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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA PROSTERMAN, ET AL.,
Plaintiffs,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants.

Case No. [16-cv-02017-MMC](#)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

Re: Dkt. Nos. 93, 94

Before the Court are two motions: (1) "Motion to Dismiss Amended Complaint," jointly filed September 2, 2016, by defendants American Airlines, Inc. ("American"), United Airlines, Inc. ("United"), and Delta Air Lines, Inc. ("Delta") (collectively, "Airline Defendants"); and (2) "Motion to Dismiss the First Amended Complaint," filed September 2, 2016, by defendant Airline Tariff Publishing Company ("ATPCO"). Plaintiffs have filed a consolidated opposition to the motions, to which the Airline Defendants and ATPCO have separately replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.¹

BACKGROUND

Plaintiffs are forty-one travel agents who assert two antitrust claims against American, United and Delta, three commercial passenger airlines that "together control over 51 percent of the market for domestic passenger air travel in the United States" (see First Amended Complaint ("FAC") ¶ 1), and against ATPCO, a "not-for-profit corporation" owned by a group of airlines that includes the Airline Defendants (see FAC ¶ 14) and

¹By order filed October 24, 2016, the Court took the matters under submission.

1 "engaged in the collection, processing and dissemination of air passenger transportation
2 fare data" and "publishing of airline rules" (see FAC ¶ 25).

3 In the First Cause of Action, titled "Price Fixing," plaintiffs allege "the Airline
4 Defendants and [ATPCO] conspired" to change the "Category 10 airfare rules" ("CAT
5 10"), specifically, "to change [the] CAT 10 rules on airline combinability in order to
6 prevent air travelers from being able to combine the least expensive, non-refundable,
7 one-way fares for multi-city destination flights" and "to require instead that the
8 passengers pay hundreds and even thousands of dollars more for the same multi-city
9 flights than had been charged before the CAT 10 rule was changed." (See FAC ¶ 62.)
10 For example, prior to the rule changes, although United's fare for a flight from Los
11 Angeles to New Orleans was \$363, a passenger could obtain a ticket for a flight between
12 those two cities at the lower cost of \$189, by combining on one ticket the price for a one-
13 way ticket from Los Angeles to Houston (\$102) and the price for a one-way ticket from
14 Houston to New Orleans (\$87). (See FAC ¶ 66; Ex. C at 3.)²

15 In the Second Cause of Action, titled "Coordination Facilitating Device," plaintiffs
16 allege ATPCO is "a system that has been formulated and is operated in a manner that
17 unnecessarily facilitates coordinated action against the Airline Defendants" and which
18 system "each of the [d]efendants" agreed to use to set "rules for multi-city domestic air
19 passenger transportation services." (See FAC ¶¶ 93-94.)

20 LEGAL STANDARD

21 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be
22 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
23 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,

24
25 ²Although the rule changes restrict combining on a "single" ticket "lower, non-
26 refundable, one-way fares on multi-city itineraries" (see FAC ¶¶ 62, 79(a)) passengers
27 may "continue to purchase fares for each leg of a multi-city itinerary where each leg is
28 booked separately," i.e., by purchasing a separate ticket for each leg (see FAC ¶ 79(d).)
"Traveling on separate tickets," however, "increases the likelihood of travel impacts such
as missed connections for checked baggage or cancelled tickets if travelers miss a
connection." (See FAC Ex. B at 3.)

1 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of
2 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.
3 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a
4 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
5 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his
6 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
7 of the elements of a cause of action will not do." See id. (internal quotation, citation, and
8 alteration omitted).

9 In analyzing a motion to dismiss, a district court must accept as true all material
10 allegations in the complaint, and construe them in the light most favorable to the
11 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To
12 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
13 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.
14 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be
15 enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555.
16 Courts "are not bound to accept as true a legal conclusion couched as a factual
17 allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

18 DISCUSSION

19 Plaintiffs' antitrust claims are brought pursuant to § 1 of the Sherman Act, which
20 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in
21 restraint of trade or commerce among the several States." See 15 U.S.C. § 1. To state a
22 cognizable claim under § 1, a plaintiff must allege the existence of an "agreement, as
23 distinct from identical, independent action" by the defendants. See Twombly, 550 U.S. at
24 548-49. "[M]ere allegations of parallel conduct — even consciously parallel conduct —
25 are insufficient to state a claim under § 1." In re Musical Instruments & Equip. Antitrust
26 Litig., 798 F.3d 1186, 1193 (9th Cir. 2015). Rather, "[p]laintiffs must plead 'something
27 more,' 'some further factual enhancement,' a 'further circumstance pointing toward a
28 meeting of the minds' of the alleged conspirators." Id. (quoting Twombly, 550 U.S. at

1 557, 560). In that regard, courts have "distinguished permissible parallel conduct from
2 impermissible conspiracy by looking for certain plus factors," id. at 1194 (internal
3 quotation and citation omitted), namely, "economic actions and outcomes that are largely
4 inconsistent with unilateral conduct but largely consistent with explicitly coordinated
5 action," id.

6 Here, in moving for dismissal of plaintiffs' initial complaint, defendants argued
7 plaintiffs had failed to allege any plus factors, and, consequently, failed to allege the
8 existence of an agreement to change the fare rules in the manner challenged by
9 plaintiffs. The Court conducted a hearing on defendants' motions to dismiss, and, after
10 considering the parties' arguments, granted the motions. Plaintiffs, with leave of court,
11 thereafter filed the FAC. By the instant motions, defendants argue plaintiffs once again
12 have failed to plead sufficient facts to show an agreement existed. The Court next turns
13 to that issue.

14 Initially, the Court notes that the FAC includes greater specificity as to the timing of
15 the Airline Defendants' actions. In the FAC, plaintiffs now allege that each of the Airline
16 Defendants made the subject change in "mid-March 2016" (see FAC ¶ 63), which
17 allegation, assumed true at the pleading stage, suffices to allege parallel conduct. See In
18 re Medical Instruments, 798 F.3d at 1193 (holding "parallel conduct" includes
19 "competitors adopting similar policies around the same time in response to similar market
20 conditions"). As noted above, however, "parallel conduct," even "consciously parallel
21 conduct," is insufficient to state a § 1 claim in the absence of "plus factors." See id. at
22 1193-94. The issue thus before the Court is whether the FAC contains sufficient facts
23 from which an inference can be drawn that the alleged parallel conduct was the product
24 of an agreement. See Twombly, 550 U.S. at 557 (holding "allegation of parallel conduct
25 . . . gets the complaint close to stating a claim, but without some further factual
26 enhancement it stops short of the line between possibility and plausibility of entitlement to
27 relief" (internal quotation and citation omitted)).

28 In an effort to meet that additional requirement, plaintiffs have included in the FAC

1 factual allegations from their initial complaint and factual allegations that provide
2 additional detail regarding ATPCO as well as the airline industry in general.

3 First, with respect to the manner in which ATPCO operates, plaintiffs again allege
4 that the Airline Defendants "transmit fare information, including fare amounts and
5 restrictions, to [ATPCO]" (see FAC ¶ 25; Compl. ¶ 25), that the Airline Defendants submit
6 to ATPCO changes "at least once each weekday" (see FAC ¶ 36; Compl. ¶ 30) and that
7 ATPCO, upon receipt of such fare information, "processes the changes and disseminates
8 [the] information . . . to the Airline Defendants" and to "computer reservation systems"
9 (see FAC ¶ 36; Compl. ¶ 31), after which the Airline Defendants receive from ATPCO
10 "reports" that "allow the Airline Defendants to monitor and analyze immediately each
11 other's fare rules, restrictions and price changes" (see FAC ¶ 38; Compl. ¶ 33). In the
12 FAC, plaintiffs have supplemented those facts with allegations that the referenced
13 "computer reservation systems" are "GDSs" (see FAC ¶ 47), i.e., reservation systems
14 used by travel agents such as plaintiffs,³ and that the reports ATPCO provides to the
15 participating airlines are a "tool" called "Market View" that allows those airlines to view
16 "competitors' public fares and rules data," as well as a "program" called "Fare Manager"
17 that allows those airlines to "create, modify, match, or cancel airfares" in "seconds" (see
18 FAC ¶¶ 48-49).

19 Additionally, plaintiffs now include allegations as to conditions pertaining in the
20 airline industry, specifically, that the "domestic airline passenger industry is a tight
21 oligopoly" in that four carriers "control approximately 80 percent of the market" (see FAC
22 ¶ 30),⁴ that the Airline Defendants price "certain legs" at "lower amounts" due to
23 competition from "Ultra Low-Cost Carriers" (see FAC at 3:4-5), that the Airline

25 ³A GDS is a "computerized system used to distribute airline fare, flight, and
26 availability information to travel agencies . . . , and to enable those agencies to make
27 reservations and issue tickets." See In re Global Distribution Systems (GDS) Antitrust
28 Litig., 816 F. Supp. 2d 1378, 1378 n.1 (JPML 2011).

⁴According to plaintiffs, three of those four carriers are the Airline Defendants; the
fourth is non-party Southwest Airlines, which is a "participant" in ATPCO. (See id.)

1 Defendants "watch each other like hawks" using the information available through
2 ATPCO (see FAC ¶ 34), and that, at the time the Airline Defendants imposed the
3 combinability restrictions challenged in the FAC, their "greatest cost component — jet fuel
4 — had steeply fallen in price and was at record low levels" (see FAC ¶ 70).

5 Although plaintiffs' factual allegations have been expanded, the Court finds the
6 new allegations, considered together with those that have been realleged, are not
7 sufficient to plead "a plausible suggestion of conspiracy." See Twombly, 550 U.S. at 566.

8 As plaintiffs acknowledge, the commercial passenger airline industry is an
9 "oligopoly" (see FAC ¶ 30), i.e., "a market in which a few relatively large sellers account
10 for the bulk of the output." See In re Chocolate Confectionary Antitrust Litig., 801 F.3d
11 383, 397 n.10 (3rd Cir. 2015) (internal quotation and citation omitted). In such markets,
12 "a single firm's change in output or price will have a noticeable impact on the market and
13 on its rivals," and, consequently, any "rational decision by an oligopolist must take into
14 account the anticipated reaction of the other firms," the "upshot" being that "oligopolists
15 may maintain supracompetitive prices through rational, interdependent decision-making,
16 as opposed to unlawful concerted action, if the oligopolists independently conclude that
17 the industry as a whole would be better off by raising prices." See id. at 397 (internal
18 quotation, alteration and citation omitted); see also Rebel Oil v. Atlantic Richfield Co., 51
19 F.3d 1421, 1443 (9th Cir. 1995) (holding "[b]y definition, oligopolists are interdependent").
20 Put another way, "one firm can risk being the first to raise prices, confident that if its price
21 is followed, all firms will benefit." See In re Musical Instruments, 798 F.3d at 1195. "By
22 that process ('follow the leader'), supracompetitive prices and other anticompetitive
23 practices, once initiated, can spread through a market without any prior agreement." Id.

24 Here, plaintiffs' factual allegations do no more than support a finding that the
25 Airline Defendants have engaged in conscious parallelism. The allegations essentially
26 establish that the Airline Defendants use information obtained through ATPCO to match
27 or otherwise quickly react to a competitor that has made a fare or rule change. (See,
28 e.g., FAC ¶ 34 (alleging Airline Defendants "watch each other like hawks" and "assess

1 changes competitors are making").) Reacting to a competitor's change by choosing to
 2 adopt the same or substantially similar change, however, does not support a § 1 claim.
 3 See In re Chocolate Confectionary, 801 F.3d at 397 (holding, although "this practice of
 4 parallel pricing, known as 'conscious parallelism,' produces anticompetitive outcomes, it
 5 is lawful under the Sherman Act"); see also Rebel Oil, 51 F.3d at 1443 (noting "gap" in
 6 Sherman Act).

7 Plaintiffs argue they nonetheless have sufficiently alleged "plus" factors, relying
 8 primarily on the Seventh Circuit's decision in In re Text Messaging Antitrust Litig., 630
 9 F.3d 622 (7th Cir. 2010) ("Text Messaging I"). Text Messaging I, however, is
 10 distinguishable. The plaintiffs therein had alleged the defendants attended trade
 11 association meetings where they informed each other of proposed price changes, see id.
 12 at 628; see also In re Text Messaging Antitrust Litig., 2010 WL 1782006, at *3 (N.D. Ill.
 13 April 30, 2010), and agreed "to raise prices by a certain amount within a certain time
 14 frame," see id. Further, the plaintiffs in Text Messaging I alleged the defendants
 15 "changed their pricing structures, which were heterogeneous and complex, to a uniform
 16 pricing structure," see Text Messaging I, 630 F.3d at 628, specifically, that "all four
 17 defendant companies, in a series of steps (10 steps in all for the four companies), raised
 18 each of their [prices] to 20 cents [per text message]," see In re Text Messaging Antitrust
 19 Litig., 782 F.3d 867, 875 (7th Cir. 2015) ("Text Messaging II").

20 Here, by contrast, plaintiffs fail to allege facts to support a finding that defendants
 21 were aware of each other's rule changes prior to those changes having been published,⁵

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23 ⁵Although plaintiffs allege the Airline Defendants "know about changes being
 24 proposed" (see FAC ¶ 34), i.e., before such changes are adopted, such assertion lacks
 25 factual support. In particular, plaintiffs' reliance on a declaration by an American
 26 manager, initially offered by American in response to plaintiffs' motion for a preliminary
 27 injunction, is unavailing. The statement, that "American knew about similar changes
 28 made by rival airlines because it monitors the [ATPCO] 'rules queue' to assess any
 changes that competitors are making in the marketplace" (see FAC ¶ 43), does no more
 that confirm plaintiffs' own factual allegations, namely, that the Airline Defendants have
 "access" to competitors' changes that have been made and "published" by APTCO (see
 FAC ¶ 45; see also FAC ¶¶ 25, 46, 48-49), i.e., at the same time as travel agents like
 plaintiffs (see FAC ¶¶ 36, 47).

1 nor do plaintiffs allege the Airline Defendants set identical or even substantially similar
2 fares for any given route. Although plaintiffs place particular emphasis on their allegation
3 that changes to the combinability rules have resulted in higher prices at a time when the
4 Airline Defendants' fuel costs have decreased (see, e.g., FAC ¶ 70), such "apparent
5 anomaly . . . may be not because [competitors have] agreed not to compete but because
6 all of them have determined independently that they may be better off with a higher
7 price," see Text Messaging II, 782 F.3d at 871, i.e., a decision that in no way can be
8 characterized as "extreme action against self-interest" that "may suggest prior
9 agreement," see In re Musical Instruments, 798 F.3d at 1195.

10 In sum, plaintiffs have failed to "plead[] sufficient facts to provide a plausible basis
11 from which [a court] can infer the alleged agreements' existence." See id. at 1193.

12 Plaintiffs at best have pleaded factual allegations that, assumed true, establish "conduct
13 as consistent with permissible competition as with illegal conspiracy." See Matsushita
14 Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). Establishing
15 conduct "merely consistent with" a conspiracy, however, is, as a matter of law, insufficient
16 to state a claim under § 1. See id.; see also In re Musical Instruments, 798 F.3d at 1189
17 (affirming dismissal of § 1 claim based on theory manufacturers entered into agreement
18 to raise prices, where plaintiffs' allegations were "no more consistent with an illegal
19 agreement than with rational and competitive business strategies, independently adopted
20 by firms acting within an interdependent market").⁶

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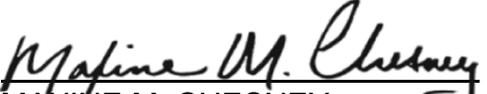
27 ⁶In light of the above ruling, the Court has not addressed herein defendants'
28 additional arguments offered in support of dismissal.

CONCLUSION

For the reasons stated above, the motions to dismiss are hereby GRANTED, and the First Amended Complaint is hereby DISMISSED.

IT IS SO ORDERED.

Dated: December 8, 2016


MAXINE M. CHESNEY
United States District Judge

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