UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION	**MDL Docket No. 2656** **Misc. No. 15-1404 (CKK)**
This Document Relates To: ALL CASES	

DEFENDANT SOUTHWEST AIRLINES CO.'S SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

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Introduction

Plaintiffs' Opposition to Southwest's Supplemental Brief in Support of Defendants' Motion to Dismiss ("Southwest MTD," Dkt. #110) illustrates what it means to beg the question. Confronted with the fact that Southwest was lapping the field in capacity growth at the critical time for Plaintiffs' supposed conspiracy, Plaintiffs ask the Court to ignore the obvious inference—Southwest had not agreed with anyone to restrain capacity—and instead conclude that Southwest *was* conspiring but, simultaneously, "cheating." Plaintiffs cannot render a foundationless inference plausible by simply assuming away every refuting fact. Because Plaintiffs allege no basis for inferring Southwest was part of a conspiracy, their Complaint must be dismissed as to Southwest.

I. Plaintiffs do not satisfy the applicable pleading standards.

Plaintiffs do not dispute that they must satisfy the *Twombly* plausibility standard as to each defendant individually. Southwest MTD at 1-2. That means Plaintiffs must allege that Southwest made a "conscious decision" to "join" the purported conspiracy, *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420, 2014 WL 309192, at *13 (N.D. Cal. Jan. 21, 2014), and "played some role" in the conspiracy, *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 164 (D.D.C. 2004). Plaintiffs plead no facts suggesting Southwest joined a conspiracy, much less played a role in it.

Plaintiffs' only glancing response is to argue that a conspirator need not be involved in "every detail in the execution of the conspiracy" to be liable for a conspiracy. Pls.' Opp'n at 46. But this does not reduce Plaintiffs' pleading burden. Plaintiffs' authorities recognize that even a conspirator with a limited role must be alleged to "join" the conspiracy "with an intent to pursue the same objectives" as the co-conspirators, *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) (cited at Pls.' Opp'n at 47 n.22), and it is here where Plaintiffs' allegations fall

short. Plaintiffs do not allege facts suggesting that Southwest took some action plausibly reflecting a shared objective in common with any other airline. Indeed, Plaintiffs do not even allege that it makes sense for Southwest and the other airlines to have shared objectives in light of their fundamentally disparate business models, as described below.

II. Plaintiffs' allegation that a disruptive competitor like Southwest conspired with other airlines makes no sense.

Plaintiffs do not dispute that Southwest is unique among the Defendants. Pls.' Opp'n at 45. Southwest engages with consumers in different ways than other airlines, and competes against those carriers in ways specific to Southwest. Southwest's strategy is built on a unique commitment to low costs and low fares, and to meet those goals it relies on unique, cost-saving efficiencies. For example, it flies a single type of jet;[1] flies its planes in a different type of route system;[2] sells the vast majority of its tickets only through its own direct-sales channel;[3] and offers customers all-inclusive fares in a single class of service.[4] An airline in such a simplified, low-cost structure has fewer ways to fine-tune capacity than traditional network carriers have, and would be affected differently than traditional carriers are by adjustments to capacity. Plaintiffs do not even begin to address how companies with profoundly different business models, like Southwest and the other Defendants, could effectively align themselves around a "common design" with respect to the methods by which each airline deploys capacity, or develop "a unity of purpose" in their

[1] *Compare* Southwest MTD Ex. 16 at 45 (detailing Southwest's Boeing 737 aircraft), *with* Southwest MTD Ex. 9 at 11 (describing United's 10 different aircraft ranging from 50 to 350 seats) *and* Southwest MTD Ex. 10 at 10 (describing Delta's use of 50-seat regional jets and 350-seat jets).

[2] Pls.' Opp'n at 32 ("Southwest does not operate airport 'hubs' through which it routes traffic to various 'spoke' destinations.").

[3] *See, e.g.*, Southwest MTD Ex. 15 (describing Southwest's direct-sales approach).

[4] *Compare* Southwest MTD Ex. 10 at 3, 24 *and* Southwest MTD Ex. 11 (both describing other airlines' revenues from unbundled options, change fees and checked bag fees), *with* Southwest MTD Ex. 12 at 1, Southwest MTD Ex. 1 at 17, Southwest MTD Ex. 4 at 6 (all describing Southwest's all-inclusive, low-fare pricing strategy).

conduct, or reach a "meeting of [the] minds" on their plans, as Plaintiffs must show to establish a conspiracy. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010).

Nor do Plaintiffs seriously dispute that U.S. antitrust enforcement authorities recognize that Southwest's different approach makes it a competitive, disruptive force in the airline transportation market. While Plaintiffs cite to a single newspaper article from 2012 commenting that Southwest had raised its fares during that year as though that suggested Southwest was no longer a low-fare leader (Pls.' Opp'n at 47, citing CAC ¶ 71), they do not dispute that the DOJ has continued to confirm and even rely on Southwest's unique competitive role. Plaintiffs, crediting the DOJ's views of competitive dynamics in the airline industry, quote liberally from the DOJ's complaint challenging the 2013 American-U.S. Airways merger (Pls.' Opp'n at 19, 38-39)—a merger that DOJ ultimately approved in large part because of Southwest's role as an aggressive rival that would compete with the merged airline and other carriers. *See United States v. US Airways Grp., Inc.*, 38 F. Supp. 3d 69, 72, 79 (D.D.C. 2014). The DOJ approved the merger on the condition of divestiture of slots, gates, and ground facilities at certain airports to low cost carriers including, most prominently, Southwest. *Id*. at 78-79. "[R]el[ying] on past experience and research," the government required the transfer of slots to Southwest as a way "to provide legitimate competition to the remaining legacy carriers." *Id.* at 78, 79. In its filings in support of the settlement, the DOJ cited multiple instances where, in contrast to legacy carriers, Southwest's entry into new markets caused ticket prices to drop "substantially." *Id*. at 78.

III. Plaintiffs do not allege any facts plausibly suggesting Southwest conspired with other airlines.

With both objective facts and regulatory observation confirming that Southwest behaves much differently from other airlines, the absence of any facts establishing that Southwest acted in concert with other airlines becomes even more glaring. Plaintiffs repeat their unsupported

allegation that Southwest adjusted its 2015 capacity growth in response to public statements by other airlines at the IATA conference in June 2015 but fail to address that Southwest announced that its growth would be "about 7%" both before and after this conference. Southwest MTD at 8-9. In addition, Plaintiffs urge the Court to ignore that Southwest was growing more than twice as fast as any of other Defendants in 2015. Southwest MTD at 9 & n.26. Plaintiffs say Southwest's 2015 growth should be "viewed in . . . context" with a hopscotch of years in which Southwest did not grow capacity (2010, 2012, and 2014). Pls.' Opp'n at 32, 48. Looking at Plaintiffs' Complaint in the "context" of these other years, however, only further highlights the divergence between the capacity decisions of Southwest and the other Defendants. Plaintiffs allege that in 2010, American cut its capacity by 12%; no allegation is made about United or Delta; and while Southwest cut capacity, it cut much less than American—only 8%. CAC ¶¶ 93, 112 n.112. Plaintiffs allege that in 2011, Delta and United announced plans to cut capacity in 2012; Southwest did not. CAC ¶ 96. Plaintiffs allege that Southwest capacity growth was flat in 2014; but they allege that the other defendants grew, with United up 0.5%, American up 2.4%, and Delta up 3%. CAC ¶¶ 108, 112 n.112. Taking the Complaint in its entire context, one thing is clear: Plaintiffs have not alleged, nor could they, that Southwest acted in parallel with the other airlines at *any* time.

Plaintiffs next contend that the Complaint alleges various Southwest acts that supposedly raise an inference of participation in a conspiracy. First, Southwest stopped serving some unidentified "airport pairs" when it merged with AirTran Airways, Inc. CAC ¶ 37. Plaintiffs do not explain how that suggests a capacity conspiracy; there is no claim that in the absence of a capacity conspiracy, a merger would have left the merging airlines' networks unaffected. Indeed, Plaintiffs do not even allege that Southwest stopped serving *city*-pairs the two airlines had served; they only allege that post-merger Southwest stopped serving *airport*-pairs that either it or AirTran

had served. Second, some Southwest shareholders own shares in other airlines. CAC ¶ 44. But Plaintiffs do not explain how this cross-ownership is relevant to the case, since it has not caused Southwest to engage in any alleged parallel conduct with the other airlines on capacity. Third, Southwest files its fares with ATPCO. CAC ¶ 54 n.27. But Plaintiffs do not allege that ATPCO facilitates capacity coordination or even contains any capacity data. Fourth, Southwest made profits in 2015. CAC ¶ 81. But Plaintiffs do not allege any facts to suggest that Southwest earned a supracompetitive profit in 2015 (a year in which Plaintiffs concede Southwest profited *less than half as much as any other Defendant*). *Id.* The mere appearance of Southwest's name in the Complaint does not constitute an allegation of facts giving rise to a plausible inference that Southwest joined a conspiracy with any other airline.

Plaintiffs' most revealing response is that because Southwest's pricing has been blended in with all the other Defendants in the Complaint's pricing data, and because executives of those airlines allegedly spoke publicly about "*industry* changes" in capacity, it is plausible that Southwest—being one of many others in the "industry"—might have participated. Pls.' Opp'n at 47, citing CAC ¶¶ 64-65, 89. In other words, Plaintiffs have aggregated Southwest into a group of defendants without alleging that Southwest participated in that group. But Plaintiffs could have done the same with any other airline in the country, with equally no foundation. Plaintiffs' *Twombly* obligation is to plead with plausibility that Southwest joined the alleged conspiracy and played a role in it. Blanket statements about the "industry" and data aggregated by the Plaintiffs obfuscating any particular airline's actual conduct give the Court no reason to infer that Southwest is part of whatever conspiracy Plaintiffs believe exists.

Plaintiffs next allege that Southwest made public statements about capacity discipline. But Plaintiffs have yet to explain how these statements would demonstrate Southwest was

coordinating with other Defendants. Plaintiffs have not alleged any parallel conduct on capacity, and *they have not alleged that Southwest engaged in any conduct that is more consistent with collusion than with Southwest's having acted unilaterally in its own interest.* At most, Plaintiffs allege Southwest, in making its own plans, was cognizant of other airlines' public statements about capacity. Reacting to competitors' plans is not only legal under antitrust law, it is to be expected as the economically rational behavior of participants in concentrated industries. *See, e.g.*, *In re Chocolate Confectionary Antitrust Litig*, 801 F.3d 383, 408-09 (3d Cir. 2015); *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 139-40 (2d Cir. 2013); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001). Reactions consistent with unilateral action do not plausibly suggest conspiracy. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2000)) (plaintiffs must allege sufficient plus factors to "'nudge[]' their allegations of horizontal agreements 'across the line from conceivable to plausible'").

Conclusion

For the reasons stated above, Southwest respectfully requests that the Court dismiss the Complaint as against Southwest.

July 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, a copy of the foregoing Supplemental Reply Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Plaintiffs' Consolidated Amended Complaint was filed electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

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