IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION	CASE NO. 1:15-mc-01404-CKK MDL No. 2656
This Document Relates To: ALL CASES	

PLAINTIFFS' OMNIBUS MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT (ECF NO. 106) AND SOUTHWEST AIRLINES CO.'S SUPPLEMENTAL BRIEF (ECF NO. 110)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION.

Plaintiffs respectfully submit this omnibus brief in opposition to: (1) Defendants' Motion To Dismiss Plaintiffs' Consolidated Amended Complaint (ECF No. 106) ("Defs.' Mot.") and (2) Defendant Southwest Airlines Co.'s Supplemental Brief In Support of Defendants' Motion To Dismiss Plaintiffs' Consolidated Amended Complaint (ECF No. 110) ("SW Mot.").

Defendants American Airlines, Inc., Delta Air Lines, Inc., United Airlines, Inc. and Southwest Airlines Co. predictably castigate Plaintiffs for taking what they deem to be a "toss it all in" approach with the Consolidated Amended Complaint ("CAC") and supposedly cramming in a slew of disparate allegations that Defendants contend do not inform them of what they are accused of doing and fail to state a plausible antitrust claim. But the CAC is far from a pleading rife with boilerplate allegations and nothing more. Nor is it premised merely on claims of parallel activity divorced from any context that suggests collusion, as in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Plaintiffs allege that by September 2008, jet fuel costs reached an all-time high of $3.91 per gallon. The cost per gallon then declined precipitously by January 2009, reaching a trough of $1.19 per gallon two months later. There was no reasonable forecast that jet fuel prices would ever again reach their 2008 peak and, in fact, they never have. CAC ¶¶ 73-74. At that juncture, there was a structural break in market behavior that is plausibly explained by collusion among the Defendants. Prior to 2009, the Defendants had increased airline capacity and engaged in pricing wars over airfares. *Id*. ¶¶ 84-88. In January 2009, the executives of Defendants (and their alleged co-conspirator U.S. Airways) entered into an agreement to limit capacity and thereby raise the level of passenger airfares generally across the United States. The executives of these companies began communicating the need for "capacity discipline" across the "industry" at industry

conferences and summits. *Id*. ¶¶ 88-130. These types of statements are inconsistent with Defendants' own antitrust policies. *Id*. ¶ 39, 115. As explained below, they also are inconsistent with legal advice given by one law firm that serves air carrier clients.

These capacity discipline efforts succeeded. Capacity growth was limited or stabilized. Defendants' executives attributed these results to collective action by the "industry." Airfares around the country also increased significantly, despite the falling fuel costs. From 2009 through 2015, airfares increased by approximately 17 percent on routes where one of the Defendants (or the airlines that they acquired) was the largest carrier.[1] *Id*. ¶¶ 64-65. This conduct continued in 2014 and 2015 even though jet fuel prices plummeted even more in the latter part of 2014, reaching 91 cents per gallon by January 2016. *Id*. ¶ 74. Defendants thereby created a fundamental change to the pricing structure in the domestic passenger airline industry that enabled them to impose multiple airfare increases during the class period. *Id*. ¶ 64. As discussed below, executives from many of the Defendants noted that this was a sharp structural break with prior practices in the industry. *Id*. ¶¶ 84, 88, 91, 100, 102.

Defendants attempt to recharacterize the allegations of the CAC as describing "price signaling" that did not involve face-to-face meetings. The facts alleged in the CAC, however, tell a different story. As discussed below, many of Defendants' acts and statements concerning capacity discipline occurred at periodic industry conferences where representatives of more than one of the Defendants were present and did see each other face to face.[2] The topic of capacity

[1] Although the conspiracy is alleged to have commenced in 2009, the class period for which Plaintiffs seek recovery is from only July 1, 2011 through May 11, 2016 (the date on which the CAC was filed).

[2] *See, e.g.*, CAC ¶ 88 (March 2009 industry summit hosted by Thomson Reuters that was attended, *inter alia*, by Kathryn Mikells ("Mikells"), United's Senior Vice-President and Chief Financial Officer; Ed Bastian ("Bastian"), President of Delta; and Gary C. Kelly ("Kelly"), Chief Executive Officer of Southwest); *id.* ¶¶ 89, 94 (June 2010 Bank of America Merrill Lynch

discipline was also addressed repeatedly at general meetings of the International Air Transport Association ("IATA"), which representatives of United, American, and Delta attended. *See id*. ¶ 86. Statements about adhering to capacity discipline were made by Bastian of Delta and Douglas Parker, formerly CEO of alleged co-conspirator U.S. Airways and now CEO of American, at the 2015 IATA General Meeting. *Id*. ¶ 120.

Plaintiffs allege that Defendants are also effectuated the conspiracy through the Airline Tariff Publishing Company ("ATPCO"), an entity co-owned by American, Delta and United and used by Southwest, which allowed Defendants to monitor and coordinate their airfares. *See id*. ¶¶ 48-56. The Department of Justice ("DOJ") condemned many of ATPCO's practices, sued it and several of the Defendants for engaging in various conspiracies under ATPCO auspices, and obtained a consent decree that has since expired. *See generally United States v. Airline Tariff Publ'g. Co*., 836 F. Supp. 9 (D.D.C. 1993). Furthermore, Plaintiffs allege specific facts regarding other practices that Defendants used to effectuate the conspiracy, including cross-market initiatives

---

Investment Conference that was attended, *inter alia*, by Mikells; Laura Wright, Southwest's CFO and Senior Vice-President of Finance; Gerard Arpey ("Arpey"), CEO of American; Scott Kirby ("Kirby"), former President of alleged co-conspirator U.S. Airways; and Derrick Kerr ("Kerr"), CFO of U.S. Airways and later Executive Vice-President and CFO of American after American acquired U.S. Airways); *id.* ¶ 91 (February 2010 industry summit hosted by Thomson Reuters that was attended, *inter alia*, by United's Mikells and Southwest's Wright); *id.* ¶ 92 (March 2010 J.P. Morgan aviation, transportation and defense conference that was attended by, *inter alia*, United's Mikells; Tom Horton ("Horton"), American's CFO and Executive Vice-President of Finance; and Delta's Bastian); *id.* ¶ 95 (March 2011 J.P. Morgan industry conference that was attended, *inter alia*, by Delta's Bastian; Jeff Smisek ("Smisek"), former CEO of United; and executives from the other Defendants); *id.* ¶¶ 96-97 (September 2011 Deutsche Bank conference that was attended, *inter alia*, by Bastian of Delta; Smisek of United, Wright of Southwest; Kirby of U.S. Airways; and Beverly Goulet, Vice-President and Treasurer of AMR Corporation, the parent of American); *id.* ¶ 100 (November 2011 Citigroup North American Credit Conference that was attended, *inter alia*, by Paul Jacobson, Senior Vice-President and Treasurer of Delta; Gerry Laderman, Senior Vice-President Treasurer of United; and Kerr of U.S. Airways). As noted blow, J.P. Morgan is one of the common stockholders in several of the Defendants.

(CMIs) to deter airfare competition (CAC ¶ 57),[3] parallel conduct by several of the Defendants regarding the use of ancillary fees, *id*. ¶¶ 78-79, lobbying to exclude foreign airlines that might introduce price competition on domestic routes, *id*. ¶ 136, and the coordinated efforts of United, American, and Delta to stifle air passengers' use of online travel agencies to search for the cheapest airfares, *id.* ¶¶ 136-38.

All of this occurred in the context of an industry that has been subject to repeated antitrust actions (including governmental actions and successful class actions that involved allegations of price-fixing or other conduct in violation of the antitrust laws by some of the same Defendants here), *id*. ¶¶ 48-56, 59-62, and one that is marked by high concentration, high barriers to entry, and common shareholders for several of the Defendants, *id*. ¶¶ 40-47. The practices at issue in the CAC have not been the subject of concern by merely Plaintiffs, but have also been the subject of scathing criticism by members of Congress and investigations by both DOJ and the Connecticut Attorney General. *Id*. ¶¶ 83, 124-29, 141.

Taken together and viewed as a whole, these allegations are more than sufficient to allege a plausible conspiracy and more than satisfy the requirements of the United States Supreme Court's decision in *Twombly*. Under *Twombly*, an averment of parallel conduct "gets a [Sherman Act] §1 complaint close to stating a claim" under Rule 8 of the Federal Rules of Civil Procedure. *Twombly*, 550 U.S. at 546. To overcome a motion to dismiss under Rule 12(b)(6) where parallel conduct is alleged, a plaintiff need only present some "factual enhancement" sufficient to "nudge[] their claims across the line from conceivable to plausible." *Id.* at 558, 570. Plaintiffs have more

[3] A CMI is used when different airlines compete on multiple routes. If an airline offers discounted fares on one route, its affected rival can respond with discounts on another route—a CMI—where the initial discounting airline prefers a higher fare. The result of this practice is that discounts are often withdrawn. CAC ¶ 57.

than met that requirement.

II. ARGUMENT.

A. Applicable Legal Standards.

1. The Allegations Must Be Taken as True And All Inferences Must Be Drawn in Plaintiffs' Favor.

Twombly does not impose a heightened pleading standard for complaints alleging antitrust conspiracies. *Oxbow Carbon & Minerals LLC v. Union Pac. Ry. Co.*, 81 F. Supp. 3d 1, 13 (D.D.C. 2015); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 3 (D.D.C. 2008). *Accord, e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 799 F. Supp. 2d 777, 794 (N.D. Ohio 2011); *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1005 (E.D. Mich. 2010); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) (*Southeastern Milk*). Despite Defendants' attempts to convince the Court otherwise, detailed factual allegations are thus not necessary to withstand a motion to dismiss under Rule 12(b)(6). *Twombly*, 550 U.S. at 555; *Oxbow*, 81 F. Supp. 3d at 8. A complaint need only allege sufficient facts, accepted as true, to state a claim that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Osborn v. Visa, Inc.*, 797 F.3d 1057, 1065 (D.C. Cir. 2015), *pet. for cert. filed*, No. 15-961 (Jan. 29, 2016); *Oxbow*, 81 F. Supp.3d at 8.

In the context of horizontal price-fixing claims, "complaints are sufficient if they contain 'enough factual matter (taken as true) to suggest that an agreement was made.'" *Osborn*, 797 F.3d at 1066 (quoting *Twombly*, 550 U.S. at 556). In making this assessment, all of the allegations of the complaint are assumed to be true "'even if doubtful in fact' [and the plaintiff is given] the benefit of all reasonable inferences derived from the facts alleged.'" *Meijer, Inc. v.*

Biovail Corp., 533 F.3d 857, 866 (D.C. Cir. 2008) (quoting *Aktieselskabet AF 21 November 2001 v. Fame Jeans*, Inc., 525 F.3d 8, 17 (D.C. Cir. 2008)).

In addition, the complaint has to be considered in its entirety, and Defendants cannot attack Plaintiffs' allegations by viewing each allegation in isolation. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007); *In re Processed Egg Prods. Antitrust Litig.*, 902 F. Supp. 2d 704, 710 (E.D. Pa. 2012) ("Defendants' briefing attempts to dismember plaintiffs' Complaint in order to show how each allegation, in isolation, fails to sufficiently aver plausibility. However . . . the allegations in the Complaint must be viewed as a whole . . . *Twombly* emphasized context.") (citing *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 630-31 (E.D. Pa. 2010); *Foam*, 799 F. Supp. 2d at 782 ("[R]elevant case law counsels this Court to view the individual allegations in [the] context of the whole complaint."); *Packaged Ice*, 723 F. Supp. 2d at 1006 ("The court in *Southeastern Milk* also expressly rejected defendants' attempts to read the allegations of the complaint in isolation, finding defendants' 'attempt to parse and dismember the complaints, contrary to the Supreme Court's admonition that [t]he character and effect of a [Sherman Act] conspiracy are not to be judged by dismembering it and viewing its separate parts.'") (quoting *Southeastern Milk*, 555 F. Supp. 2d at 1006)) (alterations in original).[4]

---

[4] *See also Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) ("Defendants' attempt to parse the complaint and argue that none of the allegations (i.e., quoted public statements, parallel capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy—is contrary to the Supreme Court's admonition that '[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts.'") (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962))) (alteration in original)); *In re Chocolate Confectionary Antitrust Litig.*, 607 F. Supp. 2d 701, 705 (M.D. Pa. 2009) (*Chocolate II*) (following this principle); *In re Rail Freight Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 33 (D.D.C. 2008) (same); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) (noting that nothing in *Twombly* "contemplates [a] 'dismemberment' approach to assessing the sufficiency of a

In assessing plausibility under *Twombly*, while mere allegations of parallel conduct are insufficient, without more, to plead a conspiracy, placing such conduct in a context that suggests agreement will suffice. *See, e.g., Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 44-45 (1st Cir. 2013); *Erie Cty., Ohio v. Morton Salt, Inc*., 702 F.3d 860, 869 (6th Cir. 2012); *Anderson News, L.L.C. v. Am. Media, Inc*., 680 F.3d 162, 186-87 (2d Cir. 2012). *Twombly* provided examples of such context, including conduct that "indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement" and "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." 550 U.S. at 557 n.4.

In making any such assessment, if both non-conspiratorial and conspiratorial inferences could be drawn from the facts alleged in a complaint, a court should not choose which is most plausible. The First Circuit in *Evergreen* made this point well:

> *Twombly* also clarified that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. at 556 . . . . It is not for the court to decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder. *See Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. [752] at 766 n. 11 [(1984)] . . . .(the meaning of documents that are "subject to" divergent "reasonable ... interpret[ations]" either as "referring to an agreement or understanding that distributors and retailers would maintain prices" or instead as referring to unilateral and independent actions, is "properly ... left to the jury"); *id*. at 767 n. 12 . . . ("The choice between two reasonable interpretations ... of testimony properly [i]s left for the jury."). *At these early stages in the litigation, the court has no substantiated basis in the record to credit a defendant's counterallegations. Instead, we may at this early stage only accept as true all factual allegations contained in a*

---

complaint. Rather, a district court must consider a complaint in its entirety without isolating each allegation for individualized review"); *In re Automotive Parts Antitrust Litig*., No. 12-cv-501, 2014 WL 4272772, at *8 (E.D. Mich. Aug. 29, 2014).

> *complaint, make all reasonable inferences in favor of the plaintiff, and properly refrain from any conjecture as to whether conspiracy allegations may prove deficient at the summary judgment or later stages. Twombly*, 550 U.S. at 555–56 . . . ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." (internal quotation marks omitted)); *Anderson*, 680 F.3d at 185 ("A court ruling on ... a [Rule 12(b)(6)] motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."). In fact, "a well-pleaded complaint may proceed if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556…. (internal quotation marks omitted).

720 F.3d at 45 (emphasis added). *Accord, e.g.*, *Anderson*, 680 F.3d at 189-90 ("The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible. . . . [T]he plausibility standard is lower than a probability standard, and there may therefore be more than one plausible interpretation of a defendant's words, gestures, or conduct. Consequently, although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible."); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.").[5]

The cases also make the point that a defendant cannot rely on summary judgment standards to support a motion to dismiss because the standards under Rule 56 are vastly different

[5] *Anderson* was recently followed in *Gelboim v. Bank of Am. Corp.*, No. 13-cv-3565, 2016 WL 2956968, at *15-16 (2d Cir. May 23, 2016) ("The Banks argue that the 'pack' behavior described in the complaints is equally consistent with parallelism. Maybe; but at the motion-to-dismiss stage, appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, even if the facts are susceptible to an equally likely interpretation").

from those under Rule 12(b)(6). *See, e.g.*, *SD3, LLC v. Black & Decker (U.S.) Inc*., 801 F.3d 412, 425 (4th Cir. 2015), *cert. denied*, --- S. Ct. ---, 2016 WL 345148 (2016); *Erie Cnty.*, 702 F.3d at 868-69; *Evergreen*, 720 F.3d at 44; *Barker ex rel. U.S. v. Columbus Reg'l Healthcare Sys., Inc*., 977 F. Supp. 2d 1341, 1346 (M.D. Ga. 2013); *In re Delta/AirTran Baggage Fee Antitrust Litig*., 733 F. Supp. 2d 1348, 1359-60 (N.D. Ga. 2010). In *Osborn*, the District of Columbia Circuit reversed the dismissal of an antitrust complaint where the lower court "relied on cases that had been decided at summary judgment." 797 F.3d at 1065. Unlike a motion to dismiss, "[o]n a motion for summary judgment . . . the question is not whether the plaintiff has asserted a plausible theory of harm, but rather whether the plaintiff has offered sufficient evidence for a reasonable jury to conclude that its theory is correct." *Id*. Defendants run afoul of that proscription here. In support of their motion to dismiss, they rely extensively on cases decided either on summary judgment or on post-trial motions, and none of those authorities are controlling at the pleading stage.[6]

Equally inapposite are Defendants' frequent citations to *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1106 (9th Cir. 2015), Defs.' Mot. 6, 7, 10, 14, 18, 23, 29, 30, 31, 35, and *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042 (9th Cir. 2008), Defs.' Mot. 7. In

[6] *See* Defs.' Mot. 7 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); Defs.' Mot. 41 (citing *United States v. Gen. Elec. Co*., 272 U.S. 476 (1926)); Defs.' Mot. 18, 25, 27, 29, 38 (citing *In re Chocolate Confectionary Antitrust Litig*., 801 F.3d 383 (3d Cir. 2015)); Defs.' Mot. 21-22, 25, 34 (citing *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003)); Defs,' Mot. 25, 29 (citing *FTC v. H.J. Heinz Co*., 246 F.3d 708 (D.C. Cir. 2001); Defs.' Mot. 28 (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., Inc*., 998 F.2d 1224 (3d Cir. 1993)); Defs.' Mot. 20-21 (citing *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (7th Cir. 1992), *Market Force, Inc. v. Wauwatosa Realty Co*., 906 F.2d 1167 (7th Cir. 1990), and *Holiday Wholesale Grocery Corp. v. Philip Morris, Inc*., 231 F. Supp. 2d 1253 (N.D. Ga. 2002)); Defs.' Mot. 17 (citing *In re Beef Indus. Antitrust Litig*., 907 F.2d 510 (5th Cir. 1990)); Defs.' Mot. 40 (citing *Sw. Airlines Co. v. BoardFirst, LLC*, No. 06-cv-0891, 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007)).

both cases, motions to dismiss were granted, but only after the plaintiffs were allowed discovery prior to filing an amended complaint. *Musical Instruments*, 798 F.3d at 1190; *Kendall*, 518 F.3d at 1046. Of course, here, the CAC was not prepared with the benefit of any discovery; Plaintiffs tried to obtain early discovery of documents supplied to the DOJ and other government authorities, but Defendants resisted that effort, and the Court denied the request. Mem. Op. and Order, March 30, 2016 (ECF No. 96). In short, viewing the CAC as a whole, and construing all inferences in Plaintiffs' favor, the requirements of *Twombly* and *Iqbal* are satisfied.

2. The Court May Consider Only the Allegations in the Complaint and Extraneous Documents Only Under Certain Circumstances that Do Not Apply Here.

Both Defendants' joint memorandum and Southwest's supplemental brief append and rely on nearly 40 exhibits—documents to which Plaintiffs provided footnoted citations in the CAC as the source of certain facts they alleged—to attempt to contradict or suggest the implausibility of Plaintiffs' allegations. But the Court may not rely on these documents at the motion to dismiss stage merely because they are cited as sources of allegations. First, although a court may consider documents referred to in a complaint and integral to a plaintiff's claim, all facts within such documents "are not automatically deemed facts alleged as part of the complaint." *Banneker Ventures LLC v. Graham*, 789 F.3d 1119, 1133 (D.C. Cir. 2015). Second, the Court must consider why plaintiffs attached the document, its author, and reliability. *Id*. at 1133-34. Where a document is attached or referenced merely to identify the source of an alleged fact, "Rule 10(c) 'does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading."' *Id*. (quoting *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454–56 (7th Cir. 1998)); *see also Goines v. Valley Cmty. Servs. Bd*., -- F.3d --, 2016 WL 2621262, at *5-6 (4th Cir. 2016) (citing *Banneker*, 789 F.3d at 1133, and finding that

where plaintiff refers to a document "to show how he learned of certain facts alleged in his complaint, he does not automatically adopt all of the factual conclusions contained in the report."). Here, where the documents are not the basis for the claims but are instead merely the source of certain facts alleged, they are not documents that may be considered to be "incorporated by reference" into the CAC. *Goines*, 2016 WL 2621262, at *6 (finding plaintiff did not adopt report as true simply by relying on it for some of the facts alleged, where the claims were not based on the report itself); *Banneker*, 789 F.3d at 1133-34 (ignoring document attached to defendant's motion where document was referenced as the source of plaintiff's knowledge of certain facts because plaintiff "was not required to adopt the factual contents of the report wholesale"). Accordingly, the Court should disregard Defendants' exhibits in their entirety.

B. Plaintiffs Have Alleged The Elements Of A Conspiracy.

Defendants assert that the Complaint lacks: "direct allegations" of an agreement; allegations regarding the formation of a conspiracy; and allegations regarding the "object" of the claimed conspiracy because there is purportedly no such thing as national air transportation service. Defs.' Mot. 8-12. Additionally, they contend that the "terms" of any alleged conspiracy are unclear because "capacity discipline" is an inherently vague and undefined concept. *Id.* 23. None of these arguments has merit.

Direct Allegations of a Conspiracy. In asserting that Plaintiffs have not made direct allegations of a conspiracy, Defendants ignore paragraphs one through four of the CAC. In those paragraphs, Plaintiffs set forth the framework of their allegations and then later provide explicit factual support for those allegations. Those paragraphs state as follows:

> 1. This action arises out of a conspiracy by the four largest commercial air passenger carriers in the United States—American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), Southwest Airlines Co. ("Southwest"), and United Airlines, Inc.

> ("United") (collectively, "Defendants")—to fix, raise, maintain, and/or stabilize prices for air passenger transportation services within the United States, its territories and the District of Columbia in violation of Sections 1 and 3 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 3), by, *inter alia*, colluding to limit capacity on their respective airlines. Plaintiffs allege that the conspiracy commenced in the first quarter of 2009 and continues to the present. During that period, Defendants' airfares rose substantially compared to those of other domestic air carriers, despite stagnant or decreasing demand and declines in the cost of jet fuel. Plaintiffs seek recovery of treble damages for the period from July 1, 2011 to the present (the "Class Period").
>
> 2. The domestic air passenger industry used to be marked by numerous major competitors, price wars and addition of passenger capacity. It is now highly concentrated, with the four Defendants controlling approximately 80% of available passenger seats and with high barriers to entry. Airfares are also transparent to the Defendants, who jointly own or participate in the Airline Tariff Publishing Company ("ATPCO"), which enables them to police each other's fares and adjust their own respective airfares on a real time basis.
>
> 3. The alleged conspiracy was carried out, *inter alia*, by repeated assurances by the executives of Defendants to each other that: (a) each of their companies is engaging in "capacity discipline" (i.e., reduction or relative stabilization of airline capacity); (b) this is a practice that has to be utilized by the industry as a whole; (c) it is good for the industry as a whole; and (d) it reflects the collective commitment of the Defendants' airline managers. These communications occurred on earnings calls with analysts, at numerous airline industry or other conferences held each year (which representatives of the Defendants attended), and at meetings of the International Air Transport Association ("IATA"). The Defendants facilitated this conspiracy through, inter alia, limiting the ability of consumers to compare airfares, and deterring potential competitive entry by foreign air passenger carriers.
>
> 4. As a result of these efforts, airline capacity has deviated from historical patterns, and has largely been stagnant or decreasing on an annual basis, despite the recovery from the Great Recession and positive GDP growth. Passengers have been injured by paying higher airfares and facing reduced flight choices.

The paragraphs that follow those quoted above lay out the *specific* factual allegations in support of these statements, including: (a) industry consolidation and concentration, including

concentration among airline stockholders, CAC ¶¶ 33-46; (b) barriers to entry, *id*. ¶ 47; (c) the use of ATPCO to effectuate the conspiracy, *id*. ¶¶ 48-56; (d) the use of CMIs, *id.* ¶ 57; (e) prior antitrust actions involving the airline industry, *id*. ¶¶ 58-62; (f) economic and other evidence on increases in airfares, despite decreasing jet fuel costs, *id*. ¶¶ 63-77; (g) common use of ancillary fees (such as baggage charges), *id*. ¶¶ 78-79; (h) Defendants' profits during the Class Period, *id*. ¶ 81; (i) statements made at IATA meetings, *id*. ¶ 86; (j) Defendants' statements about capacity and prices from 2009 to 2015, *id*. ¶¶ 88-122; (k) governmental investigations as a result of those statements, *id*. ¶¶ 123-34; and (l) other facilitating practices, such as efforts to deter competition by foreign airlines or discouraging the use of online travel agencies, *id*. ¶¶ 136-41. Thus, to contend that there are no "direct allegations" of a conspiracy in the CAC—allegations that clearly inform the Defendants as to what this case is about—is not credible.

To the extent Defendants contend that dismissal is warranted because Plaintiffs have not pleaded facts demonstrating "direct evidence," they are mistaken; "direct evidence" is unnecessary. *E.g.*, *In re Text Messaging Antitrust Litig*., 630 F.3d 622, 629 (7th Cir. 2010) (noting the complaint at issue "does not allege direct evidence of such an agreement [to fix prices]; the allegation is an inference from circumstantial evidence. Direct evidence of conspiracy is not a *sine qua non*, however. Circumstantial evidence can establish an antitrust conspiracy."); *Chocolate II*, 607 F. Supp. 2d at 707 (finding where no direct evidence of an agreement is available, allegations based on circumstantial evidence suffice); *In re Graphics Processing Units Antitrust Litig*., 540 F. Supp. 2d 1085, 1096-97 (N.D. Cal. 2007) ("Finally, defendants point out that plaintiffs have still not come up with specific allegations of meetings or actions in furtherance of the alleged conspiracy. Plaintiffs so concede. But as the prior order on defendants' motions to dismiss noted, direct allegations of conspiracy are not always possible

given the secret nature of conspiracies. Nor are direct allegations necessary.") (citing *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1450-51 (9th Cir. 1988))); *Aktieselskabet*, 525 F.3d at 85 (to the extent "direct allegations" cannot be made, inferential allegations suffice).[7]

Allegations of Conspiracy Formation. Defendants assert that the Plaintiffs do not allege how exactly the conspiracy was formed and present no averments of "face-to-face communications among the defendants." Defs.' Mot. 10, 12. These arguments ignore the CAC's allegations.

Plaintiffs assert that consensual capacity reductions began in 2009 and are reflected in statements by Defendants' executives on earnings calls and in industry conferences attended by various representatives of Defendants. CAC ¶ 88. A news report on the Bank of America Merrill Lynch Investment Conference in June of 2010, where representatives of all four Defendants attended and met face to face, pointed out that the conduct with respect to capacity discipline represented a sharp break with the past. *Id*. ¶ 89. U.S. Airways' Kirby[8] confirmed this, saying "it's different this time." *Id.* ¶ 91. He presented this as an industrywide development: "I don't think rapid capacity growth is going to become a problem in this industry . . . ." *Id*. ¶ 89. Kirby added that "[t]he capacity cuts are in place and no sign of reversing anytime in the foreseeable future. . . . And really, it's a fundamental change to the pricing structure and the model." *Id*. ¶ 94. He explained what was happening as a "structural permanent change to the industry." *Id*. ¶ 102.

[7] Cases that arise in other contexts also make the point that direct evidence of a conspiracy is not required. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) (noting that "direct evidence will rarely be available"); *Milgram v. Loew's, Inc*., 192 F.2d 579, 583 (3d Cir. 1951) ("It is rare indeed for a conspiracy to be proved by direct evidence."); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982) ("[W]e think that it is most unlikely that antitrust plaintiffs, like any other plaintiffs alleging conspiracy, will have direct evidence.").

[8] U.S. Airways is alleged to be a co-conspirator before its acquisition by American. CAC ¶ 27.

Delta CEO Richard Anderson agreed, saying that "the world has transformed from management that grew up in a regulated environment" to management that was more interested in "running a rational industry." *Id*. ¶ 82. American's CEO Arpey similarly noted that "[t]here are also hopeful signs that the industry has learned its lesson about keeping capacity growth in line with demand—and will continue to apply that lesson even as the economy comes back." *Id*. ¶ 89. Or as Smisek, the former CEO of United, stated, "I would say that we have found religion as an industry in capacity discipline." *Id*. ¶ 103. Similarly, Kerr, the former CEO of U.S. Airways and later a top executive at American, said in 2011: "[I]t's not the same industry that we've had in the past." *Id*. ¶ 100.

The economic evidence presented in the CAC further bolsters the contention that beginning in the first quarter of 2009, there was a sharp divergence from past patterns in the airfares charged by Defendants on routes where one of them was the largest carrier as compared with routes where a non-Defendant was the largest carrier. *Id*. ¶ 64. This represented a significant break point compared with airfares in previous years. This same break is reflected in the governmental Producer Price Index data for the domestic air passenger industry, which began a steep, steady climb in January of 2009. *Id*. ¶ 87. This break also coincided with a period where the price of jet fuel fell drastically from its peak in 2008 and never reached any similar peak level in succeeding years. *Id*. ¶ 75. These allegations are more than sufficient to assert the formation of a conspiracy. *See Gelboim*, 2016 WL 2956968, at *3, *16 (noting allegations that the value of LIBOR moved in tandem with the Federal Reserve Eurodollar Deposit Rate until 2007, when there was divergence, supported the plausibility of the claimed conspiracy).

Similarly, Defendants' notion that plausibly alleging a conspiracy requires proof of secret face-to-face meetings or direct allegations of an agreement is not the law. *Delta/AirTran*, 733 F.

Supp. 2d at 1360 ("Plaintiffs need not allege the existence of collusive communications in 'smoke-filled rooms' in order to state a § 1 Sherman Act claim."); *see also Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1059 (5th Cir. 1985) ("[A] conspiracy need not be hatched in the dark of the night by men in conical hats."); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (with "price-fixing conspiracies, it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence . . . .A knowing wink can mean more than words.") (internal citation omitted). This is because it is "naive . . . to believe that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of . . . conspirators in this day and age." *Id.*

Here, the comments of Defendants' own executives cited above demonstrate that the major domestic air transportation carriers had a sea change in their approach to competition in 2009. The economic evidence bears this out. Such a "complex and historically unprecedented change[]" is a factor a court can consider in weighing the plausibility of allegations of an antitrust conspiracy. *Twombly*, 550 U.S. at 556 n.4. *See also Erie Cnty.*, 702 F.3d at 868; *Text Messaging*, 630 F.3d at 628.

Allegations of The Object of the Conspiracy are Sufficient. Defendants contend that the restricted product cannot be "air passenger transportation services within the United States" because passengers buy tickets to go from one location to another. Defs.' Mot. 11-12. But they cite to a case that dismissed claims involving a "national market for air transportation." *Malaney v. UAL Corp.*, No. 10-cv-2858, 2011 WL 6845773, at *4 (N.D. Cal. Dec. 29, 2011). In Defendants' view, the only meaningful analysis is on a city-pair basis, and they claim Plaintiffs have identified no routes impacted by the alleged conspiracy. This argument ignores the allegations of the CAC and is contradicted by the relevant case law.

To begin with, when Defendants' own executives talked about "capacity discipline," they did not confine their discussion to specific city-pairs, but instead made statements about either each Defendants' own *system-wide* capacity or the capacity of the *industry as a whole*. CAC ¶¶ 88-110. The decision about whether to buy more planes or increase the available seats on planes is done without reference to specific city-pairs since new or reconfigured planes can be allocated to many different routes. Likewise, when Defendants calculate "load factors," they typically do so on a system-wide basis, as do industry analysts. *See id.* ¶ 76.[9]

Moreover, Defendants fail to cite authority holding that Plaintiffs must plead the conspiracy on a "city-pair" basis. *Malaney* does not support Defendants' position. That case involved a challenge to the proposed merger of United and Continental Airlines, where defining a relevant market in order to assess the effects of the proposed merger was at issue. *Malaney*, 2011 WL 6845773, at *4. This case, by contrast, involves *per se* claims of price-fixing and output restriction, where there is no need to identify a relevant market. *E.g., FTC v. Super. Ct. Trial Lawyers' Ass'n*, 493 U.S. 411, 435-36 & n.39 (1990); *Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 986 (9th Cir. 2000).

A more pertinent analysis is found in *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991). There, the plaintiffs brought a class action against nine airlines (some of which were legacy airlines, including Delta, American and United, and some of which were not) and ATPCO, alleging a conspiracy to fix domestic airfares throughout the nation. The plaintiffs filed a motion for class certification and their expert testified that common issues predominated within a nationwide air passenger transportation market. As here,

[9] As explained in that paragraph of the CAC, a "load factor" is measured as revenue passenger miles divided by available seat miles (ASMs). An ASM is a measure of airline output that refers to one aircraft seat flown one mile, whether occupied or not. CAC ¶ 76 n.38.

the defendants in that case contended that "varying geographical conditions and other market characteristics render plaintiffs' allegation of a nationwide conspiracy unbelievable and unprovable." *Id*. at 685. The defendants in that case also made a similar city-pair argument. *Id*. ("Defendants present an exceedingly complex industry that goes through a mind-boggling number of fare changes each day. Therefore, defendants argue, there is no manner of proof that would indicate the same antitrust violations in all city pairs nationwide.").

The court considered, and rejected, the city-pair argument and certified a class of all persons in the United States who purchased one or more airline passenger tickets on a defendant airline to or from a defendant's hub. *Id*. at 697. In so ruling, it stated that "[w]hile the actual ticket from city A to city B is not necessarily interchangeable with a ticket from city C to city D, the service being offered by each defendant, which amounts to the product, is essentially the same." *Id*. at 687. The court went on to explain that:

> All airline service is homogeneous in that it performs substantially the same function, in substantially the same manner, and for the same purpose. Defendants do not dispute that, from any given origin to any given destination, the service offered by one defendant is not significantly different from that of another serving the same route. In fact, defendants can and do allocate and reallocate air transportation resources from one city pair to another to maximize the return on those resources.

Id. *Accord In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-md-1175, 2014 WL 7882100, at *28, *30, *38 (E.D.N.Y. Oct. 15, 2014), *adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) (at class certification, rejecting the contentions that there was no predominance because all plaintiffs purportedly alleged at most a "collection of individual route-specific conspiracies" and plaintiffs' expert did "not account for regional and route-specific factors that would make such a [global] conspiracy impracticable or impossible;" and noting that "[w]hether the plaintiffs' proof of such a [global] conspiracy is more or less compelling than the defendants' alternative theory is

a question of fact for the jury"). *See also In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1063 (N.D. Cal. 2015) ("[T]here simply is no requirement that an antitrust plaintiff draw the boundaries of the alleged conspiracy (or conspiracies) in a complaint with the precision of a diamond cutter."). The same logic supports the view that Plaintiffs' allegations here are sufficient for pleading purposes.

Even were this Court to conclude otherwise, the CAC *has* allegations about the effects of the alleged conspiracy on various city-pairs. It describes an economic analysis done on a city-pair basis from January 2003 to August 2015, which shows that the average fare per route when the largest carrier was a Defendant was significantly higher than when the largest carrier was not a Defendant. CAC ¶¶ 64-66. Defendants' criticism *ignores* what is alleged in the CAC.

Allegations of the Terms of the Conspiracy are Sufficient. Defendants argue that the concept of "capacity discipline" is vague and uncertain. And they contend that there is no parallel conduct here with respect to such "discipline" because Plaintiffs have not alleged that the Defendants reduced capacity at the same time or that they reduced capacity in precisely the same way. Defendants' arguments ignore the gravamen of the conspiracy alleged in the CAC. It refers to collusive efforts to "limit capacity." CAC ¶ 1. That can involve reduction or "relative stabilization." *Id*. ¶ 2. The DOJ itself defined "capacity discipline" in its complaint in *United States v. U.S. Airways Group, In*c. as "restraining growth or reducing established service." CAC ¶ 39. That is exactly how Plaintiffs use the term here. "Capacity" limitations have also been referred to in other cases involving collusive airline efforts to limit or curtail growth. *See, e.g.*, *Delta/AirTran*, 733 F. Supp. 2d at 1353 (referencing airlines' discussions regarding eliminating capacity). And Defendants certainly knew what they were talking about when they repeatedly

used the phrase on earnings calls and at industry conferences where they met face to face. To now say they have no idea what Plaintiffs mean by "capacity discipline" is disingenuous.

Agreements to limit capacity are agreements to limit output—the ASMs that passengers can use. In the airline industry, as alleged in the CAC, there was a direct correlation between capacity discipline and higher passenger airfares. This sudden shift in how Defendants limited capacity began in 2009 and directly impacted prices. Thus, for example, Smisek of United noted in March of 2011 that "we [airlines] have raised prices and we have had a round of price increases that have been faster than I have seen in the 16 years in the business. I think that speaks volumes [about] capacity discipline." *Id*. ¶ 95. Bastian, the President of Delta, expressed a similar sentiment in February of 2011, saying that "[w]e've been pretty successful as an industry with respect to maintaining price discipline. We've put through four price increases over the last 45 days, and there's another one in the market." *Id*. He added that "[w]e have seen an unprecedented level of pricing discipline within the industry." *Id*. ¶ 89 ("The consensus among airline executives is that the industry will exercise 'capacity discipline' by resisting the temptation to re-insert seats in markets that show strengthening demand. Should the industry exhibit such behavior, it likely would mean more crowded airplanes and could provide carriers the impetus to raise fares and an opportunity to take another run at sustained profitability."). Similarly, one 2014 article noted that average round-trip airfares in current dollars increased by 17 percent from 2007 to 2013. *Id*. ¶ 107.

All of this comes as no surprise. "Functionally, an agreement to restrict output works in most cases to raise prices above a competitive level, and for this reason, output restrictions have long been treated as *per se* violations." *United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) (citing *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th

Cir. 1984) (internal citation omitted). *Accord Moundridge*, 471 F. Supp. 2d at 40. Thus, the conspiracy involved, *inter alia*, raising airfares by, *inter alia*, limiting or reducing capacity.

The CAC cites statements by Defendants' executives that repeatedly refer to an industrywide *consensus* on capacity reduction. As for the key common investors in domestic air carriers, they had a significant interest in agreements to exercise such "capacity discipline" rather than competing.[10] Defendants assert that "capacity discipline" as *they* used the terms is a "vague phrase that communicates nothing more than management's intention to act responsibly." Defs.' Mot. 1. But that flies in the face of the allegations in the CAC and information from other cases cited above. Such a post hoc and self-serving interpretation of the terms not be credited at this stage where inferences are to be drawn in Plaintiffs' favor. Defendants also assert that public statements serve an important purpose in the industry by explaining their conduct to consumers and shareholders so the latter could make "efficient market decisions." *Id.* 21. If Defendants really intended to communicate their intentions to behave "responsibly," they could have done so without reference to specific capacity plans and not made comments or predictions about what the industry as a whole should do. That the airline executives did not do so speaks volumes.

C. Plaintiffs Have Pled Parallel Conduct.

Defendants cite four news articles referenced in the CAC that purport to show differences in capacity reduction among the Defendants as support for the proposition that the CAC contains no adequate allegations of parallel conduct. Defs.' Mot. 15-17. But the CAC, read as a whole, refutes this argument. It contains numerous examples of parallel conduct based on Defendants'

[10] The Defendants cite two decisions to support their arguments. Defs. Mot. 32. One is *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003), which is inapposite because it was decided on a motion for summary judgment. The other is *In re Plasma-Derivative Protein Therapies Antitrust Litigation*, 764 F. Supp. 2d 991 (N.D. Ill. 2011). But in that case, a motion to dismiss was denied. *Id*. at 1002-03.

own contemporaneous statements.

Thus, for example, in the third quarter of 2009, John Tague, President of United, extolled the "level of capacity discipline that we have led and most people in the industry have participated in." CAC ¶ 88. Hank Halter, the CFO of Delta, similarly stated in December of 2009 that "I think all the airlines collectively have pulled down their capacity and have been very disciplined." *Id*. Horton of American noted that "[a]ll told, when measured against 2007, 2009 mainline domestic capacity for the network carriers was down a whopping 14.5%." *Id*. ¶ 92. In February 2010, United's Mikells looked back on 2009, stating "'[w]hat we have seen so far is I think very good overall behavior in terms of capacity discipline on the part of the industry." *Id*. ¶ 91. American's Arpey said in April of 2010 that "network carriers' capacity is down about 12% from the first quarter of 2008." *Id*. ¶ 93. Similarly, a month later, Kirby of U.S. Airways said that the capacity cuts were in place across the industry and there was "no sign of reversing anytime in the foreseeable future." *Id*. ¶ 94.

By October 2010, United's Mikells said she was still pleased: "[w]e've been clearly an industry leader and have long been preaching the need across the industry for capacity discipline. I've been very encouraged by what I've seen thus far." *Id*. ¶ 92. Jim Compton, United's Vice-Chairman and Chief Revenue Officer, made the same point a year later. *Id*. ¶ 99. In November of 2011, Kerr of U.S. Airways and later American said "every announcement I have seen from a capacity perspective is down or minimal growth in 2012." *Id*. ¶¶ 98, 100. Statements by representatives of all four Defendants corroborate this. *Id*. ¶ 96. The predictions were accurate. In 2012 and 2013, statements by various Defendants' executives and Kirby of U.S. Airways indicated that their companies and the industry as a whole were maintaining capacity discipline. *Id*. ¶¶ 103-04. Indeed, in 2013, Kirby said that "I think the whole industry has improved." *Id*. ¶

105. Tammy Romo ("Romo"), Southwest's CEO and Executive Vice-President and John Rainey ("Rainey"), United's former CFO, made similar points in September of 2014. *Id*. ¶ 106.

Did the Defendants reduce or limit capacity by *identical* amounts? Not always, but complete and exacting parallelism has never been a requirement for an antitrust conspiracy. In *SD3, LLC v. Black & Decker (U.S.), Inc*., the Fourth Circuit recently rejected an argument that the plaintiff failed to adequately plead a group boycott because the defendants' conduct was too varied, finding that such an argument was inconsistent with precedents. As it explained:

> Take, for example, *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), in which a group of real estate brokers were convicted of violating § 1 by conspiring to fix real estate commissions. It seems an understatement to say that the *Foley* defendants did not move in any way close to perfect tandem: some defendants did not act to implement the commission-fixing agreement until months after it formed, while at least one defendant implemented the new commissions before the conspiracy formed.. Still other defendants only "partially" joined, taking higher commissions when available but otherwise pursuing lower ones. Had *Foley* been decided under the dissent's framework, these "divergent paths to the same end" (higher commissions) would apparently have required reversal of the convictions. The Court, however, reached a different result—it affirmed all nine criminal convictions after finding sufficient evidence of agreement.

801 F.3d at 429 (internal citations omitted). *See, e.g.*, *Evergreen,* 720 F.3d at 51 (criticizing the district court for "improperly weigh[ing] [the] defendants' alleged inconsistent responses"); *Anderson*, 680 F.3d at 191 (holding that defendants' "varied" actions during the initial stages of the alleged conspiracy did not render the existence of a conspiracy implausible); *Blood Reagents* 756 F. Supp. 2d at 630 ("Plaintiffs are not required to plead simultaneous price increases—or that the price increases were identical—in order to demonstrate parallel conduct."); *In re Baby Food Antitrust Litig*., 166 F.3d 112, 132 (3d Cir.1999) (recognizing that parallel pricing need not be uniform and may occur "within an agreed upon range"). As the Fourth Circuit noted,

sophisticated companies might well try to conceal their conspiracy by taking different courses of action. *SD3*, 801 F.3d at 428.[11]

D. Plaintiffs' Factual Allegations Support A Plausible Conspiracy.

Defendants next argue that Plaintiffs' factual allegations do not support a plausible conspiracy. They contend that communications with investors or investment analysts were entirely permissible, and that a "signaling" conspiracy cannot be inferred where there is no parallel conduct. Defs' Mot. 18-19, 22-23. And they contend that no conspiracy can be inferred from Southwest's announcement on capacity in July 2015 and the industry response to it. *Id*. 23-25. None of these arguments are persuasive.

1. Plaintiffs' Allegations of Presentations to Investors Support a Plausible Conspiracy.

As noted above, the fact that four firms—BlackRock, Inc., State Street Corporation, J.P Morgan Chase & Co., and Capital Group Companies—are the largest stockholders in the Defendants, also supports an inference of conspiracy. CAC ¶ 42. Each common top investor would share the motivation, though counter to each airline's individual interest, that the Defendants discipline capacity. Economic studies support the view that this type of common stockholding results in higher airfares; such stockholders would benefit from collusion and high profitability. *Id*. ¶¶ 43-45 (citing and quoting from such studies). Indeed, when Southwest announced its modest capacity expansion plans in May 2015, one of the analysts in attendance, Hunter Keay, said that "what's best for your shareholders might not be what's best for you but what's best for the industry . . . ." *Id*. ¶ 116.

[11] The Fourth Circuit cited *American Tobacco Co. v. United States*, 328 U.S. 781, 800-01 (1946), as an example of a case "detailing a price-fixing conspiracy in which the defendants used a variety of differing methods to achieve the same ultimate objective, an understood and settled price for tobacco." 801 F.3d at 428.

Moreover, the law firm Baker Botts, which has represented airline clients, published an article about what should not be said to investors on earnings calls, including the following:

> **Suggest business strategy depends on competitors following your company's lead** – Do not announce or discuss business strategies that are conditioned upon the actions of the company's competitors or the industry as a whole. Such announcements may be seen as attempts to "signal" other players in the market about the company's own intentions.
>
> **Speculate about the future behavior of others** – Executives should not address what the company's competitors "should" or "could" do going forward. Statements regarding the likely behavior of third parties could suggest a desire on the part of the company to improperly influence competitors.
>
> . . . .
>
> **Take ownership of "the industry"** – The company should not, even if pressed to do so by analysts, purport to speak for the "industry" or "market." If asked to address industry conditions as a whole, do not make statements that call for specific behaviors from industry players (*e.g*., the need for price or capacity "discipline"). The company should also avoid statements or implications that it is "leading."[12]

The Defendants routinely transgressed these bounds. Their executives repeatedly talked about the "industry" as a whole and called for specific behavior from firms within it. CAC ¶ 88. Several executives said their companies were taking leadership roles within the industry. *Id*. ¶¶ 88, 92, 94, 102. Others suggested that "capacity discipline" required efforts by their competitors or the industry. *Id*. ¶¶ 82, 88-91, 94, 95, 98, 101, 103-106, 109. And they routinely speculated about what other members of the industry would do. *Id*. ¶¶ 91, 93-95, 100, 102, 105. All of this conduct supports an inference of a conspiracy.

And, as noted in the CAC, such conduct runs afoul of Defendants' own internal antitrust

[12] Baker Botts, *'Are You Talking to Me?' Antitrust Risks and Guidelines for Earnings Calls and Investor Presentations*, http://www.bakerbotts.com/ideas/publications/2015/03/are-you-talking-to-me (last visited June 24, 2016), Mar. 13, 2015.

compliance policies, which explicitly address concerns about competitors taking similar action following inter-firm communications or doing anything that even raises the "appearance of impropriety." *Id*. ¶ 104. The common use by Defendants' executives of the term "capacity discipline" itself is a warning sign in the context of antitrust enforcement. *Id*. ¶ 39. Indeed, when Arpey of American extolled the "convergence" of views among airline executives on this issue at the 2010 Bank of America Merrill Lynch investment conference mentioned above, he said he had to phrase his description carefully for "antitrust reasons." *Id*. ¶ 94. In 2013, one analyst even asked Anderson of Delta if the industry's capacity discipline model was "fixed," and rather than denying any such thing, he said "I will set that question aside." *Id*. ¶ 104. All of this supports an inference of conspiracy as well.

2. Case Law Supports an Inference of a Conspiracy.

The Defendants focus briefly on three cases involving what they call a "signaling" conspiracy: *Petroleum Products*, *Delta/AirTran*, and *ArcelorMittal*. Defs.' Mot. 22-23. At the outset, Plaintiffs note that the CAC alleges far more than mere "signaling." In many of the paragraphs of the CAC cited above, Defendants' executives refer to already-reached agreements or understandings within the "industry" regarding capacity control. Nor did the Defendants' use of ATPCO or CMIs involve mere "signaling" conduct.

But *Delta/AirTran* and *ArcelorMittal* cut against Defendants' arguments. In those cases, courts denied motions to dismiss involving circumstances that are strikingly similar to those here. Importantly, those cases rejected some of the very arguments Defendants put forth here.[13]

[13] *Petroleum Products* is not on point because it arose in a different procedural context. It was decided on a motion for summary judgment after the plaintiffs had the benefit of discovery. Thus

ArcelorMittal involved allegations that domestic steel producers conspired to reduce production of certain steel products in order to raise prices. 639 F. Supp. 2d at 879. There, like here, the industry consolidated and became more concentrated. In 2005, Mittal executives began making remarks at industry conferences that the industry should put a "focus on profits rather than on tons" and a "disciplined approach to bringing on supply and managing capacity" with the goal of "more stable price levels and a financially healthier industry overall." *Id*. at 884-85. Other steel company executives at one of these conferences echoed these sentiments. *Id*. Soon thereafter, all defendants engaged in unprecedented production cuts. *Id*. at 886-87. The trade press noted the defendants' resolve in reducing production in the face of oversupply. *Id*. at 887. The CEO of defendant, Steel Dynamics, said "I've been around the industry for 20 years. And I haven't seen this kind of discipline. And it's to be applauded." *Id*. at 888.

In 2006 conferences, a Mittal executive said "the environment is very positive" and "we believe the industry will remain watchful and be proactive whenever they see that the market is softening." *Id*. at 889. In October 2006, executives of several defendants attended an industry conference and "[d]espite expectations of strong demand in the near-term, the executives at the conference urged production restraint and holding the line on capacity;" more production cuts followed. *Id*. at 890. On earnings calls, Mittal executives applauded the "market evolution" and said that "[w]e have successfully demonstrated the benefits that a more consolidated industry creates. We have successfully demonstrated our ability to better manage supply and demand." *Id*. at 891. And at a 2007 industry conference, the Steel Dynamics CEO stated that "the North American industry has entered a new age marked by the aforementioned discipline." *Id.* at 892.

---

pleading threshold is much different here, where Plaintiffs are facing a motion to dismiss without the benefit of discovery.

The court denied the motion to dismiss though the defendants argued that their executives were merely making "legitimate public observations" about the transformation of their industry. *Id*. at 894. ("Defendants argue that it is equally if not more plausible that the term 'discipline' and other statements alleged by Plaintiffs describe unilateral decisions by producers in a concentrated market."). The court noted that "[w]hile more innocent inferences can be drawn from the statements that Plaintiffs contend infer an agreement to cut production, it is not Plaintiffs' burden to allege facts that cannot be squared with the possibility of unilateral action." *Id*. at 895. It found the plaintiffs had done more than merely allege opportunities to conspire at trade conferences: the "[p]laintiffs have alleged the specific content of statements made in public by Defendants' executives which endorsed an industry strategy to reduce the output of steel." *Id*. at 897. Plaintiffs here allege the same types of facts that the court in *ArcelorMittal* found sufficient to defeat a motion to dismiss. Here, as in *ArcelorMittal*, there was an unprecedented industry shift in the treatment of capacity, statements of collective industry-wide commitment at various public conferences attended by executives of competitors, and successful follow-up industry endorsement.

Delta/AirTran is equally compelling. That case arose from events between January and August 2008, when jet fuel prices were climbing to an all-time peak. The plaintiffs alleged that in April 2008, AirTran said that capacity needed to be removed from the market in order to get prices up and said its capacity would be flat through 2009. "AirTran emphasized that the price of oil was creating a situation where all carriers are going to react and that the carriers would change the revenue environment by push[ing] up average fares as redundant capacity is cut." *Delta/AirTran*, 733 F. Supp. 2d at 1353 (quotations omitted) (alteration in original). The next day, Delta held an earnings call and said it would "continue to be aggressive about pulling

capacity in response to fuel prices." *Id*. In June 2008, Delta's Bastian spoke at an industry conference and said Delta would take a "pause" in its plans to cut capacity and would watch what the "industry" would do. A few days later, AirTran held its own earnings call and said, in light of increases in jet fuel, it expected capacity would be reduced from September to December 2008; that prediction was realized. *Id*. at 1354.

The *Delta/AirTran* court denied the motions to dismiss, rejecting defendants' reliance on summary judgment cases, and, relying on other cases alleging facts comparable to those alleged here, noted:

> [T]he Eleventh Circuit recognizes that Plaintiffs need not allege the existence of collusive communications in "smoke-filled rooms" in order to state a § 1 Sherman Act claim. Rather, such collusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways. *See In re Valassis Commc'ns, Inc.*, FTC File No. 051–0008, 2006 WL 1367833 (Apr. 19, 2006) ("[I]t is clear that anticompetitive coordination can also be arranged through public signals and public communications, including speeches, press releases, trade association meetings and the like"); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 (9th Cir.1990) ("the form of the exchange—whether through a trade association, through private exchange ... or through public announcements of price changes—should not be determinative of its legality.") (quoting R. Posner, Antitrust Law: An Economic Perspective 146 (1976)); *Standard Iron Works v. ArcelorMittal*, 639 F.Supp.2d 877, 892–95 (N.D. Ill.2009) (statements at industry conferences supported an antitrust conspiracy claim); *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 690 (D. Minn.1995) (denying summary judgment to the defendants in the face of allegations that they exchanged messages through public speeches, press releases, and meetings).
>
> Courts have also found that unlawful conspiracies may be inferred when collusive communications among competitors precede changed/responsive business practices, such as new pricing practices. See *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535 (11th Cir. 1987) (communications between a manufacturer and distributor followed by "corrective" pricing action sufficient for a jury to infer the existence of a

> conspiracy to fix prices); *United States v. Foley*, 598 F.2d 1323, 1331–32 (4th Cir.1979) (one defendant's announcement regarding prices at an industry dinner followed by price increases by those in attendance was sufficient to support conspiracy); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-CV-3066, 2009 WL 856306, at *12–15 (N.D. Ga. Feb. 9, 2009) (communications followed by parallel price increases sufficient for a jury to infer conspiracy); *Standard Iron Works*, 639 F. Supp. 2d at 892–95 (defendants' statements in speeches at industry conferences regarding the industry "work[ing] together to keep the prices high" and maintaining "discipline" in cutting capacity followed by competitors cutting capacity supported an inference of conspiracy). Defendants attempt to distinguish these cases by arguing that they involved more explicit and direct anticompetitive communications than alleged by Plaintiffs here. Even if Defendants' interpretation of these cases is correct, the Court is not persuaded that Plaintiffs' § 1 Sherman Act claim should be dismissed. It is true that Plaintiffs' complaint is built upon circumstantial evidence of a conspiracy; nevertheless, the Court is unable to say at this stage of the litigation that the inferences Plaintiffs draw from this evidence are implausible. Accordingly, the Court finds that Plaintiffs have alleged sufficient facts to establish an unlawful § 1 Sherman Act conspiracy.

Delta/AirTran, 733 F. Supp. 2d at 1359-61. The court found that the plaintiffs' complaint, which included allegations of collusive public communications, the identity of the speakers, the content of the communications, and the changed business practices, did not lack detail. *Id.* at 1364.[14]

[14] *Plasma* also addressed allegations of supply cutbacks:

> The supply cutbacks alleged in *Standard Iron Works* . . . gave rise to an inference that the defendants in those cases were coordinating because the reductions were dramatic, nearly simultaneous, and closely following communications among competitors. The supply cutbacks in this case are alleged to have occurred more gradually and thus could have resulted from one firm observing its competitor's decisions and then independently deciding to follow along. But *Twombly* does not require that a complaint include allegations of such an unnatural coincidence in the management of competitors' businesses. It would be difficult for a court to conclude that a conspiracy had been plausibly alleged without facts demonstrating "that the defendants had a motive to conspire or, which is the same thing, that their behavior is interdependent rather than simultaneous." The complaint in this case plausibly alleges interdependence because, despite rising demand, defendants allegedly reduced their production capacity in order to keep profits high. In a perfectly competitive market, supply reductions by one firm would presumably

The same is true here. Indeed, the CAC's allegations are substantially more persuasive given that: (a) they involved far more than a few earnings calls; (b) the Defendants' own executives attested frequently to the success of their capacity discipline efforts and how they led to higher airfares; (c) the capacity reductions or limitations and higher airfares occurred in the context of an even more concentrated and coordinated industry with substantial ownership in each Defendant by the same top stockholders; (d) they occurred in the context of declining jet fuel costs far below the levels of 2008; (e) they occurred in the context of other alleged industry practices, such as the use of ATPCO or actions taken against taken against online travel agencies; and (f) the practices at issue are the subject of intense criticism by legislators and investigation by federal and state antitrust authorities. Defendants' sole response to *ArcelorMittal* and *Delta/AirTran* is that in each case, there was actual conduct alleged to have followed the public statements at issue. Of course, as noted above, the CAC is replete with similar allegations, confirmed by the Defendants' own executives.

3. Southwest's Capacity Conduct in Mid-2015 Supports an Inference of Conspiracy.

Defendants next assert that the allegations concerning Southwest's capacity moves in 2015 do not support an inference of conspiracy. But they mischaracterize the CAC's allegations and ignore other portions entirely. Romo of Southwest announced the airline's capacity expansion plans at the May 19, 2015 Wolfe Research Transport Conference. She said they involved a year-over-year increase of seven to eight percent, encompassing the use of two additional gates at Love Field in Dallas and plans to expand service at Houston's Hobby Airport.

> lead to other competitors filling in the gaps and prices remaining lower. But in a concentrated market, like the one for plasma therapies, [defendants] have a motive to avoid undercutting one another on price.

764 F. Supp. 2d at 1000 (quoting 6 Areeda & Hovenkamp ¶ 1425b, at 184) (citation omitted).

CAC ¶ 116. These moves must be viewed in the context of an eight percent reduction in capacity noted in January 2010, keeping capacity flat or slightly down in 2012, and flat year-over-year capacity in 2014. *Id*. ¶¶ 96, 112 n.112. Upon being criticized by Keay of Wolfe Research, Romo immediately minimized the effect of Southwest's conduct, calling it "largely a "Love Field story." *Id*. ¶ 116. As the CAC notes, this was a modest expansion at best, especially since Southwest does not operate airport "hubs" through which it routes traffic to various "spoke" destinations.

Rainey of United, who was present at the Wolfe Research conference, threatened retaliation immediately and at a separate conference a few days later. *Id*. ¶¶ 116, 119. A few days after that, executives from Delta and American spoke at the IATA General Meeting and reiterated that capacity discipline should continue and that "everybody in the industry understands that." *Id.* ¶ 120. James B. Stewart reported in a *New York Times* article of June 11, 2015 that "after coming under fire at this week's conference, Southwest quickly moved to reassure investors it isn't going rogue. 'We have taken steps this week to begin pulling down our second half 2015 to manage our 2015 capacity growth, year-over-year, to approximately 7 percent,' Mr. Kelly [CEO of Southwest] said."[15] *Id.* ¶ 121. Southwest did indeed "knuckle under." As Senator Richard Blumenthal is quoted in a letter to DOJ: "The conclusion seems inescapable that the remarks made at IATA were targeted at Southwest and that its capitulation was the result of the 'fire' aimed at the company." CAC ¶ 123. The DOJ and Connecticut Attorney General investigations followed. *Id*. ¶¶ 126-29. Thus, the CAC does allege that

[15] James B. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times, June 11, 2015, *available at* http://www.nytimes.com/2015/06/12/business/airline-discipline-could-be-costly-for-passengers.html?_r=0 (last visited, June 27, 2016).

Southwest scaled back its expansion plans in response to criticism from other Defendants. Even if this episode is subject to conflicting inferences, on a motion to dismiss, Plaintiffs are entitled to the one that favors them.

4. Plaintiffs' Pricing Allegations Support an Inference of Conspiracy.

Defendants next contend that Plaintiffs' economic evidence does not support an inference of conspiracy. Defs.' Mot. 26-27. That evidence consisted of a comparison of average airfares charged by the largest carrier on various city-pair routes from 2003 to 2015. Specifically, it compared airfares on city-pair routes where the largest carrier was a Defendant and those where it was an "Other" carrier. CAC ¶¶ 64-66. The evidence shows that pricing by the two groups largely tracked each other up to 2009 and diverged widely thereafter, with "Others'" average airfares per route plummeting, then rising slightly within the $160-$175 range. Then, from early 2009 to 2015, Defendants' average airfares per route rose from about $175 to about $250.

Defendants respond as follows. *First*, they claim that "before 2009 there were ten 'major' airlines in the United States" including co-conspirator U.S. Airways, Continental and Northwest Airlines, but "[a]fter 2009, however, there were only four 'major' carriers—American, Delta, Southwest and United." Defs.' Mot. 26. *Second*, they contend that the increase in Defendants' airfares in both periods were nearly identical. *Id*. Neither of these arguments supports dismissal. The first is refuted by the charts presented in the CAC, and the second ignores a key point in the CAC.

As to the first argument, the chart presented in paragraph 64 of the CAC treated U.S. Airways (which merged with American), Continental (which merged with United) and Northwest (which merged with Delta) as each being one of the "Defendants" for the entirety of the period covered. Despite this, the average fares of the "Defendants" tracked relatively closely

the average fares of "Others" until the beginning of 2009, when the two sets of fares began a sustained divergence, which only widened over succeeding years. Thus, this chart demonstrates a significant structural break in average fares between the Defendants (and the entities that they acquired) and other airlines during the claimed conspiracy period.

The second of Defendants' arguments omits a critical part of the story. It is true that from 2009 forward, Defendants' average quarterly growth rates on fares charged on city-pair routes where one of them dominated differed marginally from pre-2009 average quarterly growth rates. *Id*. ¶ 65. But Defendants fail to note that from 2009 to 2011 on, jet fuel costs had fallen precipitously from their levels of 2008, stabilized between 2012 and 2014 at levels still far below those peaks, and then plummeted even more beginning in early 2014 through 2015. *Id*. ¶¶ 74-75. During the period of 2009 to 2015, the average quarterly growth rate on fares charged on city-pair routes where a *non-Defendant* was the largest carrier fell from just under eight percent to a *negative* 0.08 percent, reflecting the lower fuel costs. Paragraph 67 of the CAC presents corroborating data, showing the huge increase in the Producer Price Index for domestic air passenger transportation from 2009 to 2015—an industry that the Defendants came to dominate.

Thus, Plaintiffs' economic allegations clearly support an inference of conspiracy. As the District of Columbia Circuit concluded in *Osborn*:

> To be certain, Plaintiffs also rely on certain economic assumptions about supply and demand. . . . But these sorts of assumptions are provable at trial. *See United Transat Union [v. ICC]*, 891 F.2d [908] at 912 n. 7 [(D.C. Cir. 1989] (allegations "founded on economic principles," while "perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation."); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 758, 97 S. Ct. 2061, 52 L.Ed.2d 707 (1977) (Brennan, J., dissenting) (recognizing, in the context of damages, that antitrust cases often involve "tracing a cost increase through several levels of a chain of distribution"). Indeed, allegations of economic harm "based on standard principles of 'supply and demand' " are

> "routinely credited by courts in a variety of contexts." *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir.1993).

797 F.3d at 1065.

5. Plaintiffs Have Alleged Conduct Contrary to Each Defendant's Individual Self-Interest.

Defendants next assert that Plaintiffs have not shown any conduct contrary to each Defendant's individual self-interest. Defs.' Mot. 28-32. This is manifestly not the case. If the industry were operating competitively, the plummeting of jet fuel prices after 2008 would have caused the Defendants over time to buy new planes, use every one of their airport slots, and try to wrest market share from each other. That did not happen. Indeed, as the CAC points out, United kept idle as many as 82 slots at Newark Airport—more than all of the slots combined of every other competitor at that airport. CAC ¶ 61. When Southwest finally did seek to buck the trend in 2015, Keay of Wolfe Research pointedly told Romo at an investor conference that what was in Southwest's individual self-interest might differ from what was best for the industry. *Id.* ¶ 116.

The fact that airfares increased while jet fuel costs were declining is therefore powerful circumstantial evidence of a conspiracy. As Judge Richard Posner said in *Text Messaging*:

> The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices. This is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price.

630 F.3d at 628. *Accord Starr v. Sony BMG MusicEntm't, Inc.*, 592 F.3d 314, 324 (2d Cir. 2010) (*Starr*) (citing *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004) ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. In a competitive

industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs.")); *Haley Paint Co. v. E.I. DuPont de Nemours & Co.*, 804 F. Supp. 419, 426 (D. Md. 2011) ("Of critical importance to the plausibility of Plaintiffs complaint is the fact that the various price increases implemented by defendants occurred at a time when demand for titanium dioxide was dwindling and manufacturing costs had decreased."); *ArcelorMittal*, 639 F. Supp. 2d at 896 ("Plaintiffs allege that, had Defendants behaved independently, they would have operated their mills at a profit while competing with each other for market share. Giving up a part of that share, and the concomitant profit, at least plausibly infers that Defendants agreed to do so.").

A similar point was made in *Delta/AirTran*:

> More specifically, Plaintiffs have alleged that Delta and AirTran communicated with each other in public regarding how both airlines could "get average prices up"; "push fare increases and fee increases"; work "in conjunction" to increase prices; and would impose a first-bag fee during a recession even though it was counter to either Defendant's self-interest to do so alone. According to Plaintiffs, AirTran first invited Delta to collude during its April 22, 2008 earnings call. AirTran's invitation to collude sparked a roughly six-month dialogue between the parties concerning each Defendant's own plans to reduce capacity, increase prices, and set expectations as to what the other needed to do to increase prices. Following these communications, Defendants made changes to their business practices, including reducing capacity and imposing a first-bag fee. These changed business practices—combined with the preceding communications—support a plausible inference of a conspiracy to restrain trade.

733 F. Supp. 2d at 1361. Here, rational business conduct suggests that Defendants would have increased capacity and reduced prices in response to falling input prices in order to gain market share. They did not, and instead forsook market share increases in favor of higher margins, certain that their fellow members of the cartel would do the same thing.

6. Allegations of an Industry Structure Conducive to Collusion Support an Inference of Conspiracy.

Defendants also contend that Plaintiffs' allegations in the CAC about (a) concentration of, and barriers to entry in, the domestic air passenger industry; (b) pricing transparency, (c) use of CMIs (see *supra*, n.3), (d) opportunities to collude provided by industry forums; and (e) common ownership cannot bolster Plaintiffs' conspiracy claims. Defs.' Mot. 32-37. That is not the law.

Allegations of Concentration and Barriers to Entry. Defendants contend that the allegations in the CAC that the industry is concentrated and displays high barriers to entry, CAC ¶¶ 34-38, 47, do not support an inference of collusion. Defs.' Mot. 32-33. However, many courts have held that structural evidence of this type *does* support the plausibility of a claimed conspiracy.[16] Thus for instance, the district court in In re *Flash Memory Antitrust Litig*., 643 F. Supp. 2d 1133 (N. D. Cal. 2009), stated that "[s]ignificant market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above, or farther above the competitive level." *Id.* (quoting *FTC v. H.J. Heinz Co*., 246 F.3d 708, 724 (D.C. Cir. 2001)).

Moreover, these allegations support an inference of conspiracy given what the DOJ has said about this industry. In its *U.S. Airways* Complaint, *see supra* n.9, the DOJ specifically

---

[16] *See Haley Paint Co.*, 804 F. Supp. 2d at 426; *Blood Reagents*, 756 F. Supp. 2d at 631-32; *Packaged Ice*, 723 F. Supp. 2d at 1014; *In re Flash Memory Antitrust Litig*., 643 F. Supp. 2d 1133, 1145-48 (N.D. Cal. 2009) (*Flash Memory*); *ArcelorMittal*, 639 F. Supp. 2d at 883; *In re Chocolate Confectionary Antitrust Litig*., 602 F. Supp. 2d 538, 576-77 (M.D. Pa. 2009) (*Chocolate I*); *In re Static Random Access Memory (SRAM) Antitrust Litig*., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008); *Labelstock*, 556 F. Supp. 2d at 370-71; *Moundridge*, 250 F.R.D. at 5; *In re Ductile Iron Pipe Fittings (DIPF) Direct Purchaser Antitrust Litig.*, No. 12-cv-711, 2014 WL 3971620, at *7 (D.N.J. Aug. 13, 2014); *Auto Parts*, 2014 WL 4272772, at *9; *In re Aftermarket Filters Antitrust Litig*., No. 08-cv-4883, 2009 WL 3754041 at *3 (N.D. Ill. Nov. 5, 2009).

observed that "[t]he structure of the industry is already conducive to coordinated behavior." CAC ¶ 38. Likewise, after the DOJ commenced its investigation of the matters raised in the CAC, Assistant United States Attorney General William Baer was quoted as saying that "[i]n my experience looking at markets with just a few players, sometimes there is a temptation to coordinate behavior." *Id*. ¶ 40. Thus, the allegations of industry structure in the CAC support an inference of conspiracy.

Allegations of Pricing Transparency through ATPCO and Use of CMIs. Defendants assert that there is nothing inappropriate about price transparency provided by ATPCO or the use of CMIs. However, the DOJ, in paragraph 44 of the *U.S. Airways* Complaint, CAC ¶¶ 38-39, took a different view. It said that "all airlines have complete, accurate, and real-time access to every detail of every airline's published fare structure on every route through [the airline-owned] Airline Tariff Publishing Company. US Airways' management called ATPCO 'a dedicated price-telegraph network for the industry.'" CAC ¶ 48. The airlines use ATPCO to monitor and analyze each other's fares and fare changes and implement strategies designed to coordinate pricing." *See* CAC ¶¶ 48-50. The CAC explains in detail how this coordination could occur through the various services that ATPCO provides. *Id*. ¶¶ 49-50, 54-56.[17] Defendants deride Plaintiffs for citing the 1992 consent decree in the *ATPCO* case, but, as noted in paragraphs 51-53 of the CAC, the DOJ alleged there that Defendants used ATPCO to exchange fare proposals and negotiate fare changes, trade fare changes across markets and exchange mutual assurances concerning the level, timing, and scope of fare changes. That decree expired in 2004 and no longer prevents Defendants from now using the practices it proscribed. The DOJ deemed it

[17] The anticompetitive practices covered by the consent decree were explained at length in the DOJ's Competitive Impact statement, available at https://www.justice.gov/atr/case-document/file/483606/download.

important enough to cite the consent decree in paragraph 44 of its 2013 *U.S. Airways* Complaint. Plaintiffs here can legitimately point to the same evidence as supporting an inference of conspiracy.

The same is true of Defendants' use of CMIs. Paragraph 43 of the *U.S. Airways* Complaint specifically noted that airlines use this practice "to deter aggressive discounting and prevent fare wars." *Id.* ¶ 57. Again, it is entirely legitimate for Plaintiffs to rely on this same type of conduct that DOJ offered in challenging the American-U.S. Airways merger in 2013. The fact that such conduct was not condemned in the 1992 *ATPCO* consent decree does not mean that it could not become a facilitating anticompetitive practice decades later, as the *U.S. Airways* Complaint indicates.

Allegations of Opportunities to Conspire. Plaintiffs have set forth many examples where Defendants had opportunities to conspire. The various industry conferences at which capacity discipline was discussed by executives of several of the Defendants provided an opportunity to conspire. So did organizations or forums like Airlines for America or the Conquistadores del Cielo. CAC ¶ 114. As explained in *SRAM*, allegations that defendants participated together in trade organizations "demonstrate[] how and when [they] had opportunities to exchange information or make agreements." 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008).

Defendants contend that these types of assertions provide no support for claims of a conspiracy. Defs.' Mot. 35-36. While this type of evidence *standing alone* may be insufficient, the CAC must be read as a whole. These allegations, when considered in the context of all of the other allegations of the CAC, can be considered in determining the sufficiency of Plaintiffs'

complaint.[18]

Allegations of Common Ownership. Additionally, common ownership of the Defendants by a few major investors is a "plus factor" that can be considered, in conjunction with all of the other facts alleged in the CAC, in determining whether an inference of conspiracy can be drawn. *See* CAC ¶¶ 41-46. The DOJ has expressed similar sentiments. Its Civil Investigative Demands to Defendants ask about such ownership and DOJ's Baer testified about it before Congress. *Id*. ¶¶ 46, 128. Likewise, economic studies suggest this is a legitimate concern. *Id*. ¶¶ 43-44. When Keay of Wolfe Research told Romo of Southwest at the May 19, 2015 industry conference that "what's best for your shareholders might not be what's best for you but what's best for the industry," he clearly indicated the power such shareholders can wield in favor of achieving industry consensus. *Id*. ¶ 116. Thus, these allegations, when viewed as a whole in the context of the totality of the factual allegations in the CAC, support an inference of conspiracy.

7. Allegations of Governmental Investigations Support an Inference of Conspiracy.

The CAC alleges in detail the investigations by the DOJ and the Connecticut Attorney General into Defendants' efforts at capacity discipline. CAC ¶¶ 126-29. Defendants contend that these allegations add nothing. Defs.' Mot. 38-39. They are incorrect. Allegations of the existence of ongoing governmental investigations relating to the claims at hand can be considered, along with other allegations, in determining whether a complaint can survive a motion to dismiss. *See, e.g.*, *Starr*, 592 F.3d at 325; *Blood Reagents*, 756 F. Supp. 2d at 632; *Packaged Ice*, 723 F. Supp.

[18] *See, e.g.*, *Haley Paint Co.*, 804 F. Supp. 2d at 426; *Blood Reagents*, 756 F. Supp. 2d at 632; *Packaged Ice*, 723 F. Supp. 2d at 1017; *Flash Memory*, 643 F. Supp. 2d at 1148; *ArcelorMittal*, 639 F. Supp. 2d at 894-95, 897; *SRAM*, 580 F. Supp. 2d at 903; *In re N.J. Tax Sales Certificates Antitrust Litig.*, No. 12-cv-1893, 2014 WL 5512661, at *7 (D.N.J. Oct. 31, 2014); *DIPF*, 2014 WL 3971620, at *7; *In re Flat Glass Antitrust Litig. (II)*, No. 08-mc-180, 2009 WL 331361 at *3 (W.D. Pa. 2009).

2d at 1009; *Hinds County, Miss. v. Wachovia Nat'l Bank, N.A.*, 700 F. Supp. 2d 378, 394-95 (S.D.N.Y. 2010); *Chocolate I*, 602 F. Supp. 2d at 553-54, 576-77; *Auto Parts*, 2014 WL 4272772, at *8; *Flat Glass*, 2009 WL 331361 at *2. *Cf. In re Tableware Antitrust Litig.*, 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005).[19]

8. Allegations of Third-Party Statements in the CAC are Permissible.

The Defendants rail against what they claim is "speculation and conjecture" contained in statements by politicians, advocacy organizations, or industry commentators. Defs.' Mot. 39-40. The quotations from the submissions of the American Antitrust Institute, statements and communications from Senators Richard Blumenthal and Charles Schumer, and public statements by industry analysts are all thoroughly appropriate in considering why DOJ acted here to commence a civil investigation. Defendants erroneously claim Plaintiffs cannot rely, at the pleadings stage, on third-party statements that the domestic airline passenger industry is an oligopoly or that airfares shoot up and rarely come down significantly. Although hearsay may not be a substitute for proof at summary judgment, it is permissible in pleadings. *Muzaffarr v. Ross Dress for Less, Inc.*, No. 12-cv-61996, 2013 WL 1890274, at *2 (S.D. Fla. May 7, 2013) (finding pleadings are allegations not evidence and there is no rule against hearsay in them). Defendants' reliance on *In re Crude Oil Commodity Litig.*, No. 06-cv-6677, 2007 WL 1946553 (S.D.N.Y. June 28, 2007), is misplaced. There the complaint was subject to Rule 9(b)'s heightened pleading standard, which is not applicable here. Moreover, there are ample facts in the CAC that independently support these assertions. *See* CAC ¶¶ 34-38, 64, 67 (noting, among other things, concentration in the industry and increases in airfares on certain, specific routes).

[19] Such allegations can also include allegations of prior misconduct in other, different past matters. *E.g.*, *Blood Reagents*, 756 F. Supp. 2d at 629; *Flash Memory*, 643 F. Supp. 2d at 1149; *SRAM*, 580 F. Supp. 2d at 903.

9. Allegations of Other Facilitating Practices Support an Inference of Conspiracy.

Defendants next contend that the allegations about the efforts by United, Delta, and American to limit the use of online travel agencies or the efforts by United, Delta, and American to lobby against entry by foreign air carriers add nothing to support an inference of conspiracy. Defs.' Mot. 39-40. They are incorrect.

The lobbying efforts are alleged to have deterred entry that could have led to more price competition and thus relate directly to the central claims of capacity discipline and price-fixing. CAC ¶ 137. Defendants' claim that such conduct is immunized under *the Noerr-Pennington* doctrine, Defs.' Mot. 41, is beside the point. That doctrine does not preclude either the discovery or admissibility of lobbying activity. *E.g., Major League Baseball v. Crist*, 331 F.3d 1177, 1186 (11th Cir. 2003); *Associated Container Transp. (Aus.) Ltd. v. United States*, 705 F.2d 53, 59 (2d Cir. 1983); *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52-53 (4th Cir. 1981); *AT&B. Marina, Ltd. v. Logrande*, 136 F.R.D. 50, 61 (E.D.N.Y. 1991). Thus, the fact of lobbying can support an inference of a conspiracy even if those acts themselves are not antitrust violations.

As for online travel agencies, the CAC alleges that they facilitate comparison shopping by consumers and certain Defendants efforts to stifle them facilitate price-fixing. CAC ¶¶ 137-38. As Senators Richard Blumenthal and Edward Markey noted:

> Price comparison websites allow consumers to make apples-to-apples comparisons among fares and flights, acting as a catalyst for pricing competition. Decisions by the airlines to withhold their flight data seem 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….However, when airlines restrict third parties from accessing their flight scheduling and fare data, they make it harder for consumers to pick the best price, schedule and airport from all

> available options. Making comparison shopping more difficult for consumers could also aid airlines in tacitly coordinating their ancillary fees, helping to shroud and hide the true cost of flying from the market.

Id. ¶ 141. These efforts directed at online travel agencies are relevant to Plaintiffs' price-fixing claims and should be assessed in considering the plausibility of the conspiracy.

E. Plaintiffs Have Adequately Pled Standing.

Defendants next contend that Plaintiffs lack standing because they do not allege that they bought tickets on routes affected adversely by the challenged conduct. Defs.' Mot. 42-44. This argument depends on Defendants' assertion that the practices did not, in fact, affect the nationwide domestic air transportation market, but only specific city-pair routes. As stated above, Plaintiffs have pleaded a conspiracy affecting "air passenger transportation services within the United States," have alleged Defendants' fares were artificially inflated as a result, and that each plaintiff purchased a ticket from one or more defendants during the conspiracy period and were injured as a result of artificially inflated ticket prices. ¶¶ 1, 4, 11-22, 65, 156. This is sufficient to plead standing. *Gelboim*, 2016 WL 2956968, at *10. Thus, the Court should not dismiss the CAC based *Defendants*' mischaracterization of the allegations. Their argument is more suited for a Rule 56 or class certification proceedings than a Rule 12(b)(6) motion.

The fallacy of Defendants' reasoning is demonstrated by the district court opinion in *Oxbow*. In that case, where the claim was that the defendant railroads agreed to fix rail freight surcharges, the initial complaint was dismissed (in an opinion that Defendants cite) because the plaintiffs failed to allege that they paid any rail freight surcharge. The plaintiffs filed an amended complaint saying that each paid "fuel surcharges . . . that they would not have paid in the absence of a conspiracy." *Oxbow*, 81 F. Supp. 3d at 7. There was no allegation of to whom the surcharge was paid *or on which routes*, even though two years earlier, the District of Columbia Circuit had

vacated a class certification order on the ground that the plaintiffs' expert's class certification report included entities that might not have been injured. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253-54 (D.C. Cir. 2013). Despite this background, the district court declined to dismiss the amended complaint for lack of standing:

> Defendants, however, are jointly and severally liable under Section 1 for any injury suffered by plaintiffs. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257 (7th Cir.1980). Plaintiffs therefore need not identify, at this stage, to which co-conspirator they paid fuel surcharges. *See In re NASDAQ Market–Makers Antitrust Litig.*, 169 F.R.D. 493, 508 (S.D.N.Y.1996) (holding that "[b]ecause antitrust liability is joint and several, a Plaintiff injured by one Defendant as a result of the conspiracy has standing to represent a class of individuals injured by any of the Defendant's co-conspirators") (citing *Rios v. Marshall*, 100 F.R.D. 395, 404 (S.D.N.Y.1983)); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 230 (D.Kan.2010) (holding that, under a Kansas law imposing joint and several liability, "even if plaintiffs did not purchase motor fuel directly from some defendants, it appears that they would have standing to assert claims for civil conspiracy claims against them"). *At this stage, plaintiffs "need not show more than general factual allegations laying out a good faith basis for how one or more of the defendants injured plaintiffs. Nor must each plaintiff allege facts against all defendants, nor each defendant's relationship with a plaintiff be explicitly identified." Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 125 (E.D.N.Y. 2000). *Instead, plaintiffs need only allege, as they have in the amended complaint, that they suffered damages as a result of the conspiracy in which defendants participated*. . . . Plaintiffs therefore have established sufficient standing to bring their Count I claim for price-fixing under Section 1 of the Sherman Act.

81 F. Supp. 3d at 8 (emphases added). *See also* Order 49-51, *In re Disposable Contact Lens Antitrust Litig.*, No. 15-md-2626 (M.D. Fla. June 16, 2016) (ECF No. 243) (finding allegations that each plaintiff purchased the product at issue (contact lenses subject to so-called "Unilateral Pricing Policies") from one of the manufacturing defendants during the class period sufficed to state antitrust injury) (citing *Oxbow*, 81 F. Supp. 3d at 7)).

Here, each Plaintiff has gone further than the plaintiffs in *Oxbow* and alleged each Defendant airline from which a ticket was purchased; every Plaintiff alleges "pecuniary injury by paying artificially inflated ticket prices as a result of the antitrust violations alleged herein." CAC ¶¶ 11-22. Given the allegations of the CAC viewed in their totality, this is a sufficient basis on which standing may be premised.

F. Southwest's Supplemental Arguments Do Not Merit Dismissal As To It.[20]

Southwest's Supplemental Brief averring its differences from other Defendants offers no basis for dismissal of the claims against it. Southwest claims it does not use a "hub and spoke" approach but instead flies "point to point." SW Mot. 2-3.[21] It argues that: it is a "low-cost carrier" ("LCC"), *id*. 2; that it does not charge separately for bags, *id*. 3-4; that it does not utilize online travel agencies, *id.* 4; that it uses only one type of plane, *id.* 5; that regulators view it as a "disruptive" influence in the market, *id.* 5-6; and that it is not a member of IATA, *id*. 8. And Southwest points out that in 2015, it merely scaled back its capacity expansion from eight percent to seven percent. *Id*. 7-9.

---

[20] Defendant Southwest filed a Consent Motion seeking, in addition to the 45 pages for Defendants' memorandum in support of their joint motion to dismiss, another ten pages to address issues unique to Southwest. *See* Def. Southwest Airline Co.'s Consent Mot. to Exceed Page Limits (ECF No. 101). Plaintiffs consented, "provided that they have an equal number of pages to respond to Southwest's supplemental brief." *Id.* The Court granted that motion. Order, May 11, 2016 (ECF No. 107). Plaintiffs have accordingly combined their allotted pages for responses to both memoranda in this omnibus brief.

[21] Of course, when Southwest acquired AirTran in 2010, AirTran did have a hub-and-spoke operation out of Atlanta. *Delta/Airtran*, 733 F. Supp. 2d at 1351. As the district court in *Malaney* noted, "[d]espite the historical delineation separating the network carrier and LCC business models, a number of LCCs, such as AirTran and Frontier, have begun developing 'hubbing networks' that resemble those of a network carrier, and some LCCs have begun to serve small community routes." *Malaney v. UAL Corp.*, No. 3:10-cv-02858, 2010 WL 3790296, at *1 (N.D. Cal. Sept. 27, 2010). The integration of AirTran's operations into those of Southwest did not occur overnight, so Southwest was using a hub-and-spoke model for a portion of its services for a period after the merger.

Southwest's arguments either ignore key allegations of the CAC or fail to account for applicable law. It is undisputed that Southwest does not engage in all of the facilitating practices alleged against United, Delta, and American. But that does not get it off the hook. The CAC alleges a conspiracy. The fact that Southwest does not itself engage in all forms of conduct in furtherance of that conspiracy or all types of facilitating practices does not make it any less liable. It is not necessary to plead that each defendant had a role in "every detail in the execution of the conspiracy . . . to establish liability, for each conspirator may be performing different tasks to bring about the desired result." *Beltz Travel Serv., Inc. v. Int'l Air Transat Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980); *see also In re Animation Workers Antitrust Litig*., 123 F. Supp. 3d 1175, 1207-08 (N.D. Cal. 2015) (rejecting argument that defendants could not be liable for conduct of other coconspirators, and denying motion to dismiss) (citing *Beltz*, 620 F. 2d at 1367)); *In re Transpacific Passenger Air Trans. Antitrust Litig.*, No. 07-cv-5634, 2011 WL 1753738, at *21 n.22 (N.D. Cal. May 9, 2011) (citing *Beltz*, 620 F. 2d at 1367); *Blumenthal v. United States*, 332 U.S. 539, 556 (1947) ("[C]onspiracies involving such elaborate arrangements generally are not born full grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in."); *United States v. Consol. Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978) ("Even a single act may be sufficient to draw a defendant within the ambit of a conspiracy where the act is such that one may infer from it an intent to participate in the unlawful enterprise.").[22]

[22]*See also Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1491 n.16 (3d Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1105 (1986), *reinstated*, 823 F.2d 49 (3d Cir. 1987) ("Co-conspirators need not be intimately familiar with each and every detail of the conspiracy. A conspirator need not know all the other conspirators, nor have direct contact with them . . . . A plaintiff 'need not show that the defendant participated in every transaction or even that he knew

Here, there are sufficient allegations in the CAC to raise a reasonable inference that Southwest participated in the alleged conspiracy. After its acquisition of AirTran in 2010, Southwest substantially reduced capacity, eliminating 22 percent of the combined entity's served city-pairs. CAC ¶ 32. Southwest is subject to cross-ownership by some of the same major stockholders that hold interests in other Defendants. *Id*. ¶ 45. It files its fares with ATPCO. *Id*. ¶ 54 n.27. On its supposedly "disruptive" role, the CAC notes that, while it was once so viewed, it now repeatedly leads price increases that other Defendants follow. *Id*. ¶ 71. The economic pricing evidence cited in the CAC applies equally to Southwest as well as the other Defendants. *Id.* ¶¶ 64-66. Like the other Defendants, it has earned supracompetitive profits thanks to higher airfares and plummeting jet fuel costs. *Id*. ¶¶ 80-81.

On capacity discipline, as noted above, the Defendants' executives talked about *industry* changes; it is plausible to infer that Southwest participated in them. Kirby of U.S. Airways makes this point at the 2010 Bank of America Merrill Lynch Investment Conference discussed above, as reflected in an article quoted in the CAC:

> Most importantly, Kirby said, is that the entire industry—*including low-cost carriers*—"recognizes that we are a mature industry. This isn't a growth industry any more. It's hard to rationalize all the capacity that exists today, and it's even harder to rationalize new capacity on a going-forward basis. It is hard to justify buying new airplanes when you know that fuel could go back to $150 a barrel."

---

the identities of his alleged conspirators or the precise role which they played."); *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) ("It is well recognized that a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators."); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 538 (D.N.J. 2004) ("[A] co-conspirator is liable for all acts committed in furtherance of a conspiracy, regardless of when it entered the conspiracy.").

CAC ¶ 89 (emphasis added).

The statements of Southwest's own executives confirm its commitment to capacity discipline. In March 2009, Kelly, the CEO of Southwest, said that since January, it had been reducing capacity. *Id*. ¶ 88. In January 2010, Laura Wright ("Wright"), Southwest's CFO and Vice-President of Finance, said that the company had "an almost 8% reduction in our capacity" *Id*. ¶ 112 n.112. A month later, she said that, "[n]o question, if there's a lot of capacity discipline in the market, that will—that should help yields as well." *Id*. ¶ 91. In September of 2011, Wright stated at an industry conference that Southwest would keep capacity flat "or slightly down" in 2012. *Id*. ¶ 96. In a January 2012 earnings conference, she stated that "our combined 2012 combined available seat capacity will be relatively flat with our 2011 combined capacity." *Id*. ¶ 112 n.112. In the first quarter of 2014, Romo of Southwest said that "[w]e continue to have a disciplined growth strategy with flat year-over-year ASM [available seat mile] capacity in 2014." *Id*. Romo summed up the company's view in September of 2014: "*the industry as a whole has enjoyed capacity discipline, which I think is good all the way around, including for Southwest*." *Id*. ¶ 106. These statements support the inference that Southwest joined with United, American, Delta, and U.S. Airways (when it existed) to maintain capacity discipline.

Even if Southwest increased capacity in 2015 after years of restricting it, as Plaintiffs allege, that does not undermine the plausibility of its participation in the agreement: conspirators need not participate throughout the entire class period to be liable, and "cheating" in conspiracies is not uncommon. *See United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 115 (S.D.N.Y. 2010). Moreover, as noted above, Romo herself downplayed the expansion, calling it "largely a Love Field story," CAC. ¶

116, and Southwest scaled back its expansion plans after the June 2015 IATA meeting where other airline executives expressed concern about them, *id.* ¶ 122.[23]

In short, the CAC alleges facts that support the inference that Southwest joined in the alleged conspiracy. The possibility that it might have a somewhat different agenda or motivation than Delta, American, and United does not undermine the inference of its participation. *See Egg Products*, 902 F. Supp. 2d at 710; *Xtreme Caged Combat v. Cage Fury Fighting Championship*s, No. 14-cv-5159, 2015 WL 3444274, at *8 (E.D. Pa. May 29, 2015).

III. CONCLUSION.

For all of the foregoing reasons, Defendants' joint motion to dismiss the CAC should be denied.

Dated: June 27, 2016

Respectfully submitted,

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Hilary K. Scherrer
Jeannine Kenney
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200

/s/ Steven N. Williams
Steven N. Williams
Adam J. Zapala
Elizabeth Tran
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
swilliams@cpmlegal.com

[23] Nor can Southwest's conduct in 2015 be viewed, on a motion to dismiss, as withdrawal from the alleged conspiracy. As the District of Columbia Circuit noted in *Osborn*:

> To establish withdrawal, a defendant may show that it has taken [a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators. Even where a member of the conspiracy appears to sever ties with other co-conspirators, there is no withdrawal if that member continues to support or benefit from the agreement. Whether there was an effective withdrawal is typically a question of fact for the jury.

797 F.3d at 1067-68 (citations and quotations omitted) (alteration in original).

mhausfeld@hausfeld.com
hscherrer@hausfeld.com
jkenney@hausfeld.com

azapala@cpmlegal.com
etran@cpmlegal.com

Michael P. Lehmann
Bonny E. Sweeney
HAUSFELD, LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908
mlehmann@hausfeld.com
bsweeney@hausfeld.com

Interim Co-Lead Counsel

Elizabeth J. Cabraser
Eric B. Fastiff
Brendan P. Glackin
LIEFF CABRASER HEIMANN & BERNSTEIN
275 Battery Street, 29th Floor
San Francisco, CA
94111-3339
Telephone: (415) 956-1000
ecabraser@lchb.com
efastiff@lchb.com
bglackin@lchb.com

Robert N. Kaplan
Gregory K. Arenson
Elana Katcher
KAPLAN, FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
rkaplan@kaplanfox.com
garenson@kaplanfox.com
ekatcher@kaplanfox.com

Warren T. Burns
Daniel H. Charest
BURNS CHAREST LLP
500 North Akard Street, Suite 2810
Dallas, TX 75201
Telephone: (469) 904-4550
wburns@burnscharest.com
dcharest@burnscharest.com

Plaintiffs' Executive Committee