UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

Upon the Consolidated Amended Complaint, the accompanying Declaration of Katrina M. Robson, executed on May 11, 2016, and exhibits thereto, and all pleadings and proceedings herein, defendants hereby move this Court for an order pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6) dismissing plaintiffs' Consolidated Amended Complaint for all the reasons set forth in the accompanying Memorandum of Points and Authorities in Support of defendants' Motion to Dismiss the Consolidated Amended Complaint.

Dated: May 11, 2016

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

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GLOSSARY

American	American Airlines, Inc. and American Airlines Group Inc.
ATPCO	Airline Tariff Publishing Company
CAC	Consolidated Amended Complaint
Delta	Delta Air Lines, Inc.
DOJ	Department of Justice
IATA	International Air Transport Association
OTA	Online Travel Agent
Southwest	Southwest Airlines Co.
United	United Continental Holdings, Inc. and United Airlines, Inc.

INTRODUCTION

If ever there was a "toss it all in" complaint, this is it: seventy-plus pages of conclusory legal assertions, selective recitation of defendants' public statements, letters from politicians, theoretical musings about shared ownership, allegations regarding unrelated litigation involving non-defendants, and every other gripe plaintiffs can find about the airline industry. The only thing missing from the complaint is precisely what plaintiffs need to state a claim: factual allegations of a plausible price-fixing conspiracy.

Indeed, the allegations in the complaint suffer from flaws so fundamental as to make the entire alleged scheme implausible. Plaintiffs allege a conspiracy to "fix, raise, maintain, and/or stabilize prices for air passenger transportation services" that was purportedly accomplished without the public or private utterance of a single statement by any defendant about prices. Instead, plaintiffs allege that defendants increased prices (by some undetermined amount which varied from route to route) on some undetermined subset of the tens of thousands of routes they flew by conspiring to "reduce capacity." Plaintiffs offer no allegations of a direct agreement to reduce capacity. They instead attempt to infer an agreement from general statements by airline executives to investors and stock analysts that they planned to exercise "capacity discipline," a vague phrase that communicates nothing more than management's intention to act responsibly. Tellingly, plaintiffs do not ascribe any additional content to that phrase; there is no meaningful practical information about the terms of any supposed agreement, such as the amount by which capacity was to be "reduced," on which of the thousands of routes and tens of thousands of daily flights throughout the United States capacity would be restrained, or how and in what amount prices would increase as a result of capacity changes.

The complaint similarly contains no allegations that defendants engaged in any parallel capacity reduction at any level—local or system wide. There is a reason there are no such allegations. As plaintiffs' own sources repeatedly show, there was no parallel reduction of capacity and no parallel pattern of capacity changes among the defendants. The airlines acted in different ways at different times with respect to capacity.

In the absence of allegations of an actual agreement or any parallel capacity decisions, plaintiffs' remaining allegations are irrelevant, but they fail on their own terms in any event. The complaint itself shows that defendants' public statements were made to inform and to reassure investors. Invested capital being critical to this and many other industries, such conduct is plainly legitimate. And plaintiffs' other allegations—the pendency of a DOJ investigation, letters from Congressional representatives expressing displeasure with the airlines, and a number of practices with regard to travel agents and foreign carriers, among other things—are not adequate substitutes for the factual support required by *Twombly* and *Iqbal*.

The flaws in plaintiffs' pleadings are so serious that they infect even their standing to bring the claims in the complaint. Plaintiffs allege that capacity was reduced on certain routes (not identified in the complaint), but not on all routes operated by defendants. Plaintiffs also allege that prices were increased on certain routes (again not identified in the complaint), but not on all routes operated by defendants. Yet there is no allegation that the routes on which prices purportedly rose were the same as the routes on which capacity was allegedly reduced. And there are no allegations that plaintiffs purchased tickets to fly on the affected routes. General and conclusory allegations that plaintiffs purchased airline tickets from defendants during the putative class period are insufficient to establish injury-in-fact.

Because plaintiffs fall far short of pleading a price-fixing conspiracy, defendants respectfully request that the Court dismiss the Consolidated Amended Complaint.

BACKGROUND

Plaintiffs are individuals and organizations that allegedly purchased tickets for travel on defendants' airlines between July 1, 2011, and the present. CAC ¶¶ 11-22, 142. Defendants American, Delta, Southwest, and United are the four largest commercial air passenger carriers in the United States, but have different business models and route structures. *Id.* ¶ 1.[1] Plaintiffs have not named as defendants any of the other eight mainline airlines or the approximately eighty regional airlines operating in the United States.

Plaintiffs allege that the four defendants conspired "to fix, raise, maintain, and/or stabilize prices for air passenger transportation services within the United States . . . by, inter alia, colluding to limit capacity on their respective airlines." CAC ¶ 1. Plaintiffs concede that until 2009 the air transportation industry was highly competitive, with "recurring price wars over domestic air passenger fares, constant increases in airline capacity (as measured by available seat miles), and vigorous price competition." *Id.* ¶¶ 84-85. Plaintiffs also concede that during that

[1] For example, Southwest is a low cost carrier and operates a point-to-point rather than a hub-and-spoke route structure. *See* Ex. A, Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers* 12, Am. Antitrust Inst. (Nov. 21, 2013) (cited at CAC ¶ 37 n.5) (referring to American, United, and Delta as "hub-and-spoke" airlines); Ex. B, Michael D. Wittman, *The Effects of Capacity Discipline on Smaller U.S. Airports: Trends in Service, Connectivity, and Fares* 27 (May 1, 2014) ("Wittman Article") (cited at CAC ¶ 37 n.6) (describing Southwest as a "low-cost carrier"); Ex. C, *United States v. US Airways Grp.*, No. 13-1236, Compl., Dkt. 1 ¶ 47 (D.D.C. Aug. 13, 2013) ("AA Merger Compl.") (cited at CAC ¶ 38 n.7) ("Southwest, the only major, non-network airline, and other smaller carriers have networks and business models that differ significantly from the legacy airlines."); *United States v. US Airways Grp.*, No. 13-1236, Dkt. 148 at 5 (D.D.C. Nov. 12, 2013) (describing how Southwest and other low cost carriers "tend to focus more heavily on lower fares and other value propositions."). All cites to "Ex. __" herein refer to exhibits to the concurrently filed Declaration of Katrina M. Robson.

period of intense competition, and at least since 2001, airlines were "managing capacity carefully" in an effort to achieve profitability. *Id.* ¶ 86.

According to plaintiffs, after "the economic crash of 2008," everything changed. *Id.* ¶ 87. Unidentified "members of the industry became very receptive to a message of 'capacity discipline.'" *Id.* Plaintiffs quote speeches and comments by defendants' executives that use the phrase "capacity discipline"—defined by plaintiffs as the "reduction or relative stabilization of airline capacity"—without alleging any facts that the speakers intended that same meaning. *Id.* ¶¶ 3, 87. Plaintiffs contend in particular that "[w]hen the economy improved in 2009 and jet fuel prices declined precipitously, the question arose whether the industry would return to its former ways of adding airline capacity and decreasing fares." *Id.* ¶ 87. They allege that at some unspecified time in the first quarter of 2009, "members of the industry made a conscious, joint decision not to do so." *Id.*[2] That decision purportedly took the form of an agreement among unspecified airline decision-makers to engage in "[c]onsensual capacity reduction." *Id.* ¶¶ 87-88.

The complaint, however, contains no direct allegations of any agreement. Plaintiffs do not allege a single communication or meeting solely among airline executives discussing either prices or capacity in any way. The seventy-plus page complaint contains no allegations regarding the formation, object, or operation of the purported capacity-reduction agreement through which defendants were to increase prices. It instead focuses on alleged "signaling" based on public statements by airline executives to shareholders and investor analysts about their respective company's investments in capacity as a general matter. Plaintiffs do not allege that each airline's public communications with shareholders were in and of themselves improper or lacking in legitimate business purpose. Instead, plaintiffs allege that these otherwise legitimate,

[2] Plaintiffs limit their damages to the period between July 1, 2011, and the present. *Id.* ¶ 142.

rational communications were also intended to "assure" other airlines regarding capacity investments. *Id*. ¶¶ 88-106, 109-10.

Also absent from the complaint is a single allegation of parallel action among defendants with regard to capacity. Thus, although plaintiffs allege that defendants agreed to "reduce airline capacity" (*id.* ¶ 65), they advance no facts showing that defendants actually did so, let alone how they did it, at what time, or on which routes. To the contrary, the only factual allegations in the complaint pertaining to individual defendants' capacity decisions demonstrate non-parallel strategies. Some defendants actually increased capacity—thereby contradicting plaintiffs' conclusory allegations of collusive capacity reductions.

Lacking facts to support an alleged capacity-reduction conspiracy, plaintiffs advance a series of allegations about the airline industry being "conducive to coordinated behavior." *Id*. ¶¶ 33-62. Plaintiffs point to industry concentration resulting from recent airline mergers (*id.* ¶¶ 34-40), high barriers to entry based on "government regulations" (*id.* ¶ 47), transparent pricing (*id.* ¶¶ 48-56), and common shareholders (*id.* ¶¶ 41-46). Plaintiffs also cite the involvement by some—but not all—defendants in trade associations as "opportunities for the Defendants' executives to meet face to face and conspire." *Id*. ¶ 114. And plaintiffs point to an ongoing DOJ investigation, although there is no claim that the DOJ has taken any action as a result of that investigation. *Id*. ¶¶ 6, 126-29. Finally, plaintiffs contend that defendants limited the ability of consumers to compare airfares on online travel agent websites and petitioned regulators to prevent certain foreign airlines from flying international routes to the United States, both of which purportedly "facilitated" the capacity-reduction cartel in ways that plaintiffs do not explain. *Id*. ¶¶ 3, 135-41. Plaintiffs do not assert that these allegations have anything to do with the alleged capacity conspiracy, but instead contend that they provide "context" for their claims.

None of these allegations turn an otherwise conclusory claim of conspiracy into one that passes *Twombly* and *Iqbal* muster.

ARGUMENT

I. LEGAL STANDARD

A complaint must contain sufficient factual matter that, if accepted as true, states a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs must therefore plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010). Conclusory or implausible assertions will not suffice. Nor will legal conclusions masquerading as facts. *Iqbal*, 556 U.S. at 678; *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015); *In re Interbank*, 629 F.3d at 218. These pleading requirements apply to each element of a plaintiff's claim. *Iqbal*, 556 U.S. at 680-84.

Plaintiffs suing under Section 1 of the Sherman Act must establish that the challenged conduct stems from an agreement among the defendants. *Twombly*, 550 U.S. at 553. Accordingly, they must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Id*. at 556-57. A "conclusory allegation of agreement at some unidentified point," as well as facts that create only a "suspicion" or "possibility" of agreement, are not sufficient. *Id*. at 554-55, 557. The complaint must plead facts, such as the "time, place, or person involved in the alleged conspiracies," that give notice regarding the agreement and its substance. *Id*. at 558, 565 n.10; *see Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 114 (D.D.C. 2010) (dismissing civil conspiracy claims for failure to advance "factual support" of "existence of an agreement").

Plaintiffs cannot avoid this obligation by pointing to parallel behavior that is as consistent with a defendant's independent self-interest as it is with conspiracy. *Twombly*, 550 U.S. at 554; *In re Musical Instruments*, 798 F.3d at 1189. "[F]urther factual enhancement[s]" must be alleged such that the complaint plausibly suggests that the parallel conduct, if any, was the product of a conspiratorial agreement rather than similar but unilateral reactions to market conditions or the result of independent business judgment. *Twombly*, 550 U.S. at 546, 554, 560; *see In re Musical Instruments*, 798 F.3d at 1189, 1193-94; *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136-38 (2d Cir. 2013); *McManus v. District of Columbia*, 530 F. Supp. 2d 46, 74-75 (D.D.C. 2007) (Kollar-Kotelly, J.) (dismissing conspiracy claims for failure to advance factual allegations of a plausible "meeting of the minds").

Factual allegations are necessary at the pleading stage because antitrust litigation is unusually costly and burdensome. "It is no answer to say" that meritless claims can be weeded out in the discovery process because "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. *Twombly*, 550 U.S. at 558-59 (discussing "massive factual controvers[ies]" and "unusually high cost of discovery" in antitrust cases); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (unsupported and otherwise "mistaken inferences" of conspiracy can "chill the very conduct the antitrust laws are designed to protect"); *Kendall v. Visa U.S.A., Inc.*, 518 F. 3d 1042, 1047 (9th Cir. 2008) ("[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."). Rule 8 of the Federal Rules of Civil Procedure "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

II. PLAINTIFFS DO NOT ALLEGE THE BASIC ELEMENTS OF CONSPIRACY

Plaintiffs generally have two ways to properly plead a plausible conspiracy. First, they may advance "direct allegation[s]" that provide "details" regarding "who conspired, at what time, to do what" such that the "circumstances, occurrences, and events giving rise to the claim" are clear. *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 16-17 (D.C. Cir. 2008) (citing *Twombly*, 550 U.S. at 555 n.3 & 565 n.10) (quotations omitted). Second, "[t]o the extent direct allegations are missing, a complaint must contain inferential allegations" that suggest parallel conduct by the defendants was the product of an illicit agreement. *Id*. (citing *Twombly*, 550 U.S. 556-57, 566, 580) (quotations omitted); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 926 F. Supp. 2d 36, 46-47 (D.D.C. 2013). Plaintiffs fail in both respects. They advance only conclusory allegations and formulaic recitations that defendants agreed to "reduce capacity." And they do not allege any parallel behavior on capacity.

A. Plaintiffs Do Not Advance Direct Allegations of an Agreement

Plaintiffs fail to advance adequate "direct allegations" describing the formation, objective, or terms of the purported agreement. *Fame Jeans Inc.*, 525 F.3d at 17 (citing *Twombly*, 550 U.S. at 565 n.10). When a complaint "furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place," defendants in the "§ 1 context [] have little idea where to begin" when trying to respond to the complaint. *Twombly*, 50 U.S. at 565 n.10. "Without basic factual information about the alleged conspiratorial agreement"—including "how the alleged agreement came about, the basic terms of the agreement itself, or how the defendants used the agreement"—"plaintiffs' allegations are not 'enough to raise a right to relief above the speculative level'" or "to notify defendants of the nature of plaintiffs' claim." *Oxbow*, 926 F. Supp. 2d at 47 (quoting *Twombly*, 550 U.S. at 555).

Plaintiffs' allegations defining the purported agreement—collected here in their entirety—are so vague and conclusory as to be meaningless:

- "[T]he four largest commercial air passenger carriers in the United States . . . [conspired] to fix, raise, maintain, and/or stabilize prices for air passenger transportation services . . . by, *inter alia*, colluding to limit capacity on their respective airlines." CAC ¶ 1.
- "[Each defendant] engaged in an illegal price-fixing conspiracy and agreement to limit capacity." *Id.* ¶ 10.
- "[T]his pattern of increased airfares . . . was instead the result of collusive action by [defendants] to increase or stabilize airfares by, *inter alia*, an agreement to reduce airline capacity." *Id.* ¶ 65.
- "[T]he members of the industry made a conscious, joint decision not to" return to their "former ways of adding airline capacity and decreasing fares." *Id.* ¶ 87.
- "Defendants recognized that there had to be joint discipline and assured each other that capacity discipline would be maintained." *Id.*
- "[E]ach of the Defendants has repeatedly assured the others of its commitment to continued 'capacity discipline' and has emphasized repeatedly that the 'industry'—by which they mean the Defendants—have adopted this joint objective." *Id.* ¶ 112.
- "Defendants and their co-conspirators agreed to, and did in fact, restrain trade or commerce by fixing, raising, maintaining, and/or stabilizing at artificial and non-competitive levels the prices of air passenger transportation services by, *inter alia*, collusively reducing capacity." *Id.* ¶ 153.

No matter how many times plaintiffs repeat the words "collusion," "conspiracy," and "agreement," these are still bald conclusions and are "not entitled to the assumption of truth."

Iqbal, 556 U.S. at 679-80; *see In re Musical Instruments*, 798 F.3d at 1194 n.6 ("Conspiracy is a legal conclusion."); *Citigroup*, 709 F.3d at 135-36 (existence of an "agreement" is a legal conclusion). Plaintiffs offer nothing else.

No Factual Allegations Regarding Formation of the Purported Agreement. Plaintiffs allege that "the conspiracy commenced in the first quarter of 2009" after "members of the industry made a conscious, joint decision" to limit capacity. CAC ¶¶ 1, 87. Collective terms like "defendants" or "members of the industry," are too general to inform the individual defendants how, when, or through whom they purportedly agreed to conspire: "Conclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and disruption (even without ultimate liability) that are so great in antitrust (and other) cases." *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp.2d 709, 720 (E.D. Pa. 2011) (collecting cases) (dismissing in part); *see In re Zinc Antitrust Litig.*, __F. Supp. 3d__, 2016 WL 93864, at *31-32 (S.D.N.Y. Jan. 7, 2016) ("Mere generalizations as to any particular defendant—or even defendants as a group—are insufficient.").[3] Allegations that the purported conspiracy "commenced" at some unspecified time in a particular quarter similarly are too vague to survive dismissal. *Twombly*, 550 U.S. at 565 n.10 (allegations of a seven-year conspiracy "[b]eginning at least as early as February 6, 1996, and continuing to the present" deemed inadequate because they lacked facts regarding the "specific time, place, or person involved" in the underlying agreement).

[3] Plaintiffs' failure to include specific allegations about each defendant is particularly telling because of the different circumstances of each defendant during the alleged conspiracy period. American went through bankruptcy and merged with US Airways in the middle of the purported class period; United and Delta were completing their mergers at the start of the period; and Southwest is well known as a maverick low cost carrier. *See* CAC ¶ 36. To state a plausible claim, plaintiffs must do more than allege the conclusion that these differently-situated defendants conspired.

No Factual Allegations Regarding the Object of the Conspiracy. Plaintiffs must allege sufficient facts to "define the object of the horizontal agreement" such that it is possible to answer "'precisely (1) who was in agreement with whom, and (2) about what?'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 339 (3d Cir. 2010) (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1409 (2d ed. 2003)) (affirming dismissal in part).

Plaintiffs' generalized claim—that defendants fixed "prices for air passenger transportation services within the United States" by agreeing "to limit capacity on their respective airlines" (CAC ¶ 1)—answers none of those questions. Basic information is missing, including identification of the purportedly "restricted" product. No one buys something called "air passenger transportation services within the United States." As the DOJ explained in its complaint challenging the merger between American Airlines and US Airways—a document that plaintiffs selectively quote[4]— passengers "seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations." Ex. C, AA Merger Compl. ¶ 26. A "passenger would never choose a flight from San Francisco to Newark as an alternative to a flight from Seattle to Miami, regardless of price." *Malaney v. UAL Corp.*, No. C 10-02858, 2011 WL 6845773, at *4 (N.D. Cal. Dec. 29, 2011) (dismissing claims and rejecting the viability of a "national market for air transportation"). Consequently, prices are "customarily set [] on a city pair basis" and airlines compete in thousands of different city-pair markets. Ex. C, AA Merger Compl. ¶¶ 26-28. Plaintiffs do not identify which of these products—i.e., which of these

[4] On a motion to dismiss, the Court can consider omitted portions of documents, reports, and other information cited in the complaint. *Twombly*, 550 U.S. at 568 n.13 ("[T]he District Court was entitled to take notice of the full contents of the published articles referenced in the complaint."); *Mouzon v. Radiancy, Inc.*, 85 F. Supp. 3d 361, 369 (D.D.C. 2015) (Kollar-Kotelly, J.) (court can consider "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." (quotations omitted)).

routes—were subject to the purported conspiracy. Nor, as discussed below, do they specify any agreed-upon capacity level or explain how any such capacity restrictions could possibly have affected fares on routes where the airports are subject to regulatory restrictions (such as takeoff and landing slots) or where competing low cost and ultra-low cost carriers were adding capacity. It is not enough to state that defendants conspired to restrain "capacity" without alleging a single route that was subject to any purported conspiracy. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 947-48 (5th Cir. 2011) (affirming dismissal because allegations that defendants restricted "operating capacities" were "conclusory" and did "'not supply facts adequate to show illegality'" (quoting *Twombly*, 550 U.S. at 557)); *Oxbow*, 926 F. Supp. 2d at 47 (dismissing claims and noting that "Plaintiffs do not once explicitly specify which market [defendants] allegedly agreed to allocate").

No Factual Allegations Regarding the Terms of a Plausible Conspiracy. Plaintiffs fail to allege any facts describing the substance of the purported agreement to "reduce airline capacity." "Capacity discipline," "limit capacity," and "reducing capacity" (CAC ¶¶ 1, 3, 144, 152-53) are all vague and imprecise phrases, particularly when they are untethered from any particular routes. Indeed, plaintiffs cite no industry-accepted definition of "capacity discipline." Instead, they advance one of their own making: the alleged "reduction or relative stabilization of airline capacity." *Id*. ¶ 3. But even that "definition" adds nothing to an inherently ambiguous term.

Unable to define what defendants allegedly agreed to do, plaintiffs resort to vague and unsupported allegations that defendants "shared," "preach[ed]," "emphasi[zed]," or "reiterated" a "mantra of capacity discipline." CAC ¶¶ 6, 95, 102, 132. But these are not alleged to be face-to-face communications among the defendants. Moreover, the topic is not one that implicates

antitrust concerns. All well-run businesses try to exercise "discipline" when making important business decisions, and shareholders legitimately expect companies to exercise such discipline. Absent allegations regarding when, where, *by what means, and to what extent* the defendants purportedly colluded to reduce capacity, plaintiffs advance nothing more than "a bare allegation of conspiracy." *Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 860 (7th Cir. 1999) (dismissing conspiracy claims because allegations failed to identify the alleged terms of the agreement—the "form and scope of the conspiracy are thus almost entirely unknown"). Indeed, they must give meaning to the supposed conspiratorial pact, including the "basic terms of the agreement" as well as "how the defendants used the agreement." *Oxbow*, 926 F. Supp. 2d at 47.[5]

As a result of all these issues, an effort "to fix, raise, maintain and/or stabilize prices" through a generalized agreement to "reduce capacity" or exercise "capacity discipline" is, in *Twombly* terms, inherently implausible. There are no allegations plausibly suggesting that defendants agreed on capacity levels across hundreds of city-pair routes involving thousands of flights—many of which are served only by a subset of defendants—on a daily or even hourly

[5] *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 719, 721 (E.D. La. 2013) (dismissing Section 1 claim because the court was "unable to infer . . . what, precisely, the agreement was"); *In re Elevator Antitrust Litig.*, No. 04 CV 1178, 2006 WL 1470994, at *8 (S.D.N.Y. May 30, 2006) (dismissing antitrust claims because a complaint is "truly vacuous unless it contains allegations about specific plaintiffs, specific transactions, and specific wrongdoing" relevant to the diverse products implicated by the complaint), *aff'd*, 502 F.3d 47 (2d Cir. 2007) (per curiam); *see also Lacey v. Maricopa Cty.*, 693 F.3d 896, 937-38 (9th Cir. 2012) (en banc) (affirming dismissal when complaint failed sufficiently to identify "the scope" of the conspiracy, each defendant's role in it, and "how the conspiracy operated"); *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 179 (3d Cir. 2010) (dismissing claims; "Great Western has failed to allege except in general terms the approximate time when the agreement was made, the specific parties to the agreement, . . . the period of the conspiracy, or the object of the conspiracy."); *Acosta Orellana*, 711 F. Supp. 2d at 114 ("In sum, stripped of its factual and legal conclusions, the plaintiffs' amended complaint paints a maze from which it cannot be discerned with whom the plaintiffs are alleging the CropLife Defendants conspired, when the alleged agreement was reached, and what particular activity was the object of the conspiracy.").

basis. Nor do plaintiffs suggest how defendants could allocate their finite resources, such as aircraft fleet and crews, in order to satisfy other "conspirators." Indeed, each defendant on each route would have had to grapple with any number of specific city-pair considerations that impact capacity, including low cost and ultra-low cost competitors, demand, route distance, gate fees and availability, airport takeoff and landing restrictions, labor costs and contracts, and myriad other economic considerations. And defendants would have had to reconcile market forces and allocate revenue across hundreds of city-pairs, each subject to its own distinct competitive profile. Absent allegations regarding the scope of the conspiracy, each defendant's role in it, and how the conspiracy operated, generalized claims of an agreement on "capacity discipline" are impractical, unmanageable, and, therefore, implausible. *Spectrum Stores*, 632 F.3d at 947-48; *Oxbow*, 926 F. Supp. 2d at 47; *In re Elevator*, 2006 WL 1470994, at *8. But the implausibility of plaintiffs' complaint is even more profound than in prior cases given the two levels of inference required—an alleged agreement on prices that is to be inferred from an alleged agreement on capacity which, in turn, has no foundational allegations in the complaint and must be inferred from highly general and perfectly legitimate public statements.

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In sum, plaintiffs have not alleged facts adequately describing the purportedly illegal agreement. Plaintiffs' incantation of the terms "conspiracy," "collude," and "coordinate" does not state a claim, and the complaint should be dismissed. *In re Musical Instruments*, 798 F.3d at 1193 & n.5 (affirming dismissal); *Spectrum Stores*, 632 F.3d at 947-48 (affirming dismissal); *Acosta Orellana*, 711 F. Supp. 2d at 113-14 (dismissing civil conspiracy claim; "the amended complaint here 'mentions no specific time, place, or person involved in the alleged conspiracies,'

resulting in the [defendants] having 'no clue' as to how they 'supposedly agreed . . . [to an] illicit agreement'" (quoting *Twombly*, 550 U.S. at 565 n.10) (last two modifications in original)).[6]

B. The Complaint Fails to Plead Parallel Conduct

Plaintiffs also fail to plead facts from which a conspiracy can be inferred. To raise a plausible inference of conspiracy, plaintiffs must allege both parallel conduct and sufficient "plus factors" or "inferential allegations" to suggest that the defendants' parallel conduct stemmed from an illegal agreement. *In re Musical Instruments*, 798 F.3d at 1189; *Fame Jeans*, 525 F.3d at 17; *Oxbow*, 926 F. Supp. 2d at 46-47. The plus factors must be sufficient to "'nudge[]' their allegations of horizontal agreements 'across the line from conceivable to plausible.'" *In re Musical Instruments*, 798 F.3d at 1193 (quoting *Twombly*, 550 U.S. at 570) (modification in original). Plaintiffs are nowhere close. They do not even allege that defendants engaged in

[6] *See also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (affirming dismissal; "none of these allegations specify a time or place that any actual agreement to fix credit terms occurred, nor do they indicate that any particular individuals . . . made such an agreement"); *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 882 (D.C. Cir. 2010) (allegations of a "price-fixing club" among defendants were "broad," "vague," and constituted "naked assertions" that could not sufficiently state a bid-rigging claim); *C.N. v. Willmar Pub. Sch.*, 591 F.3d 624, 634 (8th Cir. 2010) (affirming dismissal; *Twombly* "disapprov[es] of factual allegations which fail to mention times, places, or persons involved in the specified events, and not[es] that a defendant seeking to respond to such 'conclusory' allegations 'would have little idea where to begin.'"(quoting *Twombly*, 550 U.S. at 565 n.10)); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009) (affirming dismissal; "where [a] complaint furnishes no clue as to . . . when and where the illicit agreement took place, the complaint fails to give adequate notice as required by Fed. R. Civ. P. 8" (quotations omitted)); *In re Zinc*, 2016 WL 93864, at *19 (dismissing antitrust claims; "the [complaint] does not clearly identify who precisely made this agreement, when it was made, where it was made, or its terms, but rather lists a number of alleged anticompetitive means used to execute it"); *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 946 F. Supp. 2d 1321, 1332 (S.D. Fla. 2013) (same; dismissing claims); *Prime Healthcare Servs., Inc. v. Serv. Emps. Int'l Union*, No. 11-cv-02652, 2012 WL 3778348, at *5 (S.D. Cal. Aug. 30, 2012) (dismissing antitrust claims; allegations did "not give[] Defendants sufficient notice of who is alleged to do what activity, when it was supposed to be done and how the activity was to be accomplished, so that Defendants can adequately prepare their defense" (quotation omitted)).

parallel conduct regarding capacity. Beyond that, plaintiffs have not adequately alleged any facts that can support an inference of conspiracy (as discussed below in Section III).

At bottom, plaintiffs allege that defendants pursued so-called "capacity discipline" and suggest that capacity was restrained below competitive levels. The complaint, however, does not explain what defendants actually did. It contains no allegations regarding limitations on flights (in number, routing, fleet size, or frequency) or restrictions on seats for those flights (in number, configuration, or size). And it contains no allegations that any such limitations or restrictions occurred at the same time, in the same amounts, or on the same route. To the contrary, the only facts contained in the complaint pertaining to defendants' capacity actions evidence *non-parallel* conduct and widely *varying* approaches to their capacity plans on a system-wide basis. For example:

- Plaintiffs cite a 2011 article which says that Delta planned to cut capacity in 2012 between 2-3%, United planned to keep its capacity "in line" with earlier levels, Southwest would "keep capacity flat or slightly down," and American did not know how it would approach capacity going forward. CAC ¶ 96.
- The complaint cites a 2014 Forbes article that states Delta *added* capacity over a five year period between 2009 and 2013; United cut capacity between 2011 and 2013; and American "did not add significant flying capacity" during an unspecified period after 2009. The article says nothing about Southwest's capacity plans. *Id*. ¶ 107.
- Plaintiffs refer to a 2015 article from Air Transport World as evidence of defendants' supposed "capacity reduction." But the article explains that American, Delta, and United all *added* capacity in 2014 and at sharply different rates: American expanded capacity by 2.4%, Delta grew capacity by 3%, and United expanded capacity by 0.5%. The article

also says that in 2015 United planned to grow capacity "no more than" 2.5% while American planned for 3% growth. The article is silent about Southwest. *Id*. ¶ 108.

- Plaintiffs' complaint cites repeatedly another 2015 article that indicates that Southwest also planned to grow system-wide capacity in 2015—at "approximately 7 percent." *Id*. ¶ 122; *see* Ex. D, James B. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times, June 11, 2015 ("Stewart Article") (cited at CAC ¶¶ 121-22 & n.131).

Given the scope of defendants' networks, the differences in defendants' capacity plans (lifted directly from the complaint) are significant and consequential. The difference between United expanding its network by 0.5% and Delta growing its network by 3% represents *billions* of additional available seat miles. That Delta grew *six times* as much as United renders wholly implausible any allegation of an agreement between the airlines to jointly limit capacity. The alleged conspiracy becomes even more preposterous when accounting for Southwest's 7% growth, which is more than twice the rate of growth of the other alleged conspirators. The far more compelling explanation for these dramatic differences is that each defendant was making unilateral decisions based on the competitive conditions specific to its network.

These disparate capacity decisions are flatly inconsistent with any inference of conspiracy and "make[the] conspiracy allegation even weaker than that found insufficient in *Twombly*." *Uhr v. Responsible Hosp. Inst., Inc.*, No. 10-CV-4945, 2011 WL 4091866, at *9 (D. Minn. Sept. 14, 2011) (dismissing conspiracy claims when plaintiff failed to allege parallel behavior), *aff'd*, 473 F. App'x 517 (8th Cir. 2012); *see Willow Creek Fuels, Inc. v. Farm & Home Oil Co.*, No. 08-5417, 2009 WL 3103738, at *4 (E.D. Pa. Sept. 18, 2009) (dismissing antitrust conspiracy claim where plaintiff did "not even allege parallel conduct"); *cf. In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) ("When an antitrust plaintiff relies on

circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel.").[7] Indeed, because plaintiffs' conclusory allegations of parallel "capacity reductions" are contradicted by other allegations in the complaint, the Court need not accept them as true. *Rivera v. Rosenberg & Assocs., LLC*, No. 15-0635, 2015 WL 6768985, at *8 (D.D.C. Nov. 5, 2015) ("Where, as here, the complaint's factual allegations are contradicted by exhibits incorporated by reference in the complaint . . . the Court need no longer accept as true plaintiff's version of events."); *see Burtch*, 662 F.3d at 228 (affirming dismissal because complaint failed to allege parallel conduct and because defendants actually acted inconsistently with one another); *In re Pool Prods.*, 988 F. Supp. 2d at 719 (despite allegations of "similar conduct" by defendants, court dismissed antitrust claims because the complaint did "not state that [defendants'] changes were the same, and the timeline of events belies the contention that the changes were the product of collusion").

III. PLAINTIFFS' FACTUAL ALLEGATIONS DO NOT SUPPORT A PLAUSIBLE INFERENCE OF CONSPIRACY

A. Defendants' Public Statements Do Not Suggest a Conspiracy

Lacking any non-conclusory allegations of agreement, direct competitor communications, or parallel conduct, plaintiffs attempt to manufacture a conspiracy from each airline's public communications with shareholders and investment analysts. CAC ¶¶ 88-110. Those allegations likewise fail to state a claim.

[7] Plaintiffs' failure to allege similar capacity changes *at similar times*—they compare one defendant's capacity changes between 2009 and 2013 to another defendant's actions between 2011 and 2013 and a third defendant's actions during an unspecified period after 2009 (CAC ¶ 107)—further undermines "the specter of collusion." *In re Musical Instruments*, 798 F.3d at 1195-96 (rejecting sufficiency of purportedly similar actions "over a period of several years"); *see In re Baby Food Antitrust Litig.*, 166 F.3d 112, 131-32 (3d Cir. 1999) (allegations that competitors raised prices six months apart "refute rather than support" suggestion of conspiracy). To "support a reasonable inference of a conspiracy" a complaint cannot compare "different products" or "different times." *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 410 (3d Cir. 2015) (demanding "apples-to-apples comparison").

1. *Defendants' Communications With Investors Were Entirely Legitimate*

A corporation must communicate with its shareholders about matters affecting the value of their investments. Indeed, the law requires fulsome disclosure of certain kinds of business information. Companies must "provide complete and non-misleading information with respect to the subjects on which [they] undertake[] to speak." *In re K-tel Int'l, Inc. Sec. Litig*., 300 F.3d 881, 898 (8th Cir. 2002). This includes "more than the numbers in the financial statements. [It] mean[s] the information investors need to put those numbers into context—not just the 'what?' and 'how much?' but the 'why?'. . . . Comprehensive corporate disclosure is critical to maintaining and improving investor confidence in the markets."[8] This is particularly true for the airline industry, with its long history of bankruptcies. Investors have a compelling, legitimate interest in whether the airlines they own are exercising fiscal discipline, including with respect to capital investments in capacity.

As such, the public announcement of prices or policies, even specific capacity plans to the extent such statements are alleged, "cannot be twisted into an invitation or signal to conspire." *United States v. Gen. Motors Corp.*, No. 38219, 1974 WL 926, at *21 (E.D. Mich. Sept. 26, 1974). Public statements of business plans, particularly to shareholders, are "an economic reality to which all other competitors must react," *id*., and it is commonplace for corporations to speak to the investing public about their strategy and the trends affecting their industry.[9] Such communications do not by themselves suggest illicit parallel behavior or support

[8] Elisse B. Walter, Former Commissioner, U.S. Sec. and Exch. Comm'n, Remarks at Stanford Directors College, Corporate Disclosure: The Stage, the Audience, and the Players (June 25, 2013), https://www.sec.gov/News/Speech/Detail/Speech/1365171606107.

[9] Ex. E, Lawrence D. Brown et al., *Inside the "Black Box" of Sell-Side Fin. Analysts*, 53 J. Acct. Res. 1, 10, 14, 16 (2015) (reporting that 98% of surveyed financial analysts have direct contact with the CEO or CFO of the companies they cover at least once a year, with most having such contact at least five times a year, and that substantial majorities find direct contact "very useful" in developing earnings forecasts and stock recommendations, along with knowledge of key

a plausible inference of conspiracy. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) ("the industry practice of maintaining price lists and announcing price increases in advance does not necessarily lead to an inference of price fixing"); *Mkt. Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990) (public announcement of commission policies "is nothing more than a restatement of conscious parallelism"). Indeed, they are entirely consistent with the obligation to inform investors of decisions that impact the business and, ultimately, shareholder stock prices. *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 896 (W.D.N.C. 2001) ("Almost every corporation and corporate executive has a legitimate interest in maintaining or increasing shareholder value through increased stock prices.").

Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253 (N.D. Ga. 2002), is instructive. There, the court evaluated public statements by the defendants to determine if they were indicative of a conspiracy or legitimate business communications. *Id.* at 1275. Despite the fact that "each company would send a representative to its competitors' analyst presentations so that each Defendant knew such 'signals' would be received," *id.*, the court refused to infer conspiracy from the public statements because they "described the type of information companies legitimately convey to their shareholders." *Id.* at 1277. The court explained that plaintiffs improperly relied on a "combination of statements taken out of context" and "ominous readings of typical industry reporting on strategy," whereas "the cases which have found that an inference of traditional agreement from indirect communications . . . show far more

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industry trends); Ex. F, Brian J. Bushee et al., *Conference Presentations and the Disclosure Milieu*, 49 J. Acct. Res. 1163, 1167-68 (2011) (stating that the number of public corporations participating in investor and analyst conferences has "grown substantially" in recent years—noting more than 95,000 conference presentations over a recent nine-year period that typically provide an "overarching view of the company and its strategy").

detailed communications *with no public purpose*." *Id.* at 1275-76 (granting summary judgment for defendants) (emphasis added), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003). Indeed, where the information conveyed in public announcements is useful—either to consumers or shareholders—courts do not credit them as plausible support for a conspiracy claim. *See, e.g.*, *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447-48 & n.14 (9th Cir. 1990) (although public comments that are irrelevant to customers may facilitate conspiracy, the "conclusion would necessarily be different [if plaintiffs'] inference of [] price-fixing" had a legitimate purpose like allowing "consumers to get the information they need to make efficient market decisions"); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 1001 (N.D. Ill. 2011) (disregarding "general statements to investors or regulators about the trajectory of the plasma therapies industry").

Here, plaintiffs acknowledge that defendants had legitimate reasons to communicate with current and prospective shareholders about actions that impact revenue, including capacity decisions. Investors use the information to make efficient market decisions regarding whether to invest more or less in any particular airline. CAC ¶ 122 (noting investor pressures and efforts to reassure shareholders); Ex. D, Stewart Article (noting investors sold off stocks after capacity action announced). In fact, plaintiffs' sources make clear that defendants made their statements in response to the investment community's extensive interest in and regular questions about capacity. *See, e.g.*, Ex. G, Am. Airlines Grp. Inc. Q1 2011 Earnings Call Tr. at 11 (Apr. 20, 2011) (cited at CAC ¶ 112 n.112) ("Can you walk us through why you think cutting less than [other legacy carriers] in the back half is a better strategy than matching the size of their cuts? Or maybe even cutting more to account for the profitably differential?"); Ex. H, AMR Corp. Q1

2010 Earnings Call Tr. at 10 (Apr. 21, 2010) (cited at CAC ¶ 93 & n.76) ("I know there are reasons why you have that growth [of 1-1.5%]. But why not shrink 7% again? . . . [A.] What I think everybody in the industry is trying to ascertain is what is the new level of demand. . . . I think it would be premature for us to make another big cut in capacity until we see how the economy begins to settle out."). Such public statements therefore "serve[] an important purpose in the industry" and are readily "explainable apart from any agreement to fix prices." *Reserve Supply Corp.*, 971 F.2d at 53-54; *see Williamson Oil*, 346 F.3d at 1305-10 (defendants' public pricing announcements were "legitimate communication[s] within the market . . . when an explanation for [the defendants'] . . . behavior plainly was necessary"). They do not support a reasonable inference of conspiracy, and concluding otherwise would "significantly deter [the] important legitimate conduct" of communicating transparently with shareholders. *In re Petroleum Prods.*, 906 F.2d at 448.

2. *A "Signaling" Conspiracy Cannot Be Inferred When Public Statements Do Not Lead to Parallel Conduct*

The absence of parallel behavior following defendants' purported public "assurances" underscores the non-conspiratorial purpose behind these statements. In cases where public statements were part of allegations to survive a motion to dismiss, the plaintiffs had alleged facts (rather than conclusions) showing specific, immediate, and sustained parallel conduct consistent with the public statement. *See, e.g.*, *In re Petroleum Prods.*, 906 F.2d at 437, 446 (noting "evidence concerning the parallel pattern of price restorations"); *Standard Iron Works v. Arcelormittal*, 639 F. Supp. 2d 877, 897, 900 (N.D. Ill. 2009) ("massive, unprecedented, and coordinated output cuts" followed on the "heels" of statements made in public). The same was true in *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 733 F. Supp. 2d 1348 (N.D. Ga.

2010), which plaintiffs mention in the complaint. CAC ¶ 7 n.2.[10] There, the plaintiffs alleged specific acts of parallel conduct—the adoption of similar first-bag fees within a week of one another. *Id*. at 1356. But even then, the district court acknowledged "weaknesses" in plaintiffs' reliance on defendants' public statements. *Id*. at 1362.[11] Unlike the parties in those cases, plaintiffs here fail to allege a single instance of parallel capacity behavior, and their allegations actually indicate the opposite.

3. *A Conspiracy Cannot Be Inferred From Southwest's June 2015 Capacity Decision*

As the foregoing discussion makes clear, plaintiffs do not allege any discernible "cause-and-effect" between purported capacity "signaling" and specific capacity actions taken by any airline. The sole purported exception consists of plaintiffs' allegation regarding a capacity decision made by Southwest in June 2015. Specifically, plaintiffs allege that Southwest told its investors that it intended to increase capacity; that other airlines then publicly complained about Southwest's decision; and that Southwest responded by changing its capacity plans, supposedly in furtherance of the alleged "capacity reduction" conspiracy. CAC ¶¶ 5, 116-122.

The problem with these conclusory allegations is that they are belied by the complaint in three critical respects: First, plaintiffs do not explain how Southwest purportedly "knuckled under." By plaintiffs' telling, Southwest announced on May 19, 2015, that it would increase capacity 7 to 8% in 2015. *Id*. ¶ 116. On June 4 and June 7-9, employees of other defendants

[10] Plaintiffs fail to mention that the plaintiffs' capacity claims in the *Bag Fee* case were voluntarily dismissed after data showed that Delta *increased* capacity on routes where it competed with AirTran, including during the conspiracy period alleged in this case. *See* Consent Order & Stipulation, *In re Delta/AirTran Baggage Fee Antitrust Litig.*, No. 1:09-md-2089 (N.D. Ga.), Dkt. 335 (June 18, 2012).

[11] The court noted that "many of Plaintiffs' allegations [were] based upon statements made by Defendants' executives *in response* to analysts' questions rather than from prepared speeches and statements," a fact (which is also present in this case) that "weaken[ed] the probative value of those statements." 733 F. Supp. 2d at 1362.

made public statements regarding "capacity discipline" at investor meetings and an IATA conference. *Id*. ¶¶ 119-120. On June 11, Southwest purportedly reacted to those comments by giving in to collusive capacity discipline requirements. *Id*. ¶¶ 121-122. Yet those allegations are deliberately misleading. Southwest is not even a member of IATA, as plaintiffs acknowledge. *Id.* ¶ 86. And the New York Times article on which plaintiffs supposedly rely actually notes that Southwest reiterated on June 11 that it would continue to expand capacity at "approximately 7 percent" in 2015. Ex. D, Stewart Article. That is squarely within the "range" of anticipated capacity growth that Southwest announced on May 19.[12]

Second, the complaint identifies a lawful reason for any change that might have happened. Southwest sought to address the concerns of shareholders after those investors caused Southwest stock to plummet 9 percent over a week and 20 percent over a month following the news of further capacity increases. CAC ¶ 122; Ex. D, Stewart Article. Southwest's subsequent statements regarding its capacity-related intentions were—again, according to the complaint—meant to "reassure *investors*" following that stock decline. CAC ¶ 122 (emphasis added). Southwest's business reaction to pressures from its owners provides an "obvious alternative explanation," which undermines any inference of conspiracy. *Twombly*, 550 U.S. at 567; *see In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation"). Indeed, decisions about how much to grow and how to allocate an airline's capacity are of central importance to airline strategy, profitability, and operations. There is nothing unusual or inappropriate about discussing those topics,

[12] Indeed, Southwest's CEO, Gary Kelly, had publicly reiterated on May 28, 2015, that capacity would increase at "around 7%" in 2015. Southwest's Supplemental Br. Supp. Mot. to Dismiss 9, concurrently filed herewith. That announcement came before the IATA conference or any purported "knuckl[ing] under" to reduced growth.

especially in general terms, with investors or industry watchers. *In re Musical Instruments*, 798 F.3d at 1196; *Gen. Motors*, 1974 WL 926, at *21. And it is perfectly lawful for companies in concentrated industries to modify their behavior in response to shareholder reactions, or even other competitors' public actions. *In re Chocolate*, 801 F.3d at 408-09; *Citigroup*, 709 F.3d at 139-40; *Williamson Oil*, 346 F.3d at 1305; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001).

Third, plaintiffs' contention that Southwest was abandoning "capacity discipline requirements" is divorced from the reality reflected in their own sources. On May 19, 2015, the day Southwest purportedly "broke ranks" with the rest of the alleged conspirators, multiple defendants announced widely divergent capacity plans. For example, Southwest stated that it was expanding "in the 7% to 8% range" in 2015; United said that it had "decreased capacity by 0.5" percent in 2015; American said that its 2015 capacity "is growing faster than GDP"; and Delta said nothing. Ex. I, Wolfe Research Global Transp. Conference-Panel Discussion at 2, 5, 7 (May 19, 2015) (cited at CAC ¶ 116 n.122). Neither the vastly different capacity decisions by each defendant nor Southwest's 2015 capacity plans are in any way suggestive of a conspiracy. Indeed, they are facially contradictory to the purported capacity-reduction cartel.

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In short, the complaint is at war with itself. It shows that each airline's investor communications were rational and legitimate. It shows that communications regarding capacity were not followed by any discernible, much less "massive" or "unprecedented," pattern of capacity reductions by other carriers. And it cites sources that show differentiated capacity-related actions by each airline—in both timing and effect—that are entirely consistent with unilateral behavior and independent assessments of each airline's own business considerations.

B. Plaintiffs' Pricing Allegations Do Not Add up to Conspiracy

Plaintiffs allege that "beginning in January of 2009 [the beginning of the alleged capacity conspiracy], there is a drastic difference" in defendants' pricing. CAC ¶ 65. Plaintiffs rely on a chart that purports to show that after 2009, non-defendants ("Others") tended to charge lower average fares on routes where they were the largest carrier when compared to routes on which a defendant was the largest carrier. *Id*. ¶¶ 64-65 (including charts).[13] This chart, however, offers no relevant information about a conspiracy to limit capacity and is misleading on its face.[14]

The fundamental problem is that plaintiffs' chart does not control for and exclude the effects of structural changes to the industry that would innocently cause precisely the post-2009 "divergence" that plaintiffs contend supports an inference of conspiracy. *Id*. ¶¶ 66. As the complaint acknowledges, before 2009 there were ten "major" airlines in the United States, including the defendants and various legacy carriers like Continental, Northwest, and US Airways. *Id*. ¶¶ 34, 36-37. This means that before 2009, the "Defendants" group and the "Others" group both included legacy hub-and-spoke carriers. As would be expected, the average fares on routes where one of the defendants was the "largest carrier" largely tracked the average fares of "Others" on routes where another legacy airline was generally the "largest carrier."

After 2009, however, there were only four "major" carriers—American, Delta, Southwest, and United. *Id*. ¶¶ 34, 36-37, 63 (noting that US Airways is grouped with defendants for conspiracy-period analysis). As such, post-2009 the "Others" group no longer includes a "major" carrier, and instead is comprised of mostly low cost and ultra-low cost carriers, which

[13] The chart following paragraph 65 appears to be a different representation of the same data reflected in the chart following paragraph 64.

[14] These purported pricing changes are also completely disconnected from the alleged capacity-limitation conspiracy. There is no claim that the price changes resulted from capacity limitations on the routes in question, much less that defendants conspired to limit capacity on those routes in order to effect the price changes alleged.

generally "offer lower fares than their major-airline competitors." *United States v. AMR Corp.*, 335 F.3d 1109, 1112-13 (10th Cir. 2003). The "divergence" supposedly reflected in plaintiffs' chart is merely the result of altering the make-up of the group of "Other" carriers post-2009. The chart reveals only the unremarkable conclusion that low cost and ultra-low cost carriers tend to offer lower fares than larger, full-service, hub-and-spoke airlines.[15] To draw a "reasonable inference of a conspiracy," plaintiffs must compare "apples-to-apples." *In re Chocolate*, 801 F.3d at 410. Plaintiffs' purported fare comparison does not do so.

But even this flawed data refutes the notion of an asserted break in defendants' pricing behavior. Indeed, plaintiffs concede that defendants' airfares grew at a constant rate both before and after the start of the purported conspiracy. Between 2003 and 2008, a period plaintiffs acknowledge to have been competitive, defendants' airfares grew at roughly 0.8% per quarter. Between 2009 and 2015, fares grew at a nearly identical rate. CAC ¶ 65; *compare Twombly*, 550 U.S. at 556 n.4 ("[c]omplex and historically unprecedented changes in pricing structure . . . would support a plausible inference of conspiracy" (quotations omitted)).

Plaintiffs' other allegations about airfares, including third-party complaints about fares, do not plausibly suggest a capacity-reduction conspiracy. CAC ¶¶ 67-73. Plaintiffs allege that the Producer Price Index for Airlines (apparently alleged as a measure of fares) increased since January 2009, which is hardly surprising when plaintiffs' starting point is the trough of the Great Recession. *Id.* ¶ 67. Moreover, the chart depicted in paragraph 67 of the complaint does not

[15] The Court need not look beyond the face of the complaint—particularly plaintiffs' own descriptions of the chart—to conclude just how highly misleading the chart is. Notably, plaintiffs provide no source for the charts nor any explanation of how the data used to generate the charts were combined or manipulated to produce them. Defendants have, nevertheless, been able to determine by working with publicly available data that the chart compares defendants' airfares to those of different groups of non-defendants before and after 2009. Indeed, when a true apples-to-apples comparison is done, the apparent "divergence" in pricing trends disappears.

reflect the fares of only defendants. And it is easy to see from the complete chart located on the government's website—which plaintiffs omit from their complaint—that the price index for domestic airfares has been trending upward for decades (not starting in 2009) and has been flat since 2012.[16]

Plaintiffs also allege that defendants "often charge identical or nearly identical" airfares on the same routes. *Id.* ¶ 69. But that is common in many competitive industries, and not a sufficient ground for inferring conspiracy. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1246 (3d Cir. 1993) ("It is one thing for competitors all to charge the same price, as a perfectly competitive market could lead them to do so."); *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 283 (D. Minn. 1997), *rev'd in part on other grounds*, 268 F.3d 619 (8th Cir. 2001) ("[I]n an oligopolistic market, such as that in which the airlines operate, rapid price coalescence is the norm and is not, in itself, illegal."). Further, none of the few anecdotes plaintiffs advance refer to defendant Southwest, which is well known for lower fares and the "Southwest Effect." *See, e.g.*, CAC ¶ 69. And plaintiffs' allegation that fares grew faster while demand (measured by passengers) "remained steady" is actually belied by the very chart they advance for this proposition. It shows a steady growth in passengers starting in 2009. *Id.* ¶ 73. In short, plaintiffs' pricing allegations do not plausibly suggest a conspiracy.

C. Plaintiffs Do Not Allege Conduct Contrary to Defendants' Unilateral Self-Interests

Plaintiffs allege that defendants acted contrary to their individual economic self-interest by increasing fares and reducing capacity when fuel costs were falling. CAC ¶¶ 1, 63, 73, 75, 87

[16] U.S. Bureau of Labor Statistics, Producer Price Index by Industry: Scheduled Passenger Air Transportation: Domestic, retrieved from FRED, Federal Reserve Bank of St. Louis, https://research.stlouisfed.org/fred2/series/PCU4811114811111 (last visited, May 11, 2016).

(also alleging decreased demand). But such conduct is not contrary to each carrier's unilateral interest, and the allegations do not support a plausible inference of a capacity conspiracy.

Actions against economic self-interest are those that are "so perilous" that "no reasonable firm would make the challenged move without [] an agreement." *In re Musical Instruments*, 798 F.3d at 1195. Fare increases in the face of declining costs do not qualify. *Id.* at 1197; *In re Chocolate*, 801 F.3d at 400 (holding that "evidence of a price increase disconnected from changes in costs or demand" sheds no light on whether "the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy"). In concentrated markets, lawfully competing firms often set "prices at a profit-maximizing, supracompetitive level" by observing and anticipating the actions of their competitors and "recognizing their shared economic interests with respect to price and output decisions." *H.J. Heinz*, 246 F.3d at 724 n.23. Firms may therefore "maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices." *In re Chocolate*, 801 F.3d at 397. Indeed, so-called "evidence of actions against self-interest" in concentrated markets simply "restate[s] the phenomenon of interdependence" since actors in interdependent markets "often exhibit behavior that would not be expected in competitive markets" but is nonetheless lawful. *Id*. at 398 (quotations omitted). In cases like this one, plaintiffs cannot raise a plausible inference of conspiracy merely by pointing to higher prices and lower costs.

The Ninth Circuit's decision in *Musical Instruments* illustrates the point. Plaintiffs there alleged that retail prices for guitars and amplifiers rose during the relevant period despite economic factors that allegedly would be expected to lower prices, like reduced sales and

decreasing demand. 798 F.3d at 1197. According to plaintiffs in that case, this apparent incongruity suggested conspiracy. The court disagreed and affirmed the dismissal of the complaint. It explained that price increases in the face of declining demand are "no more suggestive of collusion than [they are] of any other potential cause." *Id.* "Any manner of economic variables may have contributed to" the disconnect between prices and demand, including "external market pressures," "permissible conscious parallelism," "cost of materials," and labor costs. *Id*. at 1197 n.13. As such, the allegations did not plausibly state a claim of conspiracy.

The same is true here. Plaintiffs assert that "one would have expected that these jet fuel price developments would have resulted in lower airfares charged by the Defendants." CAC ¶ 75. Plaintiffs contend that any deviation from that principle can only be explained as conspiratorial. *Id*.[17] But as *Musical Instruments* makes clear, price increases are "no more suggestive of collusion than [they are] of any other potential cause," including lawful conscious parallelism in an oligopolistic market. 798 F.3d at 1197. Indeed, it is not unreasonable and certainly not unlawful for companies to pursue and capture profits at times of lower costs. "In a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits" and this motive does not constitute evidence of an illicit agreement. *In re Baby Food*, 166 F.3d at 137. Plaintiffs' repeated allegations of "high," "huge," or "record" profits in in the face of lower costs (CAC ¶¶ 6, 32, 63, 80-83), therefore do not support a reasonable inference of conspiracy. *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 870 (6th Cir. 2012) (affirming

[17] But plaintiffs' own allegations contradict the notion that airfares must track fuel costs. The complaint asserts that airfares *declined* 12% from 2004 to 2009 while fuel costs *increased* by 33% during the same period. CAC ¶ 70; *see also Rivera*, 2015 WL 6768985, at *8 (when the "complaint's factual allegations are contradicted by" other allegations or exhibits incorporated by reference, "the Court need no longer accept as true plaintiff's version of events").

dismissal; allegations of high profits are "simply descriptions of the market, not allegations of anything that the defendants did . . . and do not give rise to an inference of an unlawful agreement").

In any event, the complaint itself provides "ample independent business reasons why" defendants unilaterally would have limited capacity or kept prices constant despite lower fuel prices. *In re Musical Instruments*, 798 F.3d at 1195. First, plaintiffs allege that defendants faced intense pressure from the investment community to limit capacity growth because investors initiate "broad selloff[s]" of airline stock when airlines announce capacity growth. Ex. J, Jack Nicas, *Southwest's Upgraded Growth Plans Stir Airline Stocks and Prices Tumble*, Wall St. J., May 20, 2015 (cited at CAC ¶ 117 & n.129). Second, plaintiffs describe highly volatile prices for jet fuel from 2004 to present, including "spike[s]" and "precipitous[]" declines (CAC ¶ 74), leading a rational competitor to avoid the wild price swings that would have accompanied each short term cost change. *See* Ex. K, Zainab Mudallal, *The airline executives standing between you and cheap plane tickets*, Quartz, Jan. 13, 2015 (cited at CAC ¶ 82 n.47) ("[A]irlines that have put big bets on future oil prices say that being locked into those investments doesn't allow for short-term changes in how they charge customers. Others say there's no telling what will happen to oil prices in [the] future, and that sudden price changes can hurt airlines long-term. And some say too many consumers are clamoring for plane tickets to justify dropping prices—even when costs are down."). That is particularly so for airlines, which begin selling tickets months before each flight, long before they can know all of the costs they must incur to fly the airplane.

Third, plaintiffs acknowledge that airlines independently pursued "capacity discipline" as a means to raise revenue as far back as 2001, an era plaintiffs admit was competitive. *Id.* ¶¶ 39,

86. And fourth, the complaint contends that defendants learned from their historical "mistake[s]" that adding too much capacity too fast leads to imbalances in supply and demand that reduce profits. *Id*. ¶ 119. These allegations "suggest [that] lawful conduct, rather than the unlawful conduct the plaintiff[s] would ask the court to infer," was the cause of any purported capacity reductions, to the extent they occurred. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (affirming dismissal). By advancing an "obvious alternative explanation," plaintiffs render their own theory of liability implausible. *Twombly*, 550 U.S. at 567; *In re Century Aluminum*, 729 F.3d at 1108 (affirming dismissal). "[I]ndependent responses to common stimuli" do not imply a conspiratorial agreement because they are "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554, 556 n.4.

D. Allegations That The Airline Industry Is "Conducive to Collusion" Do Not Support a Claim of Conspiracy

Plaintiffs assert the airline industry is "conducive to collusion" because it (1) is highly concentrated with high barriers to entry (CAC ¶¶ 34-40, 47); (2) is characterized by transparent pricing that allows for monitoring of competitors' pricing actions (*id.* ¶¶ 48-57); (3) holds trade association meetings at which defendants have the opportunity to collude (*id.* ¶¶ 113-14); and (4) the defendants are partially owned by common investors, allegedly creating incentives for the airlines to compete less aggressively (*id*. ¶¶ 41-43, 45-46). None of these allegations "nudge[]" plaintiffs' conspiracy "claims across the line from conceivable to plausible," as required by *Twombly*. 550 U.S. at 570. Indeed, they do not nudge those claims at all.

1. *Allegations of Industry Concentration and High Barriers to Entry Do Not Make Plaintiffs' Conspiracy Claim Plausible*

The complaint alleges that the airline industry is a "tight oligopoly" with "high barriers to entry due to government regulations." CAC ¶¶ 34, 47. As other courts have recognized, those

"same market features also make the market susceptible to conscious parallelism," and "[c]onsequently, none of these features make conspiracy a more plausible explanation than mere interdependence." *In re Fla. Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1317, 1319 (S.D. Fla. 2010) (granting motion to dismiss in relevant part); *see In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007), *aff'd*, F.3d 1022 (9th Cir. 2014) (dismissing claims; "[E]ven if the alleged market were concentrated, this would not render the asserted conspiracy plausible."). Even if parallel capacity reductions had been pleaded, mere allegations of industry concentration would not have transformed an otherwise defective complaint into a plausible claim of conspiracy.

2. *Allegations Regarding Pricing Transparency and Fare Competition Do Not Render Plaintiffs' Conspiracy Claims Plausible*

Plaintiffs allege that the publication of airline fares through the Airline Tariff Publishing Company gives "[a]ll airlines . . . complete, accurate, and real-time access to every detail of every other airline's published fare structure on every route." CAC ¶ 48. This supposedly "provides the Defendants with the *means and ability* to coordinate their passenger airfares, detect cheating . . . and take action to punish such cheating on a real-time basis." *Id.* ¶ 56 (emphasis added). The allegations, however, bear no connection to the alleged capacity-reduction conspiracy here.

To start, ATPCO contains only fare information. There is nothing in the complaint that even so much as hints at a link between the ATPCO fare system and an alleged conspiracy to reduce capacity. There is no allegation that ATPCO receives or reports any capacity information (which in any event is publicly reported by the Department of Transportation). There are no allegations that defendants actually exploited the transparency of fares by "coordinat[ing] passenger airfares," "detect[ing] cheating," or "tak[ing] action to punish cheating." And

although the complaint implies otherwise, defendants are entitled to use publicly available fare information, including information that ATPCO transmits to travel agents and computerized reservation systems, to determine their individual pricing strategies. *See, e.g.*, *Williamson Oil*, 346 F.3d at 1305 ("[I]n competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions." (quotation omitted)). In a well-functioning competitive market (such as a stock market), prices are publicly known, which permits buyers and sellers to respond to price developments.

The complaint also alleges that airlines "*can* deter aggressive discounting and prevent fare wars" through so-called "cross market initiatives." CAC ¶¶ 33, 57 (emphasis added). Cross market initiatives, as the complaint alleges, are simply fare reductions through which one airline undercuts the fares of another airline on a particular route or routes. *Id.* ¶ 57. This form of price competition is lawful.[18] And the complaint contains no allegations linking "cross market initiatives" to capacity in any respect. Nor are there any allegations that defendants actually employed cross market initiatives to "coordinate their passenger airfares," "detect cheating," or "punish such cheating." Plaintiffs' vague allegations thus do not "raise a right to relief above the speculative level" and cannot salvage the complaint. *Twombly*, 550 U.S. at 555; *see Iqbal*, 556 U.S. at 678 ("The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully.").

[18] Ex. L, *United States v. Airline Tariff Publ'g Co.*, No. 92-2854, Michael Doyle Jan. 21, 1994 Letter re: Pl's Interpretation of Proposed Final Judgment, at 4-5 (cited at CAC ¶ 51 n.22) (cross market initiatives involve "bona fide fares that are actually available for purchase when they are published through ATPCO, and are likely considered by reasonable, informed consumers during the time they are available. . . . Thus, the pricing actions described above are not prohibited by the Decree. Indeed, the Decree specifically states that '[r]egardless of what fares any airline offers in any city or airport pair, offering any fare in the same or any other city pair, in and of itself, does not constitute a violation of this judgment.'"); *see also United States v. Airline Tariff Publ'g Co.*, 836 F. Supp. 9, 12 (D.D.C. 1993) (similar).

3. *Opportunities to Conspire at Industry Gatherings Do Not Support a Claim of Conspiracy*

Plaintiffs claim that industry gatherings provided "abundant opportunities for the Defendants' executives to meet face to face and conspire on capacity reduction and pricing." CAC ¶ 114 (discussing Airlines for America and Conquistadores del Cielo (Captains of the Sky)); *see id*. ¶ 113 (discussing IATA). But the complaint does not allege that any unlawful discussions actually occurred at industry meetings, which (if any) defendants attended the meetings, or how any defendant availed itself of the "opportunity" to conspire. One of the alleged conspirators, Southwest, is not even a member of IATA, as the complaint acknowledges. *Id*. ¶¶ 86, 113. And although the complaint asserts that defendants' "chief executives participate in the 'Conquistadores del Cielo'" (*id*. ¶ 114), plaintiffs advance no factual allegations indicating that Delta or United executives were actually present with that group during the relevant time.[19]

More importantly, even an allegation that every defendant had attended every industry meeting during the purported conspiracy period would not plausibly support plaintiffs' conclusory allegations of conspiracy. *Twombly*, 550 U.S. at 556 n.12 ("just because [a defendant] belonged to the same trade guild [or association] as one of [its] competitors" does not, without more, suggest a conspiracy was formed); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981) (membership in industry trade groups is "not enough to establish participation in a conspiracy").[20] The court in *In re Travel Agent Commission*, for

[19] Similarly, the Complaint emphasizes events that occurred at the Wolfe Transport Conference on May 19, 2015 (CAC ¶ 116), but Delta did not even attend the conference.

[20] *See also In re Musical Instruments*, 798 F.3d at 1196 ("[M]ere participation in trade organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement."); *Am. Dental*, 605 F.3d at 1295 (same); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2011) (same); *In re Fla. Cement*, 746 F. Supp. 2d at 1316 (same); Areeda & Hovenkamp, Antitrust Law ¶ 1417b ("[T]he effect of holding opportunity sufficient would be to discourage all trade associations, industry gatherings, or joint ventures. Thereby to imperil reasonable and procompetitive collaborations would be

instance, rejected allegations that defendants' participation in IATA and "Conquistadores del Cielo" suggested that their parallel conduct was the product of conspiracy. The Sixth Circuit explained that "mere opportunity to conspire" at such meetings "does not, standing alone, plausibly suggest an illegal agreement because [defendants'] presence at such trade meetings is more likely explained by their lawful, free-market behavior." 583 F.3d at 911 (citing *Iqbal*, 556 U.S. at 680).

4. *Common Ownership Interests Do Not Suggest a Conspiracy*

Plaintiffs allege that a "concentrated number of major investors in the major passenger airlines . . . is also conducive to collusion." CAC ¶ 41. Common shareholders purportedly enable conspiracy because (1) "airline executives 'could *in theory* coordinate moves on pricing or capacity by communicating strategy through discussions with large investors'" (*id*. ¶ 43) (emphasis added), and (2) common owners "have an incentive to keep airfares and fees high, and hence airlines' revenues high, because higher revenue leads to higher share prices for themselves and other shareholders." *Id*. ¶ 45.

Plaintiffs, however, do not allege any actual communications along the lines of those envisioned by the first theory. The complaint goes no further than identifying some common investors in major airlines. It does not allege that any of those shareholders acted as conduits for non-public, anticompetitive information, much less capacity information. Nor does it suggest that shareholders or analysts were in any way involved in airline capacity decisions. The complaint offers nothing but theoretical possibilities. Such allegations do not suffice. *Iqbal*, 556 U.S. at 678 ("sheer possibility that a defendant has acted unlawfully" insufficient).

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inconsistent both with the purposes of the antitrust laws and with well-established Supreme Court permission for many kinds of collaboration among competitors.").

Similarly, plaintiffs do not contend that any common investor acted on the anticompetitive incentives alleged. They do not allege any acts of collusion involving investors. Nor do plaintiffs allege how a common investor might have used its interest in multiple airlines to "keep airfares and fees high, and hence airlines' revenues high." CAC ¶ 45. Without more, the desire to be profitable does not render plaintiffs' alleged conspiracy plausible. *See, e.g.*, *In re Baby Food*, 166 F.3d at 137 ("a legitimate understandable motive to increase profits" does not constitute evidence of an illicit agreement); *Erie Cty.*, 702 F.3d at 871 (affirming dismissal; "Just as in *Twombly*, the failure to compete alleged in this case is indicative of no more than a natural and independent desire to avoid a turf war and preserve the profits guaranteed by regional dominance."). Plaintiffs' allegations regarding shared investors do nothing to state a capacity-reduction conspiracy.

E. DOJ and State Civil Investigations Do Not Evidence Collusion

Plaintiffs' repeated references to investigations by the DOJ and the State of Connecticut do not support a plausible inference of a capacity conspiracy. CAC ¶¶ 6, 126-29. Government investigations "carr[y] no weight in pleading an antitrust conspiracy claim" because "[i]t is unknown whether the investigation[s] will result in indictments or nothing at all." *In re GPU*, 527 F. Supp. 2d at 1024. Absent further "indication from any of these proceedings that wrongdoing of the kind alleged has occurred," their existence does "not make the [complaint]'s allegations plausible[] for the purposes of deciding a motion to dismiss" *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 514 (S.D.N.Y. 2009). Put another way, "proof of the mere occurrence of [a] DOJ[] investigation is equally consistent with Defendants' innocence." *Superior Offshore Int'l., Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 517 (D. Del. 2010); *see In re Zinc*, 2016 WL 93864, at *22 (fact that "various government entities commenced investigations concerning [purportedly unlawful behavior], did not render the plaintiffs' broad

conspiracy allegations plausible"); *In re Capacitors Antitrust Litig.*, No. 14-cv-03264, 2015 WL 3398199, at *6 (N.D. Cal. May 26, 2015) (same). Plaintiffs must undertake their own inquiry and craft a complaint with appropriate factual allegations of their own. Simply pointing to a government investigation is not enough to save plaintiffs' otherwise deficient complaint.

Unable to concoct even a colorable claim regarding recent airline industry practices, plaintiffs dredge up past litigation in which airlines, including many non-defendant foreign airlines, were accused of antitrust violations. CAC ¶¶ 58-62. But plaintiffs do not, and cannot, connect those lawsuits to the capacity-reduction conspiracy they have alleged here. They certainly do not make a capacity conspiracy more or less plausible. *In re Chocolate*, 801 F.3d at 402-03 (rejecting the "fallacy" of reasoning "if it happened there, it could have happened here" (quotation omitted)); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143, 2011 WL 3894376, at *9 (N.D. Cal. Aug. 3, 2011) (similar); *Reiter's Beer Distribs., Inc. v. Christian Schmidt Brewing Co.*, 657 F. Supp. 136, 144 (E.D.N.Y. 1987) (plaintiffs' allegations "describ[ing] the history of [antitrust] litigation in the beer industry in general, and the history of [defendant's] litigation in particular" were prejudicial and had "no bearing on the issues in dispute").[21] In particular, plaintiffs cannot rely on decades-old and unproven allegations that were at one time advanced in unrelated, settled litigation involving ATPCO. CAC ¶¶ 51-53; *Gotlin v. Lederman*, 367 F. Supp. 2d 349, 363 (E.D.N.Y. 2005) (settlements in other litigation are irrelevant because they are "not the result of actual adjudication of any issues"); *see also In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258 (W.D. Wash. 2009) (dismissing complaint where plaintiffs could not link conspiracy allegations to prior guilty

[21] Courts regularly strike such allegations from complaints. *Dunbar v. Medtronic, Inc.*, No. CV 14-01529, 2014 WL 3056107, at *2-3 (C.D. Cal. June 25, 2014) (striking references to other lawsuits and DOJ settlements because they "[did] not state facts that expand or provide further meaning to the claims" in the complaint); *Reiter's Beer*, 657 F. Supp. at 144.

plea). Long past claims by *other* plaintiffs involving *unrelated* actions by *different* defendants at *different* times do not plausibly suggest a conspiracy to reduce capacity in this case.

F. Speculation and Conjecture By Third-Parties Do Not Suggest Conspiracy

The remaining support for plaintiffs' capacity allegations is drawn from letters, press releases, and newspaper columns authored by politicians, advocacy organizations, or industry commentators. None of the sources reflect first-hand knowledge of a conspiracy. Rather, the authors label the airline industry an "oligopoly," assert that "ticket prices should not shoot up like a rocket and come down like a feather," and seek regulatory intervention. CAC ¶¶ 70, 77, 79, 83, 121. Such third-party commentary does not support a plausible inference of conspiracy. Plaintiffs "cannot be permitted to free ride off the press or the complaints of other parties filing similar lawsuits, but instead must prove to the court that their complaint is backed by specific facts supporting a strong inference of" unlawful behavior. *In re Crude Oil Commodity Antitrust Litig.*, No. 06 Civ. 6677, 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007) ("hearsay nature of these recitals underscores why they are an insufficient substitute for factual allegations"). Indeed, the majority in *Twombly* found unpersuasive similar allegations of third-party commentary advanced by the plaintiffs and emphasized in Justice Stevens' dissent, including advocacy from the Illinois Coalition for Competitive Telecom detailing perceived "evidence of potential collusion" and a letter from members of Congress "to the Justice Department requesting an investigation into the possibility that the ILECs' very apparent non-competition policy was coordinated." 550 U.S. at 591-92 (Stevens, J., dissenting) (discussing plaintiffs' unsuccessful allegations) (quotations omitted). Put simply, conclusory allegations gain no more plausibility when presented as quotations from interested third parties who themselves have no first-hand information.

G. Plaintiffs' Allegations Regarding "Other Practices" Fail

Plaintiffs contend that defendants: (1) engaged in a "coordinated attack" on "price transparency, consumer protections and competition" (CAC ¶ 136); (2) refused to give online travel agencies access to defendants' pricing information or authorization to sell tickets for defendants' flights (*id*. ¶¶ 137-141); and (3) lobbied the government to restrict service by foreign carriers (*id*. ¶ 136). Those allegations have nothing whatsoever to do with capacity or any alleged conspiracy.

The principal "other practice" alleged by plaintiffs is that defendants supposedly withheld schedule and fare information from OTAs. CAC ¶¶ 137-141. But buried at paragraph 138 is the OTAs' real complaint—that airlines allegedly are "refusing to pay" for referrals. These allegations, however framed, are completely unrelated to the conspiracy alleged. Plaintiffs do not connect their OTA allegations to any capacity reductions or any monitoring of the same. Plaintiffs do not allege any parallel conduct by defendants regarding OTAs. And plaintiffs do not even allege an agreement among defendants related to OTA practices. In the absence of an agreement, federal antitrust law "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).[22]

The letter from Senators Blumenthal and Markey is similarly irrelevant. CAC ¶ 141. That letter complains that unidentified airlines are withholding information from OTAs and

[22] OTAs and other third-party online travel entities have long tried, unsuccessfully, to force Southwest to hand over its fare and flight information. Courts have rejected any notion of third-party entitlement to freely use Southwest's proprietary information for a competitive advantage. *See, e.g., Southwest Airlines Co. v. BoardFirst, LLC,* No. 3:06-CV-0891-B, 2007 WL 4823761, at *19 (N.D. Tex. Sept. 12, 2007); *Southwest Airlines Co. v. Farechase, Inc.*, 318 F. Supp. 2d 435, 441 (N.D. Tex. 2004).

price-comparison websites which "seem[s] intended to push travelers towards the airlines' own websites, where they can add-on extra fees to ticket prices for seat selection, early boarding or bag-check and luggage handling." *Id*. There is no mention of capacity, parallel conduct, or the defendants. The antitrust laws do not restrict the ability of companies to develop loyal relationships (and lower costs) by selling directly to their customers rather than through costly third-party intermediaries. *See, e.g., United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926) ("The owner of an article . . . is not violating the common law or the Anti-Trust Act by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.").

Finally, plaintiffs allege that defendants applied "political pressure" to delay international service to the United States by Norwegian Air International and three Gulf airlines (Emirates, Qatar and Etihad). CAC ¶ 136. Not only are these allegations conclusory and thus defective, *Twombly*, 550 U.S. at 555, but they are completely unrelated to the alleged capacity conspiracy. Plaintiffs make no attempt to explain how service to Europe or the Persian Gulf relates in any way to an alleged conspiracy to restrain capacity for *domestic* flights. Further, to the extent defendants allegedly petitioned the government, their advocacy is immune from antitrust scrutiny. *See, e.g., E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."); *United States v. Philip Morris, Inc.*, 304 F. Supp. 2d 60, 72 (D.D.C. 2004) (*Noerr-Pennington* protects activities aimed at the legislative, executive, and judicial branches). The "Congressional letter" and "political pressure" that plaintiffs describe are precisely the kind of

"concerted effort to influence public officials" protected by the *Noerr-Pennington* doctrine. *See Pennington*, 381 U.S. at 671.

IV. PLAINTIFFS' FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH THEIR STANDING

Plaintiffs lack standing to bring the claims in the complaint because they cannot identify the air transportation routes adversely affected by defendants' alleged unlawful conduct and, therefore, do not (and cannot) plead that they purchased tickets to fly on those routes. The failure to allege purchases for flights on adversely affected routes is a failure to establish injury-in-fact and necessitates dismissal for lack of standing. *Oxbow*, 926 F. Supp. 2d at 42-43 (to establish standing, an antitrust plaintiff must show both injury-in-fact (that it was in fact harmed) and that the alleged injury was an antitrust injury (that the harm resulted from an anticompetitive aspect of defendants' conduct)); *see also* 15 U.S.C. § 15(a) (requiring injury to the plaintiff's business or property "by reason of" an antitrust violation).

The complaint asserts only a "Lack of Competitive Pricing on Various Routes," not on all routes operated by defendants. CAC ¶ 64. Other more detailed factual contentions expressly acknowledge that defendants increased capacity and/or decreased fares on some routes, precisely the opposite of the effects allegedly harming plaintiffs. *See, e.g., id.* ¶ 116 (noting Southwest's "rapid and very successful expansion out of Dallas Love Field" and its "plans to expand service at Houston Hobby" (quotations omitted)); *id.* ¶¶ 133-34 ("airfares on certain routes have declined," at least "where Defendants faced competition from discount carriers"). Documents cited in the complaint—when considered in their entirety—further underscore the point. *See, e.g.*, Ex. B, Wittman Article at 143-62 (concluding that average fares at many airports fell between 2007 and 2012); Ex. M, David Koenig & Scott Mayerowitz, *Airlines Carve US Markets Dominated by 1 or 2 Carriers*, AP, July 14, 2015 (cited at CAC ¶ 72 & n.36) ("Some cities

[Denver, for example,] are actually seeing lower fares than they did a decade ago."); *id.* ("Delta is building Seattle into a gateway to Asia and adding flights on domestic routes long dominated by Alaska. Seattle-based Alaska has responded by adding service," and fares in Seattle have fallen).

The routes on which capacity was reduced or prices increased are not identified in the complaint. There is not even a claim that the routes on which prices allegedly were increased were the same as the routes on which capacity allegedly was reduced. For plaintiffs to have suffered an injury-in-fact, they must have purchased tickets to fly on the routes where the alleged capacity restriction led to higher prices. Plaintiffs have made no such allegation.

Plaintiffs assert in general and conclusory fashion that "[p]assengers have been injured by paying higher airfares" (CAC ¶ 4); that each plaintiff "suffered pecuniary injury by paying artificially inflated ticket prices as a result of" an alleged conspiracy (*id.* ¶¶ 11-22); that plaintiffs were "required to pay more for air passenger transportations [sic] services than they would have paid" absent the alleged conspiracy (*id.* ¶ 155(c)); and that "[a]s a direct and proximate result of Defendants' conduct," plaintiffs were "injured and damaged in their business and property" (*id.* ¶ 156). But statements such as these, which merely recite the injury element of their claim, are properly ignored in evaluating the sufficiency of the complaint. *See, e.g.*, *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (quotations omitted)).

In sum, even accepting the factual allegations in the complaint as true, plaintiffs may or may not have paid higher prices. Allegations merely consistent with a claim are not enough to satisfy plaintiffs' pleading burden. *Id*. at 557. Plaintiffs' complaint should be dismissed for lack

of standing. *See, e.g.*, *Oxbow*, 926 F. Supp. 2d at 42-43 (dismissing antitrust claim for failure to plead injury-in-fact).

CONCLUSION

For all of the foregoing reasons, defendants' Motion to Dismiss should be granted.

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Respectfully submitted,

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