

**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

**MEMORANDUM OF DELTA AIR LINES, INC. IN OPPOSITION TO
PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE
THE OPINIONS AND TESTIMONY OF DR. DARIN N. LEE**

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INTRODUCTION

In support of class certification, Plaintiffs and their expert Dr. Hal Singer contend that injury to proposed class members can be established solely by evidence of payment of a first bag fee and that there were no offsetting economic benefits that need to be taken into account. In opposing class certification, Delta has proffered expert testimony from Dr. Darin Lee. Dr. Lee is an economist who specializes in the fields of airline economics, auctions, and industrial organization.¹ Dr. Lee approaches the issue of class-wide injury using standard economic tools, widely used and accepted government data, and the same analytical approach he used in two peer-reviewed published papers on factors that influence airfares, including the adoption of first bag fees.

Using those methods and data, Dr. Lee determined that: (i) the adoption of the first bag fees resulted in lower base airfares, and (ii) the effect of the first bag

¹ Dr. Lee has published numerous peer-reviewed articles, has provided consulting services to numerous domestic and international airlines, industry trade associations and labor organizations on a wide variety of economic and statistical matters involving the airline industry, and has testified as an expert before several federal courts as well as the United States Department of Transportation (“DOT”) on matters related to the economics of the airline industry. Expert Report of Darin N. Lee (“Lee Class Report”) ¶¶ 1-4 (Sept. 24, 2010).

For expert reports cited in this brief, Delta refers the Court to its contemporaneously filed “Appendix of Exhibits,” which includes a table identifying the cited reports already in the record.

fee on fares is not uniform by route or across passengers traveling on a particular route. Moreover, there are many class members who benefited from the reduction of Delta's second bag fee simultaneously with the adoption of a first bag fee, and many more who suffered no economic harm because they were reimbursed.

Dr. Lee's expert opinions directly rebut claims by Plaintiffs and Dr. Hal Singer on issues concerning class certification.² Seeking to avoid the impact of those opinions, Plaintiffs argue for their exclusion on varying grounds. None are availing. Dr. Lee's testimony is exactly what the Federal Rules permit from an expert, and exactly what Dr. Singer failed to do—Dr. Lee applies his unquestioned expertise utilizing a reliable methodology to provide helpful specialized testimony about issues in the case.

SUMMARY OF DR. LEE'S RELEVANT OPINIONS AND WORK

Dr. Lee evaluated Dr. Singer's class certification opinions and ultimately concluded, in relevant part, that:

- (1) Dr. Singer's contention that proposed class members did not receive any offsetting benefits in terms of lower base fares when Delta adopted its

² Plaintiffs do not challenge Dr. Lee's merits opinions, including those rebutting Dr. Singer's game theory model and other of Dr. Singer's challenged merits opinions. Because Dr. Lee's merits opinions are not challenged, they are not discussed in this brief.

- first bag fee is inconsistent with both basic principles of economics and the facts; and
- (2) the adoption of Delta’s first bag fee, as an empirical matter, resulted in lower base airfares and that the magnitude of the fare reduction was not uniform among passengers.

Lee Class Report ¶ 7. Lee reached these conclusions after conducting a regression analysis, which is a statistical modeling technique widely used by economists, and in particular economists studying the airline industry. *Id.* at ¶ 17. Economists studying the airline industry commonly employ a type of regression, known as “reduced form fare regressions,” to gauge the impact of various factors on airfares. *Id.* Dr. Lee based his regression model in this case on a highly regarded model that he and fellow economists Jan Brueckner and Ethan Singer (no relation to Hal Singer) developed and published, commonly referred to in the airline industry and among economists studying the airline industry as the “BLS model.”³ *Id.* at ¶ 18.

³ Ex. 1, Jan K. Brueckner, Darin N. Lee, Ethan S. Singer, *Airline Competition and Domestic U.S. Airfares: A Comprehensive Reappraisal*, 2 ECONOMICS OF TRANSPORTATION 1-17 (Mar. 2013) (“BLS Paper”). The primary purpose of the BLS model was to investigate the effects of different types and levels of competition on airfares. It integrated several of the most well-known airline pricing studies from academic literature by incorporating control variables to account for recent industry developments. *See* Lee Class Report ¶ 18. Many of the various specifications of the original BLS model are estimated based on airline data from 2007 to 2008. *Id.*

In his report, Dr. Lee expanded on the BLS model with additional data from years 2008 through 2010. *Id.* This permitted him to capture the time period during which air carriers began introducing first bag fees. *Id.* Dr. Lee augmented the BLS model to include specific variables which allowed him to test whether and how the introduction of bag fees interacted with various factors that might affect airfares. *Id.*

Dr. Lee's data source for his analysis was the U.S. DOT's DB1B database ("DB1B"), which is a 10 percent quarterly sample of all domestic airline tickets. *Id.* at ¶ 20. The DB1B is the primary data source for virtually all empirical pricing studies of the U.S. airline industry conducted by academic and non-academic economists. *Id.*

Dr. Lee ran multiple regressions to test whether the adoption of first bag fees impacted base fares by holding constant other factors that were shown in the original BLS study and other peer-reviewed published research to affect base fares. These variables included, among others: (1) various levels of competition from legacy airline carriers⁴; (2) various levels of competition from low-cost carriers

⁴ Dr. Lee defined the term "legacy carriers" to include American, United, Delta, Continental, Northwest, US Airways, Alaska, and Midwest. *Id.* at ¶ 17 n.25.

(“LCCs”)⁵; (3) the distance of the trip; (4) the population of the endpoint city; (5) the average income at the endpoint city; and (6) the average temperature of the endpoint city (as a proxy for leisure markets). Lee Class Report ¶¶ 23-24 & Appendix C. Dr. Lee also tested the variation of the impact of first bag fees across various route characteristics including distance (“bagfee_dist”), origin/destination per capita average income (“bagfee-income”), and temperature differential (“bagfee-tempdiff”). *Id.* at ¶¶ 34-38.

Dr. Lee’s empirical analyses demonstrate, at a highly statistically significant level, that the adoption of a first bag fee resulted in lower base fares. *Id.* at ¶¶ 7, 28-45. Those analyses also show that the fee’s impact on fares varied widely by route and by passenger. *Id.*; *see also* Surrebuttal Report of Darin N. Lee (“Lee Class Surrebuttal”) ¶¶ 31-32 (Dec. 8, 2010).

Based on these empirical findings, Dr. Lee found that many members of the proposed class likely benefitted from the unbundling of the first bag fee from base fares or suffered no injury, depending on the number of flights they took during the class period, the routes traveled, and the number of times they paid a first bag fee on those trips. Lee Class Report ¶¶ 46-54. Dr. Lee also found that many

⁵ Dr. Lee defined the term “LCCs” to include Southwest, JetBlue, AirTran, Frontier, Sun Country, Virgin America, Spirit, and Allegiant. *Id.* at ¶ 18.

additional members of the proposed class suffered no economic harm as a result of Delta's adoption of a first bag fee because either they were reimbursed for their out-of-pocket travel expenses or they checked more than one bag, thereby benefitting from Delta's simultaneous reduction in its second checked bag fee. *Id.* at ¶¶ 51-52. Because of all of these factors, Dr. Lee concluded that whether any particular class member was injured by the adoption of the first bag fee can only be determined by highly individualized evidence. *Id.* at ¶¶ 7, 53-54; Lee Class Surrebuttal ¶¶ 31-32, 35-37.

ARGUMENT

This Court's gate-keeping function under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) is governed by a three-part inquiry that assesses: (1) the qualifications of the proffered expert; (2) the reliability of the expert's methodology; and (3) the helpfulness of the expert's opinion to the trier of fact. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562-63 (11th Cir. 1998) (citing *Daubert*, 509 U.S. at 589).

Dr. Lee's expert opinions are exactly within the contemplation of Federal Rule of Evidence 702. Relying on his expertise as an economist, Dr. Lee applies standard economic statistical tools to analyze the effects of the first bag fee on base fares and to determine whether the impact on individual passengers of changes in

base fares can be determined by evidence that is common to the class. Dr. Lee utilized the same basic methodology and data he has used in two peer-reviewed papers he has published on various determinants of airfares, including the adoption of first bag fees.⁶ Plaintiffs dislike the results of Dr. Lee’s analysis, but that does not change the fact that his opinions are reliable and relevant.⁷

A. Dr. Lee Does Not Opine on the Relevant Legal Standards

Plaintiffs’ first argument does not relate to any of Dr. Lee’s actual opinions or the reliability of any of his work. Rather, Plaintiffs argue that Dr. Lee should not be permitted to opine on “relevant legal standards” (presumably those the

⁶ Ex. 1, Brueckner, Lee & Singer, *Airline Competition and Domestic U.S. Airfares: A Comprehensive Reappraisal*, 2 ECONOMICS OF TRANSPORTATION 1-17 (Mar. 2013); Ex. 2, Jan K. Brueckner, Darin N. Lee, et al., *Product Unbundling in the Travel Industry*, 24 J. ECON. & MGMT. STRATEGY 457 (2015).

⁷ As with several of their *Daubert* motions, Plaintiffs argue that the Court need not consider their Motion prior to deciding class certification. Delta again agrees that Dr. Lee’s opinions are not indispensable to the denial of class certification. As previously discussed, Plaintiffs’ failure to establish the ascertainability of putative class members, and Plaintiffs’ inability to prove injury or damages using classwide evidence given the reimbursement of likely millions of class members—each of which is sufficient by itself to prevent the class from being certified—do not depend on Dr. Lee’s opinions. By contrast, Plaintiffs’ motion for class certification could not be granted without resolving Defendants’ *Daubert* motion on Dr. Singer’s class certification opinions—Plaintiffs rely virtually exclusively on Dr. Singer to argue, *inter alia*, that individualized issues concerning injury and damages do not predominate under Rule 23(b)(3). See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433-34 (2013); *Sher v. Raytheon Co.*, 419 F. App’x 887, 888 (11th Cir. 2011).

Court will apply on Plaintiffs' class certification motion). Dr. Lee offers no such opinions.

Dr. Lee's analysis shows that the adoption of first bag fees resulted in lower average base fares, but that the effect of the first bag fee on base fares was not uniform across routes or even across passengers on the same route. Therefore, to determine whether any class member was injured requires at least the following information: (i) "[t]he number of times, on what routes, and at what fares the person flew during the relevant period," (ii) "[t]he individualized fare impact of the first bag fee on base fares on each route on which they flew," (iii) "[t]he number of bags the passenger checked . . . on each of the individual trips . . . and the actual bag fees that were paid," and (iv) "[w]hether the passenger was reimbursed." Lee Class Surrebuttal ¶¶ 54-55. These statements are directed solely at the highly individualized data necessary to determine class member injury. None remotely purports to express opinions on the applicable legal standards.

Plaintiffs cite Dr. Lee's deposition, but the transcript excerpts they cite expose their argument as a contrivance. It was Plaintiffs who repeatedly sought to elicit legal conclusions from Dr. Lee (over Delta's repeated objections), and Dr. Lee made clear to Plaintiffs that legal arguments were beyond his scope:

Q. And if a jury ultimately decides that Delta and AirTran colluded, that individual who was injured should be able to recover, shouldn't he or she?

...

A. Yeah, again, I think you're asking questions that are beyond the scope of what I've been asked to do and so, you know, what -- what a jury decides I really have no opinion on.

...

Q. I'm just asking you if someone paid more because of the first bag fee and that overcharge was a result of collusion, that individual should have a right to recover, don't you think?

...

A. You know -- you know, I'm -- I'm -- again, I'm just not versed in the law of -- of what should or can't and can be recovered as -- as a result of -- collusion. So I think you're -- you're not -- something that -- this is not something which is covered in my report.

Plfs' Ex. A, Lee Dep. at 71:4-16, 72:14-73:2. None of Dr. Lee's testimony cited by Plaintiffs shows that Dr. Lee offered legal opinions or that he intended to do so. His testimony shows the opposite—that an enormous amount of time was spent by Dr. Lee resisting Plaintiffs' improper attempts to engage him in a discussion of legal standards.

B. Dr. Lee's Opinions Regarding Offsets Are Relevant

Plaintiffs argue once again that whether adoption of first bag fees caused base fare reductions is not relevant to the issues of injury and damages. This rehashes an argument Plaintiffs made in their class certification briefs and in several of their other *Daubert* motions. As Delta has previously explained, however, both Supreme Court and Eleventh Circuit precedent require the Court to

consider at class certification whether each class member's claim of injury or damages can be proven with evidence that is common to the class, including Defendants' right to assert any class member-specific defenses to claims of injury or damages. Dkt. 221 at 6-7; Dkt. 401 at 7-8; Dkt. 611 at 2-5; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' . . . a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory *defenses to individual claims*.") (emphasis added); *see also id.* at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."); *Coastal Neurology, Inc. v. State Farm Mutual Auto. Ins. Co.*, 458 Fed. App'x 793, 794 (11th Cir. 2012) (rejecting the argument that the district court should not have taken the defendants' defenses into account in assessing the predominance requirement of Rule 23: "In performing its Rule 23(b)(3) predominance analysis, the district court did not err in considering the individualized defenses that State Farm would have to the proposed class members' claims."); *DWFII Corp. v. State Farm Mutual Auto. Ins. Co.*, 469 Fed. App'x 762, 765 (11th Cir. 2012) (affirming denial of class certification because the defendant is "entitled to present any *unbundling or set off defenses* that would allow it to properly reduce the amount" due to each plaintiff) (emphasis added);

Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1178 (11th Cir. 2010) (reversing order granting class certification, and criticizing the district court for “minimiz[ing] the impact of Humana’s defenses on the outcome of the predominance inquiry”).

Plaintiffs nonetheless argue that base fare offsets are not relevant because the first bag fee and purchase of a plane ticket are somehow separate and independent transactions. But payment of a first bag fee and air travel are inextricably linked. As Dr. Lee put it in his deposition: “there’s no separate, quote-unquote, market for checked luggage that doesn’t involve a passenger traveling with that piece of checked luggage.” Ex. 3, Lee (12/15/2010) Dep. 24:11-14. The impact on base fares of implementing first bag fees is not just “another transaction,” but an inseparable part of assessing the effects of the conduct alleged in this case. Plaintiffs have alleged a conspiracy to “increase prices” for “domestic airline passenger service.”⁸ And Dr. Singer himself

⁸ Dkt. 53, Consol. Am. Compl. ¶ 1 (“Delta and AirTran agreed . . . to *increase prices* to consumers.”) (emphasis added), ¶ 28 (Delta and AirTran “agreed not to compete to enable both airlines to *increase prices*”) (emphasis added), ¶ 83 (“This contract, combination and/or conspiracy had the purpose and effect of unreasonably restraining trade in the *domestic airline passenger service market* served by Delta and AirTran”) (emphasis added). *See also* Dkt. 137, Order at 3-4 (“Specifically, Plaintiffs allege that AirTran invited Delta to collude . . . so that both airlines could increase prices to consumers without losing any market share”);

describes the case as being about whether class members “paid artificially inflated *prices for air travel*,” or “more in *total airfare*.” Singer Class Reply Report ¶¶ 22, 77 (emphasis added). Plainly, the “price” for “domestic airline passenger service” cannot be determined just by reference to the fee for transporting the first checked bag, but must also include the fee for transporting the passenger as well.⁹ Thus, determining whether a purported class member paid “more in *total airfare*”—and therefore determining both the fact of injury and damages—requires consideration of not just the amount of the bag fee but also any reduction in that class member’s base fares caused by adoption of the bag fee. *See* Dkt. 221 at 17-18 (citing Lee Class Report ¶¶ 10, 46-54).

C. Plaintiffs’ Arguments Regarding the “Reliability” and “Fit” of Dr. Lee’s Opinions on Base Fare Reductions Are Nothing More Than Disagreements with Dr. Lee’s Results

Plaintiffs argue that Dr. Lee’s econometric analysis is “unreliable.” But Dr. Lee applied his economic training utilizing standard econometric methodology to data collected by the government to arrive at his opinion in just the way contemplated by Federal Rule of Evidence 702. Plaintiffs’ additional argument

id. at 3 (“Plaintiffs allege that . . . AirTran and Delta colluded, ultimately causing consumers to suffer harm in the form of higher prices”).

⁹ As the Court has already recognized, first bag fees are “only a small part of the total price paid for air travel.” *See* Dkt. 137, Order at 41.

that his opinions do not “fit the facts” is no more than a complaint that Dr. Lee relied on objective data rather than offering his own interpretation of documents and testimony, as their expert did.¹⁰ That is not grounds for exclusion.

1. Dr. Lee’s Use of Industry-Wide Data Is The Most Reliable Way To Test The Effect of the First Bag Fee

Plaintiffs attack the reliability of Dr. Lee’s analysis by arguing that he should have used data specific to Delta and AirTran to test the effect of bag fees on base fares rather than broader industry data.

Dr. Lee, however, was testing the economic question of whether and to what extent adoption of bag fees led to reductions in base fares. To test this question, it was entirely appropriate to use the broadest data available and consistent with the standard approach utilized in his field. “It is standard practice in the academic literature studying the airline industry to examine industry-wide effects (rather than carrier-specific effects) when—as was the case of the first bag fee—the expected impact of the event in question was the same across carriers.” Lee Class Surrebuttal ¶ 10 n.27. Dr. Lee used the robust and reliable set of data for the entire industry that is collected by DOT and widely used for such economic

¹⁰ See Dkt. 625-1 at 18-21, 28-32.

analyses of the airline industry. Lee Class Report ¶ 45; Lee Class Surrebuttal ¶¶ 4, 9-10.¹¹

Dr. Lee nonetheless performed an alternative analysis using the approach suggested by Plaintiffs as a further check on the reliability of his analysis. While emphasizing that it was not his preferred approach, Dr. Lee demonstrated that even the Delta-specific model preferred by Dr. Singer was consistent with his initial results. Lee Class Surrebuttal ¶¶ 9-13. Dr. Lee did not “reverse course” as Plaintiffs contend, but performed an additional analysis in response to Plaintiffs’ criticism which only confirmed the reliability of his initial analysis:

I’d be happy to again say that what I - - how I view this model, okay, is as a further robustness test. So - - so Dr. Singer says, well, you know, Dr. Lee, you didn’t do this, you didn’t do this, you didn’t do this. What I show using these models, is, okay, yeah, I don’t agree that this is the right way to do it, but even if you do it, it shows that the first bag fee is still a statistically significant effect.

Plfs’ Ex. A, Lee Dep. at 157:22-158:7.

¹¹ As Dr. Lee explained in his Surrebuttal, it is not technically feasible to restrict his base regression model to Delta fares “since Delta adopted a first bag fee once, and thus, the regression would be unable to distinguish the effect of the first bag fee from other variables that are included to capture time-specific effects.” Lee Class Surrebuttal ¶ 9 n.23.

2. Dr. Lee’s Failure to Interpret Documents and Testimony Does Not Undermine the Reliability of His Analysis

Plaintiffs’ second “reliability” argument is that Dr. Lee should have foregone empirical economic analysis, and instead engaged in an exercise of interpreting and weighing testimony and documents. Such an approach would have been inappropriate for all of the reasons set forth in Defendants’ motions to exclude the testimony of Dr. Hal Singer. *See* Dkt. 625-1 at 18-21, 28-32.¹²

To reach his opinions in this case, Dr. Lee did the work that economists are trained to do—he applied common econometric techniques that have been used in numerous scholarly publications by Dr. Lee and other economists studying the airline industry to industry standard data. Based on his economic analyses, Dr. Lee opined that the impact of the first bag fee was to reduce base fares industry wide and that the effect on Delta’s fares would be the same. When Dr. Singer challenged Dr. Lee’s conclusions, Dr. Lee tested those criticisms and directly rebutted them. That Plaintiffs continue to disagree with Dr. Lee’s conclusions is no basis for excluding them. *See, e.g., Quiet Technology DC-8, Inc. v. Hurel-Dubois UK LTD.*, 326 F.3d 1333, 1345 (11th Cir. 2003) (“The alleged flaws in [the

¹² Plaintiffs’ own *Daubert* briefs acknowledge the impropriety of what Dr. Singer did, and what they now argue Dr. Lee should have done. *See* Dkt. 631-1, Plfs’ Carlton Br. at 18; Dkt. 632-1, Plfs’ Dick Br. at 15, 19.

expert's] analysis are of a character that impugn the accuracy of his results, not the general scientific validity of his methods. The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination.”); *Plantation Pipe Line Co. v. Cont'l Cas. Co.*, 2006 WL 6106248, at *12 (N.D. Ga. Sept. 25, 2006) (“[T]he correctness of the expert’s conclusions based on that analysis are factual matters to be determined by the trier of fact, or where appropriate, on summary judgment.”) (quoting *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000)).

Plaintiffs’ argument is also wrong for another reason. Plaintiffs argue Dr. Lee should have considered and attempted to “reconcile” with his economic analysis certain documents and testimony that they contend show Defendants did not intend or plan to reduce base fares upon adoption of first bag fees. But whether Defendants *intended* to reduce fares is immaterial to the question answered by Dr. Lee’s economic analysis: whether base fares *actually* declined as a result of the adoption of first bag fees.¹³ And while Plaintiffs fault Dr. Lee for not assessing

¹³ Moreover, Plaintiffs’ argumentative bullet-list also mischaracterizes the materials they cite. For example, Plaintiffs accuse Dr. Lee of ignoring the deposition testimony of Delta CEO Richard Anderson. *See* Plfs’ Br. at 12. But Dr. Lee did not ignore that testimony; he addressed it in his Surrebuttal report in response to a critique by Dr. Singer. Lee Class Surrebuttal ¶¶ 29-30. As Dr. Lee noted, Mr. Anderson testified he did not “think” the first bag fee impacted average fares, “**but we haven’t done that analysis.**” *See id.* (citing Anderson Dep.

Delta's subjective intent—as Dr. Singer did¹⁴—the law is clear that an expert may not offer an opinion on a party's intent or motives. *See, e.g., S.E.C. v. Johnson*, 525 F. Supp. 2d 70, 78-79 (D.D.C. 2007) (“Defendants accurately observe that several of [the expert's] opinions do invade the jury's province, specifically by making assumptions as to the intent of certain witnesses. Determinations of individuals' intent is a quintessential jury question.”); *In re Trasyol Products Liab. Litig.*, 709 F. Supp. 2d 1323, 1338 (S.D. Fla. 2010) (“[C]ourts have held that the question of (corporate) intent or motive is a classic jury question and not one for experts.”).¹⁵

101:18-102:17, attached hereto as Ex. 4) (emphasis added). Anderson's testimony is therefore completely consistent with Dr. Lee's opinions—Dr. Lee has done the “analysis,” which shows adoption of the first bag fee resulted in lower base fares. And what Mr. Anderson might have “thought” is immaterial to Dr. Lee's analysis.

¹⁴ *See, e.g., Singer Class Reply* ¶ 124.

¹⁵ *See also Kaufman v. Pfizer Pharm., Inc.*, 2011 WL 7659333, at *9 n.8 (S.D. Fla. Aug. 4, 2011) (excluding “all of [the expert's] opinions about Defendants' motives and state of mind, regardless of where or how they appear in her expert report.”); *In re Rezullin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004) (“Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony,” and excluding expert testimony “on the intent, motives or states of mind of corporations, regulatory agencies and others” because the testimony “ha[s] no basis in any relevant body of knowledge or expertise” and because allowing such testimony would allow experts to “improperly . . . assume the role of advocates for the plaintiffs' case”).

3. Dr. Lee's Analysis Accounts For Relevant Factors

The final few pages of Plaintiffs' reliability argument claims that Dr. Lee failed to account for certain "relevant factors." Although Dr. Lee addressed those same arguments in detail in his Surrebuttal, Plaintiffs nowhere acknowledge or attempt to rebut that discussion.

For example, Plaintiffs repeat Dr. Singer's claim that Dr. Lee failed to appropriately account for carrier specific fuel costs. Dr. Lee's Surrebuttal explained in detail why Dr. Singer's (and now Plaintiffs') contention is "invalid." Lee Class Surrebuttal ¶¶ 14-17. As Dr. Lee explained, his use of "time fixed effect variables" capture all of the time-varying effects that impact prices for carriers, which would include fuel price trends. *Id.* at ¶ 14 n.32. But Dr. Lee did not stop there; he also empirically tested Dr. Singer's criticism and found that "the adoption of first bag fees resulted in lower average base fares, *regardless of whether or not carrier-specific fuel prices are included.*" *Id.* at ¶ 16 (emphasis in original).

Plaintiffs' claim that Dr. Singer "corrected" Dr. Lee's analysis is also wrong. Dr. Singer tinkered with Dr. Lee's model to "fix" the purported problems he identified and disprove Dr. Lee's results. But his changes were baseless and results-oriented and produced patently absurd results, such as that the Great Recession had no impact on fares. Lee Class Surrebuttal ¶¶ 18-28. In a damaging

admission, Dr. Singer apparently attempted to conceal these absurdities by excluding the relevant variables from the charts in his report. *See id.* at ¶ 28.

D. Dr. Lee Offers Reliable Opinions Regarding the Individualized Issues of Reimbursement and Delta’s Reduction of the Second Bag Fee

Dr. Singer contends that all proposed class members were harmed each time they flew and paid a first bag fee. *See Singer Class Report* ¶ 7. Dr. Lee offered many reasons why Dr. Singer’s contention is incorrect, two of which are mentioned in Plaintiffs’ Motion as grounds for excluding Dr. Lee’s opinions: (1) Dr. Lee’s opinion that Delta’s simultaneous reduction of its second bag fee by \$25 as part of its overall realignment of fees, benefitted passengers who checked more than one bag, and (2) Dr. Lee’s opinion that proposed class members who were reimbursed for first bag fees suffered no injury.

Plaintiffs argue there is “no basis” for Dr. Lee’s assumption that Delta would not have lowered its second bag fee if it had not adopted a first bag fee. But Dr. Lee specifically cited as the basis for his assumption the deposition testimony of Delta’s President Ed Bastian: “I think if we all knew that if we put the first-bag fee that matched the industry, we would likely reduce the second-bag fee, so as not to be perceived as the high-fee airline out there.” *Lee Class Report* ¶ 52, n.57 (citing Bastian (DOJ) Dep. 82:10-14, attached hereto as Ex. 5). Five years ago, when Plaintiffs’ expert first raised the issue that Plaintiffs now raise, Dr. Lee re-cited the

testimony a second time in his Surrebuttal Report. Lee Class Surrebuttal ¶ 36. Thus, Dr. Lee's assumption is not only supported by testimony in the record, it is supported by the testimony that he cited in two reports.

Moreover, even in the absence of testimonial support, Dr. Lee would have been entitled to make reasonable assumptions under Eleventh Circuit law. *Maiz v. Virani*, 253 F.3d 641, 667 (11th Cir. 2001). Plaintiffs' disagreement about the reasonableness of Dr. Lee's assumption goes to the weight of Dr. Lee's opinions not their admissibility. *See, e.g., Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988); *Ahuja v. Cumberland Mall, LLC*, 821 F. Supp. 2d 1317, 1323 (N.D. Ga. 2011) (holding that a party's challenge to the factual basis of an expert's opinion is an issue that goes to the credibility and weight of the expert testimony as opposed to its admissibility).¹⁶ Here, Dr. Lee's assumption concerning Delta's second bag fee is clearly reasonable, as reflected by Plaintiffs' failure to cite any evidence that Delta was going to lower its second bag fee even if it had not adopted a first bag fee.

¹⁶ *See also Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 285 (S.D.N.Y. 2011) ("Questions over whether there is a sufficient factual basis for an expert's testimony may go to weight, not admissibility.") (quotation omitted).

Plaintiffs similarly argue that Dr. Lee's opinions regarding reimbursement have no basis or supporting evidence.¹⁷ They again miss the mark. Dr. Lee opines as a matter of economics that a passenger who was reimbursed for a first bag fee could not have been injured by the adoption of a first bag fee. Lee Class Report ¶¶ 51-52. It is beyond dispute that many who paid first bag fees were subsequently reimbursed, as evidenced by the fact that multiple former named Plaintiffs were fully reimbursed. *See* Dkt. 401 at 17-18. One Plaintiff even dropped out of the lawsuit because of his reimbursement, noting that he did not have any "skin in the game." *Id.* at 18 (quoting Watson Dep. 18:13-21, attached hereto as Ex. 6). That likely millions of potential class members were reimbursed for their bag fees is a real and significant issue that must be addressed by the Court. *See* Dkt. 221 at 6-7; Dkt. 401 at 7-8; Dkt. 611 at 2-5. Dr. Lee provides helpful economic testimony regarding the impact of that reimbursement on the individualized question of whether a class member was harmed by the first bag fee.

¹⁷ As explained in Delta's briefs opposing Plaintiffs' motion for class certification (Dkt. 401 at 17-19), a bag fee payor reimbursed for payment of a first bag fee has suffered no injury and can establish neither liability nor damages. *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 270-71 (D. Mass. 2004) (excluding from class "all persons or entities who suffered no economic harm" such as "those who . . . are reimbursed in full for all drug purchases) (citing *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181 (11th Cir. 2003)).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to exclude the opinions and testimony of Dr. Darin Lee.

Dated: December 4, 2015

Respectfully submitted,¹⁸

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¹⁸ Pursuant to L.R. 7.1D, counsel for Delta certifies that this document was prepared with a font and point selection approved in L.R. 5.1B.

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this day the foregoing MEMORANDUM OF DELTA AIR LINES, INC. IN OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. DARIN N. LEE 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 4th day of December, 2015.

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