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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. CV10-5830 MMM (RCx)

REPLY BRIEF IN SUPPORT OF UNITED PARCEL SERVICE CO.'S MOTION TO DISMISS [FRCP 12(B)(6)]

Date: January 31, 2011
Time: 10:00 a.m.
Ctrm: 780 - Roybal

Hon. Margaret M. Morrow

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INTRODUCTION

AFMS has failed to state a claim, and no amount of spin on its factual allegations can avoid that conclusion. As explained in the opening briefs, as a mere consultant to market participants, AFMS does not have standing under *Legal Economic Evaluations v. Metropolitan Life Ins. Co.*, 39 F.3d 951 (9th Cir. 1994). Faced with this controlling authority, AFMS tries to recast its allegations, arguing that it has alleged a *second* relevant market – "the market for consulting." (Opp. 4.) AFMS then stretches the case law, arguing that peripheral consultants such as AFMS are actually market participants. (Opp. 5-8.) But AFMS never alleged a "market for consulting," and AFMS's strained reading of the case law fails. *Legal Economic Evaluations* is on point and AFMS's other cases are distinguishable.

The opening briefs also underscored AFMS's failure to plead a plausible conspiracy because AFMS's own allegations, in particular the internal memoranda attached to the amended complaint (FAC Exs. 1 & 2), contradict any inference of an agreement. AFMS's response is to disregard what it actually alleges (Opp. 11-17), running away from the memoranda and ignoring its own allegations that show that the policies were *not* implemented simultaneously. (FAC ¶ 15.) But AFMS cannot now rewrite its already amended complaint. Its own allegations show that its conspiracy claim fails.

Finally, the opening briefs show that AFMS's monopolization claim fails because the conduct AFMS alleges would help rather than impair UPS's rivals in the alleged package delivery market. AFMS tries to deflect the impact of this flaw by arguing that *it* is a rival of UPS in some market for consulting services and the alleged conduct is driving it out of that market. (Opp. 17-20.) But AFMS's claim is based entirely on alleged monopolization in the package delivery market, not on some supposed market for consulting. (FAC ¶ 25.) AFMS cannot amend again its complaint through arguments in its opposition, and its monopolization claim fails.

The Court should dismiss AFMS's amended complaint.

ARGUMENT[1]

I. AFMS DOES NOT HAVE STANDING TO BRING ITS ANTITRUST CLAIMS.

A. AFMS Does Not Allege Injury In The Market Allegedly Restrained And Thus Lacks Antitrust Injury.

The Ninth Circuit case law provides a central principle on antitrust injury: consultants, such as AFMS, whose alleged "injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Am. Ad Mgmt., Inc. v. Gen. Tel. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("*Ad Management*"). *That is the case here*; AFMS alleges that the market for time-sensitive package delivery was restrained, but AFMS's own allegations show that the alleged injury to its consulting business occurred in some other market. (FAC ¶ 21.) AFMS's antitrust claims are thus squarely precluded by *Legal Economic Evaluations v. Metropolitan Life Ins. Co.*, 39 F.3d 951 (9th Cir. 1994), other cases involving consultants, and the well-established principles governing antitrust injury.

Given the absence of standing demonstrated in the opening briefs, AFMS argues that "AFMS has clearly alleged 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 …. (*See* FAC ¶¶ 3, 9, 16)." (Opp. 4.) *But the cited paragraphs (3, 9, 16) contain no such allegations*. Nor does any other allegation in the amended complaint because AFMS does not participate in a market for the delivery of time-sensitive letters in which FedEx and UPS compete vigorously.

Attempting to avoid this controlling authority, AFMS also seeks (without success) to contort its allegations to fit the fact patterns of two cases: *Ad Management* and *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991). (Opp. 3-8.) But the facts of those cases show that

[1] UPS also joins the arguments in FedEx's opening and reply briefs.

AFMS's relationship to the alleged market in this case is nothing like those of the plaintiffs in *Ad Management* and *Yellow Pages*. Once the plaintiffs' position relative to the participants in the relevant market in each of these Ninth Circuit cases is understood, it is clear that AFMS's position is identical to that of the plaintiffs in *Legal Economic Evaluations*.[2]

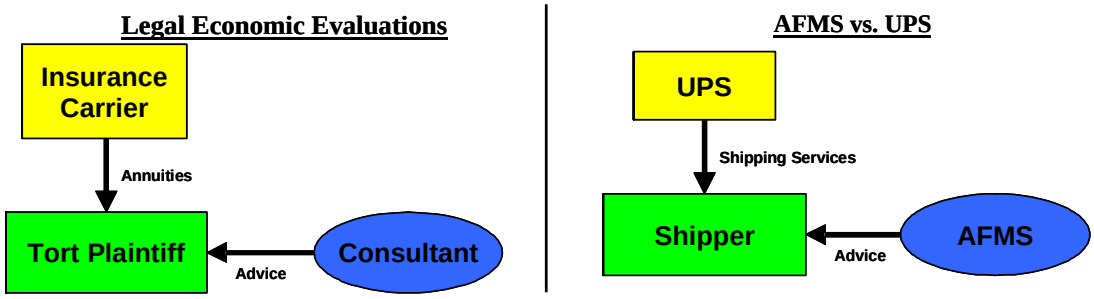
1. AFMS's Position Relative To The Participants In The Relevant Market Is Identical To That Of The Consultants In *Legal Economic Evaluations*.

Functionally, AFMS is in the same position as the consultants in *Legal Economic Evaluations*. In that case, the defendant insurance carriers sold structured settlement annuities to tort plaintiffs. 39 F.3d at 952. *Here*, UPS sells package delivery services to shippers. (FAC ¶¶ 4, 16.) *In Legal Economic Evaluations*, Weil provided consulting services to the insurance carriers' customers, tort plaintiffs, regarding those annuities. 39 F.3d at 952. *Here*, AFMS provides consulting and negotiating services to UPS's customers. (FAC ¶ 10.) *In Legal Economic Evaluations*, Weil alleged that the insurance carriers and defense-side brokers conspired to boycott consultants to tort plaintiffs, causing it to lose business. 39 F.3d at 953. *Here*, AFMS alleges that defendants have boycotted consultants, injuring AFMS's consulting business. (FAC ¶¶ 15, 18, 21.) *In Legal Economic Evaluations*, Weil alleged that the boycott harmed competition because it "decreased annuity benefits to tort plaintiffs, and increased annuity costs to liability carriers." 39 F.3d at 953. *Here*, AFMS alleges that the alleged boycott harmed competition "in the business of delivering time sensitive letters, documents and packages." (FAC ¶ 16.)

[2] AFMS even goes so far as to argue that *Legal Economic Evaluations* was "overruled" by *Ad Management*. (Opp. 7 n.3.) Poppycock. No panel can "overrule" a prior panel opinion; only an en banc court may do so. *See U.S. v. Wash.*, 872 F.2d 874, 880 (9th Cir. 1989); *see also* Fed. R. App. P. 35.

In *Legal Economic Evaluations*, the Ninth Circuit held that Weil did not suffer antitrust injury because its loss of business did "not flow from the harm to competition it alleges." *Id.* Contrary to AFMS's argument, the court did not hold that Weil failed to "causally connect the boycott of the consulting companies to any consumer injury." (Opp. 7.) The court specifically assumed "harm to competition – decreased annuity benefits to tort plaintiffs and increased annuity costs to liability carriers," but held "Weil's injury does not flow from these competitive harms." 39 F.3d at 955; *see also Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d 574, 576 (9th Cir. 1986) (licensing agent who represented motion picture "exhibitors in negotiations with distributors" did not suffer antitrust injury from conspiracy among distributors to refuse to deal with agent).

Legal Economic Evaluations is squarely on point and precludes AMFS's antitrust claims. AFMS's relationship to the participants in the alleged relevant market in this case – the market for time-sensitive package delivery (FAC ¶ 16) – is identical to Weil's position relative to participants in the market in *Legal Economic Evaluations*. UPS and FedEx are in the same position as the insurance carriers; they sell the product in the relevant market. Shippers are in the same position as tort plaintiffs; they purchase the relevant product.



AFMS is in the same position as Weil; it provides advice to the purchasers of defendants' product. And, just as Weil did not suffer antitrust injury from the alleged boycott in *Legal Economic Evaluations*, AFMS has not suffered antitrust injury here. 39 F.3d at 955; *see also Cargill Inc. v. Budine*, No. CV-F-07-349-LJO-SMS, 2007 WL 2506451, at *5 (E.D. Cal. Aug. 30, 2007) (no antitrust injury

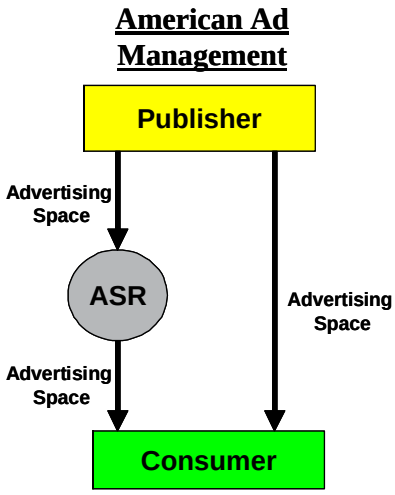
because consultant's loss of clients occurred "in a different market" than that allegedly restrained); *Martorano v. PP&L Energy Plus, LLC*, 334 F. Supp. 2d 796, 801 (E.D. Pa. 2004) (consultant lacked antitrust injury; it was "merely a peripheral rather than an integral player" in the market), *aff'd*, 137 F. App'x 491 (3d Cir. 2005).

2. AFMS Is Nothing Like The Brokers In *Ad Management*; It Is Not In The Chain Of Distribution For UPS's Services.

In contrast, AFMS's allegations are nothing like those in *Ad Management*. In that case, the plaintiffs were "Authorized Selling Representative[s] ('ASR') which [sold] advertising in phone directories which are commonly know as 'yellow pages.'" *Am. Ad Mgmt., Inc. v. Gen. Tel. of Cal.*, 92 F.3d 781, 783 (9th Cir. 1996).[3] Publishers of yellow pages also sold advertising space directly to consumers. *Id.* In effect, the publishers had "established a dual distribution system in which an advertisement [could] be purchased either directly from publishers or from an ASR." *Id.* When a customer purchased from an ASR, the ASR would purchase the advertising space from the yellow pages publisher at a price lower than that available directly from publisher. *Id.* This price differential was called a "commission," and ASRs would pass part of this price differential on to consumers as a "discount." *Id.* The plaintiffs alleged that publishers conspired to eliminate certain commissions to bring an end to "discounting" to local accounts, thereby restraining trade in the market for yellow pages advertising. *Id.* at 783-84, 790.

[3] The Ninth Circuit issued two opinions in *Ad Management*. In the first, the court focused on the relationship between the plaintiff ASRs and the defendant yellow pages publisher, affirming the lower court's holding that the rule of reason applied, but reversing summary judgment entered in favor of the defendant. 92 F.3d at 785-91. On remand, the district court granted summary judgment to the defendant a second time, finding that the plaintiff lacked standing. 190 F.3d at 1053. On appeal, the Ninth Circuit reversed again. *Id.* at 1061.

The Ninth Circuit held that the relationship between ASRs and publishers, pictured here, was "one of agency," *id.* at 786, and given their role in the market for yellow pages advertising, ASRs suffered antitrust injury caused by the alleged conspiracy. *Ad Management*, 190 F.3d at 1054, 1056-57. This was not because, as AFMS argues, the ASRs were "victims" of the conspiracy. (Opp. 5.) Being a victim is *not* sufficient; the court specifically held that "[p]arties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Id.* at 1057. Rather, the Ninth Circuit held that the ASRs suffered antitrust injury because, as agents who purchased and sold the publishers' product, the ASRs were participants in the market being restrained:



> Antitrust injury requires the plaintiffs to have suffered its injury in the market where competition is being restrained…. As a broker for the advertisements whose prices are allegedly restrained, American is a participant in the relevant market and it has suffered an injury in that market, the loss of commissions on advertisement purchases.

Id. at 1057. In other words, the *Ad Management* plaintiffs were *market participants* because they were in the chain of distribution for the relevant product.

AFMS's position relative to the relevant market here (time-sensitive package delivery) is nothing like that of the plaintiffs in *Ad Management*. Unlike the *Ad Management* plaintiffs, who purchased advertising space from the defendants, *id.* at 1053, AFMS does *not* purchase shipping services from UPS. In contrast to the *Ad Management* plaintiffs, which were in an agency relationship with the defendants, *id.* at 1054, *AFMS is not an agent of UPS.* The *Ad Management* plaintiffs served as

brokers for the defendant's product, yellow pages advertising, *id.* at 1057, but AFMS is *not* a broker for shipping services.

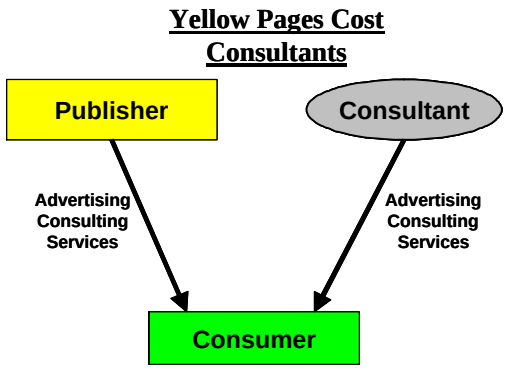
In fact, unlike the *Ad Management* plaintiffs, third-party consultants such as AFMS are not in the chain of distribution at all. UPS sells time-sensitive package delivery services. (FAC ¶ 6.) AFMS, on the other hand, provides "small parcel and freight consulting services" and assists "shippers negotiate competitive small parcel and freight contracts." (FAC ¶ 3; *see also id.* ¶ 9 (parcel consultants "gather and analyze data … to develop a strategy to save the shippers money" and help shippers "negotiate with UPS.") In short, AFMS is not a participant in the market allegedly being restrained.

3. AFMS Is Nothing Like The Consultants In *Yellow Pages*; AFMS And UPS Do Not Compete In A Market For Consulting Services, Nor Has AFMS Alleged Such A Market.

AFMS's reliance on *Yellow Pages* (Opp. 5-6) is similarly misplaced. That case stands for the simple proposition that a *competitor* injured by a restraint in the relevant market may suffer antitrust injury. *See Amarel v. Connell*, 102 F.3d 1494, 1510 (9th Cir. 1997) (plaintiffs in *Yellow Pages* had standing because "we held that the plaintiffs and defendants *did* compete in the same market"); *Ad Management*, 92 F.3d at 786 n.7 ("the actual holding of *Yellow Pages Cost Consultants* is that consultants were competitors of publishers in the market of advice"). In *Yellow Pages*, the plaintiffs were consultants that would "advise businesses on the content and form of their advertisements in yellow pages directories" to reduce costs. 951 F.2d at 1159-60. The plaintiffs alleged that GTE, which had 77% to 98% of the market for yellow pages advertising, sought to monopolize "the separate consulting market" by refusing to allow plaintiffs to "order, place, and process yellow pages advertisements on behalf of advertisers." *Id.* at 1160.

The Ninth Circuit held that the plaintiffs suffered antitrust injury based on "considerable evidence" that the yellow pages consultants and GTE "compete in the

service market of advising advertisers regarding the form, cost, content and location of yellow pages advertisements." *Id.* at 1161. For example, the "president of a GTE subsidiary admitted that the cost of its 'free advertising consulting service,' … was covered by the rates for its yellow pages." *Id.* GTE's "Competition-Countering Guidelines" also offered procedures effective in "combating competition," such as sending letters to customers inviting them to use "our trained professional representatives," for whom "there are no service fees, commission, or other hidden charges," and informing customers that other agencies "will charge you an extra fee to do exactly what GTE Directories corporations can do." *Id.* As direct competitors of GTE, the consultants could take away sales from GTE and imposed "an essential discipline" on "producers and sellers" in the market. *Id.* at 1162.



Yellow Pages does not help AFMS for two reasons. First, AFMS fails to allege facts that would show that UPS competes with third-party consultants in the provision of consulting services. Simply put, unlike the plaintiffs in *Yellow Pages*, AFMS does not allege that UPS provides the same services as do third-party consultants. (*See* FAC ¶ 4 (UPS is a "package delivery company"), ¶ 6 (UPS engaged in "delivery, by ground and by air, of time-sensitive letters, documents and packages").) Nowhere in its amended complaint does AFMS allege that UPS "gather[s] and analyze[s] data … to develop a strategy to save the shippers money." (FAC ¶ 9.) More important, UPS *cannot* compete with third-party consultants with

regard to the nub of the consulting services – helping shippers "negotiate with UPS."[4] (FAC ¶ 9.) Thus, AFMS and parcel consultants are nothing like the consultants in *Yellow Pages*.

Second, despite statements in its opposition (Opp. 4, 6, 7), *AFMS does not allege a separate market for consulting services*. To plead a relevant market, a plaintiff must allege facts regarding "reasonable interchangeability of use or the cross-elasticity of demand between the [service] itself and substitutes for it" and "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008); *see also Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). AFMS's amended complaint contains no allegations regarding such alternatives or sellers. (*See* FAC ¶¶ 8, 10 (alleging only that most shippers employ "specialists" to assist with negotiating shipping contracts but admitting that "11% of all shippers use a consultant")); *Yellow Pages*, 951 F.2d at 1162 (finding plaintiffs and GTE were competing in the same market because they had the "ability to deprive each other of significant levels of business"). Nor does AFMS allege any facts regarding the geographic scope of this supposed market. Is it local? Regional? National? AFMS offers no clue, and this failure is fatal. *Tanaka*, 252 F.3d at 1063.

In sum, AFMS cannot squirm out from under *Legal Economic Evaluations*. That case is factually on all fours. *Ad Management* and *Yellow Pages* present very different factual situations. *AFMS does not allege competition with UPS in any market; it is a supplier of services to a market participant. As a consultant offering advice to shippers, AFMS is not a participant in the market for time-sensitive*

[4] Referring to statements in UPS's internal memorandum gets AFMS nowhere. (Opp. 6.) Telling sales representatives to remind customers of the costs of using consultants and that UPS can "address the customer's issues" does not show that UPS provides consulting and negotiating services.

package delivery. It has not suffered antitrust injury. Legal Econ. Evaluations, 39 F.3d at 956; *see also SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995) (contractor that provided services to pay telephone owners did not suffer antitrust injury from restraint in pay phone market).

B. As A Supplier To Market Participants, AFMS's Alleged Injury Is Too Indirect And Derivative To Confer Standing.

As UPS pointed out in its opening brief, AFMS's role as a mere supplier of services to market participants demonstrates that AFMS also lacks antitrust standing because the alleged injury to its consulting business is too indirect and derivative. (UPS Br. 10-12 (citing *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995) (suppliers to "direct market participants" typically lack standing "because their injuries are too secondary and indirect"); *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519-20 (7th Cir. 1982) (stating that Congress did not intend to give antitrust standing to every supplier of a market participant); *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 335 (S.D.N.Y. 2003) (supplier of market participant lacked antitrust standing).) AFMS ignores this authority, pointing to its allegation of lost commissions and claiming that *Ad Management* and *Yellow Pages* hold that "similar injuries based on lost commissions satisfy the directness factor." (Opp. 8.) Not so.

Neither *Ad Management* nor *Yellow Pages* involved a consultant that was a mere supplier of services to market participants. The plaintiffs in *Ad Management* were in the chain of distribution from the defendant to the consumer, and their "commission" was the difference between the defendant's price to the public and its price to its broker-agents. 190 F.3d at 1053. AFMS, in contrast, is not in the chain of distribution from UPS to shippers, and it receives a "commission" from the consumer (shippers) not from the defendant (UPS). (FAC ¶¶ 3, 9.) The plaintiffs in *Yellow Pages* were the defendants' *direct competitors*, and their lost commissions thus occurred in the restrained market. 951 F.2d at 1161. Despite the

baseless arguments in its opposition, AFMS does not allege facts that would show it is a direct competitor of UPS.

Nor does any alleged "specific intent to drive third-party consultants, like AFMS, from the market" (Opp. 8) overcome these defects. Mere suppliers of market participants lack standing even where the supplier is targeted by an antitrust conspiracy. (UPS Br. 11-12 (citing *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Assoc.*, 830 F.2d 1374, 1379 (7th Cir. 1987) (supplier of MLS services to market participants lacked standing despite "direct action" against the supplier).) In fact, the Ninth Circuit held that consultants like AFMS lack standing even in the face of an alleged boycott to "drive consultants … out of the … business." *Legal Econ. Evaluations*, 39 F.3d at 953.

AFMS lacks standing. Its amended complaint must be dismissed.

II. AFMS'S CONSPIRACY CLAIM FAILS.

A. AFMS Fails To Plead A Plausible Conspiracy.

To state its Section 1 claim, AFMS must plead facts that place its allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement," i.e., facts that point "toward a meeting of the minds." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *see also Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Despite its protests (Opp. 10-17), AFMS has not done so.

- AFMS argues it has alleged facts that would show an agreement on third-party consultant policies, but AFMS all but ignores the internal memoranda attached to the amended complaint, which articulate those policies. (FAC Exs. 1, 2.)
- AFMS insists that it has alleged the implementation of simultaneous policies, but AFMS ignores its own allegations that the policies were not implemented simultaneously. (FAC ¶ 15, Ex. 1, Dkt. No. 31 at 13.)

- AFMS claims it has alleged UPS and FedEx have uniformly refused to deal with third-party consultants, but AFMS offers nothing more than conclusory, blanket allegations to support this claim. (FAC ¶ 15.)
- AFMS argues that independent policies would be irrational, but AFMS's own allegations show that independent conduct is not only rational but plausible.

In short, the context does not support a plausible conspiracy claim. The UPS and FedEx internal memoranda belie any inference of an agreement. (*See* FAC Exs. 1 & 2.) Nor can AFMS ignore its own allegations that UPS and FedEx face the same problem, third-party consultants, and compete in a concentrated industry where follow-the-leader conduct is not only to be expected but is already occurring. (FAC ¶¶ 6, 12.) This context does not point towards "a meeting of the minds." AFMS's allegations are "merely consistent" with the alleged conspiracy and fail to cross "the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).[5]

1. The Internal Memoranda Show There Was No Agreement.

Although the internal memoranda are inconsistent with AFMS's conspiracy allegations, AFMS asserts "the differences between the two memoranda are inconsequential." AFMS also claims that, despite the written policies, UPS and FedEx have not actually continued to deal with third-party consultants. (Opp. 14-15.) But AFMS cannot so breezily dismiss these memoranda; AFMS itself alleges that they confirm the companies' respective policies. (FAC ¶ 13.)

[5] AFMS claims that UPS has misstated pleading requirements and that on a motion to dismiss it need not "identify a specific time, place or set of persons involved in its conspiracy allegations to satisfy pleadings requirements." (Opp. 13 & n.6.) AFMS misses the point. Without such allegations and in a context where its allegations are equally consistent with independent conduct, its conspiracy allegations are implausible. *See Twombly*, 550 U.S. at 566-68.

The memoranda gut AFMS's theory. AFMS does not dispute that each memorandum states that the respective company may exercise its own independent discretion as to whether, and under what circumstances, it will deal with third-party consultants. (FAC Ex. 1, Dkt. No. 31 at 14; Ex. 2, Dkt. No. 31 at 22, 24.) Moreover, AFMS does not dispute that the memoranda specify different criteria for choosing to work with third-party consultants. (*Compare* FAC Ex. 1; Dkt. No. 31 at 14 (citing "type and size of the risk or opportunity for UPS," the "specific reason(s) the customer is going to use" the consultant, and the "customers expected timeframe" for engagement of the consultant) *with* FAC Ex. 2; Dkt. No. 31 at 18 (stating that FedEx will deal with *any* third-party consultant offering "value added services").) Nor does AFMS deny that the memoranda specifically allow dealing with a third-party consultant to "win an entrenched competitor customer." (*Id.* Ex. 2; Dkt. No. 31 at 24.) The internal memoranda thus clearly contemplate continued dealing with third-party consultants. They are contrary to any implication of an agreement. *See, e.g.*, *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (affirming dismissal where "no antitrust lawyer could help but ask almost immediately *why*" defendants would enter into such a conspiracy).

In its attempt to avoid the obvious implications of the memoranda, AFMS asserts that "even if the internal memoranda facially appear to allow some continued dealings with third-party consultants, this is not what actually happened." (Opp. 15.) But setting aside conclusory allegations, AFMS alleges only one isolated instance of what supposedly "actually happened" – a single incident where sales agents for UPS and FedEx allegedly separately told a customer "that neither company would deal with the customer if a third party consultant was involved." (FAC ¶ 13.) This is far from AFMS's blanket assertion that UPS agreed with

FedEx not to deal with any third-party consultant. (Opp. 14-15.)[6] It is also fully consistent with what competitors do in an interdependent market; they tell customers about their competitors' parallel policies. AFMS's conclusory allegations fail to plead facts sufficient to allow the Court to infer that UPS and FedEx have not followed the "writings" that allegedly "confirmed" the "third-party consultant policies." (FAC ¶ 13; *see also* Opp. 2 (internal memoranda "put into effect" the alleged policies).)

2. Shipping Companies Implementing Third-Party Consultant Policies Is Consistent With Independent Conduct.

Given the internal memoranda, the context revealed by AFMS's allegations also shows that the alleged conduct is fully consistent with independent action. This context dispels any notion of plausible conspiracy, and AFMS's argument about the timing of the policies does not change that conclusion.[7]

AFMS argues that its allegations regarding the timing of the supposed announcement of the policies and the date of the memoranda are sufficient to plead a plausible conspiracy. But AFMS ignores its own allegations that it was told by a customer that "FedEx is not working with third party consultants and that '*UPS is going to be doing the same thing soon*.'" (FAC ¶ 15 (emphasis added).) AFMS also ignores the fact that the UPS internal memorandum states that it is providing

[6] AFMS argues that the amended complaint alleges that "Defendants' representatives met and conferred regarding the implementation of this policy and to ensure its uniform application between both companies" (Opp. 12), but the cited paragraphs (FAC ¶¶ 13, 15) do not support this statement.

[7] Trying to bolster its conspiracy allegations, AFMS filed a declaration in support of its Opposition. This declaration is improper and should be stricken. In any event, it does not help AFMS; the fact that the Department of Justice has initiated an investigation is irrelevant for purposes of this motion. *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (allegation that foreign and domestic antitrust enforcers have initiated investigations into the possible anticompetitive practices "carries no weight in pleading an antitrust conspiracy claim").

"updated procedures," indicating that UPS's policy predates April 23, 2010. (FAC Ex. 1, Dkt. No. 31 at 13.)

What is more, AFMS's timing story is not consistent with an agreement. Putting aside its own contrary allegations, AFMS would have us believe that UPS and FedEx entered into an agreement, announced policies pursuant to that agreement sometime in October 2009, but issued internal memoranda on the same day seven months later that are *inconsistent* with any agreement (specifically contemplating dealing with third-party consultant to gain competitive advantage). This makes no sense.

The conduct is, however, consistent with independent action. AFMS itself alleges that UPS and FedEx faced common external market stimuli: third-party consultants that were hurting profits, meddling with customer relationships, and improperly using confidential information. (*See* FAC ¶ 11; Ex. 1, Dkt. No. 31 at 13, 14; Ex. 2, Dkt. No. 31 at 17, 20, 23.) Facing the same external pressures, "it would have been entirely rational for each defendant *independently* to decide to [implement a no-third-party-consultant policy], expecting [its] neighbor[] to do the same thing. And, it would have been equally rational for the other defendant[] to follow [that policy], rather than seek to undercut [it] …." *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007) (citation omitted). *The differences in the respective internal memoranda are fully consistent with two competitors independently addressing the same external issues differently*.

Attempting to dodge this economic reality, AFMS argues that UPS's independent response to these common external market stimuli would not have made any economic sense without an agreement. (Opp. 12.) But besides the naked allegation that "either FedEx or UPS unilaterally terminating its dealings with third party consultants" would give the other "a huge potential competitive advantage/opportunity" (FAC ¶ 14), AFMS has not alleged any facts to support this conclusion. In contrast, facing the industry conditions AFMS *does* allege, a

concentrated industry already exhibiting parallel pricing behavior, it *would* be rational for UPS to independently implement its third-party consultant policy "expecting [FedEx] to do the same thing." *Twombly*, 550 U.S. at 568; *see also In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009).[8]

AFMS relies heavily on the Second Circuit's recent decision in *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010). But *Starr* is no help to AFMS. In that case, the plaintiffs alleged detailed factual circumstances that "'suggest[ed] an agreement was made'" by the defendants, major record labels, to fix the price of music sold through the internet. *Id.* at 317 (quoting *Twombly*, 550 U.S. at 555). These allegations included a statement from the CEO of one of the defendants that the purpose of the challenged joint ventures was "to stop the 'continuing devaluation of music,'" *id.* at 323-24, that the defendants hid the use of most favored nation clauses to maintain prices because the clauses "would attract antitrust scrutiny," *id.* at 324, and that the defendants had implemented a simultaneous price increase in the face of decreasing costs, *id.* In addition, the plaintiffs had detailed factual allegations showing that the alleged conduct was against the defendants' economic self-interest. *Id.* at 327 ("it would not be in each individual defendant's self-interest to sell [at prices and with terms] that were so

[8] The cases cited by AFMS do not hold otherwise. *See In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1144, 1147 (N.D. Cal. 2009) (recognizing that "market concentration …[is] insufficient, standing alone," but plaintiffs alleged detailed facts making its claim plausible, such as some defendants and their employees had pled guilty to price-fixing for a similar product, defendants' prices were stable even when costs were decreasing, defendants entered into a "'web' of cross-licensing and joint venture agreements as a means to facilitate collusive behavior," and specific facts showing defendants "routinely exchanged highly sensitive competitive information"); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (acknowledging that "[m]ore evidence is required the less plausible the charge of collusive conduct," and holding that alleged conspiracy was plausible where allegations were of a "garden-variety price-fixing conspiracy orchestrated by a firm … conceded to have fixed prices on related products" during an overlapping period of time).

unpopular as to ensure that [according to an industry commentator] 'nobody in their right mind' would want to purchase the music, unless the defendant's rivals were doing the same"). This case is bereft of any allegation that comes close to the pivotal allegations in *Starr*, most importantly, there are no factual allegations that would show that UPS or FedEx acted contrary to economic self-interest.

In short, when viewed as a whole, there is an "obvious alternative explanation" for AFMS's factual allegations – lawful, independent conduct. *Twombly*, 550 U.S. at 567. The Section 1 claim must be dismissed. *Id.* at 567-68.

B. AFMS Does Not Dispute That The Rule Of Reason Applies And Its Conclusory Allegations Of Market Harm Are Insufficient.

AFMS also fails to allege facts that would show harm to competition. AFMS does not dispute that the rule of reason applies to the alleged group boycott of third-party consultants. (*See* Opp. 15-16.) *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 950 (9th Cir. 1998) (*per se* rule did not apply where alleged group boycott "did not disadvantage a competitor").

Instead, AFMS argues its allegation that the alleged agreement has "resulted in a significant price increase for consumers in the market for the delivery of time-sensitive letters, documents and packages" is sufficient.[9] (Opp. 16.) But this conclusory allegation is not enough. *See Markovic v. Dep't of Corr. of Wis.*, No. 09-cv-42-bbc, 2009 WL 1293083, at *4 (W.D. Wis. Apr. 30, 2009) (dismissing antitrust claims where, aside from a single fact, "plaintiffs ma[de] only conclusory statements in support of the anticompetitive effect" of the alleged agreement). In addition, the alleged restraint would not affect a sufficient share of shippers to affect market-wide prices. In fact, AFMS admits that only "11% of all shippers use a consultant." (FAC ¶ 10.) On the other hand, AFMS alleges that most shippers

[9] The alleged harm to the market for consulting services is irrelevant. (Opp. 16.) The relevant market as alleged in the complaint is the market for "delivery of time-sensitive letters, documents and packages." (FAC ¶¶ 16, 18, 23.)

must use "specialists" to understand UPS's and FedEx's agreements and hence, most shippers turn to sources other than third-party consultants for advice regarding those agreements. (*See id.* ¶ 8.) These facts fail to adequately plead actual injury to competition. *Cf. Commercial Data Servers, Inc. v. IBM*, 262 F. Supp. 2d 50, 75 (S.D.N.Y. 2003) ("substantial foreclosure of competition cannot be found where, as in this case, numerous alternative channels of distribution existed").

III. AFMS'S MONOPOLIZATION CLAIM FAILS.

A. AFMS Fails To Allege Conduct That Impairs Rivals In The Market For Time-Sensitive Package Delivery.

In its amended complaint, AFMS alleges that UPS monopolized or attempted to monopolize "the delivery of letter, documents and packages in the United States." (FAC ¶ 25.) Accordingly, AFMS must allege conduct that "tends to impair the opportunities of *rivals*" in *that* market. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (emphasis added). In other words, AFMS must allege conduct that would drive out *competitors* in the time-sensitive package delivery market, not participants in some never-pleaded market for consulting services. AFMS has not done so.

Although AFMS repeatedly argues that UPS seeks to exclude third-party consultants from "the market" (Opp. 17, 19), AFMS and third-party consultants are not competitors in the market for package delivery. Unlike UPS, which AFMS alleges is the "world's largest package delivery company delivering more than 15 million packages a day" (FAC ¶ 4), third-party consultants provide "consulting services" and assist shippers to "negotiate … freight contracts." (FAC ¶¶ 3, 9, 21.) While AFMS calls third-party consultants "rivals" of UPS, this is based on supposed competition "to advise shippers," (Opp. 20), not in the market for package delivery. (*See also* Opp. 21 n.8 (arguing that each defendant has created a monopoly "as to providing consulting services regarding their respective delivery services").)

Thus, none of AFMS's authority applies to this case. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), involved a downhill skiing facility refusing to deal with a competitor, another ski facility. *Id.* at 602-05. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), involved a refusal to deal by a newspaper to "monopolize the dissemination of news and advertising by eliminating a competing radio station." *Id.* at 154. And *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), involved a manufacturer's refusal to deal with independent service organizations with which the manufacturer competed in the market for the sale and installation of "replacement parts for its equipment." *Id.* at 1200; *see also id.* at 1211 ("Like the Supreme Court in *Aspen Skiing*, we are faced with a situation in which a monopolist made a conscious choice to change an established pattern of distribution to the detriment of competitors.").

The alleged conduct – UPS unilaterally refusing to deal with third-party consultants – cannot exclude competitors in the package delivery market.[10] To the contrary, AFMS alleges that this conduct would give UPS's competitor, FedEx, "a huge potential competitive advantage/opportunity." (FAC ¶ 14.)

B. AFMS Fails To Allege Monopolization Of Any Market For Consulting Services; UPS Does Not Compete In Such A Market And Could Not Attain Monopoly Power

Even if AFMS had alleged a market for consulting and negotiation services to shippers, AFMS's monopolization claim would be entirely flawed. As discussed above, AFMS does not allege that UPS competes in such a market. In fact, the idea that UPS would assist shippers to negotiate against itself is absurd. Given this failure, AFMS's claim cannot stand; it is axiomatic that a firm cannot monopolize a

[10] Moreover, if AFMS's allegations are applied to the time-sensitive package delivery market, AFMS *is* alleging a shared monopoly theory, which is not viable under Section 2. (UPS Br. 24-25.)

market in which it does not compete. *See, e.g.*, *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 759 (9th Cir. 1986) (holding that if defendant is not a competitor in the relevant market, it "cannot be charged with having used market position to exclude competition"); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 623 F. Supp. 2d 1144, 1175 (E.D. Cal. 2009) ("If the Commission does not compete in the relevant market, then it cannot be liable for monopolizing a business in which it does not compete.").

Moreover, AFMS fails to allege facts that would show UPS has or threatens to gain monopoly power in any market for consulting services. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). To the contrary, AFMS alleges that most shippers employ "specialists" to assist them with shipping contracts but only "11% of all shippers use a consultant." (FAC ¶¶ 8, 10.) Even if UPS were able to somehow drive all third-party consultants from "the market," AFMS's allegations show that shippers have access to sources other than third-party consultants for advice regarding UPS agreements; in fact nearly 89% of all shippers apparently use these alternative sources for this advice. Given these alternatives, UPS could not gain monopoly power in any market for advice to shippers.

AFMS's monopolization claims thus fail.

CONCLUSION

AFMS amended its complaint after conferring with defendants as to their views of flaws in the initial complaint. But the same flaws persist in the amended complaint, just as they would in any subsequent complaint.

AFMS does not say how it would amend again to fix these flaws. It could not, because the flaws go to the heart of its case. Thus, it is not surprising that AFMS concedes that the only way it could improve on the amended complaint would be to engage in "limited discovery." The notion of "limited discovery" on a complaint which fails to state a claim runs completely counter to the principles in

Twombly and *Iqbal* and should be denied. The request for discovery is a stark concession of failure to state a claim.[11]

The Court should dismiss the amended complaint with prejudice.

Dated: December 20, 2010

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[11] In the event the Court does grant leave to amend, the Court should not allow AFMS to conduct pre-complaint discovery. AFMS had ample time to include all relevant facts in its amended complaint. Neither *Kendall* nor *In re Graphics Processing Units*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007), stands for the proposition that an antitrust plaintiff is entitled to discovery after its complaint is dismissed. In fact, the court in *Graphics Processing Units* only allowed plaintiffs to file "motions to propound limited discovery and for leave to amend," where plaintiffs had to specify what facts they expected to uncover through discovery. 527 F. Supp. 2d at 1033. In effect, the motions and oppositions to them would "serve as a dismissal motion." *Id.* The court did *not* grant leave to conduct discovery.