UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SCHENKER AG,	)	
	)	
Plaintiff,	)	**The Honorable John Gleeson**
	)	
v.	)	**Civil Action No. 14 CV 04711 (JG) (VVP)**
	)	
SOCIÉTÉ AIR FRANCE, KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V., MARTINAIR HOLLAND N.V., CARGOLUX AIRLINES INTERNATIONAL, S.A., NIPPON CARGO AIRLINES CO., LTD., ALL NIPPON AIRWAYS CO., LTD., QANTAS AIRWAYS LIMITED, and SAS CARGO GROUP A/S,	)	
	)	
Defendants.	)	

SCHENKER AG'S MEMORANDUM OF LAW IN OPPOSITION TO QANTAS AIRWAYS LIMITED'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Plaintiff Schenker AG ("Schenker") respectfully submits this memorandum of law in opposition to defendant, Qantas Airways Limited's ("Qantas") motion to dismiss Schenker's complaint, (the "Complaint" or "Compl."), pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion").[1]

PRELIMINARY STATEMENT

This case arises from Qantas' participation in a criminal price fixing conspiracy among various air carriers to fix surcharges imposed on airfreight shipping services. Qantas pled guilty to a criminal violation of the Sherman Act and paid $26.5 million to settle the resulting class action brought against it and its co-conspirators. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 1:06-MD-01775 (JG) (VVP) (E.D.N.Y.) ("*Air Cargo* Class Action"); *see also United States v. Qantas Airways Ltd.*, No. 07-CR-322 (D.D.C. Jan. 14, 2008). Schenker opted out of that settlement and now seeks to recover from Qantas for its injury.

In its Motion, Qantas does not (and cannot) attack the Complaint for failure to state a claim. Nor does it argue that Schenker was not injured by the conspiracy. Rather, Qantas moves to dismiss solely on the basis of the Clayton Act's four year statute of limitations.

Qantas' entire Motion is predicated on the disputed factual contention that Schenker's claim accrued no later than February 15, 2006—the day the press first reported that air cargo carriers, *other than Qantas*, were raided by antitrust enforcers around the world. By running the statute of limitations from this date, Qantas argues that Schenker's Complaint was filed 68 days after the statute of limitations expired. However, Qantas' factual predicate is in fact false. Qantas concedes it was not even under investigation until May 2006—three months after the

[1] The Complaint is attached as Exhibit A to the Declaration of Mary Ellen Hennessy, dated January 30, 2015. "Mov. Br." refers to the Memorandum of Law in Support of Defendant Qantas Airways Limited's Motion to Dismiss Based on the Statute of Limitations, dated January 9, 2015, ECF No. 39-1.

February raids.[2] Qantas also concedes it did not disclose it was being investigated until August 2006—six months after the raids. It is thus no surprise that Qantas was not named in any of the multiple original class action lawsuits brought against numerous other air carriers in February 2006. Indeed, Qantas was not added to the *Air Cargo* Class Action until February 2007, a year after the raids. In short, the central factual contention on which Qantas bases its Motion—the truth of which is not appropriate for resolution on a motion to dismiss—provides no basis for dismissing Schenker's Complaint under Rule 12(b)(6).

Schenker's claim is timely because it did not accrue until at least August 2006—the first date Qantas disclosed that it was under investigation. Six months of the statute ran from Qantas' August 2006 disclosure to February 2007, when Qantas was named as a defendant in the Amended Class Action Complaint. Qantas concedes that the statute was tolled from February 2007 through May 2011, when Schenker opted out of the class settlement. Schenker sued Qantas in August 2014—three years and three months after it opted out. Thus, three years and nine months of the limitations period had run when Schenker filed this action, but the limitations period had three more months to run.

Qantas' Motion should be denied even if its contention that Schenker's claims accrued in February 2006 is credited. First, Qantas fraudulently concealed its involvement in the conspiracy and, given the allegations of the Complaint, Schenker could not have discovered its involvement by February 2006 through reasonable due diligence. The law is clear that when, as

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[2] Even if this Court took the early date of May 2006—the date when Qantas indicates the government began its investigation (*see* Mov. Br. at 11 n.20)—as the date when Schenker's claim began to accrue, Schenker's claim is timely. As Qantas impliedly acknowledges, if Schenker's claim accrued at any point after April 24, 2006, it would be timely. (*See id.* at 1 n.1 (marking April 24, 2006 as four years before Schenker's Complaint was filed, after accounting for tolling during the Class Action)).

here, a conspiracy could not possibly have been discovered, a plaintiff need not allege its own due diligence.

Second, Schenker's claims are timely because the amendment of the Class Action complaint on February 8, 2007—the date on which Qantas concedes tolling began—relates back to the filing of the original complaints on February 17, 2006. Thus, the statute of limitations as to Qantas tolled on February 17, 2006, just as it did for the other defendants in this case.

Third, the statute of limitations has continued to toll to the present day because antitrust claims toll while the U.S. government investigates or prosecutes co-conspirators for the same conspiracy under 15 U.S.C. § 16(i). That rule applies here because there are still open criminal cases against at least five individuals involved in the conspiracy.

Finally, Schenker pleads that the conspiracy continued through the end of 2006, and indeed, alleges overt acts that occurred as late as October 2006. Those allegations permit Schenker to seek, at minimum, damages resulting from overt acts alleged within the statute of limitations period. For all of these reasons, this Court should deny Qantas' Motion.

FACTUAL BACKGROUND

The Parties

Schenker provides logistical and freight forwarding support to its customers that require the transportation of goods within, to, and from the United States. (Compl. ¶ 16.) Qantas provides airfreight shipping services to customers around the world. (*Id.* ¶ 22.) During the relevant time period, Schenker purchased millions of dollars of Qantas' services, and paid the artificially-inflated surcharges at issue in this case. (*Id.* ¶¶ 16, 22.)

The Price-Fixing Conspiracy

Qantas and its co-conspirators (the "Cartel") engaged in a secret and unlawful global conspiracy from late 1999 until at least 2006 to fix, raise, maintain and/or stabilize the prices of airfreight shipping services. (Compl. ¶ 3.) The Cartel concertedly imposed artificially inflated prices and eliminated discounts on flights to, from, and within the United States. (*Id.* ¶ 63.) On February 15, 2006, it was announced that various air carriers, *but not Qantas*, were raided the day before by domestic and foreign antitrust and competition law enforcement authorities investigating air cargo price-fixing agreements. (Mov. Br. at 1.) Press reports referred to the raids, but did not name co-conspirators beyond those that were raided. *See, e.g.*, ECF No. 39-14.

Despite the raids, Qantas and its co-conspirators continued to collude. (Compl. ¶ 141.) For example, in furtherance of the conspiracy, Qantas met with United Airlines to discuss rates on May 1, 2006 (*id.* ¶ 142), instituted artificially inflated price increases that paralleled price increases imposed by other air carriers between May 3 and May 11, 2006 (*id.* ¶ 143), and continued to impose artificially-inflated prices through 2006. (*Id.* ¶ 144.)

Qantas' Successful Efforts to Conceal the Conspiracy

Qantas and its co-conspirators affirmatively, fraudulently and successfully concealed their unlawful, price fixing from Schenker. (*Id.* ¶ 190.) They held secret meetings and privately exchanged pricing and cost information to monitor and enforce their illegal agreements. (*Id.* ¶¶ 69, 70, 85, 159, 163, 195.) They agreed not to publicly reveal the acts they undertook in furtherance of the conspiracy. (*Id.* ¶ 194.) They staggered price changes to mask coordination and give the impression that they were acting unilaterally. (*Id.* ¶ 70.) They publicly distributed so-called "fuel price indexes," but published different numbers to give the impression of

multilateral action where there was none. (*Id.* ¶96.) They publicly announced false and pretextual reasons for the artificially inflated airfreight shipping services. (*Id.* ¶¶ 197, 208.)

Qantas and its co-conspirators' false business justifications for the artificially inflated services conditioned Schenker reasonably to believe that the air cargo industry was competitive and that the prices charged were competitive prices. (*Id.* ¶¶ 198, 199, 204, 208.) Even if Schenker suspected foul play, it would not have been able to uncover the conspiracy because it did not have access to the financial information necessary to uncover the artificially inflated prices.[3] (*Id*. ¶¶ 204, 205.) Publicly available information did not assist Schenker in uncovering the conspiracy, much less the identity of each conspirator. (*Id*. ¶ 209.)

Qantas and its co-conspirators continued to conspire secretly well after the raids in February 2006. (*Id*. ¶ 191.) As a result, Schenker was unaware of Qantas' unlawful activity for the duration of the conspiracy. (*Id*. ¶ 192.) Indeed, as Qantas concedes, it was not publicly identified as a member of the conspiracy until August 2006. (Mov. Br. at 20.)

The Filing of Class Action Lawsuits

In the wake of the government raids on air carriers *other than Qantas*, dozens of antitrust class action lawsuits were filed in the United States in early 2006. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-01775-JG-VVP, ECF No. 1. *None of these lawsuits named Qantas as a defendant*. The various lawsuits were consolidated in this Court and a Consolidated Amended Complaint was filed in the *Air Cargo* Class Action on February 8, 2007. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-01775-JG-VVP, ECF No. 271. After being

[3] In its papers, Qantas refers to the Plea Agreement entered by Schenker in a completely unrelated matter in *United States v. Schenker AG*, No. 10-CR-271 (D.D.C. Dec. 9, 2011), ECF No. 21. (Mov. Br. at 2.) Although Qantas states that the "plea concerned a conspiracy to raise shipping rates," the plea contains no suggestion that Schenker knew of Qantas and its co-conspirators agreement to fix prices for airfreight shipping services. *See id.*

publicly identified in August 2006—six months after the initial raids in February—Qantas was named as a defendant for the first time in February 2007. (*See* Mov. Br. at 3, 20.)

On January 13, 2011, the *Air Cargo* Class Action plaintiffs and Qantas executed a settlement agreement providing that Qantas would pay $26.5 million to settle the case. (Compl. ¶ 188.) On March 14, 2011, Schenker received notice of the settlement and, on May 24, 2011, Schenker excluded itself from the settlement. (*Id.* ¶ 214.)

The Filing of Schenker's Complaint

On August 7, 2014, Schenker filed the Complaint in this case. The Complaint pleads an antitrust conspiracy that is substantially identical to the conspiracy pled in the Consolidated Amended Complaint and seeks treble damages. (*Compare id.* ¶¶ 217–233 *with* First Consol. Amend. Compl. ¶¶ 225–260, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-01775-JG-VVP, ECF No. 271.)

ARGUMENT

In evaluating a motion to dismiss, the Court accepts the factual allegations in the complaint as true, and determines whether they "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard announced by the Supreme Court in *Iqbal* and *Twombly* applies to motions to dismiss based on statutes of limitations. *See, e.g.*, *George v. Strayhorn*, No. 11-CV-3701, 2014 WL 1259613, at *2 (S.D.N.Y. Mar. 24, 2014). "[T]he Court can only grant a motion to dismiss based on statute of limitations grounds if there is no factual question as to whether the alleged violations occurred within the statutory period," *Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 369 (E.D.N.Y. 2012). In addition, the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all

reasonable inferences in favor of the plaintiff. *See Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 44 (2d Cir. 2003); *see also Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007).

Qantas concedes that "Schenker's statute of limitations was tolled . . . from February 8, 2007 until May 24, 2011" —the period between Qantas being named in the *Air Cargo* Class Action Complaint and the date on which Schenker opted out of Qantas' settlement with the class. (*See* Mov. Br. at 6.) Qantas argues nevertheless that Schenker's August 7, 2014 Complaint was 68 days late because the statute of limitations began to run on February 15, 2006—the date of the raids on air carriers other than Qantas—and tolling did not begin until a year later on February 8, 2007. (*See id.* at 6–7.) Qantas' Motion should be denied.

I. QANTAS' MOTION SHOULD BE DENIED BECAUSE IT FRAUDULENTLY CONCEALED THE CONSPIRACY THROUGH AUGUST 2006.

Schenker's claim against Qantas could not have accrued until August 2006 when Qantas was identified as a member of the conspiracy.[4] Before that time, Qantas' involvement in the conspiracy was fraudulently concealed. (Compl. ¶¶ 190-213.)

The Second Circuit recognizes that "fraudulent concealment of the existence of a cause of action" under the antitrust laws tolls the running of the four-year statute of limitations. *Atl. City Elec. Co. v. Gen. Elec. Co.*, 312 F.2d 236, 238 (2d Cir. 1962). To establish fraudulent concealment, Schenker must plead: "(1) that the defendant concealed the existence of the antitrust violation; (2) that plaintiff remained in ignorance of the violation until sometime within

[4] As Qantas notes, the four-year statute of limitations equals 1,461 days. (*See* Mov. Br. at 7, n.17.) Qantas concedes that tolling commenced when class counsel filed the First Consolidated Amended Complaint on February 8, 2007 and continued until Schenker opted out of the class on May 24, 2011. Although 1,171 days passed from the time Schenker opted out of the *Air Cargo* Class Action until the filing of the Complaint, only 175 days elapsed between August 17, 2006 and February 8, 2007, when Qantas concedes that tolling commenced. Accordingly, Schenker filed its Complaint within four years of the accrual of its claims.

the four-year antitrust statute of limitations; and (3) that his continuing ignorance was not the result of a lack of diligence." *Hinds County, Mississippi v. Wachovia Bank, N.A. (Hinds II)*, 700 F. Supp. 2d 378, 399 (S.D.N.Y. 2010); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

"[A] plaintiff need only plead fraudulent concealment, as opposed to affirmatively proving it." *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 (JG) (VVP), 2011 WL 7053807, at *50 (E.D.N.Y. Jan. 4, 2011) (Pohorelsky, Mag.) *adopted* No. 08-CV-42 (JG) (VVP), 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012) (Gleeson, J.). Although fraudulent concealment must be pled with particularity, *Hinds II*, 700 F. Supp. 2d at 387, "the rules only require that the circumstances of fraud be pled with enough particularity to put the party on notice as to the nature of the claim." *In re Vitamins Antitrust Litig.*, No. MISC 99-197 (TFH), 2000 WL 1475705, at *2 (D.D.C. May 9, 2000) (internal quotation and citation omitted); *see also Benchmark Export Servs. v. China Airlines Ltd.*, No. 06-MDL-1775 JG VVP, 2010 WL 10947344, at *19 (E.D.N.Y. Sept. 22, 2010) (Pohorelsky, Mag.) *adopted* No. 10-CV-639 (JG) (VVP) (E.D.N.Y. Nov. 1, 2010) (Gleeson, J.). Schenker has met this burden.

A. This Court Should Not Decide the Issue of Fraudulent Concealment at the Motion to Dismiss Stage.

Courts—including this Court in cases involving the same conspiracy at issue here—have considered the motion to dismiss stage an "inappropriate" time to decide fraudulent concealment claims. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1120 (N.D. Cal. 2008); *Benchmark*, 2010 WL 10947344, at *19 (deciding when freight forwarders had inquiry notice of their claim "is better left to the finder of fact—not this court and not now"); *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 374 (D.N.J. Aug. 9, 2001) (fraudulent concealment "is intimately bound up with the facts of the case").

In *DPWN Holdings (USA), Inc. v. United Air Lines, Inc. (DPWN II)*, 747 F.3d 145 (2d Cir. 2014), the Second Circuit held that a court must consider allegations that contradict a plaintiff's assertion it lacked knowledge of its claim. *Id.* at 152. In remanding, the Second Circuit held that "what aspects of United's alleged price-fixing conduct were known by DHL, or reasonably ascertainable," could be resolved "either on the face of the pleadings, or after discovery." *Id.* at 153. On remand, this Court held it would determine "the question of [plaintiff's] knowledge of its potential claim only after discovery has been conducted." *DPWN Holdings (USA), Inc. v. United Air Lines, Inc. (DPWN III)*, No. 11-CV-564 (JG), 2014 WL 5394950, at *2 (E.D.N.Y. Sept. 16, 2014).

In *Benchmark*, another related air cargo case, Magistrate Pohorelsky, in an opinion adopted by this Court, examined a statute of limitations defense in a case nearly identical to Schenker's and reached the same conclusion: "there are questions of fact that need to be resolved as to whether what the plaintiffs knew and when they knew it would excite the inquiry of a reasonable person." *Benchmark*, 2010 WL 10947344, at *19 (citation and quotation omitted).

This Court should follow its decisions in *DPWN III* and *Benchmark*, deny Qantas' Motion, and resolve the issue only after a full factual record is developed. Indeed, while this Court's decisions in related cases are not technically law of the case, the Court now faces a nearly identical issue with nearly identical allegations. Given the avalanche of supplemental documents Qantas asks this Court to review and the pages of its brief devoted to purely factual arguments, (*see* Mov. Br. at 14-20), this is essentially a summary judgment motion that is not

appropriate for decision now.[5] *See Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 426-430 (2d Cir. 2008).

B. Schenker Pled that Qantas and Its Co-Conspirators Concealed the Conspiracy Through 2006.

In any event, Schenker has met its burden of pleading fraudulent concealment. Concealment is pled with allegations that "the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature as to be self-concealing." *Hendrickson Bros.*, 840 F.2d at 1083. Here, Schenker has pled that Qantas engaged in a self-concealing conspiracy *and* took affirmative steps to further conceal the conspiracy from its victims, including Schenker. As alleged in the Complaint, Qantas and its co-conspirators engaged in secret meetings (Compl. ¶¶ 69, 70, 85, 159, 163, 195), agreed that they would not publicly reveal the acts they undertook in furtherance of the conspiracy (*id.* ¶ 194), staggered pricing changes to mask their price coordination (*id.* ¶ 70), publicly distributed misleading "fuel price indexes," (*id.* ¶ 96), and publicly announced false and pretextual reasons for artificially inflated prices (*id.* ¶¶ 197, 208).

These allegations, all pleaded with particularity, establish affirmative acts of concealment. *See In re Vitamins,* 2000 WL 1475705, at *3 (affirmative concealment allegations that, *inter alia*, "create[d] the illusion of competitive pricing, instruct[ed] members of the conspiracy not to divulge the existence of the conspiracy to any non-participants, [and] the convening of secret meetings"). Moreover, price-fixing conspiracies are, by their nature, self-concealing. *Hinds II*, 700 F. Supp. 2d at 399 ("bid-rigging and price-fixing conspiracies in violation of § 1 are self-concealing"); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181,

[5] For that reason, Schenker opposes Qantas' request that the Court take judicial notice of various extraneous documents. *See* ECF No. 39-2, 39-3, 39-4.

193 (S.D.N.Y. 2000) (plaintiffs are not required to plead defendants' affirmative actions to prevent discovery of price-fixing claim).

Qantas does not deny the fraudulent concealment, it argues instead that the government raids in February 2006 essentially revealed the conspiracy,[6] imposing an obligation on Schenker to investigate its potential claims against Qantas. (Mov. Br. at 10-11.) Qantas makes this argument even though it was *never raided, was not investigated until May and did not disclose that investigation until August 2006, six months after the raids*. (*Id.* at 2, 20.) In effect, Qantas contends that Schenker was obligated to investigate Qantas before the government did. (*See id.* at 11.)

Qantas cites two cases to support its argument, but neither one does. *In re Merrill Lynch Ltd. P'ships. Litig.*, 7 F. Supp. 2d 256 (S.D.N.Y. 1997), did not involve an antitrust claim or a concealed conspiracy. It was a RICO case involving alleged misrepresentations concerning investments where the defendant argued that its offering materials contained statements that should have put the plaintiff on notice to investigate its claim. *Id.* at 259-62, 275. Here, Qantas made no statements announcing its involvement in the conspiracy at all until it disclosed the investigation in August 2006.

Qantas also cites *Benchmark.* (Mov. Br. at 11.) There, Magistrate Pohorelsky stated that a plaintiff's duty to investigate may have been triggered once governments investigated the conspiracy *and* "admissions of liability on the part of many" air carriers had been made. *Benchmark*, 2010 WL 10947344, at *18. As no air carrier admitted liability here until 2007, *Benchmark* can be read to suggest that no duty to investigate was triggered until 2007. (*See*

[6] Qantas incorrectly asserts that Schenker fails to allege any acts of affirmative concealment beyond February 15, 2006. (Mov. Br. at 10.) Qantas and its co-conspirators continued to secretly meet and charge artificially inflated agreed-upon prices for airfreight shipping services through at least October 2006. (*See* Compl. ¶¶ 141-44, 190.)

Compl. ¶ 177 (listing air carrier guilty pleas and dates upon which they were entered).) In any event, *Benchmark* does not support the contention that Schenker had a duty to investigate Qantas in February 2006—three months before the government even started its investigation of Qantas.

C. Schenker Adequately Pleads that It Was Ignorant of the Conspiracy Through 2006.

Qantas also argues that Schenker fails to plead the second element of fraudulent concealment because it does not allege that "it was unaware of its claims until after April 24, 2006, which is four years before it filed its Complaint (after tolling is taken into account)." (Mov. Br. at 12.) In support of its argument, Qantas refers to a Paragraph in the Complaint, which states that "Schenker did not discover and could not have discovered . . . the existence of the conspiracy alleged herein until February 2006 at the earliest." (Compl. ¶ 191.) Qantas argues that this allegation bars Schenker from asserting that it was ignorant of its claims against Qantas beyond February 2006. (Mov. Br. at 12.)

The language of the allegation belies Qantas' argument. The allegation states that the *conspiracy* could not have been identified until February 2006 *at the earliest*. (Compl. ¶ 191.) Nothing in this allegation says that Schenker knew the identities of all the conspirators, or that it was capable of uncovering all of their identities at that time. Indeed, that same Paragraph goes on to state that "the conspiracy continued well after February 2006, as Defendants and other Airfreight Carriers continued to secretly conspire to fix the Surcharges." (*Id.*) Schenker also pled that it was incapable of uncovering the conspiracy due to Qantas and its co-conspirators' secret efforts to conceal it. (*Id.* ¶¶ 204, 205, 209.) As discussed above, those efforts continued throughout 2006. (*See id.* ¶¶ 141–44.) These allegations, taken as a whole, plead ignorance of Schenker's claims against Qantas until well beyond February 2006.

D. Schenker Adequately Pleads that Its Ignorance Was Not Attributable to Its Lack of Due Diligence.

1. Schenker Adequately Pleads Due Diligence.

Qantas further argues that Schenker fails to plead the third element of fraudulent concealment—its own due diligence—with particularity. (*See* Mov. Br. at 8–9.) However, courts within the Second Circuit have held that plaintiffs are not required to allege specific instances of affirmative inquiries when such inquiries would be futile. *See In re Nine West*, 80 F. Supp. 2d at 193 (plaintiff alleged due diligence by pleading that it "could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of the affirmative, deceptive practices and techniques of secrecy employed by Defendants"); *see also United States S.E.C. v. Power*, 525 F. Supp. 2d 415, 426 (S.D.N.Y. 2007) (allegations of affirmative acts of fraudulent concealment "suffices to satisfy the diligence requirement").

Here, as alleged in the Complaint, Qantas and its co-conspirators provided false business justifications for the artificially inflated services that deliberately conditioned Schenker reasonably to believe that the air cargo industry was competitive and that the prices charged were competitive prices. (Compl. ¶¶ 198-99, 204, 208.) Schenker would not have been able to uncover the conspiracy even if it suspected foul play, because it did not have access to the financial information necessary to uncover the artificially inflated prices. (*Id.* ¶¶ 204-05.) These allegations, along with the previously discussed allegations of affirmative concealment, *see supra* at 11–13, adequately plead due diligence. *See Benchmark*, 2010 WL 10947344, at *18 (freight forwarders pled fraudulent concealment despite the fact that "plaintiffs do not assert any specific inquiries they made, but rather that any inquiries would have been futile in any case").

2. Qantas' Reliance on Public Sources Should Be Discounted.

Qantas argues that this Court must consider the "totality of the circumstances" to conclude that Schenker had notice of its claims against Qantas by February 2006. (Mov. Br. at 13-14.) However, this is a 12(b)(6) motion and "[i]nquiry notice may be found as a matter of law only when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct." *Staehr*, 547 F.3d at 427. Here, Qantas spends pages of its Brief citing irrelevant sources that do not provide information about whether a reasonable purchaser could have uncovered a massive and secret price-fixing conspiracy in the industry. Indeed, Qantas asks this Court to examine a factual dispute on the basis of hundreds of pages of evidence submitted with its Motion that would more properly be considered on summary judgment or trial. *See DPWN III*, 2014 WL 5394950, at *3.

Qantas relies in part on the same facts alleged in the *DPWN* complaint, to assert that Schenker had sufficient knowledge to put itself on notice of its claims against Qantas. (*See* Mov. Br. at 13–14; *compare* Compl. ¶¶ 62, 69, 77, 114, 115, 122, 124, 127, 129, 134, 135, 140 *with* Amend. Compl. ¶¶ 38–40, 47, *DPWN Holdings (USA), Inc. v. United Air Lines, Inc*, No. 11-CV-00564 (E.D.N.Y. May 6, 2014), ECF No. 54.) Those allegations relate to the co-conspirators' parallel pricing even after they applied for, but failed to obtain authorization from the Department of Transportation to charge uniform fuel surcharges. (Mov. Br. at 14.) But this Court declined to decide what plaintiff knew when at the motion to dismiss stage in *DPWN III*, and it should do so here as well. 2014 WL 5394950, at *2; *see also Benchmark*, 2010 WL 10947344, at *19 (deciding when a freight forwarder knew of its claim is a determination "better left to the finder of fact—not this court and not now").

Qantas also cites 13 media reports and other public documents not addressed in *DPWN III* to support its claim that Schenker was on notice of its claims. (Mov. Br. at 14–19.) Of those

15 sources, only four discuss the possibility of a conspiracy among members of the air cargo industry at all, and none of them names Qantas as a possible member of the conspiracy. (*See* ECF Nos. 39-5, 39-6, 39-9, 39-14.) Three of the reports discuss the conspiracy in the context of the government raids, but failing to even refer to Qantas, Schenker could not possibly have known that Qantas was a member of the conspiracy.[7] As Qantas' cited authority makes clear, "suggestion of probable claims necessary to trigger inquiry notice *must also be defendant-specific*." *Hinds County, Mississippi v. Wachovia Bank N.A. (Hinds V)*, 885 F. Supp. 2d 617, 631 (S.D.N.Y. 2012) (emphasis added).

Nevertheless, Qantas argues that this case is different because "it became known that the various fuel indexes published and utilized were likely artificial" after the government raids on February 15, 2006. (Mov. Br. at 13.) Despite the inability of dozens of plaintiffs to name Qantas in their complaints after the government raids—and despite the fact that the government itself did not even subpoena Qantas until May 2006—Qantas argues that the raids prompted a duty to investigate that began the running of the statute of limitations. Qantas relies on *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013), to support its position. (Mov. Br. at 13.) In *LIBOR*, the court examined when plaintiffs were on inquiry notice of claims against defendant banks who manipulated LIBOR rates. The LIBOR court explained that "[i]t was a matter of public knowledge which banks were on the USD LIBOR panel . . . and how the final LIBOR fix was determined." *Id.* at 706. As the defendants banks were each on the panel, and press reports suggested that "LIBOR had likely been" manipulated,

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[7] One cited report written in the aftermath of the government raids notes that the conspiracy was "industry-wide." (ECF No. 39-14.) That report alone cannot trigger a duty to investigate every air carrier in the industry including Qantas. *See Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 234 (D. Mass. 2004) (reports about "Wall Street analyst conflicts" generally were insufficient to put plaintiff on inquiry notice).

the court held "to whatever extent plaintiffs need notice of *who* was responsible for their injury, such notice existed." *Id.* at 706-07; *see also Staehr*, 547 F.3d at 429 (finding that media reports of an industry's illegal bid rigging did not place plaintiff on inquiry notice because "they are general articles about structural conflicts in an industry, rather than being specific to the company [defendant]").

Here, the government raids revealed a possible conspiracy with several participants in February 2006, but the fact of Qantas' participation in the conspiracy was not revealed until August 2006 at the earliest. *See Butala v. Agashiwala*, No. 95 CIV 936 JGK, 1997 WL 79845, at *5, *8 (S.D.N.Y. Feb. 24, 1997) (plaintiffs sufficiently alleged fraudulent concealment by alleging "they were unable to discover defendants' role in the fraud" until a time within the limitations period); *Robertson v. Seidman & Seidman*, 609 F.2d 583, 591 (2d Cir. 1979) (although certain facts suggested fraud, "there is nothing that would point conclusively to [defendants]"). For this reason, the government raids did not create a duty to investigate Schenker's claims.

Other reports offered by Qantas demonstrate exactly why Schenker was conditioned to believe that Qantas' artificially-inflated surcharges were legitimate. (Compl. ¶¶ 198, 199, 204, 208.) As Qantas concedes, most of the cited reports merely show that "a common fuel index was used" by many in the air cargo industry. (Mov. Br. at 16.) Indeed, all of the reports pre-dating the government raids indicate that the fuel surcharges imposed by airlines resulted from rises in the cost of oil.[8] For example, a statement by Lufthansa declares that the fuel price index upon

[8] *See, e.g.*, ECF 39-12 (surcharge imposed to "recover the recent increase in fuel costs"); 39-13 (Qantas raised prices because "transport companies . . . pass on the [oil] price hikes"); 39-15 (price increases are "triggered by events outside [the air carriers] control"); 39-18 (airlines imposing higher surcharges "because the price of jet fuel has rocketed").

which many airlines changed their prices was "based on the average price of aviation fuel . . . ." (ECF No. 39-24.) These reports show that the air carriers publicly provided the pretextual justification that the increased charges related to the recovery of fuel costs. (Compl. ¶ 64.)

Qantas urges this Court to view these facts "objectively in total." (Mov. Br. at 19.) However, when viewed in total, these facts suggest that some, but not all, air carriers were widely believed to have increased prices to recover fuel costs. When government raids occurred, it may have appeared possible that some air carriers participated in an agreement to manipulate the prices of airfreight shipping services, but it would not have been clear which ones – *especially since Qantas had not been raided*. Moreover, Schenker still had no ability to determine which air carriers were responsible for manipulating the fuel price index. As pled in the Complaint, Schenker had no basis or information on which to do so. *See Hinds V*, 885 F. Supp. 2d at 630 ("These reports—which do not mention the GE Defendants and appear to discuss broadly an ongoing and general investigation into the municipal bonds industry—are similarly simply too meager to hold that Class Plaintiffs should have recognized in them claims against the GE Defendants.").

II. QANTAS' MOTION SHOULD BE DENIED BECAUSE SCHENKER'S CLAIMS ARE TOLLED UNDER THE RELATION BACK DOCTRINE FROM FEBRUARY 17, 2006 THROUGH MAY 24, 2011.

Qantas concedes that Schenker benefits from tolling from February 8, 2007 through May 24, 2011, pursuant to the doctrine first enunciated in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974): "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." Here, however, the filing of the Consolidated Amended Complaint in the *Air Cargo* Class Action, adding Qantas as a defendant on February 8, 2007, relates back to the February 2006 filing of the initial class action complaints under Fed. R. Civ. P. 15(c). *See Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 548

(2010). Accordingly, the tolling period in this case spans the period from February 17, 2006, when the first class action complaints were filed, to May 24, 2011, when Schenker elected to opt out of the Qantas settlement. (*See supra* at 2.) Thus, even if Qantas did not fraudulently conceal its claims from Schenker past February 15, 2006, Schenker's claims are timely.

Federal Rule of Civil Procedure 15(c) provides that an amended complaint relates back to the original complaint when:

> [T]he amendment changes the party or the naming of the party against whom a claim is asserted . . . and if . . . the party to be brought in by amendment . . . received such notice of the action that it will not be prejudiced in defending on the merits; and . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The Rule further provides that the added party must have received notice of the claim "within the period provided by Rule 4(m) for serving a summons or complaint"—that is, 120 days from the complaint's filing. Fed. R. Civ. P. 15(c)(3); Fed. R. Civ. P. 4(m); *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1076 (2d Cir. 1993) (a "complaint relates back to the time of the original if the new party was aware of the action within 120 days of the filing of the original complaint").

Here, it cannot be argued that Qantas did not receive notice of the initially filed actions within 120 days of the complaints filed on February 17, 2006. Qantas concedes that the government commenced an investigation about Qantas' involvement in the conspiracy in May 2006—well within 120 days of the earlier filed complaints. (Mov. Br. at 11 n.20, 20 n.45). Qantas also knew or should have known that it should have been named as a defendant in a case against so many of its co-conspirators seeking relief under the antitrust laws. Given its position on fraudulent concealment, it is impossible for it to credibly claim that it did not.

The Supreme Court has made clear that a plaintiff may take advantage of the relation back doctrine when adding a new defendant to the case even when the "plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or

role in the events giving rise to the claim at issue." *Krupski*, 560 U.S. at 549. Since *Krupski*, courts within the Second Circuit have held that a plaintiff may amend his complaint and take advantage of the relation back doctrine to add a new defendant when that new defendant should have known that it would have been named but for an error, including the plaintiff's lack of knowledge concerning the new defendant's identity and liability.[9] *See, e.g.*, *Abdell v. New York*, 759 F. Supp. 2d 450, 457 (S.D.N.Y. 2010) ("[A] mistake 'concerning the proper party's identity' under Rule 15(c) includes lack of knowledge regarding the conduct or liability of that party"); *S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, No. 10-CIV-7547 KMW RLE, 2013 WL 1234937, at *5 (S.D.N.Y. Mar. 26, 2013) *reconsideration den.*, 2013 WL 5677045 (S.D.N.Y. Oct. 18, 2013) (Rule 15(c) satisfied where plaintiff lacked knowledge regarding the conduct or liability of the newly added party); *Roe v. Johnson*, No. 07-CV-2143 RJD RER, 2011 WL 8189861, at *4 (E.D.N.Y. Aug. 12, 2011), *adopted by* No. 07-CV-2143 RJD RER, 2012 WL

[9] Qantas may rely on *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466 (2d Cir. 1995) *modified* 74 F.3d 1366 (2d Cir. 1996), a case involving the late identification of "John Doe" defendants to argue "the requirements of Rule 15(c) for relation back are not met" where "the new [defendants] were added not to correct a mistake but to correct a lack of knowledge." *Id.* at 470. The Second Circuit has continued to apply *Barrow* in John Doe cases with little if any discussion of *Krupski*. See *Hogan v. Fischer,* 738 F.3d 509, 517-518 (2d Cir. 2013). To the extent other courts within the circuit continue to apply *Barrow* the cases generally involve John Doe situations. To the extent a few district courts have applied *Barrow* in non-John Doe situations, we respectively submit they are contrary to *Krupski*. *See S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc.*, No. 10 CIV. 7547 KMW RLE, 2013 WL 5677045, at *4 (S.D.N.Y. Oct. 18, 2013) ("*Barrow* may still control the amendment and relation back of John Doe pleadings after *Krupski*, but that is not at issue in this case. This case turns instead on Plaintiffs' alleged misunderstanding of Defendant's role 'in the 'conduct, transaction, or occurrence' giving rise to [their] claim,' which *Krupski* explicitly stated is a 'mistake concerning the proper party's identity' under Rule 15(c)."); *Roland v. McMonagle*, No. 12 CIV. 6331 JPO, 2014 WL 2861433, at *4 (S.D.N.Y. June 24, 2014) ("to the extent that *Barrow* defines 'mistake' in terms of what the plaintiff—rather than the prospective defendant—knew or should have known, it has been abrogated by *Krupski*").

2575340 (E.D.N.Y. Jul. 3, 2012) (same, relying on *Krupski*). Accordingly, Schenker's claim against Qantas relates back to February 17, 2006. It is timely.

III. QANTAS' MOTION SHOULD BE DENIED BECAUSE SCHENKER'S CLAIMS ARE TOLLED UNDER 15 U.S.C. § 16(i) TO THE PRESENT DAY.

Alternatively, Schenker's claim is timely filed because its claim against Qantas had been tolled, and indeed, continues to toll under 15 U.S.C. § 16(i). As Qantas concedes, "[t]hat statute suspends the statute of limitations until one year after the pendency of a civil or criminal investigation by the United States for a civil case based on the same underlying facts as in the government action." (Mov. Br. at 7 n.18.) Qantas wrongly argues, however, that "the U.S. obtained its last guilty plea in a matter related to Schenker's Complaint on June 24, 2011, from EVA Airways." (*Id.*) In fact, criminal proceedings are still pending against three officers of the Air France Defendants, who were initially indicted in September 2010 and April 2011. (Compl. ¶ 177; *see* Hennessy Decl. Ex. B, *United States v. Boudier*, No. 1:11-cr-00308 (N.D. Ill.); Hennessy Decl. Ex. C, *United States v Ullings*, No. 1:10-cr-00406 (N.D. Ga.).) Similarly, cases made against certain Japan Airlines and Nippon Cargo former officers are not closed. (Compl. ¶ 177; *see* Hennessy Decl. Ex. D, *United States v. Kunugi*, No. 1:10-cr-00478-UNA-3 (N.D. Ga.).) Although these officers are fugitives, tolling under Section 16(i) still applies. Indeed, under Section 16(i), tolling continues until the last related criminal proceeding is closed. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2014 WL 1091589, at *12 (N.D. Cal. Mar. 13, 2014); *see also Benchmark*, 2010 WL 10947344, at *20-*24.

IV. QANTAS' MOTION SHOULD BE DENIED BECAUSE IT ENGAGED IN A CONTINUING CONSPIRACY THAT EXTENDED THROUGH 2006.

"In the context of a continuing conspiracy to violate the antitrust laws . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the

commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). "Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy . . . each overt act that is part of the violation and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

Qantas argues that Schenker "has not adequately or plausibly alleged a new overt act beyond" the last date that could timely serve as the basis of its August 7, 2014 Complaint. (Mov. Br. at 21.) Qantas is wrong. Schenker alleges that "the alignment of the Fuel Surcharges [a method of the anticompetitive price-fixing] imposed by Defendants lasted well beyond February 2006" (Compl. ¶ 141), and describes a May 1, 2006 meeting between Qantas and United Airlines employees (*id.* ¶ 142), Qantas' imposition of artificially inflated price increases that paralleled price increases imposed by other air carriers between May 3 and May 11, 2006 (*id.* ¶ 143), and the continued charging of artificially-inflated prices throughout the duration of 2006 (*id.* ¶ 144). On these bases, Schenker has pled acts extending through October 2006 that contain both elements of overt acts: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff. *Rite Aid Corp. v. American Express Travel Related Servs.*, 708 F. Supp. 2d 257, 268 (E.D.N.Y. 2010) (quotation omitted).

First, Qantas' meetings and pricing in 2006 do not constitute mere affirmations of an initial act. As a matter of law, the meetings alone constitute an overt act under the continuing violation doctrine. *See Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) ("The typical antitrust continuing violation occurs in a price-fixing

conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement."); *see also In re Magnetic Audiotape Antitrust Litig.*, No. 99-CIV-1580 (LMM), 2002 WL 975678, at *3 (S.D.N.Y. May 9, 2002) (allegations that defendants "[m]et on a regular basis to coordinate pricing" are overt acts under the continuing violation doctrine). Moreover, as the Supreme Court has indicated, "each sale to the plaintiff" pursuant to a price-fixing conspiracy constitutes an overt act. *Klehr*, 521 U.S. at 189 ("each sale to the plaintiff" is an "overt act"); *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) ("each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act."). Here, Schenker alleges that it purchased artificially inflated airfreight shipping services through October 2006. (Compl. ¶ 144.)

Second, Schenker plainly incurred new and distinct injuries each time Defendants charged a fixed price. *See, e.g.*, *Hinds County, Miss. V. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 520 (S.D.N.Y. 2009) (claims "based upon events" alleged within limitations period survive a motion to dismiss). In *Benchmark,* Magistrate Pohorelsky, in an opinion adopted by this Court, held that the continuing violation doctrine is applicable through the date upon which it is alleged that the conspiracy ended (in that case September 11, 2006). *Benchmark*, 2010 WL 10947344, at *14. The Court explained that, "[s]ince the object of the conspiracy to provide airfreight services at inflated, fixed prices, that the defendants continued to sell such price-fixed services to the plaintiffs and other purchasers is a rational inference to be drawn." *Id.* As a result, the Court held that the plaintiffs continued to purchase shipping services until September 11, 2006. *Id.* Accounting for the four-year statute of limitations, the Court concluded that at "any point before September 11, 2010," the complaint would have been timely. *Id.*; *see also Precision Assocs.*, 2011 WL 7053807, at *47–48.

Qantas ignores this authority, including prior holdings in related cases, and instead argues that its own 2006 acts do not constitute overt acts for six reasons, none of which are availing. (*See* Mov. Br. at 22-23.) Qantas first argues that "the Complaint does not allege that United Airlines . . . was a member of the air cargo surcharge conspiracy or cartel." (*Id.* at 22.) The Complaint's allegations, however, clearly demonstrate that United was a member of the conspiracy. (*See, e.g.*, Compl. ¶ 89 (referring to an e-mail authored by a United employee indicating its participation in the conspiracy); *id.* ¶ 143 (alleging United's parallel price increase); *id.* ¶ 165 (alleging that United was a member of the Star Alliance, which met to fix prices of airfreight shipping services); *id.* ¶ 67 n.33 (referring to United as a "member[ ] of the Cartel").)[10]

Citing *Benchmark*, Qantas next argues that "allegations of parallel pricing, without more, are not sufficient to allege a new overt act . . ." (Mov. Br. at 22.) Qantas misreads *Benchmark*. While Magistrate Pohorelsky wrote in *Benchmark* that "parallel conduct with only a bare assertion of conspiracy does not give rise to a plausible *claim* under the Sherman Act," he ultimately found, as discussed above, (*see supra* at 22), that parallel conduct—by charging agreed-upon, fixed prices—was an *overt act* in furtherance of the conspiracy. *See Benchmark*, 2010 WL 10947344, at *6, *14 (emphasis added).

Qantas then contends that the meeting between Qantas and United "does not plausibly plead an antitrust violation" because there is no allegation that the two air carriers reached agreement at that meeting. (Mov. Br. at 22.) Again, Qantas confuses the pleading requirements for finding a cause of action with those of finding an overt act for continuing violation purposes.

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[10] Qantas cites to Paragraph 12 of the Complaint to argue that Schenker did not name United as a co-conspirator. (Mov. Br. at 22.) That Paragraph, however, defines the "Cartel" and names some of Qantas' co-conspirators, but expressly prefaces the list with "including but not limited to." (*See* Compl. ¶ 12.)

The law is clear that an allegation of a meeting in furtherance of an earlier pleaded conspiracy is an overt act, even if no agreement was reached. In *In re Magnetic*, the court held that an allegation of a meeting, in conjunction with allegations that parties regularly met to coordinate pricing, is sufficient to allege an overt act. 2002 WL 975678, at *3. Here, both allegations are made. (*See* Compl. ¶¶ 69, 142.)

Qantas also argues that the meeting with United on May 1, 2006 related solely to lawful "prorates" and cite to a document referred to support its position. (Mov. Br. at 23, ECF No. 39-25; *see* Compl. ¶ 142.) That document is an expense statement of the Qantas executive who attended the meeting, and it merely establishes that the meeting occurred. (*Id.*) While the expense report states that the purpose of the meeting was to discuss "prorates," it is reasonable to infer from the Complaint that price-fixing was also discussed, given the parallel and coordinated price increases to the price of airfreight shipping services that occurred only days later. (*Id.* ¶ 143.) At a minimum, questions such as these confirm that these issues are best left addressed at the summary judgment or trial stage of this litigation.

Finally, Qantas argues that prices set in accordance with a pre-existing agreement is not a new predicate act. To support its position, Qantas cites *In re Ciprofloxacin Hydrochloride*, 261 F. Supp. 2d 188 (E.D.N.Y. 2003), but that case did not concern a price-fixing conspiracy, as this one does. Where, as here, a price-fixing conspiracy is alleged, the Supreme Court has stated that "each sale to the plaintiff" constitutes a new overt act. *Klehr*, 521 U.S. at 189. As Qantas and its co-conspirators continued to act in furtherance of the conspiracy until at least October 2006, Schenker's filing of its Complaint on August 7, 2014 is timely.

CONCLUSION

For the reasons set forth above, Qantas' motion to dismiss should be denied in its entirety.

Dated: January 30, 2015

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