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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AFMS LLC,

Plaintiff,

v.

UNITED PARCEL SERVICE CO. and FEDEX CORPORATION,

Defendants.

Case No. 2:10-CV-05830-MMM-RC

DEFENDANT FEDEX CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Hearing Date: January 31, 2011
Time: 10:00 a.m.
Place: Courtroom 780, Roybal
Judge: Hon. Margaret M. Morrow

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PRELIMINARY STATEMENT

This case is about whether Plaintiff AFMS, a third-party consultant that provides "small parcel and freight consulting services" to shipping customers of Defendants FedEx and UPS (First Amended Complaint ("Complaint" or "Compl.") ¶ 3), can use the federal antitrust laws to compel Defendants to give it access to their confidential pricing and contract information. The antitrust laws require no such thing. No third party has a right to gain access to proprietary contract data. There is no requirement that pricing be public. FedEx has the right to insist that the terms of its contracts with its customers be kept confidential. Because AFMS is trying to use the antitrust laws to aid its business, as opposed to competition, the antitrust laws do not cover this claim.

First, AFMS lacks standing to assert a claim under either Section 1 or Section 2 of the Sherman Act. AFMS earns revenue by aggregating and using pricing and other data from shipping customers' past transactions with FedEx and UPS to help those customers negotiate more favorable pricing with FedEx and UPS. (Compl. ¶ 9.) It does not claim to compete with, supply to, or buy from FedEx or UPS itself. It sells its services in a completely different market from the market for the sale of shipping services. Accordingly, AFMS has not suffered *antitrust* injury of the type cognizable under the Sherman Act. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 538-39 (1983). Moreover, because it merely claims as damages a portion of its clients' alleged lost savings, its alleged injury is indirect and speculative, and barred by well-established precedent. *Id.* at 540-43.

Second, AFMS's claim that FedEx independently is attempting to monopolize the market in violation of Sherman Act Section 2 makes no sense at all, given the allegations of market concentration. The Complaint alleges that UPS has almost 60 percent of the shipping market to FedEx's approximately 40 percent. To

the extent anything that FedEx does might increase its market share, such conduct is procompetitive because it reduces the risk of monopolization by the market leader, UPS. Furthermore, the Complaint itself shows that the attempted monopolization claim is illogical and implausible. If one of the two Defendants attempted to monopolize through this alleged refusal to deal, and if a customer were unhappy with such a policy, the customer would simply move to the other competitor. Unilateral conduct of the sort alleged here could not succeed as a device to monopolize this market.

Third, AFMS's Sherman Act Section 1 claim fails to meet the requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007). The Complaint fails to allege even a single fact indicating any agreement between FedEx and UPS. It does not provide the "who, what and when" that *Twombly* and its progeny mandate. AFMS's claims of parallel conduct between Defendants likewise fail to plead a plausible conspiracy. The Complaint does not allege facts showing that the inference of collusion is more likely than the inference of independent conduct. In fact, the Complaint shows exactly why both Defendants would have had the lawful and independent motive to engage in the conduct alleged in the Complaint—to protect the confidentiality of their pricing data and their customer relationships.

Accordingly, the First Amended Complaint should be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6).

ARGUMENT

I. AFMS DOES NOT HAVE STANDING TO ASSERT ITS CLAIMS.

A. AFMS Has Not Suffered Antitrust Injury.

Since AFMS does not compete in the same market as Defendants, it has not suffered antitrust injury and therefore lacks standing. In order to have standing to assert a claim, a plaintiff must first have suffered *antitrust* injury, *i.e.*, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190

F.3d 1051, 1055 (9th Cir. 1999) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). To establish antitrust injury, "the injured party [must] be a participant in the same market as the alleged malefactors." *Bahn v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985); *Am. Ad Mgmt.*, 190 F.3d at 1057 ("Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury."). Market participation is determined by analyzing whether the products or services at issue are reasonably interchangeable or have cross-elastic demand. *Bahn*, 772 F.2d at 1470-71.

AFMS's allegations are virtually identical to those asserted by the plaintiffs in *Legal Economic Evaluations, Inc. v. Metropolitan Life Insurance Co.*, in which the Ninth Circuit found antitrust injury to be lacking. 39 F.3d 951, 954-56 (9th Cir. 1994). In *Legal Economic*, plaintiffs were consulting firms that advised tort plaintiffs on structured settlements involving annuities. These consultants claimed that the annuity insurers and brokers for tort defendants conspired to drive them out of business, by providing necessary financial information about the annuities only to the defense-side brokers. *Id.* at 952-53. The Ninth Circuit found that the alleged harm to competition—decreased annuity benefits to tort plaintiffs and increased annuity costs to tort defendants' liability carriers—occurred in the *markets for settling litigation or selling annuities*. *Id.* at 955-56. In contrast, the plaintiff consultants stood to suffer injury in the *market for consulting services*, through either a more limited choice of clients or reduced fees. *Id.* at 956. Because the consultants participated in and would have suffered harm in a different market than those potentially harmed by the alleged anticompetitive conduct, the consultants had "failed to show that [their] losses flow from injury to competition in the relevant market" and thus failed to show antitrust injury. *Id.*

Like the plaintiff consultants in *Legal Economic*, AFMS is not a participant in and did not suffer any alleged injury in the same market in which Defendants

operate. FedEx and UPS are engaged in the business of shipping and delivering packages by ground and by air. (Compl. ¶¶ 4-6.) AFMS provides consulting services to shipping customers and therefore is not a participant in this allegedly relevant market for shipping and delivery services, either as a provider of such services, as a customer contracting for its packages to be shipped, or in any other manner. (Compl. ¶¶ 3, 21 ("plaintiff has suffered and will continue to suffer substantial financial injury in its business and property in that it is being deprived of its ability to function as a third party consultant").) And the shipping services market is not reasonably interchangeable with the market for consulting services. A customer needing to transport a package to a different location cannot meet this need by receiving advice from a consultant, nor would a customer seeking consulting services be satisfied by the mere shipment of its packages.[1] As in *Legal Economic*, AFMS's alleged injury—to its business as a consultant (Compl. ¶ 21)—occurs in a separate market and does not "flow from" the alleged harm to competition—which occurs in the shipping market (Compl. ¶ 20 (shipping customers forced to pay higher prices and given fewer choices)). Accordingly, AFMS has not and cannot plead antitrust injury.

AFMS is going to rely on *American Ad Management*, 190 F.3d 1051 (9th Cir. 1999), but that case is distinguishable because it involved plaintiffs who participated in relevant markets allegedly harmed by anticompetitive conduct. In *American Ad Management*, the plaintiff sales representative held an agency relationship with the defendant publisher, in which the representative *purchased*

[1] Participation in a *related* market is insufficient to demonstrate participation in the relevant market. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1221 (C.D. Cal. 2003) (finding that "a party does not have standing simply because it has a commercial relationship with a market participant, thereby giving it an economic interest in avoiding restraint of the relevant market by a third party"); *Barton & Pittinos, Inc. v. Smithkline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997) (finding marketer of vaccine did not participate in the market for the "package of marketing and distribution of the vaccine").

advertising space directly from the publisher and then *resold* it to advertisers. *Id.* at 1053-54. The Ninth Circuit found the sales representative to have standing because it "is a participant in the relevant market [for advertisements in telephone directories] and it has suffered an injury in that market." *Id.* at 1057. In contrast, here AFMS has not alleged that it purchases shipping and delivery services, nor that it sells or resells such services to shipping customers. AFMS's business is instead limited to the consulting market, a distinct market from shipping and delivery services.[2]

This case underscores AFMS's lack of standing. In contrast to the plaintiffs in *American Ad Management*, AFMS has not alleged that it has any contractual relationship or dealings with FedEx or UPS, nor that it conducts any business or has suffered any injury in the distinct market for shipping and delivery services. If competition were reduced in the market for shipping services, then in theory, prices to shipping customers would rise. (*See* Compl. ¶ 20(d).) But the price of shipping is unrelated to AFMS's alleged injury to its third-party consulting business. Just as in *Legal Economic*, where the consultants' alleged injuries did not flow from decreased competition in the relevant markets for settling lawsuits or selling annuities, AFMS's injury—if any—does not flow from any decreased competition in the market for shipping services. *See Legal Economic*, 39 F.3d at 955-56.

B. AFMS's Alleged Injury Is Too Remote and Tangential to Any Harm Caused by the Alleged Antitrust Violation.

AFMS's connection to Defendants is too remote even if it had suffered

[2] While the Ninth Circuit does not require a plaintiff to participate in the relevant market specifically as a consumer or a competitor, *see American Ad Management*, 190 F.3d at 1057, this is most often the manner in which a plaintiff with standing will have participated in the relevant market. This stands to reason, as the antitrust laws are intended to protect competition among participants in specific markets. *See, e.g.*, *AGC*, 459 U.S. at 538. It is well-established that one must individually participate in the specific relevant market harmed in order to have suffered antitrust injury. *Id.* at 538-40; *Am. Ad. Mgmt.*, 190 F.3d at 1057.

antitrust injury. AFMS claims no direct contractual dealings with Defendants. It neither buys from nor sells to them, much less buys or sells shipping services. AFMS does not allege that Defendants' conduct has caused it to pay more for shipping services. Rather, it claims that it would have earned as a bounty a portion of the theoretical savings that Defendants' customers might have reaped through its consulting services, not unlike a lawyer getting paid through a contingency arrangement. (*See* Compl. ¶ 9 (third-party shipping consultants, including AFMS, "operate on a basis where their revenue from the shippers depends, at least in material part of the savings achieved").)

But this business model makes it crystal clear that AFMS is not entitled to any funds unless its clients, Defendants' customers, in fact paid more than they would have but for the challenged conduct. AFMS therefore lacks standing to assert these antitrust claims because its injury, if any, is derivative of any injury suffered by FedEx's and UPS's customers, who are allegedly paying higher prices to ship their packages (Compl. ¶ 20(d)). *AGC*, 459 U.S. at 540-42; *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 541-42 (9th Cir. 1987) (no standing where "any injury suffered by the [plaintiffs] is derived from any injury suffered by" the "immediate victims"); *Metro-Goldwyn-Mayer*, 269 F. Supp. 2d at 1222 (rejecting as too remote plaintiff's claim for damages that was "entirely derivative" of its customer's alleged injuries, "even if harm to [the customer] is a foreseeable consequence of the conduct alleged"). Here, if any party had a claim for damages (none does), it would be those shipping customers who allegedly are now paying more than they otherwise would have, but for the alleged unlawful conduct.[3]

To prove any damages, AFMS would first have to prove that customers of FedEx and UPS would have paid less for shipping but for the alleged unlawful

[3] FedEx does not suggest that there are any such customers or that any of them could state a claim for relief, for many of the same reasons as set forth here with respect to AFMS.

conduct, and that AFMS was entitled to a portion of those savings. Such allegations are speculative at best. The finder of fact must speculate as to whether AFMS would have entered into consulting agreements with certain of Defendants' customers; whether those agreements would have remained in effect and, if so, under what terms; and whether AFMS would have obtained for the customers more favorable contract terms in negotiations with Defendants. The antitrust laws forbid this type of attenuated injury based on conjecture and speculation. *AGC*, 459 U.S. at 543; *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982).

Such "indirect" claimants do not have standing under the Sherman Act. *See Am. Ad Mgmt.*, 190 F.3d at 1058. AFMS is not only not "close in the chain of causation," *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 147 (9th Cir. 1989), it is not in the chain of causation at all. It is merely a potential, indirect beneficiary of the alleged lost savings of its clients. The secondhand, derivative injury that AFMS claims to have suffered is exactly the type of alleged injury that courts have found too attenuated and remote from any direct harm to support a finding of standing. *See AGC*, 459 U.S. at 541-42, *see also Ill. Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977) (barring suits brought by indirect purchaser plaintiffs remote from defendants). AFMS's claims are even more remote than those of an indirect purchaser plaintiff, as it has not alleged that it is a purchaser of shipping services or participant in the shipping services market at all.

No less importantly, AFMS's claims create the obvious risk of duplicative recovery, if the customers themselves sued, just like in the more typical indirect purchaser context. *See Ill. Brick*, 431 U.S. at 730-35 (permitting indirect purchasers to sue would expose defendants to a risk of duplicative liability and make uncertain and complex the task of apportioning damages among parties at different levels of the distribution chain); *cf. Blue Shield*, 457 U.S. at 475 (no risk of duplicative exaction from defendant where plaintiff had already paid her bill, and her injury consisted of defendant's failure to reimburse her). If there were a claim here, the

customers can sue and obtain from Defendants the lost savings. At most, AFMS is merely entitled to a portion of those alleged lost savings. If AFMS and customers were both permitted to bring these claims, Defendants would face the prospect of paying customers 100 percent of their losses, and then paying AFMS some additional percentage of those losses (AFMS's contingency fee). This risk is precisely why *Illinois Brick* makes clear that the Sherman Act bars such indirect claims.

II. AFMS'S SHERMAN ACT SECTION 2 CLAIM SHOULD BE DISMISSED FOR FAILURE TO PLEAD ANTICOMPETITIVE CONDUCT OR THE MAINTENANCE OR THREAT OF MONOPOLY POWER.

AFMS alleges that FedEx and UPS each has been independently "engaged in a plan and scheme to achieve or maintain monopoly power in the delivery of time sensitive letters, documents, and packages," in alleged violation of Section 2 of the Sherman Act. (Compl. ¶ 23.) To properly state a claim under Section 2, Plaintiff must plead facts showing that FedEx (1) engaged in anticompetitive conduct, and (2) as a result of this conduct, either maintains or threatens to obtain a monopoly. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). AFMS has failed to allege either. AFMS has not—and cannot—plead facts showing that FedEx's alleged conduct was anticompetitive, or that FedEx possesses or threatens to possess monopoly power.

Anticompetitive conduct is "behavior that tends to impair the opportunities of *rivals* and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (emphasis added) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985)). AFMS alleges two courses of action in support of its monopolization claim: (1) that FedEx refused to deal with third-party consultants as a means of increasing prices, and (2) that FedEx

threatened its customers with higher prices if they did not keep FedEx's contract data confidential from third parties. (Compl. ¶ 24.) But a unilateral refusal to deal with a consultant is not anticompetitive conduct. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (every firm "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently"); *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 483 (9th Cir. 1988). And raising prices and changing the terms of customer contracts is not anticompetitive here because it would not limit the opportunities of, or harm, FedEx's rivals (exclusively UPS, according to the Complaint, ¶ 6). The Complaint does not allege that FedEx's conduct has harmed UPS.

Rather than harm UPS, the Complaint asserts that FedEx's alleged conduct stands to benefit UPS and expand UPS's opportunities, as customers unhappy with FedEx's policies might be driven to do business with UPS instead. As the Complaint itself asserts, FedEx "unilaterally terminating its dealings with third party consultants" would give UPS "a huge potential competitive advantage/opportunity." (Compl. ¶ 14.) Thus, the Complaint's own allegations make frivolous the claim that FedEx's conduct creates a "dangerous probability of success" in obtaining monopoly power (Compl. ¶ 25) because conduct that gives rivals an advantage is not "anticompetitive conduct." *Cascade*, 515 F.3d at 894.

Any claim that FedEx's purported conduct was anticompetitive is particularly illogical given FedEx's smaller share of the market. FedEx's alleged share of 41.2% of the overall market for time-sensitive shipping (Compl. ¶ 7) is too low to give rise to the possibility of monopolization, particularly when a single company, UPS, is alleged to hold the remaining majority share of the market. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) (holding that market share of less than 50% was insufficient to establish single-firm monopoly power as a matter of law); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (finding size and strength of competing firms to be a relevant factor in

determining whether a firm has monopoly power). FedEx is not the predominant firm surrounded by smaller, struggling competitors; rather, FedEx is itself the smaller player between the two firms alleged to participate in the market. (*See* Compl. ¶¶ 6-7.) Any claim of attempted monopolization by FedEx makes no sense given the allegations of the Complaint.

III. *TWOMBLY* MANDATES THE DISMISSAL OF AFMS'S SHERMAN ACT SECTION 1 CLAIM.

A. *Twombly*'s Standards for Pleading an Unlawful Conspiracy.

Twombly mandates that a complaint must allege "not just ultimate facts (such as a conspiracy), but evidentiary facts which if true, will prove" a conspiracy in order to state a plausible claim under Section 1 of the Sherman Act. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555). To meet this requirement, a complaint cannot simply allege legal conclusions masquerading as facts. Both the Supreme Court and the Ninth Circuit have long recognized that courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (internal citation omitted); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) ("[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged").

AFMS alleges no facts and makes no mention of any express agreement between FedEx and UPS regarding third-party shipping consultants or any other matter. AFMS does not allege when the purported conspiracy began, where Defendants purportedly agreed to join the conspiracy, or what person or persons were involved in orchestrating the alleged conspiracy. *See Twombly*, 550 U.S. at 565 n.10 (requiring facts such as the "specific time, place, or person involved in the alleged conspiracies"); *Kendall*, 518 F.3d at 1048 (complaint was properly

dismissed where it failed to "answer the basic questions: who, did what, to whom (or with whom), where, and when?").

AFMS will likely respond that a conspiracy should be inferred from Defendants' allegedly parallel conduct. But "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to state a claim under the Sherman Act, Section 1. *Twombly*, 550 U.S. at 556. Such parallel conduct, while "consistent with conspiracy," can be "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. Indeed, the accepted teaching of antitrust economics of the past 30 years strongly suggests that parallel conduct relating to pricing would be the *expected* result in the absence of an agreement. *See, e.g.*, *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305-06 (11th Cir. 2003) (parallel pricing is to be expected in oligopolistic markets); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 443 (9th Cir. 1990) (interdependent pricing may occur in a concentrated market, in which the number of competitors is small).

The Complaint itself demonstrates that FedEx had an independent motive to discourage its customers from working with third-party consultants—to protect its customer relationships and the confidentiality of its pricing data. And the Complaint indicates that FedEx and UPS did not adopt the policies simultaneously; rather, AFMS recounts a point at which FedEx had already stopped working with consultants, while UPS would be doing the same in the future. (Compl. ¶ 15.) The Complaint's stray allegations of parallel conduct do not change this fact. When a complaint—as here—includes only conclusory allegations that defendants conspired and the challenged conduct can be just as readily explained by non-collusive behavior, *Twombly* mandates that the complaint be dismissed. 550 U.S. at 554.[4]

[4] *Twombly* further emphasizes that courts must scrutinize closely the adequacy of allegations of an "agreement" at the pleading stage in a Section 1 case because

B. The Complaint's Circumstantial Allegations Are Insufficient to Plead a Plausible Conspiracy.

1. The Complaint Fails to Plead Parallel Conduct Sufficient to Give Rise to an Inference of Unlawful Conduct.

The Complaint conclusorily asserts that FedEx and UPS conspired to exclude consultants "[b]eginning on or about the Fall of 2009." (Compl. ¶ 18.) But it alleges no facts to support that conclusion. The allegation that FedEx and UPS representatives "announced" the policies at an industry event in October 2009 (Compl. ¶ 13) says nothing about when either FedEx or UPS *decided* to adopt the purported policies, or when either FedEx or UPS began *implementing* the purported policies. In fact, the Complaint suggests that FedEx and UPS did not adopt the alleged policies at the same time, as AFMS's managing director was purportedly told by a customer representative that "FedEx is not working with third party consultants and that 'UPS is *going to be doing the same thing soon . . . .*'" (Compl. ¶ 15 (emphasis added).) The very allegations of the Complaint therefore suggest that FedEx already had implemented such a policy while UPS had not yet implemented such a policy but would do so in the future. The Court cannot infer an agreement from such scant and inconsistent factual allegations.

In its newly amended complaint, AFMS has tried to bolster what it apparently recognized were insufficient allegations, by pointing to internal memoranda published by UPS and FedEx on April 23, 2010. (*See* Compl. ¶ 13, Exs. 1 and 2.) Yet the Complaint itself indicates that UPS and FedEx had already

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antitrust litigation is unusually costly and burdensome. *Id.* at 558-59. Noting that "[i]t is no answer to say" that meritless claims can be weeded out in the discovery process, the Court cautioned that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery" in meritless cases. *Id.* at 559; *see also Kendall*, 518 F.3d at 1047 ("[D]iscovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case."); *accord Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. 07-00043, 2007 WL 4976364, at *5 (C.D. Cal. Oct. 29, 2007).

decided to adopt the purported policies months earlier—no later than October 2009. (Compl. ¶ 13 (UPS and FedEx announced their policies at the October 2009 industry event); Compl. ¶ 18 (alleging that FedEx and UPS began excluding consultants "on or about the Fall of 2009.")) These subsequent, coincidental announcements by themselves are too far removed in time to give rise to an inference of an agreement taking place at least six months earlier.

If anything, these memoranda demonstrate that UPS's and FedEx's procedures were *not* the same, and instead varied in significant respects. The UPS Memo does not prevent customers from working with Third Party Negotiators ("3PNs"), and rather sets out "[p]rocedures for *interacting* with" 3PNs, including the use of non-disclosure agreements signed by the 3PN and customer. (Compl. Ex. 1 (emphasis added).) In contrast, FedEx's Rules of Engagement prevent sales staff from working with third-party consultants unless "limited exceptions" apply. (Compl. Ex. 2.) The FedEx memorandum also establishes a process for determining if a consultant adds value beyond price negotiation (a "Value Added Provider" or "VAP") and directs sales staff to respond to VAP consultants and non-VAP consultants differently. (Compl. Ex. 2.) The UPS memo draws no such distinction. (Compl. Ex. 1.) Nor does the UPS memo distinguish between requests from existing versus new customers, or with respect to 3PNs that have worked with UPS in the past versus those that have not. (Compl. Ex. 1). Conversely, the FedEx memo prescribes different treatment for consultants with which it has and has not previously worked (Compl. Ex. 2 at 2 ("If new business, the response is 'no.' . . . If FedEx has previously done business with the consultant . . . *we will request an exception to submit a bid*.") (emphasis in original)), and with respect to existing FedEx customers and customers that are new to FedEx (Compl. Ex. 2 at 3). These differences undermine AFMS's assertion that UPS and FedEx acted in parallel pursuant to an unlawful agreement. That UPS and FedEx published these distinct procedures months after they allegedly adopted the third-party consultant policies

does not support any inference of an agreement to adopt the policies.

Furthermore, AFMS's allegation that "historically [FedEx and UPS] have announced lock-step price increases annually over a long number of years" (Compl. ¶ 12) undercuts the significance of the alleged parallelism of the third-party consultant policies. The Complaint does not allege that the "historical" parallelism in pricing was the result of unlawful conduct. Notwithstanding the alleged parallel pricing, there have been no lawsuits, nor government enforcement actions, challenging that pricing as unlawful. Such parallelism in an industry as concentrated as the Complaint here alleges is to be expected as a matter of rational economics. *See Williamson Oil*, 346 F.3d at 1305-06; *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("A section 1 violation cannot . . . be inferred from parallel pricing alone . . . nor from an industry's follow-the-leader pricing strategy."). Because the Complaint claims that the purported third-party policies are really a device to conform pricing (Compl. ¶ 11), and because such parallel pricing has been the hallmark of the lawful operation of this market for many years, according to the Complaint, the mere fact that the Defendants acted in an allegedly parallel manner here cannot be a sufficient basis from which to infer *unlawful* conduct now any more than in the past. AFMS's own allegation of historical parallelism in the industry thus negates any possible inference that the alleged parallel adoption of the third-party policies did not result from "independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550 U.S. at 557 n.4.

2. The Complaint Demonstrates an Independent and Lawful Motivation to Engage in the Challenged Conduct.

The Complaint fails to provide any factual support for the assertion that FedEx did not have a rational economic motive for acting independently. The allegation that AFMS and other consultants obtained pricing discounts for some clients (Compl. ¶¶ 10-11) hardly supports the contention that FedEx and UPS had a

motive to conspire. *Twombly* rejected as insufficient the very same type of allegations. 550 U.S. at 550-51 (alleging a "compelling common motivation" to thwart the competitive efforts of new market entrants); *id.* at 566-67 (disregarding allegation because "nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance," and "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway").

Even if one were to accept the assertion that the work of the consultants was material to Defendants, such an assertion provides no reason to infer that FedEx and UPS conspired, as both had motivation to increase their revenues and profits independently of each other. In fact, FedEx would stand to benefit more by finding a way to increase its own profits while its competitor, UPS, did not. Inferring a conspiracy from the profit-driven motives of businesses, as AFMS urges, would lead to an absurd result. "If a motive to achieve higher prices were sufficient, every company in every industry could be accused of conspiracy because they all would have such a motive." *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007) (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999) (internal quotations omitted)).

In short, the Complaint's assertions about the alleged pricing advantage resulting from eliminating consultants is as consistent with an inference of independent action as it is collusion:

- If, as alleged, 5.5 percent of customers receive a better price by using a consultant (Compl. ¶ 10),[5] and if AFMS found more than $100,000,000 in

[5] According to the Complaint, approximately half—49 percent—of those customers that use a consultant enjoy a greater discount than those that do not. (Comp. ¶ 10.) And in 2006, only 11 percent of customers used a consultant. (Compl. ¶ 10.) At best, this suggests that approximately 5.5 percent (49 percent of 11 percent) of customers obtained better pricing by using shipping consultants. (FedEx does not agree with these statistics, but is merely repeating what the Complaint alleges for purposes of this motion.)

customer savings between FedEx and UPS shipments (Compl. ¶ 12), FedEx would have a strong, independent reason to try to minimize the involvement of consultants. If by eliminating consultants, a shipper could increase prices for some percentage of customers, such a strategy would be rational and attractive, unless the benefit were outweighed by the loss of other customers because of the new policy. But, as discussed below, the Complaint contains no facts suggesting such a downside risk, only AFMS's naked assertion.

- FedEx also has substantial motivation to protect the confidentiality of its contract terms and pricing to customers, particularly in a period of economic recession in which shipping is down and prices are under greater pressure. (The Court can take judicial notice of the recession that followed 2007, which resulted in reduced volume and thus increased pressure on Defendants' pricing.) Preventing its own pricing data with other customers from being used against it in pricing negotiations is itself a sufficient independent justification for FedEx to treat its data as confidential, regardless of any decision by UPS to follow suit. FedEx's use of confidentiality terms in its contracts with customers—making it more difficult for them to use consultants—is really AFMS's central complaint in this case.

- Apart from pricing, FedEx would have an independent interest in eliminating a middleman in its relations with customers. As the Complaint itself indicates, third-party consultants insert themselves into FedEx's communications with its customers and use their knowledge of past transactions—including FedEx's own past pricing to other customers—to influence the negotiations and obtain more favorable pricing. (*See* Compl. ¶ 9.) FedEx, like any service provider, logically would prefer to communicate and promote its products through direct relationships with customers, rather than filtered through a third-party consultant with a different agenda. No antitrust principle requires a company to deal with third-party consultants. And there is no antitrust principle condemning enforcement of confidentiality restrictions in contracts with customers. FedEx's independent

decision to handle its customer accounts directly, particularly under the circumstances alleged in the Complaint, is both reasonable and lawful. *See Baby Food*, 166 F.3d at 134 (finding that "profit is always a motivating factor in the conduct of a business" and a "legitimate motive"); *Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, No. 00-5663, 2001 WL 1468168, at *14 (S.D.N.Y. Nov. 19, 2001) (finding defendants' decisions to handle certain accounts internally, rather than utilizing market representatives, insufficient to state a Section 1 claim).

AFMS tries to overcome this defect by asserting that "neither company would have dared" terminate dealings with third-party consultants without an understanding that the other company would do the same at the same time. (Compl. ¶ 14.)[6] But such a conclusion cannot withstand dismissal under *Twombly* because it could be said about *any* concentrated industry with respect to *any* policy affecting price. The contention that FedEx would not have done it without UPS doing the same would apply just as equally to price increases, because in both cases the underlying theory is that customers would flee to the other competitor. *Twombly* unambiguously teaches that such a naked assertion is insufficient by itself to state a claim. *Twombly*, 550 U.S. at 556-57; *Kendall*, 518 F.3d at 1049 ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

And the assertion here is truly naked. The Complaint does not allege facts that would suggest any particular concern about loss of customers to UPS if FedEx had acted unilaterally. The Complaint's own allegations establish that the industry is marked by very little customer turnover. Approximately 90 percent of FedEx's

[6] The Complaint itself refutes the notion that FedEx would not have terminated dealings with third-party consultants without UPS doing so at the same time. (Compl. ¶ 15 (AFMS manager told by customer representative that FedEx had already ceased working with third-party consultants, while "UPS is going to be doing the same thing soon.").)

customers do *not* change shipping companies each year. (Compl. ¶ 10.) Loss to the competitor here is the exception, not the rule, so the Complaint's suggestion that fear of losing customers to the other required collusion is simply made up. The allegation that FedEx is somehow concerned that a change to its policy regarding consultants would drive a meaningful number of customers to UPS is also unsupported by any facts, since the Complaint alleges that only a small number of shipping customers even use consultants. According to the Complaint, in 2006 only 11 percent of customers used a consultant. (Compl. ¶ 10.) If the Court accepts the Complaint's assertion that 12 percent switched shippers in 2006, that means that only 1.3 percent of those customers that switched also used consultants (11 percent of 12 percent).[7] And, the Complaint does not allege that any of the 12 percent that switched carriers did so because of price or because of anything that consultants may have done. (Compl. ¶ 10.)

Although AFMS itself has customers and claims injury, it has failed to allege that a single one of its customers would have switched carriers had FedEx unilaterally adopted the purported third-party consultant policy, much less identify one by name. AFMS's lack of facts on this point is understandable. The very Morgan Stanley analyst reports on which the Complaint supposedly relies (Compl. ¶ 10) clearly establish that price is only one factor in a customer's decision as to which shipping carrier to use, along with perceived quality, customer service, and other determinants. The disconnected statistics alleged in paragraph 10 do not provide a factual basis for inferring that FedEx would have been concerned if UPS had not adopted a similar policy. *Twombly* demands stronger factual assertions.

[7] The use of these percentages alone to demonstrate a "substantial" effect on Defendants' "revenues and profits" of "at least in the low billions per year" (Compl. ¶ 10) is itself misguided. Without some analysis of how these percentages of customers relate to actual volumes, the services used (overnight delivery vs. delayed delivery), and the prices associated with those various services, these percentages are an insufficient basis for the conclusion urged by AFMS in paragraph 10.

Additionally, AFMS's allegation that neither FedEx nor UPS "would have dared" to undertake a policy against third-party consultants alone (Compl. ¶ 14) directly conflicts with AFMS's claims under Section 2 of the Sherman Act, which allege that each company separately undertook a course of action to eliminate third-party consultants and thereby tried to monopolize the delivery of letters, documents, and packages (Compl. ¶¶ 24-25). While AFMS may plead in the alternative, its assertions that Defendants could not have acted independently, and yet that they *may have* acted independently, are not logically or economically plausible. Where, as here, the allegations do not make sense, the Complaint fails to plead plausible grounds for relief. *See DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (upholding dismissal of antitrust complaint because the alleged conspiracy was "highly implausible") (cited approvingly in *Twombly*, 550 U.S. at 557).

In sum, the Complaint tries to dress up the insufficiency of its logic and factual support for *unlawful* parallelism by trotting out disconnected statistics that do not support a logical theory as to why the alleged parallelism is more consistent with unlawful conduct than with lawful conduct, as *Twombly* requires. Such a vague theory based on "[g]eneral similarity of conduct is not enough" to support an inference of an agreement among competitors. *Zoslaw v. CBS*, 533 F. Supp. 540, 552 (N.D. Cal. 1980), *aff'd in part, rev'd in part on other grounds*, 693 F.2d 870 (9th Cir. 1982).

3. The Complaint's Meager Allegations of Opportunity to Collude Are Insufficient to Plead a Plausible Conspiracy.

Courts have consistently refused to infer the existence of a conspiracy from allegations of opportunities to communicate, even where the defendants are alleged to have participated in recurring industrywide meetings or associations and have had many opportunities to directly communicate. *See, e.g.*, *Citric Acid*, 191 F.3d at 1103 (rejecting plaintiff's attempt to infer a conspiracy from multiple meetings and

telephone conversations, as such meetings "do not tend to exclude the possibility of legitimate activity"); *In re Elevator Antitrust Litig.*, No. 04-1178, 2006 WL 1470994, at *10-11 (S.D.N.Y. May 30, 2006) (explaining that "the allegation that elevator company executives attend trade, industry, or social functions together is clearly insufficient to state a claim"). AFMS's allegation that UPS and FedEx representatives had the opportunity to communicate—at a single industry event in October 2009 (Compl. ¶ 13), and at a customer's premises at some unspecified time and location (*id.*)—are likewise insufficient and fail to give rise to a plausible inference of conspiracy regarding third-party consultants.

With respect to the one industry event, AFMS has not even alleged that FedEx and UPS representatives spoke or communicated with each other while there. AFMS weakly asserts that UPS and FedEx representatives made parallel announcements regarding their third-party consultant policies at the industry event in October 2009, at which both representatives were panelists. (Compl. ¶ 13.) But AFMS does not allege that these representatives ever *agreed* to these purported policies (or had the authority to do so)—whether at the industry event, before the event, or after it—or even discussed the policies with each other. AFMS alleges no other facts to indicate when or where or with whom such an agreement was reached. *See Kendall*, 518 F.3d at 1048 (complaint was properly dismissed where it failed to "answer the basic questions: who, did what, to whom (or with whom), where, and when?"). AFMS tries to compensate for this omission by alleging that the FedEx and UPS representatives "did not deny collusion between the companies" in deciding upon their purported policies. (Compl. ¶ 13.) Yet nowhere does AFMS allege that the representatives were ever asked about collusion between the companies or whether they had reached an agreement to implement the purported policies. AFMS's suggestion that the lack of an unprompted denial of collusion somehow demonstrates collusion is logically erroneous and deliberately misleading.

The allegation that representatives of FedEx and UPS "sat and conferred" with each other at or outside a customer's premises (Compl. ¶ 13) also falls far short of demonstrating collusion. The Complaint does not identify who the representatives were, which customer's premises they were at or outside, when the meeting occurred, where it occurred, or what the representatives "conferred" about. Importantly, the Complaint fails to allege that the communication had anything at all to do with third-party consultants or even with FedEx, UPS, or shipping business generally. While AFMS asserts that the meeting took place at some point before FedEx and UPS individually told the unidentified customer that they would not work with a third-party consultant, the Complaint is silent as to how long before that the alleged meeting took place or whether the meeting was in any way related. When parsed, this allegation amounts to nothing more than an isolated opportunity to communicate. And like the allegations made in *Citric Acid* and *Elevator Antitrust*, it fails to provide the factual basis needed to support an inference of unlawful conspiracy. *See* 191 F.3d at 1103; 2006 WL 1470994, at *10-11.

* * * * *

Twombly requires that AFMS allege facts showing that either an express agreement was made or that purportedly parallel conduct was not simply the result of natural market forces, but instead suggests a preceding agreement. 550 U.S. at 556-57. AFMS has failed to do so. The Complaint alleges neither an express agreement nor the type of parallel conduct that could not "just as well be independent action." *Id.* at 557. As in *Twombly*, the Complaint is insufficient to justify the enormous expense of antitrust litigation, and AFMS's Section 1 claim should be dismissed.

Dated: November 12, 2010 O'MELVENY & MYERS LLP

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