

**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 NUMBER  
1:09-md-2089-TCB

ALL CASES

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

## TABLE OF CONTENTS

I.	A DAUBERT ANALYSIS IS UNNECESSARY PRIOR TO CLASS CERTIFICATION .....	1
II.	DR. GAIER’S TESTIMONY SHOULD BE EXCLUDED AS LEGALLY IRRELEVANT .....	2
III.	DR. GAIER’S OPINIONS ARE UNRELIABLE .....	2
A.	Dr. Gaier’s Difference-in-Differences Analysis Is Unreliable. ....	2
1.	The Lack of Control Variables Makes the Difference-in-Differences Analysis Unreliable. ....	2
2.	Dr. Gaier’s Difference-in-Differences Analysis Contains a Mathematical Error Rendering it Unreliable. ....	6
B.	Dr. Gaier’s Regression Analysis Is Unreliable Because He Fails to Control for Key Variables. ....	8
1.	Dr. Gaier Unreliably Failed to Include Carrier Specific Fuel Costs. ....	8
2.	Dr. Gaier Unreliably Failed to Include a Carrier-Specific Time Trends Variable. ....	11
C.	Contemporaneous Documents Undermine Dr. Gaier’s Opinions. ....	12
IV.	CONCLUSION.....	14

**TABLE OF AUTHORITIES**

**Cases**

*Bazemore v. Friday*, 478 U.S. 385 (1986).....2, 8

*Dart v. Kitchens Bros. Mfg. Co.*, 253 F. App'x 395 (5th Cir. 2007).....6

*Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996) .....6

*In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966 (C.D. Cal. 2012).....3, 5

*In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000)2,  
8, 9, 11

*Local 703 v. Regions Fin. Corp.*, 762 F.3d 1248 (11th Cir. 2014).....1

*Phillips v. Am. Honda Motor Co.*, 238 F. App'x 537 (11th Cir. 2007)..... 2, 5, 8

*Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333 (11th Cir. 2003) .6

*Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022 (D. Kan. 2006)  
.....5

**Other Authorities**

Peter F Kostiuk, Eric M. Gaier, & Dou Long, *The Economic Impacts of Air Traffic  
Congestion*, 7(2) AIR TRAFFIC CONTROL Q. 123 (1999).....10

**Rules**

Fed. R. Evid. 702 .....9

## I. A *DAUBERT* ANALYSIS IS UNNECESSARY PRIOR TO CLASS CERTIFICATION

AirTran does not dispute that a *Daubert* ruling is unnecessary prior to class certification if the court does not rely on challenged expert testimony to resolve any relevant class certification issue. *Local 703 v. Regions Fin. Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014).

While AirTran points out that the Court's Vacated Order (#549) did not "reject[] Dr. Gaier's opinions" (AirTran Response at 2 (#636)), the Order also found that, notwithstanding Dr. Gaier's opinions, Plaintiffs had met their burden of demonstrating that the Rule 23 requirements were met.<sup>1</sup> AirTran raises no new arguments for why the Court must rely on Dr. Gaier's disputed testimony in resolving class certification.<sup>2</sup>

---

<sup>1</sup> See generally Vacated Order (#549) (certifying class without relying upon challenged expert evidence on any critical issues). AirTran argues that the Order did not adopt certain arguments made by Plaintiffs. AirTran Response at 3 (#636) (citing Vacated Order at 11 (#549)). But the Order found that evidence supporting Plaintiffs' arguments was sufficient to justify granting class certification, stating that, "[w]ith respect to Plaintiffs' second through fifth arguments, the Court finds based on the record that Plaintiffs have presented sufficient evidence that any potential conflict . . . does not rise to the level of being a fundamental conflict[.]" Vacated Order at 11-12 (#549). AirTran also cites to the Court's finding that individual damages proof will likely be needed in this case, but ignores the Court's finding that the need for such individual damages proof does not preclude class certification.

<sup>2</sup> In fact, AirTran does not argue that this motion needs to be decided before a class certification ruling. AirTran Response at 2-3 (#636). Rather, AirTran only argues

## **II. DR. GAIER'S TESTIMONY SHOULD BE EXCLUDED AS LEGALLY IRRELEVANT**

As a matter of law, Dr. Gaier's testimony about base fare offsets is not relevant to antitrust injury or damages. Pls.' Class Cert. Reply at 19-25 (#269); Pls.' Supp. Class Cert. Reply at 13-16 (#607). While offsets theoretically could be relevant to the existence of a class conflict, "Plaintiffs have presented sufficient evidence that any potential conflict . . . does not rise to the level of being a fundamental conflict," and offsets therefore would not prevent class certification even if they occurred. Vacated Order at 11-12 (#549).

## **III. DR. GAIER'S OPINIONS ARE UNRELIABLE**

Dr. Gaier's two regression analyses are unreliable, namely: (a) his basic difference-in-differences ("DID") analysis; and (b) his regression analysis.

### **A. Dr. Gaier's Difference-in-Differences Analysis Is Unreliable.**

Dr. Gaier's basic DID analysis is unreliable because: (1) it lacks control variables; and (2) it contains a mathematical error.

#### **1. The Lack of Control Variables Makes the Difference-in-Differences Analysis Unreliable.**

Regression analyses that omit critical control variables are inadmissible. *Bazemore v. Friday*, 478 U.S. 385, 400 & n10 (1986) ("There may, of course, be

---

that "Plaintiffs misstate the procedural posture of this case and this motion." *Id.* at 2.

some regressions so incomplete as to be inadmissible as irrelevant[.]”); *Phillips v. Am. Honda Motor Co.*, 238 F. App’x 537, 542 & n.8 (11th Cir. 2007); *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1365 (N.D. Ga. 2000) (“[T]he party challenging a regression model [must] proffer[] evidence that an omitted variable is ‘correlated with the dependent variable and is likely to affect the result of the regression analysis[.]’” (quoting *Estate of Bud Hill v. ConAgra Poultry Co.*, No. 94-CV-0198, 1997 WL 538887, at \*8 (N.D. Ga. Aug. 25, 1997))).

Dr. Gaier’s DID analysis compared changes in AirTran’s average roundtrip fares on 200 routes to changes in Southwest and JetBlue’s average fares on less than half those routes during the first three quarters of 2008 compared to 2009.<sup>3</sup> The DID analysis did not contain control variables. *See* Gaier 10/21/10 Tr. 110:17-19 (#617-1) (“The regression is more sophisticated [than the basic DID analysis]. It allows you to control for other factors.”).<sup>4</sup>

As one would expect, the relative fares of AirTran, JetBlue, and Southwest are not static over time – even during time periods when none of the airlines changed first bag fees. Nonetheless, Dr. Gaier attributed the entire relative change in fares to

---

<sup>3</sup> Gaier Class Cert. Report ¶ 42 (#269-6 at Ex. 54); Singer Class Cert. Reply ¶ 37 (#269-1) (“The majority of AirTran’s top 200 routes are not even served by Southwest or JetBlue.”).

<sup>4</sup> Dr. Singer demonstrated that uncontrolled factors led to fare variations, including route-by-route variations, not FBF. *See, e.g.*, Singer Class Cert. Reply ¶¶ 50, 63-66 (#269-1).

first bag fees, ignoring numerous relevant control variables. *See In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 974-75 (C.D. Cal. 2012) (excluding expert testimony that a “disparity in price was the result of Defendants’ anticompetitive conduct” without “account[ing] for *any* other possible explanation(s) for this disparity”).<sup>5</sup> For example, the DID analysis did not control for changes in costs, capacity, route-specific effects, etc.<sup>6</sup> All of the experts agreed that these and other control variables were appropriate, including Dr. Gaier himself, who included control variables in his other regression analysis.<sup>7</sup>

The omission of these control variables led to inaccurate results. For example, on the Baltimore to Boston route, Southwest and JetBlue began offering service in 2009, causing AirTran to lower its fare by \$50. On this route, the DID analysis attributes the \$50 AirTran fare reduction entirely to first bag fees, not increased competition, even though Dr. Gaier admits this result is incorrect.<sup>8</sup>

---

<sup>5</sup> AirTran argues that the DID analysis demonstrates that there was great variation in base fare changes. AirTran Response at 10 (#636). But without control variables, it is unsurprising that uncontrolled factors introduce substantial variation in the data.

<sup>6</sup> Singer Class Cert. Reply ¶ 37 (#269-1) (“[T]he majority of AirTran’s top 200 routes are not even served by Southwest or JetBlue. This makes it impossible for Dr. Gaier to control for route-specific effects, as any meaningful difference-in-difference calculation should.”), *id.* ¶¶ 46-47.

<sup>7</sup> Gaier Class Cert. Report ¶¶ 58-59 (#269-6 at Ex. 54).

<sup>8</sup> Singer Class Cert. Reply ¶ 38 (#269-1); Gaier 10/21/10 Tr. 115:16-116:8 (#617-1).

Dr. Gaier's analysis shows that on four of AirTran's five most heavily trafficked overlap routes, AirTran *increased* airfares relative to Southwest and JetBlue as a result of FBF.<sup>9</sup> Dr. Gaier testified that there was something wrong with these results: "Q. ... Is there something wrong with that result [that FBF led to increased AirTran fares on some routes] in your view? A. Yes. Q. What is wrong with it? A. It doesn't control for other things like the capacity of the carriers on that route."<sup>10</sup> In other words, Dr. Gaier himself admits that the DID analysis is flawed because of a lack of control variables.

Dr. Singer added relevant control variables in his regression analyses and demonstrated that including relevant control variables changed the result of the regression.<sup>11</sup> Dr. Gaier's DID analysis is therefore unreliable and inadmissible. *Phillips*, 238 F. App'x at 542 (excluding regression analysis because it contained "significant uncontrolled and unexplained variables"); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d at 974-75; *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022, 1031 (D. Kan. 2006) ("Because [the expert] attributes all lost profits to defendants without considering increased competition in the market, other

---

<sup>9</sup> Gaier Class Cert. Report ¶ 43, Figure 10 (#269-6 at Ex. 54).

<sup>10</sup> Gaier 10/21/10 Tr. 143:2-8 (#617-1).

<sup>11</sup> Singer Class Cert. Reply ¶¶ 48, 50 (#269-1).

market conditions or alleged wrongdoing of other competitors, [his] testimony would not assist the jury in determining the fact or the amount of damages.”).

## **2. Dr. Gaier’s Difference-in-Differences Analysis Contains a Mathematical Error Rendering it Unreliable.**

“*Daubert* . . . requires[] courts to determine . . . whether the expert has committed . . . mathematical errors.”<sup>12</sup> As Dr. Singer explained, “Dr. Gaier has made an elementary error in the algebraic ‘order of operations’ when computing his weighted average [fares]” in his DID analysis.<sup>13</sup> Dr. Gaier admits that, based on the order of operations issue, he is “not sure that the bias is significant” or not. Gaier 10/21/10 Tr. 135:3-4 (#617-1). But Dr. Singer corrected the order of operations and found the result was significant, resulting in a negligible correlated base fare reduction of just 36 cents for each one-way fare.<sup>14</sup>

---

<sup>12</sup> *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1400 (D. Or. 1996) (quoting David E. Bernstein, *The Admissibility of Scientific Evidence After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 Cardozo L. Rev. 2139, 2165-66 (1994)); *see also Dart v. Kitchens Bros. Mfg. Co.*, 253 F. App’x 395, 399 (5th Cir. 2007) (affirming exclusion “for basic mathematical errors and flaws in methodology”). AirTran inaccurately argues that the Eleventh Circuit held that identification of mathematical errors is the role of cross-examination, not *Daubert*. AirTran Response at 12 n.17 (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003)). But in *Quiet Technology*, unlike here, despite a slightly erroneous formula, the results “showed trends[,]” “was not completely invalid,” required at the most a “re-matching” of figures, and the model “did not purport to represent reality.” *Id.* at 1344-45 & n.12.

<sup>13</sup> Singer Class Cert. Reply ¶ 41 (#269-1).

<sup>14</sup> Singer Class Cert. Reply ¶ 41 (#269-1).

Dr. Gaier's methodology sometimes credits AirTran with base fare reductions relative to JetBlue and Southwest even when AirTran *increased* fares relative to JetBlue and Southwest on those routes.<sup>15</sup> Dr. Gaier admits that his methodology leads to an incorrect result in some situations.<sup>16</sup> On routes on which AirTran reduced fares the same amount as JetBlue and Southwest, Dr. Singer would properly treat that route as having no net fare reduction, unlike Dr. Gaier. AirTran Response at 13 (#636).

AirTran argues that it was appropriate for Dr. Gaier to credit AirTran with fare *reductions* attributable to FBF on routes on which its fares *increased* relative to JetBlue and Southwest. AirTran Response at 13 & n.19 (#636). But the DID analysis is intended to use JetBlue and Southwest as control carriers to account for other reasons for fare changes besides FBF. If AirTran *raised* fares on those routes compared to control carriers, then the DID analysis should not attribute a fare *reduction* on those routes to FBF.<sup>17</sup>

In response to Dr. Singer's criticisms, Dr. Gaier conducted a DID analysis using the correct order of operations, but analyzed a different data set of 761 overlap routes (instead of his original analysis of 200 routes), and claims he reached an

---

<sup>15</sup> Singer Class Cert. Reply ¶¶ 41-44 (#269-1).

<sup>16</sup> Gaier 10/21/10 Tr. 122:12-129:12 (attached as Ex. 5) (agreeing with the example provided in Singer Class Cert. Reply ¶ 42 (#269-1)).

<sup>17</sup> Singer Merits Report ¶¶ 177-78 (#556 at PX398).

opposite result from Dr. Singer. AirTran Response at 14 (#636). But in his revised analysis Dr. Gaier assumes that the imposition of a \$30 roundtrip bag fee *caused* fare declines of up to \$558, inconsistent with the predictions of Defendants’ own economic theories.<sup>18</sup> After removing outliers where the fare decline exceeds the bag fee, the DID analysis shows that fares *increased*, even for the new data set of 761 routes.<sup>19</sup>

**B. Dr. Gaier’s Regression Analysis Is Unreliable Because He Fails to Control for Key Variables.**

Some regressions may be so incomplete as to be unreliable. *Bazemore*, 478 U.S. at 400 & n10; *Phillips v. Am. Honda Motor Co.*, 238 F. App’x 537, 542 & n.8 (11th Cir. 2007). The challenging party should provide “evidence that an omitted variable ‘is correlated with the dependent variable and is likely to affect the result.’” *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1365. As reflected in Plaintiffs’ brief, Dr. Gaier’s regression omitted two control variables correlated with the dependent variable that changed the results: (1) carrier-specific fuel costs; and (2) carrier-specific time trends. Pls.’ Mem. at 12-17 (#617).

**1. Dr. Gaier Unreliably Failed to Include Carrier Specific Fuel Costs.**

---

<sup>18</sup> Singer Merits Report ¶ 181 (#556 at PX398).

<sup>19</sup> *Id.* ¶ 182.

Dr. Gaier's regression attributes any unexplained change in price to FBF. But "[w]ith respect to changes in prices, changes in costs are one obvious explanatory variable." *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1360. As Dr. Lee admitted, "when [fuel] prices go down, [airlines' prices] tend to come down as well."<sup>20</sup> The largest cost for airlines in 2008 was the cost of fuel.<sup>21</sup> Airlines' fuel costs varied widely in 2008 and 2009 because of fuel hedging.<sup>22</sup>

Fuel costs and prices are positively and significantly correlated (as both Dr. Singer and Dr. Lee found),<sup>23</sup> and the addition of a carrier-specific fuel cost variable changes the outcome of the regression analysis.<sup>24</sup> Dr. Gaier's failure to control for the "obvious explanatory variable" of carriers' differential fuel costs (and other differential costs) therefore renders his analysis unreliable. *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1360; *see also* Fed. R. Evid. 702, Advisory Committee

---

<sup>20</sup> D. Lee 10/14/10 Depo. Tr. 25:16-17 (Dkt. #571).

<sup>21</sup> Offsite Discussion Outline (June 11, 2008) AIRTRAN00037355 (#557, PX38) (stating that oil "[r]epresents 50% +/- of [AirTran's] costs."); E-mail from R. Fornaro to Board of Directors (July 3, 2009) AIRTRAN00490866 (#556-1, PX344) ("Energy . . . is our largest cost driver.").

<sup>22</sup> Singer Merits Report ¶ 190 (#556 at PX398); Singer Class Cert. Reply ¶ 47 (#269-1); Singer Merits Rebuttal ¶ 20 (#556 at PX400); G. Hauenstein 9/30/10 Dep. Tr. at 93:25-94:3 (#567).

<sup>23</sup> Lee Surrebuttal Report ¶ 25 at Table 3 (#224-6); Singer Class Cert. Reply ¶ 49 (#269-1) (finding that the data shows that "higher fuel costs are passed on to consumers in the form of higher prices").

<sup>24</sup> Singer Class Cert. Reply ¶¶ 49-50 & Table 3 (#269-1).

Note (2000 Amendment) (stating that a factor in determining reliability is whether the expert “adequately accounted for obvious alternative explanations”).

AirTran argues that carrier-specific fuel costs are irrelevant to pricing. AirTran Response at 18 (#636). AirTran’s argument assumes that fuel hedges are irrelevant because airlines theoretically could sell fuel on the spot market. *Id.* But as Dr. Gaier conceded, airlines do not buy or sell fuel at market prices on the spot market.<sup>25</sup> This would result in significant transaction costs that would change effective fuel costs.

In his published work, unlike here, Dr. Gaier accounted for carrier-specific fuel costs.<sup>26</sup> While AirTran points out that Dr. Gaier’s published work was intended to measure how certain factors affect carriers’ costs, his published work treated fuel costs as varying between individual airlines, contrary to his litigation-driven position here that fuel costs should be treated as uniform across airlines.<sup>27</sup>

---

<sup>25</sup> Singer Merits Report ¶ 191 & n.231 (#556 at PX398) (citing Gaier 10/21/10 Tr. 163:2-7 (“Q. Do airlines ever resell fuel on the spot market? A. No.”)).

<sup>26</sup> Peter F Kostiuk, Eric M. Gaier, & Dou Long, *The Economic Impacts of Air Traffic Congestion*, 7(2) Air Traffic Control Q. 123, 123-45 (1999) (#617-3); Gaier 10/21/10 Tr. 217:22-218:22 (attached as Ex. 5).

<sup>27</sup> Singer Merits Report ¶ 193 (discussing Peter F Kostiuk, Eric M. Gaier, & Dou Long, *The Economic Impacts of Air Traffic Congestion*, 7(2) Air Traffic Control Q. 123, 123-45 (1999) (#617-3)); Gaier 12/17/10 Tr. 102:25-103:10 (attached as Ex. 6).

AirTran tries to show empirically that carrier-specific fuel costs are irrelevant by changing the time period of Dr. Gaier’s analysis. But even in the revised time period, the addition of one additional control variable – discussed below – demonstrates that the carrier-specific fuel costs variable is stable and statistically significant.<sup>28</sup>

**2. Dr. Gaier Unreliably Failed to Include a Carrier-Specific Time Trends Variable.**

Dr. Singer’s analysis demonstrated that a carrier-specific time trends variable is “correlated with the dependent variable and is likely to affect the result.” *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1365. Specifically, the addition of a carrier-specific time trends variable demonstrates that AirTran *increased* its fares relative to Southwest between 2008 and 2009, disproving the hypothesis that FBF led AirTran to reduce fares relative to carriers that did not charge FBF.<sup>29</sup> Omitting the carrier-specific time trends variable therefore makes Dr. Gaier’s regression analysis unreliable and inadmissible. *In re Polypropylene Carpet*, 93 F. Supp. 2d at 1365.

AirTran argues that it is inappropriate to consider the fact that AirTran raised fares compared to Southwest, and would prefer to combine Southwest and JetBlue’s

---

<sup>28</sup> Pls.’ Mem. at 14 (#617) (citing Singer Merits Rebuttal ¶¶ 197-99 & Table 10 (#556-1 at PX400)).

<sup>29</sup> Singer Class Cert. Reply ¶¶ 49-50 (#269-1).

fares. AirTran Response at 23-24 (#636). But “if Defendants’ hypothesis were correct, we should observe AirTran’s fares falling relative to *both* Southwest *and* JetBlue.”<sup>30</sup>

AirTran complains that adding treatment effects variables caused a high “variance inflation factor.” AirTran Response at 25 (#636). But Dr. Gaier himself admitted that a variation inflation factor above or below the benchmark does not indicate whether or not there is a problem with multicollinearity.<sup>31</sup> Dr. Gaier also admitted that removing a relevant explanatory variable from a regression analysis would cause a bias, even if the variable caused a high variation inflation factor.<sup>32</sup>

### **C. Contemporaneous Documents Undermine Dr. Gaier’s Opinions**

AirTran argues that the reliability of Dr. Gaier’s opinions is demonstrated by certain documents about the experiences of other airlines that may have reduced base fares after imposing FBF. AirTran Response at 4 (#636). But the examples AirTran relies on are not relevant to the *conspiratorial* imposition of FBF by AirTran and Delta. For example, AirTran cites Spirit Airlines, which advertised that it was reducing base fares when it imposed FBF.<sup>33</sup> AirTran and Delta, however, never advertised that they reduced fares because of FBF.

---

<sup>30</sup> Singer Merits Report ¶ 188 (#556 at PX398).

<sup>31</sup> Gaier 2/22/11 Tr. 85:9-11, 85:20-86:1 (#591).

<sup>32</sup> *Id.* at 79:20-80:7.

<sup>33</sup> AirTran Response at 4 & n.7 (#636); Kasper 10/15/10 Tr. 65:4-18 (#572).

AirTran also cites a GAO report, but the inadmissible report offers self-serving hearsay statements of anonymous airline executives hypothesizing that their unilateral imposition of baggage fees enabled them to maintain lower fares. AirTran Response at 4 (#636) (citing GAO Report at 13).

Finally, AirTran cites opinions of experts in this case, but the experts opined only that the unilateral imposition of FBF would lead to lower fares, not the collusive imposition of FBF.<sup>34</sup>

Furthermore, AirTran and Dr. Gaier fail to address the testimony and contemporaneous documents reflecting that AirTran and Delta's imposition of FBF did not lead to base fare reductions, but to lost market share.<sup>35</sup> *See, e.g.*, Healy 30(b)(6) 6/3/10 Tr. 55:12-15 (#559) (“Q: So there was no direct communication to people in the pricing group to lower prices because AirTran has introduced a first bag fee; is that right? A: Not that I recall.”); Value Proposition at 10-15 (#556 at PX234) (reflecting market share gains from competitors charging FBF); Grimmett 9/28/10 Tr. 183:7-11 (#565) (“Q. Did anyone suggest if we impose this fee, we can

---

<sup>34</sup> Singer Reply ¶¶ 24, 54-62 (#269-1); H. Singer 11/23/10 Dep. Tr. at 651:1-17, 702:15-704:22, 712:13-715:5 (#626-3); Pls.’ Mem. in Supp. of Mot. To Exclude M. Schwartz at 4-11 (#622); Pls.’ Mem. at 5-10 (#617).

<sup>35</sup> Pls.’ Class Cert. Reply at 7-10 (#269); Pls.’ Supp. Class Cert. Br. at 1-4 (#357); Singer Report ¶ 92-95 (#124-1); Singer Reply ¶¶ 52 (#269-1); Singer Merits Report ¶¶ 168-70 (#556 at PX398).

reduce [] fares at all and drive demand? A. No. Q. That was never considered? A. No.”); Anderson 10/6/10 Tr. 102:6-7 (#569) (“I don’t think [the first bag fees] had any impact on average[] fares.”). Dr. Gaier’s initial report reflects that he failed to consider relevant testimony and contemporaneous documents.<sup>36</sup>

Thus, contrary to AirTran’s arguments, the evidence in this case does not bolster the reliability of Dr. Gaier’s opinions. Rather, it demonstrates that his opinions are unreliable and do not fit the facts of this case.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs’ motion to exclude the testimony and opinions of Dr. Gaier should be granted.

---

<sup>36</sup> Gaier Class Cert. Report ¶ 56 (#269-6 at Ex. 54); Gaier Class Cert. Surreply Report ¶ 46 (#231-9); Gaier Merits Reply Report ¶ 38 (#638-3).

Respectfully submitted,

Dated: December 18, 2015

*/s/ Daniel L. Low*

Daniel A. Kotchen  
Daniel L. Low  
KOTCHEN & LOW LLP  
1745 Kalorama Rd. NW  
Suite 101  
Washington, DC 20009  
dkotchen@kotchen.com  
dlow@kotchen.com

James L. Ward, Jr.  
Robert S. Wood  
RICHARDSON, PATRICK,  
WESTBROOK & BRICKMAN, LLC  
P.O. Box 1007  
1037 Chuck Dawley Blvd., Bldg. A  
Mt. Pleasant, SC 29465  
jward@rpwb.com  
bwood@rpwb.com

R. Bryant McCulley  
Stuart H. McCluer  
McCULLEY MCCLUER PLLC  
P.O. Box 505  
Isle of Palms, SC 29451  
bmcculley@mcculleymccluer.com  
smccluer@mcculleymccluer.com

Cale H. Conley  
Georgia Bar. #181080  
CONLEY, GRIGGS & PARTIN LLP  
1380 West Paces Ferry Road NW  
#2100  
Atlanta, GA 30327  
cale@conleygriggs.com

*Interim Co-Lead Counsel for  
Plaintiffs*

David H. Flint  
Georgia Bar No. 264600  
Andrew Lavoie  
Georgia Bar No. 108814  
SCHREEDER WHEELER &  
FLINT, LLP  
1100 Peachtree Street, NE, Suite  
800  
Atlanta, GA 30309-4516  
dflint@swflp.com  
alavoie@swflp.com

*Interim Liaison Counsel for  
Plaintiffs*

**CERTIFICATION UNDER L.R. 7.1D**

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned counsel hereby certifies that the above and foregoing is a computer document prepared in Times New Roman (14 point) font in accordance with Local Rule 5.1B.

So certified, this 18th day of December, 2015.

/s/Daniel L. Low

Daniel L. Low

KOTCHEN & LOW LLP

1745 Kalorama Rd. NW, Suite 101

Washington, DC 20009

dlow@kotchen.com

*Interim Co-Lead Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that on this day he electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to all attorneys of record who have appeared in the matter.

So certified, this 18th day of December, 2015.

/s/Daniel L. Low  
Daniel L. Low  
KOTCHEN & LOW LLP  
1745 Kalorama Rd. NW, Suite 101  
Washington, DC 20009  
dlow@kotchen.com

*Interim Co-Lead Counsel for Plaintiffs*