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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AFMS LLC,

Plaintiff,

v.

UNITED PARCEL SERVICE CO. and FEDEX CORPORATION,

Defendants.

Case No. 2:10-CV-05830-MMM-RC

DEFENDANT FEDEX CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Hearing Date: January 31, 2011
Time: 10:00 a.m.
Place: Courtroom 780 - Roybal
Judge: Hon. Margaret M. Morrow

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AFMS's Omnibus Opposition to Defendants' motions to dismiss only underscores the insufficiency of its First Amended Complaint against FedEx. Despite already having the opportunity to amend its complaint, AFMS goes far outside its pleadings to argue that this litigation should proceed. Its arguments are faulty, and its claims should be dismissed with prejudice.[1]

I. AFMS Lacks Antitrust Standing Because It Failed to Plead Injury in the Relevant Market in Which Competition Was Allegedly Harmed.

A. Time-Sensitive Package Delivery and Consulting Services Are In Separate Product Markets.

It is well established that antitrust injury "requires the plaintiff to have suffered its injury *in the market where competition is being restrained*." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (emphasis added). Accordingly, the plaintiff must itself participate in the market that has suffered the alleged competitive injury. *Id.*; *Bahn v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). AFMS fails to meet this requirement because it has not – and cannot – plead that it participated in the relevant market of package shipping and delivery, or that FedEx somehow caused harm to competition for consulting services.

Notwithstanding the newly asserted facts in Plaintiff's Opposition, this motion must be resolved based on what is *and is not* alleged in the First Amended Complaint. AFMS does *not* allege that it sells package shipping and delivery. Instead, by its own admission, it is in the business of "providing small parcel and freight consulting services and assisting shippers negotiate competitive small parcel and freight contracts." (First Amended Complaint ("FAC") ¶ 3.) Conversely, AFMS does *not* allege that FedEx participates in the market for shipping consulting services. Indeed, AFMS alleges no facts to define such a market for consulting services, or that FedEx has any share of that market. AFMS does not allege that

[1] FedEx incorporates by reference the arguments and authorities cited in UPS's opening memorandum and reply brief.

FedEx and UPS compete with one another in consulting services, or that they compete with AFMS or the hundreds or thousands of shipping consultants like AFMS. The First Amended Complaint instead alleges that Defendants compete with one another in the package delivery and express shipping market. (FAC ¶ 6.) Moreover, AFMS also does not allege that Defendants' conduct has resulted in a decrease in the competitive price of consulting services. Rather, AFMS alleges only that their conduct resulted in higher *shipping* costs. (FAC ¶ 10-11.) AFMS is not alleging that it personally has paid higher shipping costs.

No matter what tortured argument AFMS may try to make regarding standing, the fact is undisputed on this record that package delivery and consulting services are not interchangeable products. The First Amended Complaint does not allege that they are. Entities that sell package delivery do not compete with entities that offer shipping consulting services. Rather, AFMS acknowledges that there are two distinct markets at play: the market for shipping packages and a market for providing consulting services. Omnibus Opp'n at 4:17-20 (claiming that it participated in "*both* the market for the delivery of time-sensitive letters, documents and packages *and* in the market for consulting on such deliveries by, amongst other things, facilitating deals and handling negotiations between Defendants and shippers") (emphasis added). But AFMS's claim to participate in both of these markets is outside the four corners of its pleadings. As noted above, the First Amended Complaint does not allege that AFMS participates, or how AFMS participates, in the market for the delivery of time-sensitive letters, documents and packages.

AFMS and Defendants operate in two distinct economic markets as illustrated by the more traditional example of alleged price fixing. Assume that the allegation here were that Defendants shared information that stabilized prices for package delivery. An inflated price for package delivery would not negatively affect AFMS's business opportunities or the price that AFMS charges its clients for

its services. Similarly, if AFMS and its competitors colluded and fixed the price at which they sold their consulting services (for instance, if they all charged as their fee the same percentage of any savings they obtained for their clients), that collusion would not affect the price at which FedEx and UPS sold their services. The pricing of consulting services is independent of the pricing of delivery services because the two markets are independent. The antitrust laws are only concerned with economic markets. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 538 (1983).

Because the market in which FedEx and UPS compete and sell their delivery services is different from the market in which AFMS sells its consulting services, AFMS's antitrust claim fails. Unlike a typical tort claim, which requires only injury and causation, the ambit of an antitrust claim is far narrower – it requires injury to competition in a relevant market and injury to the plaintiff *in that particular relevant market*. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990); *Legal Econ. Evaluations, Inc. v. Metro. Life Ins. Co.*, 39 F.3d 951, 954 (9th Cir. 1994) ("the private plaintiff must link its own injury to the *anticompetitive* aspect of the defendants' conduct") (emphasis in original). AFMS's antitrust claim is not merely a matter of causation. The fact that Defendants' conduct may have *caused* some injury to AFMS is largely irrelevant. FedEx could have tortiously interfered with AFMS's contractual relations with AFMS's clients giving rise to a common law tort claim, for instance, without that conduct constituting a violation of the Sherman Act. Only conduct that has an effect on competition in a relevant market can fall within the scope of the Sherman Act.[2]

[2] AFMS acknowledges this requirement. Omnibus Opp'n at 5 n.2 (arguing that the issue in this case is "whether AFMS's injury resulted from Defendants' anticompetitive activities within the relevant markets"). The problem with AFMS's position is that, although it agrees with this legal standard in principle, it conflates Defendant's alleged harm to competition in the relevant market for delivery services with its alleged injury in the market for consulting services. And as

B. *American Ad Management* and *Yellow Pages* Are Inapplicable Because in Those Cases the Plaintiffs Participated in the Markets Allegedly Harmed.

AFMS's allegations are markedly different from the two cases that AFMS relies upon. In *American Ad Management*, the plaintiff was an authorized selling representative of Yellow Pages advertising space. 190 F.3d at 1053. The Yellow Pages publishers permitted authorized sales representatives like the plaintiff to sell their advertising space in direct competition with the Yellow Pages publishers themselves. *Id.* The publishers paid the representatives a commission in the form of a discount. *Id.* When the publishers eliminated the discount, the sales representatives could no longer compete with the publishers in the sale of advertising space. *Id.* The plaintiff representative's claim for damages was based on its loss of the commission that it had previously received from the defendant publishers. *Id.* at 1056-57. The injury claimed by plaintiff flowed from that which made the defendants' conduct unlawful – the agreement to eliminate those commissions. *Id.* at 1056.

The plaintiff sales representative and defendant Yellow Pages publishers sold the very same product – advertising space. They operated in the same market. The publishers' change in pricing to the sales representatives resulted in the alleged injury to the representatives. In contrast, AFMS and Defendants do not compete in the sale of package transportation and delivery because AFMS ***does not offer that service***. Unlike in *American Ad Management*, the defendants' alleged collusion that resulted in increased prices in the market for the sale of package delivery services remains unconnected to AFMS's claimed injury because the product markets are different. One is the transportation and delivery of packages; the other is consulting services. The products are not interchangeable. As discussed above,

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explained above, the First Amended Complaint fails to allege either that AFMS participated and was injured in the relevant market for delivery services or that Defendants caused competitive harm in the consulting services market.

changes in the market conditions and pricing in the package delivery market do not necessarily affect any competition in the consulting market.

Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., is not to the contrary. GTE and the plaintiffs competed in the sale of consulting services to advertisers. 951 F.2d 1158, 1159 (9th Cir. 1991). GTE argued that its consulting services did not compete with plaintiffs' services because GTE did not charge separately for them, instead building them into its advertising rate structure. *Id.* at 1159-60. The court rejected this argument, finding that "GTE has cited no authority that a trier of fact could not conclude that otherwise identical services are distinct because one party charges for them as part of a package of products and the other charges for them separately in accordance with a different marketing scheme." *Id.* at 1161. Thus, there was no dispute that the parties competed in the same market. In contrast, here the First Amended Complaint does not allege that AFMS and Defendants compete – either in the sale of delivering packages (which AFMS does not sell) or in the sale of consulting services (which Defendants do not sell).[3]

AFMS's claims fail because its "injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market." *American Ad Management*, 190 F.3d at 1057. AFMS does not allege that it buys package delivery, that it provides package delivery, or that it sells package delivery as a reseller or sales representative. It has not alleged that it participates in the market for time-sensitive package delivery in any capacity whatsoever. AFMS's allegations do not support a claim for relief under the Sherman Act because AFMS is neither a consumer nor a competitor of Defendants; and because the products in

[3] Nor would it make sense for Defendants to sell the type of consulting services that AFMS provides, which according to the First Amended Complaint, involve negotiating *against* Defendants for lower pricing. (FAC ¶ 9 (a consultant such as AFMS "help[s] shippers negotiate with UPS/FedEx to achieve the maximum savings for the shipper").)

question are non-interchangeable. The parties compete in different markets, in contrast to *American Ad Management* and *Yellow Pages,* in which the product and markets were the same.

Because AFMS fails to meet antitrust standing requirements, its antitrust claims under Sherman Act Section 1 and Section 2 should be dismissed in their entirety.

II. AFMS Fails to Plead a Plausible Conspiracy and Cannot Rely on Assertions Outside of the First Amended Complaint.

AFMS's Omnibus Opposition, in which it asserts facts far beyond those alleged in the First Amended Complaint, highlights the insufficiency of its conspiracy allegations, as pled. Had AFMS actually pled a plausible conspiracy, it would have no need to go beyond the allegations of its First Amended Complaint to respond to FedEx's motion to dismiss. Yet AFMS does just that. The "main points" that it raises in support of its conspiracy claim, *see* Omnibus Opp'n at 11-13, are a combination of new, unsupported assertions and the same flawed allegations of parallel conduct that fail to explain why an inference of collusion is more likely than the inference of independent conduct. Furthermore, AFMS does not even attempt to respond to FedEx's explanation why – as the First Amended Complaint itself shows – FedEx had lawful and independent motives to keep its confidential pricing data from being aggregated and used against it in negotiations and to protect its relationships with FedEx customers.

Because parallel conduct can be "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," such bare allegations do not suffice to state a claim under Section 1 of the Sherman Act. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007). Here, AFMS's allegations do not so suffice:

Industry Event and Failure to Deny Collusion: The allegation that unnamed FedEx and UPS representatives "announced" their purported policies at an industry

event in October 2009 (FAC ¶ 13) says nothing at all about when either FedEx or UPS *decided* to adopt the policies or began *implementing* the policies. Indeed, the First Amended Complaint itself indicates that Defendants did *not* adopt their policies at the same time. (FAC ¶ 15 (AFMS's managing director was purportedly told by a customer representative that "FedEx is not working with third party consultants and that 'UPS is *going to be doing the same thing soon ...* .'".) (emphasis added).) The clear implication is that UPS adopted its policy at some point *after* FedEx had put its own policy into practice. Notably, AFMS does not address this contradiction in either its Complaint or Omnibus Opposition. Nor does the timing of the so-called "simultaneous announcement" at the industry event indicate any sort of agreement between FedEx and UPS – that both representatives purportedly referred to the policies while "appearing on a panel" (FAC ¶ 13) at an event devoted to the shipping industry is hardly surprising.

AFMS's reliance on Defendant's "failure to deny collusion" at the industry event is equally faulty. Nothing can be inferred from this claim when there was no duty to speak, particularly when the First Amended Complaint does not even allege that Defendants were asked the question. The alleged fact that the representatives did not spontaneously deny collusion is not probative of anything and cannot support a claim under *Twombly*.

Internal Memoranda: The First Amended Complaint alleges that FedEx and UPS issued internal guidelines regarding third-party consultant policies on the same date in April 2010. (FAC ¶ 13.) It does *not* allege that Defendants adopted or implemented these policies on this particular date or otherwise at the same time. AFMS's assertion in its opposition brief that policies were "put into effect, via internal memoranda, by both Defendants on the exact same day," Omnibus Opp'n at 11:28-12:1, thus finds no basis whatsoever in the First Amended Complaint. And, as FedEx noted in its motion, the Complaint itself indicates that UPS and FedEx had already decided to adopt the purported policies months earlier—no later

than October 2009. (FAC ¶ 13 (UPS and FedEx announced their policies at the October 2009 industry event); FAC ¶ 18 (alleging that FedEx and UPS began excluding consultants "on or about the Fall of 2009").) So, fairly read, the Complaint asserts that FedEx and UPS both adopted a new policy at some undefined point, that FedEx had already adopted it before UPS, no later than October 2009, and that both issued internal guidance fleshing out their different respective policies on the same date in April 2010. Arguably, the Complaint does not even allege parallel conduct, but to the extent it does, such merely parallel conduct is not enough to support a conspiracy claim. *Twombly*, 550 U.S. at 554-56.

Retaliatory Threats: AFMS's reliance on unattributed statements from unnamed parties does not meet *Twombly* standards. (*See* FAC ¶ 15 (alleging that FedEx and UPS each informed "shippers" that it would raise rates if the shippers engaged third-party consultants).) When did these alleged statements occur? Where did they occur? Who made them? Did the individual have any authority or knowledge so that the comment deserved to be credited? These are all facts within AFMS's knowledge since it has alleged that the statements were made. And even assuming that FedEx and UPS both threatened their customers with higher rates, such a fact is not probative of collusion. The mere allegation of such threats, without any attribution or detail, is as consistent with an independent decision to enforce an independent policy as it is with collusion.

Meeting and Conferring: AFMS's claim that "Defendants' representatives met and conferred *regarding the implementation of this policy and to ensure its uniform application between both companies*," Omnibus Opp'n at 12:6-8 (emphasis added), also goes far beyond the facts alleged in its First Amended Complaint. *See also* Omnibus Opp'n at 2:17-18 ("Defendants' representatives also communicated with each other *to ensure that third-party consultants were uniformly excluded*.") (emphasis added). No matter how often AFMS repeats this claim in its opposition brief, it appears nowhere in the First Amended Complaint. To the contrary,

paragraph 13 of the First Amended Complaint alleges that FedEx and UPS representatives attended an industry event – once. And apart from appearing on the same panel, there is no indication that the representatives interacted at the event or had any communication with each other whatsoever.

Paragraph 13 also alleges that representatives "sat and conferred" with each other at or outside a customer's premises. Yet as discussed in FedEx's motion to dismiss, the paragraph is silent as to who the representatives were, where or when they "sat," or what the representatives "conferred" about. The First Amended Complaint does not allege that this communication had anything at all to do with third-party consultants or with FedEx, UPS, or the shipping business generally. AFMS's assertion in its opposition brief that representatives conferred regarding the "implementation" of the purported policies to "ensure its uniform application" is pure conjecture and finds no basis in the First Amended Complaint.

Economic Motivation: The mere allegation that independent implementation of the policies does not make sense cannot satisfy *Twombly*. On the contrary, *Twombly* makes clear that courts must vet carefully such self-serving allegations. 550 U.S. at 558-59. In its motion to dismiss, FedEx has explained in detail why – as the First Amended Complaint itself demonstrates – independently ceasing to work with third-party consultants makes sense from a business perspective. FedEx Mot. to Dismiss at 15-17. AFMS does not even attempt to respond to this explanation.

Department of Justice Investigation: The allegation that the Department of Justice has opened an investigation into FedEx's and UPS's third-party consultant policies appears for the first time in AFMS's opposition brief. Omnibus Opp'n at 13 n.5. This claim is outside the pleadings and the Court should disregard it. Moreover, even if AFMS had properly alleged the existence of a Department of Justice investigation, courts have repeatedly held that such investigations are irrelevant to Section 1 conspiracy claims. *In re Graphics Processing Units*

Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (2007) (an investigation "carries no weight in pleading an antitrust conspiracy claim"); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (2008) ("the existence of the investigation does not support Plaintiffs' antitrust conspiracy claims"); *Hinds County v. Wachovia Bank, N.A.*, 620 F. Supp. 2d 499, 514 (S.D.N.Y. 2009) (investigations "do not make the [complaint's] allegations plausible, for the purposes of deciding a motion to dismiss under the standards as laid out in *Twombly* …"). As explained by the court in *Graphics Processing Units*, the result of a Department of Justice inquiry is unknown, and "the scope of the investigation is pure speculation." 527 F. Supp. 2d at 1024. The existence of an investigation is thus a "non-factor." *Id.*

Despite AFMS's attempts to introduce new facts and characterizations, it cannot save its deficient conspiracy pleadings. The First Amended Complaint fails to allege either an express agreement between FedEx and UPS or the type of parallel conduct that could not "just as well be independent action." *Twombly*, 550 U.S. at 557. AFMS's Section 1 claim falls short of *Twombly*'s standards and warrants dismissal.

III. AFMS's Monopoly Claim Is Nonsensical and Finds No Support in Legal or Economic Authority.

A. AFMS Cannot Show That FedEx – the Smaller Seller in a Two-Seller Market – Threatens to Obtain Monopoly Power.

AFMS fails to address the fundamental deficiency in its section 2 claim against FedEx – that it is completely nonsensical. In a two-player market, such as that alleged here, the smaller participant (FedEx) has no ability to exercise market power, absent some kind of lock-in effect preventing customers from moving to its competitor (UPS). *Image Technical Services, Inc. v. Eastman Kodak Co.* is utterly irrelevant, and actually reinforces the inadequacy of the allegations here. 125 F.3d 1195, 1209-11 (9th Cir. 1997). In *Kodak*, the court found that the aftermarket for servicing Kodak equipment was a plausible market for antitrust purposes. *See id.* at

1212. Therefore, although Kodak lacked market power in the market for the sale of photocopier equipment, it possessed market power in the services aftermarket because customers experienced "lock-in" to the durable product once they had purchased it. *Id.* (citing *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 477 (1992)). There is no such allegation here. Nor could there be.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), is also inapposite. There, the basis for the antitrust claim was that Aspen Skiing Co., which owned three of the four ski mountains in Aspen, somehow had market power in the form of an essential facility, requiring that it include the fourth mountain, owned by Aspen Highlands, in their multi-mountain ticket. *See id.* at 599. Putting aside the fact that *Aspen Skiing* has been criticized for years, *see, e.g.*, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004), and limited to very extreme factual conditions, FedEx possesses no essential facility here conferring on it market power. It is merely the smaller of two competitors in the market. As such, if FedEx raised prices or imposed burdensome customer restraints, such as the refusal to deal with a customer's preferred consultant, the customer could simply ship with UPS in the future.

AFMS also confuses attempts to monopolize with cases of actual monopolization. *Aspen Skiing*, *Kodak*, and *Lorain Journal Co. v. United States* each involved actual monopolists – entities with market power. *See Lorain Journal*, 342 U.S. 143, 149-50 (1951) (recognizing defendant's monopoly in the field of local advertising). But, that is not true for FedEx, which has no market power. The claim against FedEx is not a monopolization claim, but a claim of attempted monopolization. By definition, if FedEx is attempting to monopolize, it is not yet a monopolist. Therefore, *Aspen Skiing*, *Kodak*, and *Lorain Journal*, cases which turn on the defendants' monopolist status, are of no relevance. While a refusal to deal might make sense when adopted by a monopolist, it makes no sense here in the case of FedEx – which is not alleged to have been a monopolist, and had

only an approximately 40 percent market share against the 60 percent share of its sole rival. (*See* FAC ¶ 7.)[4] Any attempts by FedEx to refuse to deal would just drive customers to the market leader, UPS.

AFMS fails to address the real issue with respect to market share. It can point to no case where in a two-seller market, the smaller of the two sellers has market power, absent some form of lock-in that prevents buyers from fleeing to the competitor. There is no such case. It may be true that a seller with 40 percent of the market may be able to exercise some market power in a market that is highly dichotomized, where all of the other sellers are small. The cases relied on by AFMS make that point and demonstrate the fallacy of AFMS's allegation here. In *Rebel Oil Co. v. Atlantic Richfield Co.*, ARCO was accused of attempted monopolization based on a market share of 44 percent, yet the relevant market included many other retail gasoline sellers, including "numerous independent dealers." 51 F.3d 1421, 1430 (9th Cir. 1995). In *Catch Curve, Inc. v. Venali, Inc.* and *Cascade Health Solutions v. Peacehealth*, the entities accused of attempted monopolization were alleged to control significantly more than 40 percent of the respective relevant markets. *Catch Curve*, 519 F. Supp. 2d 1028, 1035 (C.D. Cal. 2007) (defendant alleged to control over 80 percent of the relevant product market, in which there were also alleged substantial barriers to entry); *Cascade Health*, 515 F.3d 883, 891 (9th Cir. 2008) (defendant allegedly controlled roughly 75 percent of the relevant market).

There is no legal authority, economic authority, or logic to support AFMS's theory that FedEx, at its 40 percent market share, could achieve monopoly power by imposing an unlawful restriction when the First Amended Complaint does not

[4] AFMS's assertion that FedEx "enjoys 'the larger market share of *air shippers* for time sensitive letters, documents and packages (as between it and UPS),'" (Omnibus Opp'n at 21:3-5 (emphasis added)), is nothing more than a red-herring, since the alleged relevant market consists of the market for time-sensitive shipping services by air *and by ground*. (*See* FAC ¶¶ 6, 23.)

allege that its customers are in any way locked in and where the Complaint does not allege any inhibition preventing FedEx's customers from moving to UPS if they disliked the alleged restraint.

B. FedEx's Purported Conduct Cannot Be Anticompetitive When It Would Have Allegedly Given Its Rival a "Huge Potential Competitive Advantage."

The law is clear that, to state a claim under Section 2, one must plead anticompetitive conduct – that is, "behavior that tends to impair the opportunities of *rivals*." *Cascade Health*, 515 F.3d at 894 (emphasis added). The cases cited by AFMS confirm this, as they each involve claims of injury to a *rival in the particular relevant market*. *Aspen Skiing*, 105 U.S. at 600-05 (claim against ski mountain operator for refusing to cooperate with rival ski mountain operator); *Lorain Journal*, 342 U.S. at 148-49 (claim against newspaper by radio station that competed with the newspaper in the market for local advertising); *Kodak*, 125 F.3d at 1200-01 (claim against Kodak for monopolizing a copier-services aftermarket, by rival providers of aftermarket services). As discussed above, AFMS's First Amended Complaint does *not* allege that AFMS and Defendants compete with each other, either in the delivery of packages (which AFMS does not sell) or in consulting services (which Defendants do not sell). *See supra* section I.B. Nor would it make any sense for FedEx or UPS to provide the type of consulting services that AFMS sells, which involve "helping shippers negotiate *with UPS/FedEx*." (FAC ¶ 9 (emphasis added).) Instead, as the First Amended Complaint makes clear, Defendants UPS and FedEx are the "only two commercial entities" competing in the market for time-sensitive package shipping and delivery. (FAC ¶ 6.)

Moreover, AFMS ignores the fact that its monopolization claim flatly contradicts its theory of collusion – namely, that neither FedEx nor UPS "would have dared to give the other such a huge potential competitive advantage/opportunity without an understanding that both would terminate dealings

with third party consultants at or about the same time." (FAC ¶ 14.) AFMS's entire Section 1 claim is dependent on Defendants' alleged incentives not to cease working with third-party consultants independently. But AFMS cannot have it both ways. Because the First Amended Complaint asserts that FedEx would *not* have undertaken the alleged conduct unilaterally, AFMS's claim that it in fact acted unilaterally and thereby monopolized or attempted to monopolize fails.

AFMS's Section 2 claim should be dismissed with prejudice.

Dated: December 20, 2010 O'MELVENY & MYERS LLP

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