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' REPLY 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
CMI	Cross-Market Initiatives
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

Plaintiffs have two options to state a claim under the pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007): (1) they can plead the existence of an agreement by relying on "direct allegations" that detail the conspiracy's formation, object, and terms; or (2) they can allege parallel non-competitive conduct plus additional "inferential allegations" pointing to a meeting of the minds. *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 555-57 & n.3; *id*. at 564-65 & n.10). Plaintiffs have done neither.

The Complaint fails to advance any "direct allegations" of conspiracy. The so-called "specific factual allegations" to which Plaintiffs point (Pls.' Opp'n at 11-14 (emphasis omitted)), are devoid of basic facts about the formation, object, and terms of the purported capacity agreement. So too are the other allegations in the Complaint. Repeated invocations that Defendants "agreed" to "limit," "stabilize," or "reduce" capacity by "engaging in capacity discipline"—without explaining what that means or how Defendants purportedly did so—do not constitute "direct allegations" of conspiracy. These are vague and conclusory terms of the kind that *Twombly* made clear do not state a Section 1 conspiracy claim.

That leaves Plaintiffs only the circumstantial evidence option. Plaintiffs fail there too. They attempt to plead a conspiracy to restrain capacity without identifying a single capacity action that Defendants supposedly took in parallel, even though publicly available government data show precisely what each Defendant did and when. Lacking the fundamental element of parallel conduct, Plaintiffs try to substitute parallel rhetoric. According to Plaintiffs, common use of the phrase "capacity discipline" somehow demonstrates an agreement. Not so. Plaintiffs' factual allegations and the documents on which they rely demonstrate that different airlines

actually took wildly divergent approaches to growth. Some increased capacity, some decreased capacity, and others stood pat. The magnitude and direction of their changes varied over time, as did the routes on which they modified capacity. "Capacity discipline" means different things to different people; it neither suggests a common understanding or shared goal nor does it prescribe a course of conduct to achieve any agreed-upon end. Mere labels, without common action, do not plausibly suggest that Defendants conspired.

The fundamental failure to plead parallel conduct requires dismissal and renders Plaintiffs' supposed "plus-factor" allegations irrelevant. But even with parallel conduct, their so-called circumstantial facts would not point to a meeting of the minds. Plaintiffs' allegations in this regard are both legally and factually irrelevant when considered on their own or together. Defs.' Mot. at 18-42. Finally, Plaintiffs still have not established their standing. They claim that the alleged capacity conspiracy led to increased prices only on *some* routes. Yet there are no allegations that any Plaintiff actually flew those routes and thereby was injured. Each of these failures end Plaintiffs' claim as a matter of law.

ARGUMENT

I. PLAINTIFFS DISTORT AND MISSTATE APPLICABLE LEGAL STANDARDS

Plaintiffs' assertion that a court must allow Section 1 claims to proceed to discovery whenever the facts alleged are equally consistent with either conspiracy or independent action demonstrates a fundamental misunderstanding of the law. Pls.' Opp'n at 7. *Twombly* holds that a plaintiff fails to state a claim when conspiracy is simply one "possible" explanation for the facts alleged. 550 U.S. at 557, 561-62. To get past the pleading stage, an inference of conspiracy must be "plausible," not merely possible. *Id.* at 556, 557 n.5 (claim must cross the threshold between "the factually neutral and the factually suggestive"). And the inference must be drawn from the factual allegations in the complaint, not "[s]peculat[ion]" and "suspicion." *Id.*

at 555. Whether Plaintiffs' claims are plausible is not determined or informed by catchphrases such as "parallel conduct" and "actions against self-interest," much less the rank speculation that pervades Plaintiffs' Opposition. The Court must go beyond Plaintiffs' conclusory rhetoric to consider whether they have alleged *facts* "adequate to show illegality." *Id.* at 557. This includes considering "common economic experience," "history," and "obvious alternative explanation[s]," *id*. at 565, 567, to determine if the allegations are "merely consistent with unilateral action [and therefore] insufficient" to state a claim, *In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4277510, at *26 (S.D.N.Y. Aug. 29, 2014) (dismissing claims).

Here, the Court can make this determination based solely on the four corners of the Complaint. But it may also "take notice of the full contents of the published articles referenced in the complaint." *Twombly*, 550 U.S. at 568 n.13. Plaintiffs' argument to the contrary relies on cases in which defendants asked courts to accept as true self-serving documents—created by the defendants themselves—simply because plaintiffs made passing references to them in their complaints. *See*, *e.g.*, *Banneker Ventures LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015). That is not the case here. Plaintiffs' Complaint is constructed in large part out of selective quotations drawn from third-party articles; take those away and there would be almost nothing left in the pleading. The Court is entitled to consider the full contents of these documents. *Id*. at 1134 n.6 ("a referenced document may always be read to evidence what it *incontestably shows*" (quotation omitted)); *see Twombly*, 550 U.S. at 568 n.13.[1]

II. PLAINTIFFS DO NOT ADVANCE ANY DIRECT OR OTHERWISE NON-CONCLUSORY ALLEGATIONS OF A CAPACITY AGREEMENT

[1] Plaintiffs are similarly unable to hide from unfavorable case law. Pls.' Opp'n at 8-10. It is appropriate to cite a case for a proposition of law unrelated to the posture of the litigation, as the Supreme Court did in *Twombly*, *id.* at 553-54, 560, and as Plaintiffs repeatedly do in their Opposition, *see* Pls.' Opp'n at 7, 14, 17-18, 23. And Plaintiffs cannot ignore relevant law simply because they have not been allowed discovery. *Id.* at 9-10. Pleading standards remain the same.

Plaintiffs allege no facts that plausibly define a conspiracy. Nowhere does the Complaint explain the object of the capacity conspiracy or how Defendants supposedly joined and effectuated it. Plaintiffs seek to excuse the Complaint's deficiencies in three primary ways.

First, Plaintiffs contend that they have met their burden by advancing a generalized claim that Defendants agreed to "discipline" capacity in order to raise airfares.[2] Pls.' Opp'n at 19-21. This is far too vague to sustain a conspiracy claim. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 947-48 (5th Cir. 2011) (allegations that defendants agreed to restrict "operating capacities" were "conclusory" and could not state claim). Plaintiffs alleging an output-restriction agreement must, at a minimum, explain *how* Defendants purportedly agreed to restrict output. *See In re Zinc Antitrust Litig.*, __ F. Supp. 3d __, 2016 WL 93864, at *1, 7-8, 21-23 (S.D.N.Y. Jan. 7, 2016) (output conspiracy supported with factual allegations that defendants hoarded zinc, implemented load out restrictions, falsified shipping records, and cancelled warrants, among other things; court dismissed because actions were in line with each defendant's self-interest); *In re OSB Antitrust Litig.*, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 3, 2007) (supply-reduction conspiracy accompanied by factual allegations that defendants shut down mills, delayed or cancelled construction of new mills, bought product from competitors rather than manufacturing more, and maintained low operating rates, among other things).[3]

Here, Plaintiffs are unable to decide what Defendants allegedly did, let alone how they

[2] Contrary to Plaintiffs' accusations, Defendants do not argue that Plaintiffs must plead direct evidence to survive a motion to dismiss. Pls.' Opp'n at 13-14. Rather, as Defendants explained, one manner for Plaintiffs to state a claim is to advance "direct allegations" that provide "details" about "who conspired, at what time, to do what" such that the "circumstances, occurrences, and events giving rise to the claim" are clear. *Fame Jeans*, 525 F.3d at 16-17 (citing *Twombly*, 550 U.S. at 555 n.3 & 565 n.10); Defs.' Mot. at 8.

[3] *See also In re Aluminum Warehousing*, 2014 WL 4277510, at *1, 10-13, 32-34 (advancing similar factual allegations in support of output conspiracy); *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 714-15, 744 (E.D. Pa. 2011) (similar).

did it. Defendants are alleged to have either "stabilized," or "limited," or "reduced" capacity, but the Complaint offers no facts to substantiate those contradictory and conclusory assertions. Pls.' Opp'n at 9, 12. The Complaint contains no allegations of how or by how much capacity was to be limited, restricted or reduced, on what routes, or by what mechanisms. There are no timelines for compliance nor any means by which cheating would be detected and punished. There is literally nothing in the Complaint, beyond repetition of the phrase "capacity discipline," that would even communicate the basic terms of the agreement among the alleged co-conspirators. And despite the ready availability of capacity data,[4] the Complaint does not even advance factual allegations regarding how any Defendant's purported capacity behavior was different during the alleged conspiracy, with the exception of the conclusory assertion that "airline capacity has deviated from historical patterns." CAC ¶ 4; *see id*. ¶ 87 ("members of the industry" formerly "add[ed] airline capacity"). Such allegations, made in "entirely general terms without any specification of any particular activities by any particular defendant," do not plead a conspiracy. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (per curiam) (quotations omitted); *see Spectrum Stores*, 632 F.3d at 947-48; *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 926 F. Supp. 2d 36, 46-47 (D.D.C. 2013) ("*Oxbow I*"); Defs.' Mot. at 12-14.

By way of illustration, Plaintiffs' claim would never survive a motion to dismiss had they alleged Defendants directly "agreed to raise prices" but then did not plead facts about actual prices, how Defendants purportedly raised them, or any parallel pricing behavior.[5] Plaintiffs'

[4] *See* http://www.transtats.bts.gov/Data_Elements.aspx?Data=4.

[5] *See 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" were "broad," "vague," and constituted "naked assertions" that could not state a claim); *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 2014 WL 943224, at *8 (D. Minn. Mar. 11, 2014) (similar); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (similar); *In re Elevator Antirust Litig.*, 2006

vague and conclusory assertions that Defendants "stabilized," or "limited," or "reduced" capacity are no different. According to Plaintiffs, because Defendants used similar language when discussing capacity generally, literally any action any individual airline took at any time with respect to capacity was in furtherance of the alleged conspiracy—whether it grew, shrank, or maintained capacity, and regardless of whether it was parallel to any action of any other Defendant. Such a facile claim invites the Court to conclude that every decision by each individual airline, no matter how disparate, is subject to antitrust scrutiny.

Plaintiffs respond that they are not required to allege a conspiracy with the "precision of a diamond cutter." Pls.' Opp'n at 19 (quotation omitted). They similarly argue that because some of Defendants' executives assured investors that they were exercising "capacity discipline," Defendants must "certainly" know what Plaintiffs are alleging. *Id*. at 19-20. But Plaintiffs are not allowed to proceed to costly and burdensome discovery unless they offer some plausible indication that a diamond exists. Plaintiffs' "you-know-what-you-did" pleading style gives the Court no reason to infer there is a viable claim, and gives Defendants nothing to answer. *Twombly*, 550 U.S. at 556-59; *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, 604 F. Supp. 927, 932 (N.D. Ill. 1985) ("To allow a plaintiff to plead simply, 'defendants know what they did,' would render superfluous even the liberal requirements of Rule 8."); Defs.' Mot. at 12-15.

Second, Plaintiffs try to salvage the Complaint by pointing to allegations that have nothing to do with capacity. Pls.' Opp'n at 12-13 (only one set of the supposedly "specific" allegations in the Complaint—"Defendants' statements about capacity"—relates to capacity). They attempt in particular to shift the focus to airfares, arguing that a supposedly unprecedented

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WL 1470994, at *8 (S.D.N.Y. May 30, 2006) (complaint "is truly vacuous unless it contains allegations" of "specific wrongdoing" relevant to the conspiracy alleged).

increase in fares[6] is "more than sufficient to assert the formation of a conspiracy" regarding capacity. Pls.' Opp'n at 15; *see also id*. at 20. This is not so, even assuming Plaintiffs alleged such a fare increase. "[A] price increase is no more suggestive of collusion than it is of any other potential cause." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1197 (9th Cir. 2015). "Any manner of economic variables may have contributed to" increases in prices, "from external market pressures to permissible conscious parallelism." *Id*. at 1197 n.13. If a capacity conspiracy is to be blamed for price effects, Plaintiffs must allege facts that plausibly tie the price increases to an agreement on capacity. *Id.* at 1197. Plaintiffs have advanced no connecting allegations. Defs.' Mot. at 29-32.

Third, Plaintiffs contend that they need not identify any object of the purported conspiracy beyond "air passenger transportation services within the United States" because, they contend, Defendants' capacity-related strategies do not involve city pairs.[7] Pls.' Opp'n at 16-17. That makes no sense. As the Department of Justice has long recognized, competition in the airline industry takes place, and should be evaluated, at the city-pair level. Defs.' Mot. at 11-12 (discussing DOJ's city-pair-based complaint challenging American Airlines-US Airways merger and how each city pair may be uniquely affected by slot constraints or other factors that make "system-wide" capacity economically irrelevant). The Complaint must therefore make sense in light of the fundamental economics of the airline industry. *In re Aluminum Warehousing*, 2014

[6] Contrary to Plaintiffs' misleading arguments about pricing, fares did not suddenly stop tracking fuel prices in 2009. Pls.' Opp'n at 15. Between 2004 and 2009, airfares *decreased* while fuel costs *increased*. CAC ¶ 70; Defs.' Mot. at 30 n.17. The Producer Price Index for domestic air transportation, which Plaintiffs claim started to climb as a result of the purported conspiracy (Pls.' Opp'n at 15), had actually been climbing for decades, an economic reality that Plaintiffs ignore, Defs.' Mot. at 27-28. And Defendants' airfares grew at nearly identical rates both before and after 2009. *Id*. at 27.

[7] This allegation is not found in the Complaint and cannot salvage Plaintiffs' claim. *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 165 n.10 (D.D.C. 2014) (Kollar-Kotelly, J.) (plaintiffs cannot amend their complaints through opposition briefs).

WL 4277510, at *29 (dismissing claims when "the economics of the alleged conspiracy as pled do not work"). Airlines compete to meet consumer demand for air travel. There is no consumer demand for "air passenger transportation services within the United States." Instead, customers demand air transport on specific routes, for example, San Francisco to Los Angeles. A customer flying from San Francisco to Los Angeles is injured only if that route is affected by the purported conspiracy. As explained in Defendants' Motion, allegations of a "capacity discipline" conspiracy untethered from the reality that competition takes place at the route level fails to raise a plausible inference of conspiracy. Defs.' Mot. at 11-14; *see also* CAC ¶ 64 (acknowledging competition varied by route and that only *some* routes were affected); Pls.' Opp'n at 19 (same).[8]

III. THE COMPLAINT DOES NOT PLEAD A CONSPIRACY BY INFERENCE

A. Plaintiffs Have Not Made the Threshold Allegation of Parallel Conduct

Plaintiffs' attempt to plead a conspiracy by inference fails because they have not satisfied the threshold requirement of alleging that Defendants behaved in parallel fashion. The Opposition recites allegations that "most people in the industry" have engaged in "capacity discipline"; that "all the airlines" "pulled down their capacity"; that "network carriers" reduced capacity by 14.5% between 2007 and 2009 and 12% between 2008 and 2010; and that "various Defendants" and the "industry as a whole were maintaining capacity discipline." Pls.' Opp'n at 22. But allegations that "most people" behaved in a generally "disciplined" manner says nothing about any *Defendant's* specific capacity conduct or how those actions compared to anyone else's. Nor does an allegation that industry-wide capacity declined over a period of two years during the throes of the Great Recession—all of which falls outside the alleged class period—

[8] Plaintiffs' cases do not counsel otherwise. Pls.' Opp'n at 17-19. They do not relate to pleading standards, and none dispute that routes are subject to unique competitive dynamics that influence things like pricing and demand. *See In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 687 (N.D. Ga. 1991) (while airlines offer similar services across routes, market conditions vary, including the "price sensitivities of passengers" and "return on [] resources").

speak to actions suggestive of parallel conduct by the Defendants. *In re Musical Instruments*, 798 F.3d at 1195-96. Indeed, Plaintiffs rarely specify whether their allegations about capacity relate to Defendants' domestic capacity, the purported subject of the alleged conspiracy, as opposed to all airlines and/or worldwide capacity. Pls.' Opp'n at 22-23; *see also id*. at 17 (capacity discipline relates to "system-wide capacity" and "industry as a whole").

The *only* allegations mentioning Defendants' actual capacity actions during the purported conspiracy period show that Defendants acted in widely divergent ways. The Complaint demonstrates that Defendants' respective capacity decisions differed by *billions* of available seat miles, with some Defendants increasing capacity, others reducing it, and all approaching their decisions in different ways. Defs.' Mot. at 16-17. For example, Plaintiffs' allegations indicate:

- American "did not add significant flying capacity to its network" during an unspecified period after 2009, grew 2.4% in 2014, and planned for 3% growth in 2015.
- Delta raised its capacity between 2009 and 2013, expanded capacity by 3% in 2014, and projected that capacity "could rise as much as 5%" in 2015.
- Southwest reduced capacity by "almost 8%" in 2009, kept capacity flat in 2014, and planned to grow capacity at "approximately 7 percent" in 2015.
- United lowered capacity between 2011 and 2013, but expanded capacity in 2014 and 2015 by 0.5% and "no more than" 2.5%, respectively.

Id.; CAC ¶¶ 108, 112 n.112. This disparate conduct suggests unilateral action, not conspiratorial parallel behavior, and thus is fatal to Plaintiffs' claim.

Defendants are not, as Plaintiffs assert, demanding "complete and exacting parallelism" with "identical," "simultaneous," or "uniform" behavior. Pls.' Opp'n at 23. But Plaintiffs have not alleged even one remotely parallel capacity decision—whether by timing, direction, or

amount—involving these Defendants. In this respect, *SD3, LLC v. Black & Decker (U.S.) Inc.*, upon which Plaintiffs rely, is instructive. There, defendants' "uniform actions [were] obvious": they all refused to license or otherwise implement plaintiff's technology. 801 F.3d 412, 427 (4th Cir. 2015). Defendants argued that their behavior was dissimilar because some defendants negotiated with the plaintiff for longer periods of time before refusing the technology. *Id*. The court rejected the need for "relative lockstep" and "identical" actions, but explained the "unremarkable proposition" that "*parallel conduct must produce parallel results*" to state a claim. *Id*. at 428-29 (emphasis added). In *SD3*, a boycott case, that meant each defendant must have ultimately refused to deal with the plaintiff. Here, a case in which Defendants allegedly agreed to stabilize, reduce, or limit capacity, it means that Defendants must have produced parallel limitations or reductions in capacity. *Id*. at 429. Plaintiffs have alleged no such conduct.

The *SD3* court identified two cases in which price-fixing allegations revealed "varying" or "inconsistent" pricing and, as a result, "involved non-parallel ends" that could not support a conspiracy allegation. *SD3*, 801 F.3d at 429 (emphasis omitted). In the first case, *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117 (D.D.C. 2006), the court denied a preliminary injunction when the only allegations regarding "actual prices" indicated that plaintiffs paid different amounts. *Id*. at 131-32 (explaining further that plaintiffs must be able to "show that the defendants' behavior was in fact parallel, the first element necessary in showing a conspiracy with conscious parallelism."). In the second, *LaFlamme v. Société Air France*, 702 F. Supp. 2d 136 (E.D.N.Y. 2010), the court dismissed a price-fixing complaint containing only "dubious" allegations of parallel pricing, with surcharges "in some instances varying by a factor of three" or being introduced weeks apart. *Id*. at 151.

Together, *SD3* and the cases on which it relies underscore the flaws in the Complaint.

Plaintiffs do not allege that Defendants took parallel actions on capacity. The Complaint, in fact, is replete with allegations of "varying," "inconsistent," and "non-parallel" capacity behavior. *SD3*, 801 F.3d at 429; *see* Defs.' Mot. at 16-17. Such variation in *conduct* belies the claim that purportedly similar *commentary* about capacity—the use of the phrase "capacity discipline"—is indicative of some sort of common plan. An airline can make unilateral decisions in its own independent economic interest *and* be "disciplined" in its approach to capacity whether it is reducing, maintaining, or growing capacity. The fact that multiple airlines described their capacity decisions as "disciplined," but implemented widely varying capacity actions, renders implausible any inference of agreement and requires dismissal. Defs.' Mot. at 15-18 (collecting cases); *SD3*, 801 F.3d at 429; *City of Moundridge*, 429 F. Supp. 2d. at 132.

B. Plaintiffs' Plus Factors Do Not Support A Plausible Inference of Conspiracy

In the absence of parallel capacity conduct, Plaintiffs' alleged plus factors are simply irrelevant. But even assuming parallel conduct (counterfactually), those allegations do not suggest conspiracy, even when considered as a whole and accorded every reasonable inference.

1. *General Public Statements to Investors Do Not Plausibly Suggest Conspiracy*

Plaintiffs argue that certain Defendant employees "routinely speculated about what other members of the industry would do." Pls.' Opp'n at 25. According to Plaintiffs, this public speculation "transgressed the[] bounds" of guidance published by a private law firm and was inconsistent with "internal antitrust compliance policies," rendering the alleged conduct "strikingly similar" to allegations that survived dismissal in *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 733 F. Supp. 2d 1348 (N.D. Ga. 2010) ("*Delta/AirTran*"), and *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009). Pls.' Opp'n at 25-31. Putting aside the lack of relevance to what a law firm (apparently unconnected to any Defendant)

thought, Plaintiffs' allegations are not remotely similar to the facts alleged in those cases.

The facts pleaded in *Delta/AirTran* were straightforward. The AirTran CEO responded to an analyst's question about AirTran's preference to be a follower rather than a leader in adopting a first bag fee. Delta and AirTran then announced a first bag fee in the same amount within one week of each other. *Id*. at 1355-56. Notably, Plaintiffs again ignore that the capacity-restriction allegations in *Delta/AirTran* were voluntarily dismissed once those plaintiffs actually looked at the capacity data, which showed non-parallel capacity decisions.[9] In *ArcelorMittal*, plaintiffs coupled allegations of direct communications and "massive, unprecedented, and coordinated output cuts" with contemporaneous public statements advocating for "exactly" those changes. 639 F. Supp. 2d at 886, 895-96, 900. In contrast, Plaintiffs here have not alleged any parallel capacity *action* by any Defendant, notwithstanding the ready availability of public data that would show precisely what each Defendant did in terms of capacity and when.

None of Defendants' communications with investors in any way purport to describe "already-reached agreements or understandings within the 'industry' regarding capacity control." Pls.' Opp'n at 26. The public statements speak for themselves and reflect the "economic reality" that corporations should and do discuss strategy, prices, and industry trends with shareholders. *United States v. Gen. Motors Corp.*, 1974 WL 926, at *21 (E.D. Mich. Sept. 26, 1974). There is nothing illegal or suggestive about that behavior. *See* Defs.' Mot. at 19-22. Such statements cannot be twisted into evidence of conspiracy simply because they reference the "industry" or use a common phrase. *Id.*; *see Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, __ F. Supp. 3d __, 2016 WL 304404, at *11 (D. Del. Jan. 25, 2016) ("it may be in a firm's best interest to

[9] *See* Defs.' Mot. at 23 n.10. If *Delta/AirTran* teaches anything, it is that the first place to look to see if capacity claims like those advanced here have any possible substance is at the capacity data, which Plaintiffs (despite the availability of DOT data) have assiduously avoided.

consider the interests and needs of the industry as a whole").

Plaintiffs also contend that conspiracy can be inferred from certain investors owning shares in multiple Defendants. Pls.' Opp'n at 24, 40. Plaintiffs provide no legal authority for a theory that common ownership begets conspiracy and have alleged no facts that would even remotely suggest such a conspiracy here. Defs.' Mot. at 36-37.[10] Even the DOJ has expressed doubts about whether substantial common ownership of stock by investors can be reached under antitrust merger laws. Ex. N, Leah Nylen, *DOJ Looking Into Common Ownership Among US Airlines, Other Industries, Baer Says,* MLex Market Insight (Mar. 9, 2016) (cited at CAC ¶ 46 & n.19) (quoting William Baer: "It's not clear to me that the antitrust laws existing today do fully reach" common ownership of company stock).

2. *Reiterating Allegations Regarding Southwest Does Not Support an Inference of Illicit Agreement*

Plaintiffs continue to argue that Southwest's 2015 capacity plans support an inference of conspiracy dating back to 2009, but their Opposition highlights the utter implausibility of their claim. Southwest was aggressively competing and expanding output. Plaintiffs' own documents demonstrate that in the first quarter of 2015, Southwest increased its capacity by 6% year-over-year, creating "pricing pressure" on other airlines. Southwest Suppl. Br. at 8 (citing SW-Ex. 22 at 3). Plaintiffs do not deny that Southwest grew and cannot explain, if there was a capacity conspiracy afoot, why Southwest was expanding or why Southwest's alleged co-conspirators ignored what Plaintiffs now sheepishly call Southwest's "cheating."

Instead, Plaintiffs double down on the puzzling assertion that when Southwest announced

[10] The so-called "[e]conomic studies" to which Plaintiffs point (*see* Pls.' Opp'n at 24) demonstrate that common shareholders are just one of many factors that may influence prices. José Azar et al., *Anti-Competitive Effects of Common Ownership* 31-32 (2015) (noting recession and product quality; explaining that effects may occur absent collusion or communication between competitors).

its expansion plans for the second half of 2015, it "knuckled under" to pressure applied by other airlines at industry events. CAC ¶¶ 119-22. Plaintiffs cite a pair of quotes from a newspaper columnist and a senator speculating that Southwest's June capacity guidance—growth for the year of "around 7 percent"—was moderated as a result of public remarks at an IATA conference. Pls.' Opp'n at 32; CAC ¶¶ 122. But conclusory speculation that would not satisfy *Twombly* is not made more plausible when presented as quotations from politicians or columnists. And Plaintiffs ignore the fact that Southwest's CEO gave that exact guidance ("around 7 percent") on May 28, *more than a week before* the gatherings hosted by Deutsche Bank and IATA (of which Southwest is not a member) at which Southwest purportedly was "pressured" into giving the "around 7 percent" guidance. Southwest Suppl. Br. at 8-9 (citing SW-Ex. 23 at 2).

Moreover, Plaintiffs have no answer to the fact that there is, in *Twombly* terms, an "obvious alternative" to conspiracy that explains why Southwest would comment publicly about its capacity plans: to reassure investors in the wake of stock declines. Defs.' Mot. at 24-25. At the motion to dismiss stage, factual allegations that are consistent with *either* legal or illegal conduct are "stuck in neutral territory" and do not give rise to a plausible inference of an illicit agreement. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quotation omitted); *see In re Aluminum Warehousing*, 2014 WL 4277510, at *26.

3. *Plaintiffs Do Not Plausibly Allege a "Structural Break" in Prices*

Plaintiffs try to circumvent the absence of parallel capacity conduct by pointing to a supposed "structural break" in prices. They rely on a strange statistic about the price charged by the largest airline on certain unidentified routes, alleging that there was a change in January 2009 when one of the Defendants was the largest carrier on those routes. Pls.' Opp'n at 1, 2, 15, 34. Nothing can be derived from the actual data or methodology behind this so-called "analysis," however, because Plaintiffs offer neither, and in the absence of this information, the Court can

and should disregard these allegations as conclusory.[11] Even if Plaintiffs had bothered to provide the source(s) of their purported analysis, these allegations would still be irrelevant to the issues at hand—how Defendants' capacity changed and whether those changes were in parallel. Finally, instead of evidence demonstrating that Defendants suddenly changed their pricing behavior in complex and historically unprecedented ways, Plaintiffs' "structural break" allegations actually show that Defendants' average fares increased at the same rate before and after 2009. CAC ¶ 65.

Tellingly, even Plaintiffs' explanation of the charts at Paragraphs 64 and 65 of the Complaint is muddled. In the Complaint, Plaintiffs purported to draw a clear distinction between Defendants and non-Defendants—and specified that US Airways "prior to its merger with American" was included with "Defendants." CAC ¶ 65. But in their Opposition, Plaintiffs suddenly claim that they intended to (and did) treat Continental and Northwest as Defendants in their analysis. Pls.' Opp'n at 33.[12] This new explanation of the charts is not in the Complaint. *See* CAC ¶ 1 (defining "Defendants" as American, Delta, Southwest, and United); *id*. ¶¶ 23-26 (defining "Defendants" without any mention of US Airways, Continental, or Northwest); *id*. ¶¶ 64-65 (describing charts as depicting "Defendants'" prices to prices of "Others"); *see also Kingman Park*, 27 F. Supp. 3d at 165 n.10; *BEG Invs., LLC v. Alberti*, 34 F. Supp. 3d 68, 85 (D.D.C. 2014) ("facts [] not alleged in its Complaint" cannot be considered). Nor is it consistent with publicly-available information: unless Defendants' merger partners are treated as "Others" during the pre-2009 period, Plaintiffs' misleading charts are wildly inconsistent with Department

[11] Had the Complaint identified the data source for the charts, the Court could consider that data in assessing the Complaint, especially given how Plaintiffs make the charts the centerpiece of their Opposition. *See, e.g.*, *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" (quotation omitted)); *Slate v. Pub. Def. Serv.*, 31 F. Supp. 3d 277, 287 (D.D.C. 2014) (same). But Plaintiffs studiously avoid providing the data source.

[12] Plaintiffs do not explain how AirTran (which merged with Southwest) is treated in the chart.

of Transportation data.

Plaintiffs' other pricing data are equally flawed. Plaintiffs assert that Paragraph 67 of the Complaint "corroborat[es]" an alleged "structural break" in Defendants' pricing behavior (Pls.' Opp'n at 34), but the domestic airline Producer Price Index data says nothing about *Defendants'* behavior with respect to capacity or pricing—it relates to the industry as a whole. The complete data, moreover, shows no "huge increase" in prices after 2009. The index for domestic airfares has been increasing for decades, and has been flat since 2012. Defs.' Mot. at 27-28 & n.16.

Because of inconsistency between the Complaint's description of the charts and Plaintiffs' *post hoc* explanation, combined with their refusal to explain their methodology and disclose their sources, the Court should disregard the charts and the allegations in the Complaint based on them. *Kingman Park*, 27 F. Supp. 3d at 165 n.10; *BEG Invs.*, 34 F. Supp. 3d at 85.

4. *Plaintiffs Have Not Plausibly Alleged Defendants Acted Contrary to Their Economic Self-Interests*

Plaintiffs claim that Defendants acted contrary to their economic self-interests because "airfares increased while jet fuel costs were declining." Pls.' Opp'n at 35. But allegations of actions against self-interest can support an inference of conspiracy only when they are "so perilous" that "no reasonable firm would make the challenged move without [] an agreement." *In re Musical Instruments*, 798 F.3d at 1195; *see In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 400-01 (3d Cir. 2015). Even if the Complaint plausibly alleged price increases that "broke" from past practice (it does not), there is nothing to suggest that such increases were "perilous" in any respect.

Indeed, the very same fare charts on which Plaintiffs rely show that *non-Defendant* airlines also *increased* fares during the alleged conspiracy period and that on average Defendants' fares grew at the same rate before and after the start of the purported conspiracy.

CAC ¶¶ 64-65, 67. The Complaint also reflects flat or increasing fuel costs for most of the alleged conspiracy period. CAC ¶ 74 (chart showing jet fuel spot price increased between 2009 and 2015). And although Plaintiffs allege that jet fuel prices in the *spot market* declined during the alleged conspiracy period (CAC ¶¶ 74-75), the Complaint contains no factual allegations that *Defendants' actual fuel costs* declined. To the contrary, materials cited in the Complaint indicate that Defendants' fuel costs did not always follow the price of fuel, often as a result of fuel hedging. *See, e.g.*, Defs.' Mot. at 30 n.17, 31; *id*. at Ex. K; Ex. O, Trefis Team, *Why Did US Airlines Deliver Record Profits in the Seasonally Weak First Quarter?*, Forbes (May 13, 2015) ("Trefis Team Article") ("[Delta] suffered hedging losses of about $1.1 billion due to mark-to-marketing of its [fuel] hedging positions.") (cited at CAC ¶ 80 n.42).

An allegation that Defendants raised prices while fuel costs were declining would not, in any event, demonstrate conduct contrary to the unilateral self-interests of the airlines. Plaintiffs have not alleged any facts or any economic or legal reason that airlines in a concentrated market—where competitors "watch each other like hawks," *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015)—should conclude that adding capacity or cutting fares will increase profits. A rational competitor could independently determine that it is more profitable to maintain the same capacity with lower costs rather than incurring significant long-term expenses to add capacity in response to what may be a short-term fluctuation in the highly-volatile price of fuel. Thus, Plaintiffs do not allege conduct that would be "perilous" absent conspiracy. A choice not to sacrifice profits by chasing market share can be perfectly rational, expected, and normal. *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 283 (D. Minn. 1997) ("in an oligopolistic market, such as that in which the airlines operate, rapid price coalescence is the norm and is not, in itself, illegal"); Defs.' Mot. at 29-32. Indeed, the conduct

Plaintiffs advocate might be the most perilous of all. Plaintiffs' contention that each airline should cut fares in the face of lower costs would mean no change in relative prices, no gain in market share for anyone, and reduced profits for all.

In concentrated markets, "[a]n action that would seem against self-interest in a competitive market may just as well reflect market interdependence giving rise to conscious parallelism." *In re Musical Instruments*, 798 F.3d at 1195. Put differently:

> [E]ach firm in an interdependent market expects that a widely unfollowed price increase will be rescinded. But so long as prices can be easily readjusted without persistent negative consequences, one firm can risk being the first to raise prices, confident that if its price *is* followed, all firms will benefit. By that process ("follow the leader"), supracompetitive prices and other anticompetitive practices, once initiated, can spread through a market *without any prior agreement*.

Id. (second emphasis added); *see Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (describing "oligopolistic price coordination or conscious parallelism" as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions"). Because Plaintiffs allege the airline industry is an oligopoly (CAC ¶ 34), there is nothing irrational about maintaining or increasing prices, even in the face of decreasing costs. Such action is no more suggestive of conspiracy than it is of lawful interdependence. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) ("[A]cts against self-interest often do no more than restate interdependence." (quotation omitted)); Defs.' Mot. at 28-32.

Plaintiffs cite a number of cases where the alleged price increases are easily distinguishable from those alleged here. In *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), for example, plaintiffs alleged that "all at once the defendants changed their

pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third," a change that plaintiffs alleged was "so rapid," it "could not have been accomplished without agreement." *Id*. at 628. Because this is a case about an alleged capacity conspiracy, there is a notable absence of any factual allegations of a sudden, unexplained industry-wide shift in capacity. And Plaintiffs' allegations about pricing do not, in fact, plausibly allege that Defendants increased their prices, did so by similar amounts, or acted differently than non-conspirators.

Plaintiffs also rely on *Haley Paint Co. v. E.I. DuPont De Nemours & Co.*, 804 F. Supp. 2d 419 (D. Md. 2011). That case involved allegations of numerous "lock-step price increases" "in the midst of" the "great recession" in 2008 when demand "was dwindling." *Id.* at 426. And as noted above, in *ArcelorMittal* the plaintiffs alleged that defendants' statements "encouraging industry production restraint" were "on many occasions . . . *followed closely* by unprecedented industry-wide production cuts, *exactly* as encouraged and represented by Defendant executives." 639 F. Supp. 2d at 895-96 (emphasis added). Here, by contrast, Plaintiffs do not identify a single pricing (or capacity) change actually taken by any Defendant—let alone a series of specific parallel actions—and ignore that passenger demand for air travel since 2009 has *increased* (making any price increase entirely rational).[13]

Finally, *In re Flat Glass* is contrary to Plaintiffs' assertion that airfare increases "while jet fuel costs were declining is . . . powerful circumstantial evidence of a conspiracy." Pls.' Opp'n at 35. There, the court found that price increases that were not "correlated with any changes in

[13] Defs.' Mot. at Ex. K ("There are several reasons for staying the course on price . . . too many customers are clamoring for plane tickets to justify dropping prices—even when costs are down."); Defs.' Mot. at Ex. M ("To be sure, other factors have contributed to higher fares, among them a stronger economy, longer average flight distances and, for most of the past few years, some of the highest fuel prices in history."); Ex. O, Trefis Team Article at 3 ("demand for air travel remained strong throughout the quarter").

costs or demand" did *not* indicate whether defendants' actions were "merely interdependent or the result of an actual agreement." 385 F.3d at 362. Instead, the court focused on precisely what is missing in this case: extensive "'traditional' conspiracy evidence," including multiple private communications among the defendants that were immediately followed by parallel price increases, and an admission to fixing prices by one of the settling defendants, as part of a proffer to DOJ. *Id.* at 362-69. Here, Plaintiffs do not (and cannot) allege anything like that.

5. *Industry Structure Allegations Do Not Support an Inference of Conspiracy*

Plaintiffs' Opposition, like their Complaint, points to market concentration and barriers to entry as supporting an inference of conspiracy. Plaintiffs cite to a number of cases for the unremarkable proposition that structural evidence can sometimes support an inference of conspiracy when coupled with other factors. But industry concentration alone is not a plus factor. *See, e.g.*, *Twombly*, 550 U.S. at 550 n.1 (affirming dismissal despite allegations of 90 percent market share); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014) (finding 70 percent market share was not a plus factor). Plaintiffs, moreover, do not address how this structural evidence makes conspiracy a plausible explanation. *In re Text Messaging*, 782 F.3d at 875.

Plaintiffs' allegations concerning opportunities to conspire are equally flawed. Plaintiffs concede, as they must, that "this type of evidence standing alone may be insufficient" (Pls.' Opp'n at 39), but still seek to make something of it. They contend for the first time in their Opposition that Defendants actually "met face to face" at industry conferences to usher in a "sharp break with the past." *Id*. at 14; *see id*. at 2 & n.2, 20. The Complaint itself does not go that far, claiming only that industry meetings represented "opportunities for the Defendants' executives to meet face to face and conspire." CAC ¶ 114. No facts are alleged showing that any Defendant actually availed itself of the opportunity. And, in any event, "it is well settled law

that a plaintiff cannot amend its complaint by the briefs in opposition to a motion to dismiss." *Kingman Park*, 27 F. Supp. 3d at 165 n.10 (Kollar-Kotelly, J.).

Plaintiffs' references to ATPCO and CMIs are similarly unavailing. Plaintiffs fail to identify any connection between either ATPCO or CMIs and the alleged object of the conspiracy—disciplining *capacity*. Pls.' Opp'n at 38-39. Plaintiffs also continue to mischaracterize the 1992 consent decree in *United States v. Airline Tariff Publishing Co.*, 836 F. Supp. 9 (D.D.C. 1993), as condemning public dissemination of fare information. The focus of that case was on the announcement of fares through ATPCO long before the new fares took effect. The consent decree preserved the procompetitive ATPCO function of publicly distributing current fare information to the industry, including airlines and travel agents. The decree did not "prevent the settling defendants from disseminating currently available fares through [ATPCO], from advertising currently available fares to consumers, or from offering for sale fares good only for future travel." *Id.* at 11; *accord Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003) ("in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions" (quotation omitted)); Defs.' Mot. at 33-34 & n.18. Plaintiffs' allegations concerning CMIs are similarly irrelevant: CMIs involve discounting prices (CAC ¶ 57), and the Complaint includes no allegations explaining how cutting prices is a relevant element of "the structure of the industry" (CAC ¶¶ 33, 57), "a facilitating anticompetitive practice" (Pls.' Opp'n at 39), or otherwise related to a capacity conspiracy.

6. *A Pending Civil Government Investigation Does Not Suggest A Conspiratorial Agreement*

Plaintiffs' repeated references to civil investigations by the DOJ and the State of Connecticut are "equally consistent with Defendants' innocence." *Superior Offshore Int'l, Inc.*

v. Bristow Grp. Inc., 738 F. Supp. 2d 505, 517 (D. Del. 2010) (dismissing claims). Indeed, Plaintiffs cite a string of factually distinguishable cases in support of their assertion that "[a]llegations of the existence of ongoing governmental investigations relating to the claims at hand can be considered . . . in determining whether a complaint can survive a motion to dismiss." Pls.' Opp'n at 40-41. The government investigations in the cited cases all presented some "indication . . . that wrongdoing of the kind alleged [] occurred." *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 514 (S.D.N.Y. 2009). The sort of "general references" to "government investigations" that Plaintiffs make here "cannot help [them] satisfy the standard for stating a §1 claim." *Id*. at 516. Moreover, cases involving criminal indictments and law enforcement raids do not bear the slightest resemblance to the facts concerning the civil investigations alleged here. *Superior Offshore*, 738 F. Supp. 2d at 517.

7. *Statements By Persons Lacking Personal Knowledge Do Not Support an Inference of Conspiracy*

Plaintiffs build a straw man in arguing that they are permitted to rely on hearsay, such as public statements by legislators, at the pleading stage. Pls.' Opp'n at 41. The issue is not whether Plaintiffs can rely on hearsay to support their alleged conspiracy, but whether a conclusory accusation becomes more plausible when repeated as hearsay from people who themselves lack personal knowledge. Such a result would be anomalous: a speculative statement that would not pass muster if directly alleged, can only lose, not gain, credibility if it is made by an uninformed third party.[14] Plaintiffs have no answer to *Twombly*'s treatment of third-party commentary, similar to that offered by Plaintiffs, as unpersuasive evidence of a plausible

[14] As the court noted in *In re Crude Oil Commodity Antitrust Litigation*, 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007), the fact that the statements are hearsay underscores their inadequacy. And contrary to Plaintiffs' assertions (Pls.' Opp'n at 41), it makes no difference that *In re Crude Oil* proceeded under Rule 9(b)'s heightened pleading standard—the types of third-party statements cited in the CAC do *nothing* to render Plaintiffs' claims plausible, and would not meet their burden irrespective of the applicable pleading standard.

conspiracy. *See* Defs.' Mot. at 39. Indeed, Plaintiffs appear to concede that third-party statements cited in the Complaint do not suggest the existence of a conspiracy, but are merely offered in support of other allegations that the domestic airline industry is an oligopoly and that "airfares shoot up and rarely come down significantly" (Pls.' Opp'n at 41)—facts which, even if true, do nothing to enhance the plausibility of an alleged capacity conspiracy.

8. *"Other Facilitating Practices" Are Irrelevant*

Plaintiffs' conclusory assertion that "other practices . . . facilitate" collusion illustrates once more that Plaintiffs cannot allege facts about *capacity* that suggest collusion. CAC ¶¶ 135-41. For example, Plaintiffs simply assert that lobbying by United, Delta, and American has "deterred entry" into the market. Pls.' Opp'n at 42. Plaintiffs point to no factual allegations supporting this conclusion. Plaintiffs do not dispute that, per the Complaint, the only "entry" supposedly deterred was international service by a Norwegian airline and three Gulf airlines, not service within the United States. CAC ¶ 136. And Plaintiffs' argument that Constitutionally-protected lobbying efforts could be discoverable is beside the point.[15] Plaintiffs have not explained how lobbying related to *foreign* travel facilitates control of *domestic* capacity or has any bearing on the alleged conspiracy in this case.

Plaintiffs' arguments about Online Travel Agencies similarly fail to connect Defendants' conduct to a conspiracy related to capacity. Plaintiffs quote a letter from Senators Blumenthal and Markey extolling the supposed virtues of OTAs, but the letter does not address airline capacity or the Defendants, much less how some unidentified airlines' treatment of OTAs would

[15] Plaintiffs' cases addressing the low standard of relevance required for the DOJ to issue a CID (*Major League Baseball* and *Associated Container*) are inapposite. DOJ may seek information pursuant to a CID based only on a reason to believe a violation of law has occurred; it does not even need probable cause. *See* 15 U.S.C. § 1312(a); *see also Austl./E. U.S.A. Shipping Conference v. United States*, 1981 WL 2212, at *8 (D.D.C. Dec. 23, 1981), *modified*, 537 F. Supp. 807 (D.D.C. 1982). CID and Rule 26 relevance standards are not pertinent to *Twombly* analysis.

enable a capacity conspiracy in this case. Pls.' Opp'n at 42-43. Moreover, Plaintiffs do not allege collusive or parallel conduct with respect to OTAs; indeed, their own documents show Defendants take different approaches to OTAs.[16] Absent some relationship to the alleged conspiracy, the OTA allegations are irrelevant, as Plaintiffs do not dispute that antitrust law permits each airline to make its own distribution choices, and either use OTAs or not as it prefers. *See* Defs.' Mot. at 40-41 (citing *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919); *United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926)).

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

Plaintiffs must allege that they actually purchased a product the price of which was increased by the challenged conspiracy. Plaintiffs have made no such allegations and therefore their claims should be dismissed for lack of standing.

Plaintiffs do not and cannot claim that the alleged conspiracy caused all purchasers of tickets from Defendants to pay higher airfares. On the contrary, Plaintiffs claim "Lack of Competitive Pricing on *Various* Routes," CAC ¶ 64 (emphasis added),[17] not on all routes. Specifically, they claim that, on average, fares on routes where one of the Defendants was the largest carrier rose during the alleged conspiracy period relative to the average fares on routes where non-Defendants were the largest. Pls.' Opp'n at 2 (citing CAC ¶¶ 64-65). They also concede that "airfares on certain routes have declined." CAC ¶¶ 133-34. But not a single Plaintiff claims to have purchased a single ticket on any adversely-affected route. Plaintiffs allege only that each of them bought tickets (no route specified) from one or more Defendants during the alleged conspiracy period. Because those purchases may not have been for routes

[16] *See, e.g.*, Southwest Suppl. Br. at Ex. 15 (Southwest has long used direct sales without OTA intermediaries).

[17] *See also* Pls.' Opp'n at 19 ("the CAC *has* allegations about the effects of the alleged conspiracy on *various* city-pairs" (second emphasis added)).

affected by the alleged conspiracy, Plaintiffs' allegations are insufficient to establish standing.

The rehabilitation of the claims in *Oxbow* demonstrates Plaintiffs' shortcomings here. In *Oxbow I*, the plaintiffs claimed a conspiracy among railroads to establish a fuel surcharge. But the complaint was devoid of "facts about which plaintiffs . . . paid the alleged surcharge," and in response to defendants' motion to dismiss plaintiffs "appear[ed] to concede that certain plaintiffs did not pay the uniform standard fuel surcharge." *Oxbow I*, 926 F. Supp. 2d at 43. In dismissing for lack of standing, the court faulted the complaint for failing to supply "basic facts to support an inference that each plaintiff was harmed by the imposition of any surcharge." *Id*. Only after the complaint was amended to include specific allegations detailing which plaintiffs had paid which types of surcharges did the court find it sufficient to establish standing. *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 81 F. Supp. 3d 1, 7 & n.4 (D.D.C. 2015) ("*Oxbow II*").

Gelboim v. Bank of America Corp., __ F.3d __, 2016 WL 2956968 (2d Cir. May 23, 2016), and *In re Disposable Contact Lens Antitrust Litigation*, No 15-md-2626-HES-JRK (M.D. Fla. June 16, 2016), are to the same effect. In each case plaintiffs claimed standing by alleging that they bought the specific product for which prices were inflated as a result of the purported conspiracy—LIBOR-based financial instruments, and contact lenses subject to the challenged "Unilateral Pricing Policies," respectively. The factual allegations offered in support of plaintiffs' standing in those cases were thus far more specific than the general allegations made by Plaintiffs here. Absent an allegation of injury, Plaintiffs have not alleged their standing to seek relief. Their claim should be dismissed.

CONCLUSION

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

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Respectfully submitted,

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