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

IN RE: DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION	Civil Action No. 1:09-md-2089-TCB ALL CASES

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CONSOLIDATED MOTION TO EXCLUDE THE MERITS TESTIMONY OF DR. HAL SINGER

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RULES

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OTHER AUTHORITY

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Joseph Kattan & William R. Vigdor, Game Theory and the Analysis of Collusion in Conspiracy and Merger Cases, 5 Geo. Mason L. Rev. 441 (1997) 13

Gale M. Lucas et al., Against Game Theory, Emerging Trends in the Social & Behavioral Sciences: An Interdisciplinary, Searchable, and Linkable Resource (Robert A. Scott & Stephen M. Kosslyn eds., May 15, 2015) 13

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INTRODUCTION

In their briefs opposing Defendants' summary judgment motions, Plaintiffs extensively rely on the multiple reports submitted by their expert, Dr. Hal Singer.[1] In those reports, Dr. Singer offers an opinion on the ultimate issue in the case—whether AirTran and Delta "colluded" to adopt a first bag fee. In doing so, however, Dr. Singer adopts a definition of "collusion" that includes behavior that is clearly legal under binding Eleventh Circuit law. Specifically, Dr. Singer "defined 'collusion' to include conscious parallelism," which the Eleventh Circuit has found to be "perfectly legal." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1291 (11th Cir. 2003). He, therefore, "did not differentiate between legal and illegal pricing behavior." *Id.* at 1323. Accordingly, as in *Williamson Oil*, Dr. Singer's "testimony could not [aid] a finder of fact to determine whether [Defendants'] behavior was or was not legal." *Id.* For this reason alone, Dr. Singer's reports and testimony should be excluded.

[1] *See, e.g.*, Dkt. 554 at 28 n.131 (citing Singer Am. Merits Report ¶¶ 2, 25-55), 29 n.134 (citing Singer Am. Merits Report ¶¶ 75, 76-81), 63 n.252 (citing Am. Merits Report ¶¶ 57-68), 64 n.256 (citing Singer Am. Merits Report ¶¶ 2, 25-55, 90-119), 65 n.257 (citing Singer Am. Merits Report ¶¶ 25-55). Plaintiffs' Surreply brief contains several citations to the entirety of Dr. Singer's reports without a page or paragraph citation. *E.g.* Dkt. 610 at 29 n.68 (citing PSOF as citing "PX398" (Singer Am. Merits Report)), 32 n.75 (citing PSOF as citing "PX398").

Dr. Singer's opinion that Defendants colluded is also based on his own weighing of the evidence and assessing witness credibility, finding certain witness testimony untruthful, "self-serving," or "in tension with [Singer's view of] contemporaneous documents in the record," claiming that he is more experienced than a jury in weighing credibility. Ex. 1, Singer Dep. 765:1-768:25, 930:18-933:22; *see also id.* at 1146:10-12, 1178:7-18, 1203:19-1204:3, 1234:6-20. This is not permitted by an expert. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 567 n.27 (11th Cir. 1998) (holding that an expert's "characterizations of pieces of documentary evidence as tending to show collusion" should be excluded because "such judgments are for the court to make at summary judgment and for the trier of fact to make at trial"); *United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997) (affirming exclusion of expert opinion on the weight and reliability of witness testimony).

For example, a foundation of Dr. Singer's collusion opinion is the Value Proposition presentation prepared by Delta's Revenue Management Department to advocate against adoption of the first bag fee. Dr. Singer labels the Value Proposition "Delta's" analysis, ignoring the uncontradicted testimony of Delta's top decision-makers that they rejected the basic assumptions about the risk of share shift in the document. They instead chose to credit the actual publicly reported

experiences of airlines that had adopted the fee. Similarly, Dr. Singer continues to rely on alleged "collusive communications" between lower level Delta and AirTran employees, when the claims of their occurrence are dubious at best, and there is no evidence that any such attempted communications reached anyone at Delta even remotely connected with its bag fee decision. Dr. Singer's opinions thus not only lack sufficient factual basis, they are contradicted by uncontroverted facts, and should be excluded. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (rejecting expert opinion where "not supported by sufficient facts to validate it in the eyes of the law" and "when indisputable record facts contradict or otherwise render the opinion unreasonable"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (affirming district court's finding that expert report was inadmissible because it contained assumptions that were "both implausible and inconsistent with the record evidence").

Dr. Singer's other opinions similarly depend on his substituting his own views for evidence. For example, he opines that Delta's implementation of the bag fee was against its independent economic interest because it would create reputational harm. But this ignores the undisputed fact that every other legacy carrier had adopted the fee and reported substantial revenue gains, despite the

supposed risk of reputational harm. Likewise, Dr. Singer opines that AirTran's adoption of a first bag fee was against its economic interest, but he ignores that AirTran's internal analysis predicted the fee revenues would be "overwhelming."[2] Dr. Singer also opines that Defendants' adoption of a first bag fee was against their independent economic interest because a competitive firm would not increase prices in the face of falling costs. But, even assuming Dr. Singer's factual premise—that unbundling is the same thing as increasing fares—were correct, such conduct is commonplace in oligopoly markets and is not evidence of conduct inconsistent with independent self-interest. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 400 (3d Cir. 2015) ("evidence of a price increase disconnected from changes in costs or demand" does not tend to exclude the possibility of independent conduct); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993) ("[I]t is quite likely that oligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut.").

[2] Dkt. 353-21 (AirTran EX19).

For these reasons and others, Dr. Singer's opinions in this case are inadmissible and should be excluded.[3]

ARGUMENT

Federal Rule of Evidence 702, amended in 2000 to codify *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its progeny, "affirms the trial court's role as gatekeeper and provides . . . general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702, Advisory Committee Note (2000 amendment). "*Daubert* requires that trial courts act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury." *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010). To fulfill its *Daubert* obligations this Court must:

[3] Dr. Singer's opinions have been rejected in several other recent cases. *See, e.g.*, *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164, 182 (N.D. Cal. 2015) (excluding Dr. Singer's opinions in support of class certification, finding "his analysis does not reliably support his conclusion that impact or damages are subject to classwide proof"); *Jarrett v. Insight Commc'ns Co., L.P.*, 2014 WL 3735193, at *7 (W.D. Ky. July 29, 2014) (finding Dr. Singer's opinion "is not supported by the record," and granting summary judgment to defendant); *In re Photochromic Lens Antitrust Litig.*, 2014 WL 1338605, at *23-25 (M.D. Fla. Apr. 3, 2014) (finding Dr. Singer's methodology deficient and denying class certification); *In re Florida Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674 (S.D. Fla. 2012) (rejecting Dr. Singer's methodology and denying class certification); *In re Cox Enter., Inc. Set-Top Cable Television Box Antitrust Litig.*, 2011 WL 6826813, at *16 (W.D. Okla. Dec. 28, 2011) (noting methodology Dr. Singer proposed for calculating damages "rests on unstable ground," and denying class certification).

> engage in a rigorous inquiry to determine whether: "(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."

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291-92 (11th Cir. 2005) (quoting *Harcros*, 158 F.3d at 562). The burden is on Plaintiffs, as the party offering Dr. Singer, to establish that his proffered testimony satisfies these requirements. *Id.*

A. Dr. Singer's Opinions and Testimony to Support Claims of "Collusion" Should Be Excluded Because They Are Contrary to Law and Cannot Assist the Jury

In his initial merits reports,[4] Dr. Singer opined that "Defendants engaged in collusion to jointly impose first bag fees." Singer Merits Report ¶ 2.[5] He then

[4] For expert reports cited in this brief, Defendants refer the Court to their contemporaneously filed "Appendix of Exhibits," which includes a table identifying the cited reports already in the record.

[5] *See, e.g.*, Singer Merits Report ¶ 2 ("My analysis demonstrates that Defendants engaged in collusion to jointly impose first bag fee."), ¶ 6 ("I conclude that Defendants colluded to jointly impose first bag fees."), ¶ 33 ("Delta's and AirTran's decisions to adopt first bag fees were the result of collusion."); Singer Merits Rebuttal ¶ 1 ("[Defendants' experts] have not caused me to alter my opinion that . . . Delta and AirTran engaged in an anticompetitive conspiracy to charge a first bag fee"); *see also* Singer Merits Report p. 12 (heading), ¶ 23, ¶ 75, ¶ 106, ¶ 110, n.148; Singer Merits Rebuttal ¶ 16, ¶ 153.

reiterated that conclusion under oath: "Defendants in my opinion have conspired to . . . impose bag fees." Ex. 1, Singer Dep. 882:18-20.[6]

Following his depositions on his initial merits reports, Dr. Singer amended his reports, and submitted a supplemental report, trying to correct this fatal flaw.[7] He claimed to "clarify" (Singer Supp. Report ¶ 5) that he was not offering an opinion on the ultimate legal issue in the case—the existence of a conspiracy—but merely opining that "Defendants' actions were inconsistent with unilateral conduct." Singer Am. Merits Report ¶ 6. However, even in his amended reports, Dr. Singer continues to opine that Delta and AirTran colluded to impose first bag fees. *Id.* ¶ 119; *see also* Ex. 2, Singer Dep. (v.6) 122:13-123:1.[8]

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[6] *See also id.* at 979:8-11 ("Q. What's your view? A. I think I ultimately interpret the totality of evidence [] as being consistent with a theory of collusion."), and 1058:23-1059:12 ("Q. Dr. Singer, is it your testimony that Delta's adoption of its first bag fee must have been the result of collusion or conspiracy and that there is no possibility of a first bag fee occurred without an agreement with AirTran? A. I think that's pretty fair . . . all of my analysis is pointing me in that direction. . . . do I hear God speaking to me? No. . . . I think that it wouldn't have been achievable absent the communications.").

[7] Dr. Singer provided "redlined" versions of his initial merits reports reflecting the extensive changes. Ex. 3, Singer Merits Report – Redlines; Ex. 4, Singer Merits Rebuttal – Redlines.

[8] Dr. Singer opines that Mr. Fornaro's October 23, 2008 earnings call statements constituted an "offer of assurance" that had an effect on Delta. Ex. 1, Singer Dep. 760:23-761:5; *see also* Ex. 2, Singer Dep. (v.6) 106:9-11, 107:20-108:2, 124:11-16. Dr. Singer opines that Delta adopted its own bag fee because it learned of Mr.

Dr. Singer defines "collusion" as "a type of coordinated interaction whereby ostensibly independent firms act jointly only as a result of a prior assurance between firms." Singer Class Report ¶ 19. Dr. Singer does not claim that "collusion," as he defines it, is illegal, only that it "harms consumers." *Id.* The bottom line for Dr. Singer—whether the label he attaches is "collusion" or inconsistency with "unilateral conduct"—is "whether or not [a] communication [from a competitor] *had a material effect on* [the recipient's] decision making." Ex. 1, Singer Dep. 1089:17-19 (emphasis added). Differently stated, Dr. Singer's view is that "[i]f the information that [the recipient] obtained allows [it] to implement a price increase that would not otherwise be possible, then [the recipient] should not be able to exploit that information." *Id.* at 1109:11-14.

Thus, according to Dr. Singer, if a firm's price or output decision is influenced by a rival's public statement, the firm would be guilty of "collusion"—even if taking the action is otherwise consistent with its independent economic interest. *Id.* at 773:17-774:2, 1160:20-1161:15. This is not the law. Nor could it be without imposing treble damage liability on firms in numerous industries, like

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Fornaro's statement, and therefore he concludes that Delta and AirTran engaged in "collusion" as he defines it. Ex. 2, Singer Dep. (v.6) 122:21-123:1, 127:6-19.

the airline industry, where competitors engage in lawful "interdependent" behavior. As Judge Richard A. Posner recently explained:

> Competitors in concentrated markets watch each other like hawks. *Think of what happens in the airline industry*, where costs are to a significant degree a function of fuel prices, when those prices rise. Suppose one airline thinks of and implements a method for raising its profit margin that it expects will have a less negative impact on ticket sales than an increase in ticket prices—*such as a checked-bag fee* or a reservation-change fee or a reduction in meals or an increase in the number of miles one needs in order to earn a free ticket. The airline's competitors will monitor carefully the effects of the airline's response to the higher fuel prices afflicting the industry and may well decide to copy the response should the responder's response turn out to have increased its profits.

In re Text Messaging Antitrust Litig., 782 F.3d 867, 875 (7th Cir. 2015) (emphasis added).

Dr. Singer would condemn as "collusion" or behavior "inconsistent with unilateral conduct" what Judge Posner appropriately describes as lawful interdependent conduct. And Dr. Singer's version of collusion ("whether or not [a] communication [from a competitor] had a material effect on [the recipient's] decision making") would condemn the very conduct the Eleventh Circuit upheld as consistent with lawful interdependence in *Williamson Oil*. 346 F.3d at 1305-10. This Court has already recognized that such "conscious parallelism" is not prohibited by Section 1 of the Sherman Act. Dkt. 137, Order at 32-33; *see also*

Text Messaging, 782 F.3d at 871 ("'[C]onscious parallelism,' as lawyers call it, 'tacit collusion' as economists prefer to call it . . . does not violate section 1 of the Sherman Act. Collusion is illegal only when based on agreement.").

Even if, contrary to the evidence, Mr. Fornaro's public statements actually influenced Delta's decision to impose a first bag fee, Dr. Singer's opinion is irrelevant because "he finds inferences of collusion where the law finds none." *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1321 (N.D. Ga. 2002), *aff'd sub nom., Williamson Oil*, 346 F.3d 1287.[9] By advancing a concept of conspiracy that conflates legal and illegal conduct, Dr. Singer's opinion could not possibly aid the fact finder and therefore should be excluded. *Williamson Oil*, 346 F.3d at 1323 (affirming exclusion of expert testimony because the expert "defined 'collusion' to include conscious parallelism" and "did not

[9] Indeed, under Dr. Singer's own game theory model, Delta would have decided to adopt the fee *unilaterally* once it heard AirTran's statements. Singer Am. Merits Report ¶¶ 72-74 & Figure 5 (setting forth a game theory model that Dr. Singer contends "demonstrates precisely the way in which Delta and AirTran arrived at the bag fee/bag fee outcome"). With the information available to Delta (according to the model), Delta would have predicted that AirTran would have followed Delta and also adopted a first bag fee. But such a unilateral decision is the essence of lawful conscious parallelism that does not violate Sherman Act § 1. Dkt. 137, Order at 32 ("[I]t is well settled that two competitors may lawfully observe each other's public statements and decisions without running afoul of the antitrust laws."); *Williamson Oil*, 346 F.3d at 1305 ("[I]n competitive markets, particularly oligopolies, companies monitor each other's communications with the market in order to make their own strategic decisions.") (quotation omitted).

differentiate between legal and illegal pricing behavior," which "could not have aided a finder of fact to determine whether appellees' behavior was or was not legal"); *Harcros*, 158 F.3d at 567 n.27 (explaining that economic expert's testimony should be excluded as "contrary to law").

Even if Dr. Singer were opining on the existence of a conspiracy defined in a way that was consistent with the law, his opinion would still have to be excluded as unhelpful and improperly invading the province of the jury. Courts have repeatedly rejected attempts by parties to use economic expert testimony to opine on the existence of conspiracy. *Harcros*, 158 F.3d at 565.[10] As the Eleventh Circuit explained in *Harcros*, "the trier of fact is entirely capable of determining whether or not to draw such conclusions without any technical assistance":

> [The proffered expert's] assertions regarding the existence of a conspiracy in general, and his characterization of certain bids as "signals" to co-conspirators in particular, were outside of his competence . . . His characterizations of documentary evidence as reflective of collusion, and his characterizations of particular bids as "signals," do not [assist the trier of fact] because the trier of fact is entirely capable of determining whether or not to

[10] *See also U.S. Info. Sys. v. Int'l Broth. of Elec. Workers Local Union No. 3 AFL-CIO*, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004) (holding that expert could not "reach[] the ultimate legal conclusion about whether a conspiracy existed or anticompetitive conduct actually occurred. Those determinations are the province of the trier of fact."); *Ohio v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247 (S.D. Ohio 1996) (forbidding plaintiff's experts from providing "an opinion in the form of a legal conclusion regarding the existence of an illegal conspiracy").

> draw such conclusions without any technical assistance from [the proffered expert] or other experts.

158 F.3d at 565; *see also id.* at 567 n.27 (holding that an economic expert's "characterizations of pieces of documentary evidence as tending to show collusion" should be excluded because "such judgments are for the court to make at summary judgment and for the trier of fact to make at trial"). Because Dr. Singer's opinion on the existence of an antitrust conspiracy improperly usurps the role of the trier of fact, it should be excluded.

B. Dr. Singer's Game Theory Model Opinions Are Neither Reliable Nor Useful to the Trier of Fact

In an attempt to demonstrate that Defendants conduct can be explained only by the existence of a conspiracy as he defines it, Dr. Singer uses a "game-theoretic analysis" called a Prisoners' Dilemma model. A Prisoners' Dilemma model purports to explain the incentives of two "players" to choose one course of action rather than another, depending upon the perceived "payoffs" of each course of action. In the game constructed by Dr. Singer, Delta and AirTran are the "players," and the perceived "payoffs" are the value to each airline of deciding to adopt the fee, or not to adopt the fee, depending on the choice taken by the other airline. Singer Am. Merits Report at p. 15, Figure 1.

Like other models, however, the output of Dr. Singer's model is only as good as its inputs.[11] The key to any game theory model is identifying each player's correct "payoffs" for taking or not taking certain actions—here adopting or not adopting a bag fee depending on the other party's decision. Singer Am. Merits Report ¶ 29. Dr. Singer's model was based on deeply flawed or unfounded assumptions contradicted by the record evidence and propped up only by Dr. Singer's improper weighing of the evidence and assessments of witness credibility. Dr. Singer's game theory model should therefore be excluded. *See, e.g.*, *Brooke Group*, 509 U.S. at 242 (rejecting expert opinion where "not supported by sufficient facts to validate it in the eyes of the law" and "when indisputable record

[11] As the authors of a leading article on the application of game theory to antitrust have explained: "[M]odelers must make simplifying assumptions. And the simplifying assumptions that must be made . . . in turn limit the value of the results of the models that succeed in identifying a single equilibrium or a limited number of equilibria." Joseph Kattan & William R. Vigdor, *Game Theory and the Analysis of Collusion in Conspiracy and Merger Cases*, 5 Geo. Mason L. Rev. 441, 445 (1997); *id*. at 447 (discussing "unrealistic assumptions" of a simple game theoretic model, and how "added complexities of real world competition tax the limits of game theory"). As a result, "[g]ame theory is of limited value [] in identifying" illegal behavior. *Id.* at 444; *see also* Ex. 5, Gale M. Lucas et al., Against Game Theory, Emerging Trends in the Social & Behavioral Sciences: An Interdisciplinary, Searchable, and Linkable Resource 10, 14 (Robert A. Scott & Stephen M. Kosslyn eds., May 15, 2015) ("[O]ur results verify decades of research demonstrating that subjects do not follow game theory predictions. . . . [T]he predictions of classical game theory and its refinements, are at odds with what we know about actual human cognition . . . because the equilibrium concepts were not constructed on how actual humans think, reason or make decisions.").

facts contradict or otherwise render the opinion unreasonable"); *Matsushita*, 475 U.S. at 594 n.19 (affirming district court's finding that expert report was inadmissible because it contained assumptions that were "both implausible and inconsistent with the record evidence"); *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1332 (Fed. Cir. 2014) (agreeing with courts rejecting invocations of game theory "without sufficiently establishing that the premises of the theorem actually apply to the facts at hand").[12]

[12] Numerous circuit courts and district courts, including this one, have rejected expert opinion testimony because the opinion was not supported by sufficient facts. *See, e.g.*, *Holiday Wholesale*, 231 F. Supp. 2d at 1288 (holding expert's testimony regarding the institution of permanent allocation systems was "premised on an erroneous understanding of the evidence" and thus inadmissible); *Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1038 (8th Cir. 2000) (en banc) (affirming rejection of an expert's testimony because the expert had not relied on sufficient facts "to take [her] opinion testimony out of the realm of guesswork and speculation"); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("Because there is no evidence in the record establishing [market share], any inference founded upon that factual assertion – even one drawn by an economic expert – is necessarily unreasonable."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("the meager superficial information on which [the expert] relied is highly speculative, unreliable, and of dubious admissibility before a jury"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (reversing district court's admission of an economist's testimony because the testimony "was not grounded in the economic reality . . . for it ignored inconvenient evidence"). Although not in the antitrust context, the Eleventh Circuit has also rejected expert testimony where the expert's conclusions have no basis in record facts. *See Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("[The expert]'s affidavit, though it purports to be based upon a review of the evidence, fails to provide specific facts to back up its conclusory allegations").

1. Dr. Singer's Game Theory Model Is Based on Erroneous Assumptions About the "Value Proposition" Document

There is no genuine dispute the key decision-makers at Delta believed that the payoff for Delta of adopting the bag fee was reflected in the hundreds of millions of dollars of revenues its competitors (including its new merger partner Northwest) were publicly reporting without any significant loss of market share.[13] However, Dr. Singer did not use these publicly reported revenues of other carriers as a proxy for Delta's expected "payoff" from adopting the fee. Instead, Dr. Singer determined "Delta's" payoffs by copying hypothetical revenue figures from the "Value Proposition" slides developed by Delta's Revenue Management Department as part of its advocacy to discourage adoption of the fee. Singer Am. Merits Report ¶ 34. But the evidence is uniform that those slides neither represented the views of "Delta" nor were intended to be Delta's estimates of revenues that might be gained or lost if Delta implemented a first bag fee.

[13] Ex. 6, Anderson (2010) Dep. 66:8-67:10, 72:8-12, 104:23-105:5; Ex. 7, Bastian DOJ Dep. 56:8-57:14, 58:15-59:14, 61:25-63:2, 75:9-12; Dkt. 350-60 (DX 43 (American) at DLTAPE-515, 527); Dkt. 350-61 (DX 44 (United) at DLTAPE-154, 156); Dkt. 350-62 (DX 45 (US Airways) at DLTAPE-263, 264, 272); Dkt. 350-64 (DX 47 (Northwest) at DLTAPE-374); Dkt. 350-73 (DX 56 (Continental) at DLBF-21565); Dkt. 350-101 (DX 84 (United) at DLTAPE-903); Dkt. 350-102 (DX 85 (Northwest) at DLTAPE-852); Dkt. 350-103 (DX 86 (US Airways) at DLTAPE-750, 753-54, 758).

The purported share-shift risk reflected in the Value Proposition slides—which recommended against adopting a first bag fee—was rejected by Delta's top three officers who decided Delta should adopt the fee *before* AirTran CEO Robert Fornaro made his October 23, 2008 statement, and *before* any of them ever saw the Value Proposition presentation.[14] Delta's key decision-makers flatly disagreed with the Value Proposition's basic premise that adopting the bag fee would risk losing material market share to carriers that did not have the fee and end share gains from carriers that did charge the fee. Their views were not based on theory or sensitivity analyses, but on the actual reported experiences of the carriers which had already adopted the fee.[15]

Moreover, contrary to Dr. Singer's assumption, the market share and revenue figures in the slides were not projections of the outcome, but "sensitivity analyses"—estimates of the financial implications of several different theoretical share shifts. Dr. Singer concludes otherwise only by ignoring the most

[14] *See supra* at note 13 (citing testimony from Delta CEO Richard Anderson and President Ed Bastian); Ex. 9, Gorman (2012) Dep. 77:11-78:7; Ex. 8, Gorman (2010) Dep. 40:13-48:10, 53:1-57:9, 68:4-69:4; Dkt. 350-97 (DX 80, at DLTAPE-3069); Dkt. 350-82 (DX 65, at DLTAPE-2907).

[15] Dr. Singer also ignores the look-back study conducted by Oliver Wyman in 2009 concluding that first bag fees had in fact led to little or no share shift and recommending that AirTran "continue charging the $15 fee." Dkt. 353-46, Bag Fee Analysis by Oliver Wyman (Mar. 25, 2009) at 9-10 (AIRTRAN00099194-221).

authoritative testimony on this subject—the sworn testimony of the Delta Executive Vice-President who directed his staff to create the presentation:

> Q. If you'd turn to slide 11. There's an assumption on slide 11 of a four to five percent share loss in Atlanta markets to AirTran if Delta imposed a first bag fee; is that right?
>
> A. Again, I think what we were showing were sensitivities. We did not -- we had a predicted share range of four to five which was kind of a gut feel and say okay, if you thought it was one share point, here's the value. If you thought it was ten share points, here's the value. And so I mean this was just a mathematical exercise to say if one carrier has bag fees and one carrier doesn't, passengers -- some subset of passengers will choose a carrier based on whether or not they have bag fees. And you can choose that number on this page. We provided them all, if it's one percent or is it ten percent.

Ex. 10, Hauenstein Dep. (Sept. 30, 2010) at 110:14-115:7.[16]

Because Dr. Singer's entire game theory analysis rests on the incorrect assumption that the draft Value Proposition slides accurately set out "Delta's" economic assessment of the adoption of the first bag fee, it is inadmissible and should be excluded.

[16] The Value Proposition itself confirms that the deck's figures were illustrative calculations, not actual estimates. Dkt. 557 (PX234 at 11 (identifying among range of "potential" share shift 4-5% as the amount necessary to offset the fee revenue)); *see also* Dkt. 350-1 at 31 & n.82; Dkt. 603 at 30 & n.63.

2. Dr. Singer's Game Theory Model Depends on His Weighing the Evidence and Assessment of Witness Credibility

To sidestep the uncontroverted fact that Delta's key decision-makers rejected the concerns about share shift contained in the Value Proposition document, Dr. Singer resorts to conducting his own fact-finding exercise—weighing the evidence, assessing witness credibility, and substituting his own views for the testimony of those with firsthand knowledge. *See* Singer Am. Merits Report ¶¶ 57-68. He admits his opinions about the role of the Value Proposition document in Delta's first bag fee decision are based on his determination that witness testimony was "self-serving" or "in tension with [his view of] contemporaneous documents in the record." Ex. 1, Singer Dep. 765:1-768:25, 930:18-933:22; *see also id.* at 1146:10-12, 1178:7-18, 1203:19-1204:3, 1234:6-20.[17] For example, Dr. Singer opines the testimony of Delta's President Ed Bastian was "contradicted by other deposition testimony" and "difficult to reconcile with other aspects of his testimony." Singer Am. Merits Report ¶¶ 58, 63; *see also* Singer Dep. 973:4-976:22, 977:12-978:1. Based on his "weighting" of the evidence, Dr. Singer concludes that "it is difficult to give much weight to the assertion that Delta's decision to impose the first bag fee was based primarily on

[17] Dr. Singer admits his reports imply that Delta (and AirTran) witnesses testified untruthfully. Ex. 1, Singer Dep. 938:1-20.

factors other than those examined in the Value Proposition documents, or that they were ignored by Delta executives." Singer Am. Merits Report ¶ 65.[18]

Dr. Singer conceded that he has no expertise to assess credibility and weigh evidence. Singer Dep. 931:2-4. Yet Dr. Singer did claim to be better at doing so, in at least some respects, than a jury:

> And so the only difference that I might have with respect to the jury on this particular issue is that having been involved in several litigation matters, I've seen the issue before, and so I've become accustomed to based on experience in applying a certain weighting function, and this might be the first time for some jurors.

Id. at 934:33-935:4.

However, weighing the evidence and assessing witness credibility is not the role of an expert—it is the exclusive domain of the trier of fact. *United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997); *United States v. Beasley*, 72 F.3d

[18] Dr. Singer repeatedly steps outside the proper role of an expert witness by making factual arguments similar to those normally made by counsel—none of which are grounded in his economics training. These sorts of factual arguments should be excluded under Rule 702 as unhelpful to the trier of fact. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla.*, 402 F.3d 1092, 1111 (11th Cir. 2005) ("'Proferred expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.'") (quoting *United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004)); *Jones v. Hawker Beechcraft Corp.*, 2013 WL 8013570, *5 (N.D. Ga. Dec. 16, 2013) (Batten, J.) ("expert testimony generally will not help the trier of fact 'when it offers nothing more than what lawyers for the parties can argue in closing arguments.'") (quoting *Frazier*, 387 F.3d at 1262-63).

1518, 1528 (11th Cir. 1996); *see also United States v. Libby*, 461 F. Supp. 2d 3, 7 (D.D.C. 2006) ("Expert testimony will also be precluded if [it] would usurp the jury's role as the final arbiter of the facts, such as testimony on witness credibility and state of mind."); *Holiday Wholesale*, 231 F. Supp. 2d at 1289 (deeming inadmissible expert's testimony that he found it "hard to credit" the defendants' justifications for certain conduct, because that testimony goes to credibility issues reserved for the trier of fact); Wright & Gold, 29 Fed. Prac. & Proc. Evid. § 6262 (1st ed.) (explaining that one of the goals of Rule 702 is "to preserve the trier of fact's traditional powers to decide the meaning of evidence and the credibility of witnesses.").[19] Because Dr. Singer's opinions concerning the Value Proposition deck—the main ingredient for his game theory model—are based on his own weighing of the evidence and his rejection as self-serving or untrue virtually every

[19] *See also United States v. Schmitz*, 634 F.3d 1247, 1268 (11th Cir. 2011) ("While Rule 608(a) permits a witness to testify, in the form of opinion or reputation evidence, that another witness has a general character for truthfulness or untruthfulness, that rule does not permit a witness to testify that another witness was truthful or not on a specific occasion."); *Snowden v. Singletary*, 135 F.3d 732, 739 (11th Cir. 1998) ("Witness credibility is the sole province of the jury."); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) ("expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony"); *Holiday Wholesale*, 231 F. Supp. 2d at 1289 ("[E]xpert opinion evidence . . . would not be admissible on whether a statement is true or false. Making that determination is a question for the triers of fact. . . .").

piece of relevant testimony, those opinions must be rejected as improperly usurping the domain of the fact finder.

3. Dr. Singer's Game Theory Model Rests on Other Erroneous Assumptions That Render It Unreliable and Irrelevant

Dr. Singer's game theory model is based on other erroneous assumptions inconsistent with the record, reality, or both. Those mistaken assumptions render Dr. Singer's game theory model unreliable and irrelevant, requiring its exclusion, just as his opinions have been in other recent cases. *See Jarrett*, 2014 WL 3735193, at *7 (finding Singer's opinion in support of Plaintiff "is not supported by the record," and granting summary judgment to defendant); *Florida Cement*, 278 F.R.D. at 685 ("[T]he entire basis for Dr. Singer's opinion is grounded on a faulty premise.").

First, Dr. Singer's game theory model assumed that Delta and AirTran had "complete information" about each other's views and objectives. Ex. 1, Singer Dep. 1098:16-19. But Dr. Singer conceded that in reality Delta and AirTran had *incomplete* information about each other's internal workings. *Id.* at 251:10-254:1. If modeled in this way (and not correcting for other flaws) the adoption of a first bag fee by both airlines can be explained by entirely independent decision-making. *See* Lee Merits Rebuttal ¶ 42 & Appendix D (¶¶ 76-82).

Second, Dr. Singer also assumed in constructing his game theory model that Delta and AirTran made *simultaneous* decisions about whether to impose a first bag fee—that each airline made its decision without observing the decision of the other. Ex. 1, Singer Dep. 1095:18-22. However, in the real world, they did not, as Dr. Singer concedes. *Id.* at 999:7-1000:7, 1024:12-20 (acknowledging Delta's announcement on *November 5*, 2008, and AirTran's announcement on *November 12*, 2008). Once Delta announced its decision, AirTran did not make its decision in the vacuum assumed by the Prisoner's Dilemma model but instead knowing that Delta had already adopted the fee. Thus, AirTran did not face the uncertainty about the other actor's decision, which is an essential requirement of the Prisoner's Dilemma.[20] The Prisoner's Dilemma thus does not accurately describe the decision that AirTran faced.

Moreover, Dr. Singer's assumption of simultaneous decisions contradicts his (and Plaintiffs') collusion theory, the core of which is the airlines' *sequential* interaction—that Delta would not have adopted the first bag fee absent "assurance"

[20] Ex. 12, Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 182 (4th ed. 2005) ("Each firm must choose its action or strategy without knowing what the other firm will do. That is . . . a firm must choose an action without observing the simultaneous (or earlier) move of its rival.").

by AirTran on its public earnings call that it would follow Delta's lead.[21] As explained above, recognizing that Delta and AirTran made their decisions sequentially, 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. Thus, the sequential nature of Defendants' first bag fee decisions illustrates lawful interdependent decision-making in an oligopoly and renders Dr. Singer's simultaneous game theory model inapplicable to the facts of the case and therefore irrelevant.

Third, Dr. Singer's game theory model assumed that each airline would have made its initial decision to adopt a first bag fee as if the decision could not later be changed. Ex. 1, Singer Dep. 1096:17-1097:5 ("if you do something that's

[21] Dr. Singer characterizes AirTran's October 23 earnings call statement as an "assurance"—or as Plaintiffs call it, an "invitation to collude"—because it reflected a "commitment" by AirTran to adopt the fee if Delta did. *See* Singer Am. Merits Report ¶¶ 41, 115, 116. However, Dr. Singer admitted in his depositions that AirTran's statement was *not* a commitment and that Delta did not interpret it as such. Ex. 1, Singer Dep. at 277:4-10 ("[I]t was a statement. He wasn't, as we discussed, necessarily bound to the statement"), 774:11-17 ("There was still, even in Delta's mind, a small probability that AirTran wouldn't follow, if you recall from the value proposition deck. Even after the AirTran conference call, the probability of Delta's assessment or the probability that AirTran follow was 90 percent. That's not a hundred percent.").

radical to your pricing regime . . . it's going to be permanent").[22] That assumption also conflicts with the way competitors behave in the real world, constantly evaluating and reacting to changes in competitive and market conditions. Indeed, in this case, after Delta and AirTran adopted first bag fees, each made numerous non-parallel adjustments to their fees (including AirTran's elimination of the fee upon its merger with Southwest)—directly contrary to Dr. Singer's assumption. Singer Am. Merits Report ¶¶ 21-22; Dkt. 553-1 (Tenley Decl. ¶¶ 5-14). Had Dr. Singer used an assumption more accurately reflecting the real world, his result would have been different, which he admits.[23]

C. Dr. Singer's Opinion That Neither Defendant Would Have Adopted a First Bag Fee Given Economic Conditions Should Be Excluded as Unreliable

To buttress his opinion that Defendants colluded to adopt a first bag fee, Dr. Singer opines that adoption of the fee was counter to Defendants' independent business interests because: (1) the economy was in recession, and demand for air travel was decreasing (Singer Am. Merits Report ¶¶ 76-77); (2) fuel costs were

[22] In game theory parlance, Dr. Singer's assumption stems from his decision to model the game as a "one-shot" interaction (*i.e.*, each airline only has one chance to adopt the bag fee, and can never revisit it), or alternatively, a "finitely-repeated game" in which the airlines were "myopic" (*i.e.*, they made their initial first bag fee decision ignoring potential future interactions). *See* Singer Am. Merits ¶¶ 45-50.

[23] Singer Am. Merits Report ¶ 51; *see also* Lee Merits Rebuttal ¶ 28.

decreasing (*id.* ¶ 78); and (3) the "unilateral" imposition of a first bag fee would harm each airline's reputation, but if both airlines imposed a first bag fee each would be partially insulated from that harm (*id.* ¶¶ 82-85).

These opinions should be excluded because they rest critically on an incorrect assumption—that those at Delta responsible for deciding to adopt a first bag fee viewed unbundling as a price increase that would have a material effect on demand or passenger behavior. Dr. Singer can only maintain his fiction by ignoring or discrediting the undisputed successful first bag fee adoption by every other legacy carrier and the testimony of Delta witnesses that it was this real world evidence that drove the decision to adopt the fee rather than theoretical concerns about "share shift." *See supra* at notes 13-14.

Delta's top three executives and decision-makers did not believe the bag fee would cause large numbers of passengers to choose not to fly or to defect to carriers without the fee.[24] As a result there was no reason to be concerned about adopting the fee during a time of reduced demand or because of any concerns about reputational harm which would have already been incurred by Delta's legacy competitors. Indeed, passengers were treating Delta as if it had already adopted

[24] Ex. 6, Anderson (2010) Dep. 66:8-67:10, 72:8-12, 104:23-105:5; Ex. 7, Bastian DOJ Dep. 56:8-57:14, 58:15-59:14, 61:25-63:2, 75:9-12; Ex. 8, Gorman (2010) Dep. 53:1-57:9, 68:4-69:4; Ex. 9, Gorman (2012) Dep. 77:11-78:7.

the fee in line with its major legacy competitors.[25] Dr. Singer's view that falling fuel costs should have kept Delta from instituting the fee ignores the reality that fuel prices continued to exceed historical levels and remained extremely volatile. And even if one were to accept Dr. Singer's premise that the unbundling of the fee was a price increase, Dr. Singer's opinions ignore the reality that increasing prices in the face of falling costs is not necessarily inconsistent with competitive behavior in oligopoly markets. *Chocolate*, 801 F.3d at 400 ("evidence of a price increase disconnected from changes in costs or demand" does not tend to exclude the possibility of independent conduct); *Petruzzi's*, 998 F.2d at 1244 ("[I]t is quite likely that oligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut.").

Dr. Singer's opinions should also be excluded as unreliable because he fails to "adequately account[] for obvious alternative explanations" for Defendants'

[25] Ex. 8, Gorman (2010) Dep. 68:3-72:4; Ex. 11, West DOJ Dep. 36:8-19; 95:2-22, 106:14-112:20, 218:2-220:18, 244:2-246:11, 250:6-251:10; 350-91 (DX 74), DLBAG-2817 (Nov. 5, 2008 e-mail from Gil West to Alan Martin regarding "1 bag charge": "[W]e realized most customer[s] actually thought we were already charging for the first bag (we were not getting credit for not charging)."). As Delta's CEO Richard Anderson observed the experience of the other legacy carriers, he concluded that customers had accepted the first bag fee as part of a new industry norm. Ex. 6, Anderson (2010) Dep. 66:11-68:1, 71:23-72:15, 76:2-77:19; Ex. 7, Bastian DOJ Dep. 74:3-21.

adoption of a first bag fee. Fed. R. Evid. 702, Advisory Committee Note (2000 Amendment); *see also Frazier*, 387 F.3d at 1297 n.13 ("The Advisory Committee Notes to Rule 702 delineate five additional factors in determining reliability: . . . 'Whether the expert has adequately accounted for obvious alternative explanations' . . . ."). Dr. Singer does not even consider, much less "reasonably rule out," obvious alternative explanations for Defendants' adoption of first bag fees when they did.

For instance, Dr. Singer failed to consider the legitimate business justification *Plaintiffs themselves* have provided for Delta's adoption of the fee when it did. Plaintiffs concede that at Delta's October 27, 2008 CLT meeting where the first bag fee was discussed the leaders of Delta's Revenue Management Department advocated against adoption of the fee, despite changing the Value Proposition slides to reflect AirTran's October 23 earnings call statement. Plaintiffs also concede that "the majority of Delta's CLT members *initially spoke out against* the FBF" at the October 27 CLT meeting—obviously not swayed by Fornaro's statement four days earlier. However, the CLT then "reversed course and decided . . . to adopt FBF" only "after [Delta President] Ed Bastian expressed that he was '*worried about Delta surviving*' and *not about AirTran benefitting from FBF*, and after Bastian pointed out the *importance of every dollar* of

incremental profit *to fund impending pension obligations*." Dkt. 554 at 26 (emphasis added). Thus, contrary to Dr. Singer's opinion that AirTran's October 23 statement was the deciding factor for Delta's adoption of the fee, Plaintiffs' own recounting of the October 27 CLT meeting identifies an independent economic justification for Delta's decision that Dr. Singer ignores—Delta's need for "every dollar" in revenue to "fund impending pension obligations."

Similarly, as the Court has already recognized, Delta's merger with Northwest and the resulting need to harmonize the two airlines' fee structures would provide a "valid justification" for both Delta's adoption of the fee and its timing. *See* Dkt. 137, Order at 31. Dr. Singer barely acknowledges this "obvious" alternative explanation for Delta's adoption of the fee, and dismisses it not for any economic reason, but because he does not find it to be credible—asserting that "Delta's impending merger with Northwest gave the airline a one-time pretextual justification for adopting the fee." Singer Am. Merits Report ¶ 47; *see also* Singer Am. Merits Rebuttal ¶ 5. Because Delta's legitimate, unilateral decision to align the Northwest and Delta fee structures cannot be reconciled with Dr. Singer's opinions, his only answer is to deny that it happened. But he has no basis for this factual conclusion except his disbelief of numerous documents and his own improper assessments of witness credibility. Singer Am. Merits Rebuttal ¶ 134-

141. In any event, determinations about "pretext" are quintessential matters of fact, and not properly the subject of expert testimony. *See, e.g.*, *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980, *5 (D. Md. May 1, 2013) ("[T]estimony regarding the Defendants' possible pretext is also not admissible. This testimony, if admitted, would impinge upon the jury's function to determine the truthfulness and credibility of the Defendants. . . . the experts may not testify that . . . that particular actions the Defendants took were a pretext for collusive behavior."); *Holiday Wholesale*, 231 F. Supp. 2d at 1289 (deeming inadmissible expert's testimony that he found it "hard to credit" the defendants' justifications for certain conduct, because that testimony goes to credibility issues reserved for the trier of fact).

D. Dr. Singer's Interpretation of Documents and Deposition Testimony to "Corroborate" His Other Opinions Is Inadmissible

In a separate effort to "corroborate" his "game-theoretic analysis," Dr. Singer devotes four sections of his Merits Report and much of his Merits Rebuttal Report and Supplemental Report to his interpreting and weighing "record evidence from deposition testimony, [and] internal documents." Singer Am. Merits Report ¶¶ 90-119; *e.g.*, Singer Am. Merits Rebuttal ¶¶ 13-15, 20, 22-24, 33, 35-42, 44, 46, 60-62, 66, 73-8, 104-108, 129, 132, 125-139, 146-147; Singer Supp. Report ¶¶ 1-4.

Dr. Singer's interpretation of emails and other documents is not based on any expertise or reliably applied methodology from his field of economics, adds nothing of value to the fact finder, and is therefore inadmissible. Nor is it proper for an expert to "corroborate" his opinions through weighing and assessing the credibility of deposition testimony. *Harcros*, 158 F.3d at 565, 567 n.27. Indeed, even Dr. Singer concedes that these opinions are beyond the realm of his expertise as an economist. Ex. 1, Singer Dep. 1219:1-14 ("[E]conomic evidence would include the economic analysis that I performed . . . . In contrast, corroborating evidence would be things like e-mails or conference calls that are what they are, and that are not as susceptible to economic analysis . . . .").

By way of example, the evidence Dr. Singer "interpreted" included what he called "a series of private . . . communications concerning the joint imposition of first bag fees." Singer Am. Merits Report ¶ 2. Dr. Singer interprets emails sent by AirTran employee Scott Fasano and weighs of Mr. Fasano's deposition testimony. *See* Singer Am. Merits Report ¶¶ 106-109; Singer Am. Merits Rebuttal ¶¶ 104-106; Singer Supp. Report ¶¶ 1-4. Dr. Singer opines that these communications "caused Delta to change its view" of the revenue potential of the first-bag fee from negative to positive. Singer Am. Merits Report ¶ 2; *see also id.* at ¶¶ 106-109. Yet there is no evidence that Scott Fasano's communications or attempted

communications—even if they actually had occurred—could have "caused Delta to change its view" because there is no evidence that they reached any Delta decision-maker. And Dr. Singer readily concedes that his opinions about these "communications" are based on nothing but his own subjective views of the evidence. To reach his opinions, he parsed the testimony of Scott Fasano deciding when he thought the witness was lying (or not) and when to give less weight to his testimony:

> Based on the totality of evidence I reviewed, I don't think [Scott Fasano] lied on that portion [about passing on the message to Delta] … my inclination is to credit the contemporaneous evidence, at least more than the deposition … I would say that the farther you go out in time, the less reliable [his] … testimony is going to be.

Ex. 2, Singer Dep. (v.6) 23:3-24:8; *see also* Singer Supp. Report ¶¶ 2-4 (asserting that his opinions about "potentially anticompetitive private communication[s]" were unchanged because he "continue[s] to believe . . . that in the presence of conflicting testimony, it is appropriate to weight the contemporaneous evidence most heavily").

Dr. Singer's opinions about the existence and relevance of alleged "collusive communications" are not only contradicted by the evidence, Dkt. 271, Order at 26

("These e-mails simply are not direct evidence of collusion"),[26] they are a clear example of why his testimony-weighing and document-interpreting opinions are inadmissible. Plaintiffs are trying to use the imprimatur of Dr. Singer's designation as an economic expert to fill the evidentiary gap between Scott Fasano's alleged communications—to vendors, former Delta employees and remote station managers in July—to a decision made by the most senior executives of Delta. Such opinions are not based on *any* application of "scientific, technical, or other specialized knowledge" and should be excluded. Fed. R. Evid. 702; *Harcros*, 158 F.3d at 562, 567.

CONCLUSION

For the foregoing reasons, the Court should exclude the merits testimony of Dr. Hal Singer.[27]

[26] *See also* Dkt. 350-1 at 42-43; Dkt. 353-1 at 46-48; Dkt. 603 at 13-19; Dkt. 604 at 17-21.

[27] Defendants reserve the right to assert further objections and file appropriate *Daubert* motions related to any expected trial testimony by Dr. Singer. *See* Dkt. 551 at 2 n.1.

Dated: November 6, 2015

Respectfully submitted,[28]

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CONSOLIDATED MOTION TO EXCLUDE THE MERITS TESTIMONY OF DR. HAL SINGER was filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to counsel of record in this matter.

This 6th day of November, 2015.

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