your pricing regime, that it's going to be permanent.").

assumption that Defendants viewed their FBF decision as a permanent decision, as AirTran continued charging FBF for as long as AirTran tickets were sold,[36] Delta continues to charge FBF,[37] and other carriers have not switched back and forth between charging and rescinding FBF.

Because Dr. Singer has a reasonable factual basis for his assumption that Defendants did not view their FBF decision as one that would be infinitely repeated, his testimony should not be excluded. *See 0.161 Acres of Land*, 837 F.2d at 1040 ("where the expert's testimony has a reasonable factual basis, a court should not exclude it").

5. The Record Supports Dr. Singer's Opinion That Economic Conditions Would Have Made it Against Either Defendant's Unilateral Self-Interest to Adopt a First Bag Fee.

Dr. Singer found that Defendants' imposition of FBF was contrary to Defendants' unilateral economic self-interests because: expected market share shift made the fee unprofitable for Delta to impose unilaterally; Defendants imposed FBF after fuel costs had fallen dramatically and were continuing to fall; Defendants

[36] Southwest acquired AirTran in 2011 and continued charging FBF on AirTran flights until November 1, 2014, when AirTran stopped selling tickets. Tenley Decl. ¶ 13 (#553-1).

[37] Contrary to Defendants' arguments, Dr. Singer's game theory analysis did not make any prediction about whether the dollar amount charged for FBF would change over time, and Dr. Singer took into account changes in FBF in establishing his game theory analysis. Singer Merits ¶¶ 21-22.

imposed FBF after demand had fallen and was continuing to decline because of a severe economic recession; and unilateral imposition of FBF would harm each airline's reputation. Singer Merits ¶¶ 26, 76-85. Defendants' own experts agreed that in a competitive market they would expect prices to decline when fuel costs declined, or when there was an economic recession that caused a decrease in demand.[38]

Defendants argue that Dr. Singer's opinions are inadmissible because they "rest critically on an incorrect assumption." Defs.' Mem. at 26. But Dr. Singer has a "reasonable factual basis" for his assumptions. *0.161 Acres of Land*, 837 F.2d at 1040. First, Defendants argue that Dr. Singer incorrectly assumes that individuals at Delta responsible for FBF did not view imposition of FBF as a price increase that would affect demand or passenger behavior. Defs.' Mem. at 25. But there is extensive testimony and numerous contemporaneous documents demonstrating that FBF was viewed as a price increase that Delta expected to affect demand.[39] Delta

[38] Dick 2/25/11 Tr. 162:14-18 (#593) ("As a general proposition, everything else held equal, lower input costs generally will be followed over some time period by – by a reduction in price. Competition will lead to that outcome."); Lee 10/14/10 Tr. 25:13-17 (#571) ("when fuel prices are very, very high, airlines essentially to cover the cost of that fuel and their prices tend to get elevated and when prices go down, they tend to come down as well."); Carlton 2/24/11 Tr. 145:4-6 (#592) ("in a competitive market, . . . as costs fall, I would expect prices to fall"), *id.* at 139:4-6, *id.* at 139:17-19 ("during a period in which demand is declining, I would expect total price to be falling").

[39] *See, e.g.*, Value Proposition (#556 at PX234, pp. 10-17); Q3 Earnings Q&A (#557 at PX190, p. DLBF 189520); Grimmett 5/4/12 Tr. 183:7-11 (#566); Anderson 10/6/10 Tr. 102:5-6 (#569); Dailey 6/10/10 Tr. 17:4-6 (#561); West 8/16/09 Tr. 118:13-14 (#369-1); DLBF 182821 (#357 at Ex. 1); E-mail from G. Hauenstein to

recognized that it had been gaining market share from other legacy carriers because they were charging FBF and Delta was not.[40] By contrast, there are no contemporaneous documents reflecting that the imposition of FBF would cause Defendants to reduce base fares, or that Defendants would not lose market share. The only relevant evidence Defendants cite to support their claim is self-serving deposition testimony.[41]

R. Anderson, *et al.* (May 28, 2008), Delta Ex. 67 (#350-84); E-mail from G. Hauenstein to G. Grimmett (July 18, 2008) (#557 at PX89, p. DLBAG 1067); G. West to G. Hauenstein (July 18, 2008) (#557 at PX90, p. DLBAG 9622); Delta 1st Bag Analysis (Aug. 11, 2008) (#557 at PX137, p. DLBAG 12217); E-mail from S. Gorman to H. Halter (Aug. 22, 2008) (#557 at PX142, p. DLTAPE 3404); E-mail from S. Springer to D. Elkon, *et al.* (Sept. 24, 2008) (#557 at PX170); Email from P. Elledge to G. Hauenstein (Sept. 30, 2008), (#557 at PX180, p. DLTAPE 6394); Delta Baggage Handling Study (Sept. 2008) (#557 at PX181, p. DLBAG 10965-66); E-mail from G. West to M. Zessin, *et al.* (Oct. 23, 2008) (#557 at PX215, p. 1); Springer 6/16/09 Tr. 56:1-5, 188:1-11 (#368, 368-1); Phillips 8/15/09 Tr. 283:14-284:6 (#367-2); Singer Merits ¶¶ 36-37; Singer Class Cert. Reply ¶¶ 25-50 (#269-1) (finding no correlation between Defendants' FBF and a reduction in fares).

Extensive documents and testimony reflect that AirTran also viewed FBF as a price increase that would affect demand and passenger behavior. AirTran1718223 (#357 at Ex. 2); AirTran024025162-70 (#357 at Ex. 3); E-mail from M. Klein to K. Healy, *et al.* (Nov. 5, 2008) (#556 at PX268); E-mail from K. Healy to M. Klein, *et al.* (Nov. 5, 2008) (#557 at PX270, p. AIRTRAN 64714); Healy 6/3/10 Tr. 55:12-15 (#559); Healy 7/16/09 Tr. 195:6-13 (#361-2); Cannon 3/22/12 Tr. 81:22-25 (#594); Klein 11/17/10 Tr. 210:15-20 (#579); Smith 11/15/10 Tr. 50:4-7 (#577).

[40] *See, e.g.*, Value Proposition (#556 at PX234, pp. 10, 15-16); Q3 Earnings Q&A (#557 at PX190, p. DLBF 189520).

[41] Defs.' Mem. at 25-26 & n.24, 25. Defendants cite one e-mail trying to justify the FBF decision, in which Gil West speculates that "most customer[s]" thought Delta was already charging FBF. *Id.* at 26 n.25. But this speculation is contradicted by contemporaneous Delta studies. Delta 1st Bag Analysis (Aug. 11, 2008) (#557 at

Second, Defendants argue that Delta adopted FBF because Delta observed other legacy carriers successfully adopt FBF, and that Dr. Singer "ignor[ed]" this explanation for Delta adopting FBF. Defs.' Mem. at 26. In fact, however, Dr. Singer's reports explicitly considered and rejected this explanation. Singer Rebuttal ¶ 38; Singer Merits ¶¶ 94-95. Based on Delta's own contemporaneous documents, he found that Delta refrained from adopting FBF before December 5, 2008 "because Delta was 'much more exposed to LCCs [low cost carriers]'" than other legacy carriers. Singer Merits ¶ 94 (quoting Value Proposition). "Delta was hamstrung by its exposure to low-cost carriers," unlike other legacy carriers, making other legacy carriers' successful adoption of FBF largely irrelevant to Delta's FBF decision. *Id.* Dr. Singer also found that, if Delta were simply waiting to see if other legacy carriers' adoption of FBF was successful, Delta would have adopted FBF months earlier as other legacy carriers had done. Singer Rebuttal ¶ 38; *see also* Delta Statement of Facts ¶ 23 (#350-3) (citing other legacy airlines' public statements in July 2008 about their successful implementation of FBF).[42]

Third, Defendants dispute that falling fuel prices were relevant because prices

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PX137, p. DLBAG 12217); Delta Baggage Handling Study (Sept. 2008) (#557 at PX181, p. DLBAG 10965-66).

[42] Moreover, the other carriers had adopted FBF before the recession and when fuel prices were higher, thus providing a legitimate competitive justification for the fees. Singer Rebuttal ¶¶ 21, 26-27.

exceeded "historical levels" and were volatile. Defs.' Mem. at 26. But fuel prices in December 2008 – when Defendants implemented FBF – were lower than they had been for any month since February 2005.[43] And Defendants cite no record evidence suggesting that volatility of fuel played any role in Delta's decision making. Defs.' Mem. at 26. In contrast, there is a variety of evidence in which Delta executives recognized that falling fuel prices would lead to pressure from consumers to lower prices. *See* Singer Rebuttal ¶¶ 19-20; PSOF ¶ 243 (collecting evidence).

Fourth, Defendants claim that "increasing prices in the face of falling costs is not necessarily inconsistent with competitive behavior in oligopoly markets." Defs.' Mem. at 26. Defendants cite two cases to support their argument, but neither case suggests that it would be rational to increase prices when costs are falling. *See In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 400 (3d Cir. 2015) (prices increased when "costs . . . were *increasing*") (emphasis added); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993) (reversing in part grant of summary judgment to defendants where plaintiffs alleged "refusals to bid on existing accounts as aggressively as new accounts").[44]

To the contrary, Defendants' own experts acknowledge that in a competitive

[43] U.S. Jet Fuel Spot Price (#556 at PX448, pp. 4-5); Singer Merits ¶ 78.

[44] While *Petruzzi's* states in *dicta* that oligopolists might sell at the same prices as competitors because of their interdependence, it says nothing about the rationality of increasing prices when costs are falling.

market, declining costs should lead to decreased prices.[45] Similarly, in *American Tobacco Co. v. United States*, the Supreme Court affirmed criminal price-fixing convictions where defendants' parallel price increases in the face of declining production costs and likely reductions in demand were inexplicable absent collusion. 328 U.S. 781, 805-06 (1946). And Dr. Singer cites a variety of evidence reflecting Defendants' concerns about the success of a proposed price increase during a time of plummeting demand and low costs. *See* Singer Merits ¶¶ 76, 79-81.

Thus, Dr. Singer has a "reasonable factual basis" for the assumptions that led to his opinion that Defendants' adoption of FBF was contrary to their independent economic self-interest. *0.161 Acres of Land*, 837 F.2d at 1040.

6. Dr. Singer Adequately Accounted for Obvious Alternative Explanations.

Whether an expert has adequately accounted for obvious alternative explanations is a non-dispositive factor that a court "may consider" in evaluating expert testimony. *Woodard v. Wal-Mart Stores East LP*, No. 5:09-CV-428, 2011 WL 3759782, at *3-4 (M.D. Ga. Aug. 25, 2011) (citing Fed. R. Evid. 702, advisory committee's note). An expert need not "eliminate every other possible cause," and his elimination of an alternative hypothesis need only be founded on "more than 'subjective beliefs or unsupported speculation.'" *Florists' Mut. Ins. Co. v. Lewis*

[45] Dick 2/25/11 Tr. 162:14-17 (#593); Lee 10/14/10 Tr. 25:13-17 (#571); Carlton 2/24/11 Tr. 145:4-6 (#592).

Taylor Farms, Inc., No. 7:05-CV-50, 2008 WL 875493, at *19 (M.D. Ga. Mar. 27, 2008) (quoting *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003)).[46] An expert "sufficiently 'account[s] for obvious alternative explanations,' [where] opposing counsel cross-examined him about other potential justifications . . . and [the expert] sufficiently explained why he still believed that Defendants engaged in questionable business practices." *Tindall v. H&S Homes, LLC*, No. 5:10-CV-044, 2012 WL 3241885, at *13 (M.D. Ga. Aug. 7, 2012). Where defendants do not squarely present an alternative explanation and give the expert the opportunity to address it, then it is not an "obvious" alternative that the expert must account for. *Woodard*, 2011 WL 3759782, at *8.

Defendants argue that Dr. Singer did not adequately account for two alternative explanations for why Delta adopted FBF. First, Defendants argue that Delta adopted FBF because of the "'*importance of* every dollar of *incremental profit* to fund impending pension obligations.'" Defs.' Mem. at 27-28 (quoting #554 at 26) (emphasis added). But this is not an "alternative" explanation. Rather, it is consistent with Dr. Singer's opinion that, prior to AirTran's October 23, 2008 earnings call, adopting FBF would be contrary to Delta's independent economic interest because

[46] *See also Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert) (cited in Fed. R. Evid. 702, advisory committee's note).

Delta expected that the fee would be unprofitable, but that after the October 23 call Delta expected that the fee would be profitable, and Delta subsequently adopted the fee *because of its profitability*. Singer Merits ¶¶ 35, 40, 65, 115, 118; Singer Rebuttal ¶¶ 42, 77, 79, 80.

Although some CLT members voted against FBF because they would have preferred to lose out on some short-term profits to prevent its key competitor – AirTran – from gaining profits from Delta's adoption of FBF, there is no real dispute that Delta adopted FBF because of its expected profitability. R. Anderson 10/6/10 Tr. 87:9-13 (#569) ("[At the CLT meeting,] Ed Bastian . . . advocated that we go forward with the first bag fee at Delta. Because of the positive financial benefits of the first bag fee for Delta.").[47] And Dr. Singer's analysis of economic self-interest is based on profitability. Singer 2/10/11 Tr. 789:17-18.

Moreover, Dr. Singer acknowledged in his report that Delta wanted additional profits to fund its pension obligations, and Dr. Singer took this fact into account in forming his opinions. Singer Merits ¶ 47. The issue of whether Delta intended to use incremental profits to fund pension obligations or to use new profits for some other purpose is irrelevant to Dr. Singer's opinion on whether adopting FBF was in Delta's

[47] There is no evidence that anyone at Delta who believed that FBF would be unprofitable advocated that Delta adopt the fee (nor is there evidence that any Delta decision-makers believed that the fee would be unprofitable after AirTran's October 23 earnings call). *See* PSOF ¶¶ 166, 175, 177, 211, 280 (citing evidence that Delta adopted FBF because of its expected profitability).

profit-maximizing unilateral economic self-interest.

Second, Defendants argue that Delta's merger with Northwest (which already charged FBF) was an obvious alternative explanation for Delta's FBF adoption that Dr. Singer "dismisses . . . because he did not find it to be credible[.]" Defs.' Mem. at 28.[48] Dr. Singer examined the evidence and found that: "Delta's own internal calculus . . . demonstrated that the fee would still be unprofitable for the combined Delta-Northwest if AirTran did not adopt the fee as well." Singer Merits ¶ 53.[49] He also applied economic game theory analysis to find that "the combined [Delta-Northwest] entity would rationally refrain" from imposing FBF. *Id.* ¶¶ 54-55.[50]

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[48] Defendants assert that the Court recognized that the Northwest merger provided a "valid justification" for Delta's adoption of FBF and its timing, Defs.' Mem. at 28, but this is inaccurate. The Court stated only that Delta would have a valid justification for adopting FBF *if* Delta "elected to impose a first-bag fee for reasons *wholly unrelated* to AirTran's public statement." Order at 31 (#137) (emphasis added).

[49] Defendants provide no contemporaneous documents indicating that the Northwest merger was the actual motivation for the fee. And while there is evidence that Delta intended to harmonize Delta and Northwest's fees after the merger closed, the evidence shows that prior to AirTran's October 23 call, Delta intended to harmonize fees by repealing Northwest's FBF. PSOF ¶¶ 158, 253 (collecting evidence).

[50] Defendants cite cases on the inappropriateness of experts testifying to their determinations about pretext, citing paragraph 47 of Dr. Singer's Merits Report. Defs.' Mem. at 28-29. In paragraph 47, Dr. Singer identifies four factors suggesting that Delta wanted to make a FBF decision quickly, including the fact that Delta's merger with Northwest provided a one-time justification for adopting FBF. Singer Merits ¶ 47. This paragraph of Dr. Singer's report does not make a credibility determination or judgment about why Delta adopted FBF, but simply indicates, consistent with the record and Delta's public statements, that Delta would have a

Thus, Dr. Singer has adequately accounted for obvious alternative explanations and his testimony is admissible. *Tindall*, 2012 WL 3241885, at *13; *Florists' Mut. Ins. Co.*, 2008 WL 875493, at *19.

C. Dr. Singer's Discussion of the Factual Record Is Appropriate to Identify the Basis of His Factual Assumptions and to Show that His Analyses Are Consistent with the Record.

"[I]t is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory – the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent." *In re Processed Egg Prods.*, 81 F. Supp. 3d at 424.[51] The law requires only that an expert must have a "reasonable factual basis" for his testimony. *0.161 Acres of Land*, 837 F.2d at 1040.

"An expert is entitled to make reasonable assumptions and inform the factfinder of those assumptions to put his or her opinions in context" and to testify

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one-time justification for revisiting its fee structure as part of its merger with Northwest. *See* Delta Q3 2008 Earnings Call Tr. (Oct. 15, 2008) (#350-99, Delta Ex. 82 at DLBF 38191) ("[A]nd as we merge with Northwest, we'll have another opportunity to look again with respect to where the fee-based revenues align[.]").

[51] *See also United States v. Frazier*, 387 F.3d 1244, 1294 (11th Cir. 2004) (en banc) ("'[I]t is part of the normal role of the expert not merely to describe patterns of conduct in the abstract, but to connect actions in a specific case to those patterns—sometimes even to the point of testifying that the defendant was [or was not] involved in criminal conduct.'") (quoting *United States v. Boney*, 977 F.2d 624, 629 (D.C. Cir. 1992).

to "the basis for th[ose] assumption[s]." *D.B. v. Orange County, Fla.*, No. 6:13-CV-434, 2014 WL 4655739, at *2 (M.D. Fla. Sept. 17, 2014) (citing *Maiz*, 253 F.3d at 667). By contrast, an expert cannot "simply testify that, in her opinion, it was a fact that" certain events happened. *Id.* If this distinction "is not always made clear in [an] expert disclosure, this is not a basis for striking the entirety of her opinions." *Id.*

Defendants move to strike Dr. Singer from testifying to the reasonable factual basis for his opinions, the evidence that he credits in forming the assumptions that underlie his analyses, and his basis for crediting certain evidence rather than contradictory evidence in forming those assumptions. Defs.' Mem. at 29-32.[52] For example, Defendants seek to exclude Dr. Singer's assumption that Defendants "engaged in a series of private and public communications concerning the joint imposition of first bag fees[,]"[53] and his testimony that, in forming his assumptions, Dr. Singer preferred to rely on contemporaneous documents rather than self-serving testimony when there was conflicting evidence. Defs.' Mem. at 31.[54]

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[52] While Defendants argue that Dr. Singer's opinions are *inconsistent* with the evidence (as discussed above), Defendants also make the opposite argument – *i.e.*, that Dr. Singer should not have shown that his opinions are *consistent* with the evidence. Defs.' Mem. at 29-32. Defendants cannot have it both ways.

[53] Singer Merits ¶ 2 (cited in Defs.' Mem. at 30).

[54] The primary example cited by Defendants is Dr. Singer's preference to credit contemporaneous e-mails of AirTran Director Scott Fasano reflecting that he met with, spoke to, and e-mailed individuals at Delta about jointly imposing FBF, rather than crediting Fasano's self-serving denials at his depositions. Dr. Singer can hardly be faulted for preferring contemporaneous documents. *See Gainesville Util. Dept. v.*

But such testimony is appropriate as it identifies the assumptions he makes in forming his opinions and "the basis for [his] assumption[s]." *Maiz*, 253 F.3d at 667; *D.B.*, 2014 WL 4655739, at *2. And contrary to Defendants' arguments, Dr. Singer does "not . . . intend to offer an opinion at trial specifically regarding the credibility of any witnesses" or on how the jury should weigh the evidence.[55]

Similarly, Defendants seek to preclude Dr. Singer from identifying evidence that corroborates his analysis, but it is permissible for an expert to show that the "stories drawn from the data and from the factual record are consistent." *In re Processed Egg Products Antitrust Litig.*, 81 F. Supp. 3d at 424.[56]

V. CONCLUSION

For the foregoing reasons, Defendants' motion should be denied.

Fla. Power & Light Co., 573 F.2d 292, 301 n.14 (5th Cir. 1978) (giving "'little weight'" to self-serving testimony of executives denying the existence of a conspiracy that conflicted with contemporaneous documents) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948)).

[55] Singer Supp. ¶ 3; *see also* Singer 2/11/11 Tr. 934:4-5 ("The fact finder will have his or her own weighting [of the evidence] function[.]"), 976:23-977:1 ("Q. In rendering your opinions in this case, have you made an assessment of Mr. Bastian's credibility? A. No."), 1158:1-2 ("I'd want the fact finder to consider the totality of the evidence."), 1234:1-4 ("I don't think that I'm going to be the one as an economist to make the final decision as to whether or not Mr. Fasano is credible. That would be someone else's decision.").

[56] For example, Dr. Singer's game theory analysis demonstrated that Delta and AirTran would not have imposed FBF absent collusion. Dr. Singer can permissibly testify that the AirTran earnings call and private Scott Fasano communications with Delta personnel constitute the types of communication that would have been sufficient for Delta and AirTran to coordinate on the imposition of FBF.

Respectfully submitted,

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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 4th 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 4th day of December, 2015.

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