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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AFMS LLC,

Plaintiff,

vs.

UNITED PARCEL SERVICE CO. and FEDEX CORPORATION,

Defendants.

CASE NO. CV-10-05830-MMM-RC

Assigned to Hon. Margaret M. Morrow

PLAINTIFF AFMS LLC'S OMNIBUS OPPOSITION TO DEFENDANT UNITED PARCEL SERVICE CO.'S MOTION TO DISMISS [FRCP 12(B)(6)] AND DEFENDANT FEDEX CORPORATION'S 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: Ctrm. 780, Roybal

[Filed concurrently with Declaration of Maxwell M. Blecher in Support of Plaintiff AFMS's Omnibus Opposition to Defendants' Motions to Dismiss]

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Plaintiff AFMS, LLC ("AFMS") hereby submits its Omnibus Opposition to the Motions to Dismiss filed by Defendant United Parcel Service Co. ("UPS") and Defendant FedEx Corporation ("FedEx") (collectively, "Defendants").

I.

INTRODUCTION

Despite Defendants' belabored efforts to recast their anticompetitive conduct as a mere desire to protect confidential information and a simple case of exercising the right to do business with whom one chooses, their more than forty pages of briefing boils down to three main issues. (1) Has AFMS adequately alleged it has standing? (2) Has AFMS pled a plausible conspiracy? (3) Has AFMS adequately pled its second cause of action for monopolization and/or attempted monopolization? The answer to all three questions is **yes**.

First, AFMS has standing to assert both of its claims against Defendants because AFMS suffered a direct antitrust injury. Second, given the context, statements of collusion, and evidence of retaliatory threats, AFMS has alleged a plausible conspiracy. Finally, AFMS has sufficiently pled that Defendants have either attempted to monopolize or have monopolized the market because Defendants have fully excluded third-party consultants and unlawfully injured competition.

Therefore, AFMS respectfully requests that the Court deny, in their entirety, both Defendants' Motions to Dismiss.

II.

STATEMENT OF FACTS

For nearly twenty years AFMS has worked as a parcel consultant in the market for the delivery of time-sensitive letters, documents and packages. (*See* First Amended Complaint ("FAC") ¶¶ 3, 9, 14.) Third-party consultants, like AFMS, facilitate transactions and handle negotiations between shippers and Defendants. (*See id.* ¶ 9.) Many third-party consultants, including AFMS, are

paid based on the savings they negotiate for shippers. (*See id.*) These consultants, by getting discounts and finding various ways for shippers to save money on their shipments, "reinvigorated price competition between UPS and FedEx" and "generated more intense competition between the two companies than otherwise would have existed." (*Id.* ¶¶ 10-12.) Plainly, the presence of third-party consultants in the market has the effect of depressing prices in favor of shippers.

In October of 2009, despite a history of working successfully with consultants for well over a dozen years, Defendants simultaneously announced that they would be implementing a new no third-party consultant policy. (*See id.* ¶ 13.) This new policy was put into effect, via internal memoranda, by both Defendants on the exact same day, April 23, 2010. (*See id.*) Both internal memoranda encouraged Defendants' sales associates to dissuade customers from using such consultants and established that the general message was a "no" for direct dealings with consultants. (*See generally id.*, Exhs. 1 and 2.) In addition to the internal memoranda, both Defendants threatened potential shippers with higher prices and refusals to deal if they utilized third-party consultants. (*See id.* ¶¶ 13, 15.) Defendants' representatives also communicated with each other to ensure that third-party consultants were uniformly excluded. (*See id.*)

This decision to discontinue dealing with third-party consultants substantially increased Defendants' revenues and profits while simultaneously reducing competition. (*See id.* ¶¶ 11-14, 16.) It also meant that, because AFMS could no longer facilitate any deals between Defendants and potential shippers, AFMS could not collect any commissions on such deals. (*See id.* ¶¶ 13-16, 19, 21.) Moreover, given that together Defendants control virtually 100% of the market for time-sensitive delivery of letters, documents and packages, the boycotting of third-party consultants effectively destroyed AFMS's business. (*See id.* ¶¶ 7 (stating that UPS controls 58.8% and FedEx controls 41.2%), 13-16, 19, 21.)

In response to Defendants' unlawful acts, AFMS filed its Original Complaint on August 5, 2010. AFMS then filed a FAC on October 14, 2010. Both Defendants moved to dismiss AFMS's FAC on November 1, 2010, and subsequently filed their memoranda in support of their Motions to Dismiss on November 12, 2010. AFMS now opposes both of these motions to dismiss in this Omnibus Opposition.[1]

III.

ARGUMENT

On a motion to dismiss, the court must accept all allegations of material fact in the Complaint as true. *William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (per curiam); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1018 (N.D. Cal. 2007). All of the allegations must also be "'construed in the light most favorable to plaintiff.'" *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1018 (citation omitted); *accord William O. Gilley Enters.*, 588 F.3d at 662. Furthermore, "all reasonable inferences from these allegations" must be drawn in favor of the nonmoving party. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1218 (C.D. Cal. 2003).

A. AFMS Has Standing to Assert Its Claims Because AFMS Has Suffered a Direct Antitrust Injury

Although there is no black-letter rule defining antitrust standing, the Supreme Court has identified five factors that aid in the determination. *See American Ad Mgmt., Inc. v. General Tel. Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999); *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996). First, that the injury suffered is one that "the antitrust laws were intended to forestall." *American Ad Mgmt.*, 190 F.3d at 1054; *Amarel*, 102 F.3d at 1507. Second, "the

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[1] Because of the similarity of the arguments put forth by each Defendant, AFMS has chosen to file a single Omnibus Opposition in response to both of Defendants' Motions to Dismiss.

directness of the injury." *American Ad Mgmt.*, 190 F.3d at 1054; *Amarel*, 102 F.3d at 1507. Third, "the speculative measure of the harm." *American Ad Mgmt.*, 190 F.3d at 1054; *Amarel*, 102 F.3d at 1507. Fourth, "the risk of duplicative recovery." *American Ad Mgmt.*, 190 F.3d at 1054; *Amarel*, 102 F.3d at 1507. And lastly, "the complexity in apportioning damages." *American Ad Mgmt.*, 190 F.3d at 1054; *Amarel*, 102 F.3d at 1507. While "a court need not find in favor of the plaintiff on each factor," and should instead balance the five factors, there can be no standing without an antitrust injury. *American Ad Mgmt.*, 190 F.3d at 1055. *See also Amarel*, 102 F.3d at 1507. As discussed below, AFMS has met its burden of pleading facts sufficient to support each of the factors used to determine antitrust standing and, thus, has adequately alleged standing.

1. AFMS's Injury Was Suffered in the Same Markets in Which Defendants Are Restraining Competition

Despite Defendants' assertions to the contrary, AFMS has suffered an antitrust injury because its injury occurred in the same markets in which competition is being restrained. *See American Ad Mgmt.*, 190 F.3d at 1057. 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 by, amongst other things, facilitating deals and handling negotiations between Defendants and shippers. (*See* FAC ¶¶ 3, 9, 16.) Furthermore, as a parcel consultant, AFMS's actions encouraged competition and led to lower prices. (*See id.* ¶¶ 10-12.) Thus, when Defendants decided to discontinue dealing with all such third-party consultants, they not only substantially increased their revenues and profits while simultaneously reducing competition in both markets, to the detriment of consumers/shippers, but they also directly adversely affected AFMS's business. (*See id.* ¶¶ 11-16, 19-21.) Therefore, AFMS has more than adequately pled an injury of the type that the antitrust laws were designed to prevent.

Moreover, the facts of this case are very similar to those presented in *American Ad Management*, where the Ninth Circuit did in fact find the plaintiff had suffered an antitrust injury. The plaintiff in *American Ad Management* had facilitated the purchase of yellow pages advertising space for consumers at a price that was lower than that which the consumers could obtain on their own. *American Ad Mgmt.*, 190 F.3d at 1053. For this service, the plaintiff received a commission. *Id.* The defendant later terminated these discounts, thus, stabilizing and raising the prices for yellow pages advertising. *Id.* Based on those facts, the court held that the plaintiff was a participant in the relevant market and had suffered an injury in that market because it had lost out on commissions "[a]s a broker for the advertisements whose prices [were] allegedly restrained." *Id.* at 1057.

Furthermore, in holding that the plaintiff had suffered an antitrust injury the court stated that it was not necessary that the plaintiff be either a consumer or competitor in the market; merely being a victim was sufficient. *Id.* at 1057-58. Thus, instead of focusing on the relationship between the plaintiff and the defendant, the court focused on "the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."[2] *Id.* at 1058; *accord Legal Econ. Evaluations, Inc. v. Metropolitan Life Ins. Co.*, 39 F.3d 951, 953 (9th Cir. 1994) ("antitrust laws are concerned about injury to competition, not competitors").

The decision in *American Ad Management* reinforced an earlier Ninth Circuit ruling that an antitrust injury had been suffered by a group of consulting firms that offered advice "on advertising effectively and efficiently in yellow

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[2] Defendants argue that *American Ad Management* does not apply because AFMS is not an agent of either Defendant, however, the issue in both *American Ad Management* and this case is not whether the injured party is an agent of either a seller or a consumer, but rather whether AFMS's injury resulted from Defendants' anticompetitive activities within the relevant markets. *See* UPS's Motion to Dismiss at 9 n.10; FedEx's Motion to Dismiss at 4:20-5:12; *American Ad Mgmt.*, 190 F.3d at 1058.

pages directories." *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1159 (9th Cir. 1991). In the earlier case, after several decades of permitting these third-party consultants to facilitate ad placements, GTE announced that it would no longer deal with consulting firms and instead required individuals placing ads in the yellow pages to deal directly with GTE. *Id.* at 1160. This caused the consulting firms to lose business and also reduced the savings advertisers had previously obtained via their consultants. *Id.* GTE alleged, like Defendants in this case, that the consultants had no standing because GTE's activities were in a market separate and apart from the market in which the consulting firms operated. *Id.* at 1160-61. This contention was soundly rejected by the Ninth Circuit. *Id.* at 1161-62.

First, the Ninth Circuit pointed out that both the consultants and GTE offered "advice" to potential advertisers. *Id.* at 1161. In fact, GTE instructed its sales associates to inform customers using consultants that GTE would work with the customers directly to reduce advertising costs and without the fees charged by third-party consultants. *Id.* This nearly mirrors the instructions contained in both Defendants' internal memoranda on how to deal with customers who wish to use consultants. (*See* FAC, Exh. 1 at 13-14 ("Emphasize to the customer that UPS will continue to provide a competitive value proposition and UPS is best positioned to directly address the customer's issues." and "Remind the customer of the underlying cost potentially associated with using a 3PN. . . ."); Exh. 2 at 20.) Second, the Ninth Circuit noted that consultants, like AFMS, "serve the function of competitors" by "imposing 'an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost.'" *Yellow Pages Cost Consultants,* 951 F.2d at 1162 (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 662-63 (9th Cir. 1990)). Thus, just like the consultants and brokers in *American Ad Management* and *Yellow Pages Cost Consultants*, AFMS has suffered an antitrust injury.

In contrast to these two cases that are directly on point, Defendants rely entirely on a case that deals primarily with causation and can be easily distinguished from the case at hand. (*See* UPS's Motion to Dismiss at 8-10 (citing to over half a dozen unpublished and otherwise nonbinding or irrelevant opinions); FedEx's Motion to Dismiss at 3-5.) In *Legal Economic Evaluations*, the plaintiff alleged that there was a conspiracy "to reduce the cost of structured settlements below the cash value of tort claims." 39 F.3d at 953. This conspiracy was then **furthered** by boycotting consulting companies, like Legal Economic Evaluations, and blocking access to annuity price information for tort plaintiffs and their attorneys. *Id.* Based on the facts before it, the court noted that there was still a market for tort annuities and for consulting services. *Id.* at 955. As the relevant injury, if there even was one, only affected tort plaintiffs (in the market for settling litigation) and liability carriers (in the market for the selling of annuities), the alleged losses of the plaintiff did not "flow from injury to competition in the relevant market." *Id.* at 955-56. In short, the plaintiff could not causally connect the boycott of the consulting companies to any consumer injury so that there was no antitrust injury. *Id.*

This is very different from the case at hand. Here not only was AFMS directly competing with Defendants in the consulting market, but the injury of **increased prices to the market for the delivery of time-sensitive letters, documents and packages was directly caused by Defendants' agreement to refuse to deal with third-party consultants**. Simply put, while in *Legal Economic Evaluations*, the alleged restraint did not produce consumer injury, in *American Ad Management*, *Yellow Pages Cost Consultants*, and the case at hand, Defendants' decision to restrain competition is exactly what caused injury to both shippers and AFMS.[3]

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[3] The argument could also be made that to the extent the ruling in *Legal Economic Evaluations* is inconsistent with that in *American Ad Management*, it is overruled by the later decision.

As AFMS's injuries, lost commissions, flow directly from Defendants' unlawful decision to eliminate discounts to consumers and to stop dealing with third-party consultants, antitrust injury has been adequately alleged and the FAC should not be dismissed on this ground. *See American Ad Mgmt.,* 190 F.3d at 1056-58; *Yellow Pages Cost Consultants,* 951 F.2d at 1160-62.

2. AFMS's Injury Was Directly Caused by Defendants' Unlawful Conduct and Would Not Be Duplicative of Any Other Potential Recovery

As discussed above, Defendants' refusal to deal with third-party consultants directly affected AFMS because it meant that AFMS could no longer facilitate deals between Defendants and consumers and consequently could not collect any commissions on such deals. (*See* FAC ¶¶ 13-16, 19, 21, 25.) The Ninth Circuit has already ruled that similar injuries based on lost commissions satisfy the directness factor. *See American Ad Mgmt.*, 190 F.3d at 1058-59; *Yellow Pages Cost Consultants*, 951 F.2d at 1162-63. This is because it would be nearly impossible for there to be a closer causal link between Defendants' refusals to deal and the injury suffered by AFMS. *See American Ad Mgmt.*, 190 F.3d at 1058; *Yellow Pages Cost Consultants*, 951 F.2d at 1162 (stating that, in the antitrust context, directness means closeness in the chain of causation). Moreover, Defendants' specific intent to drive third-party consultants, like AFMS, from the market "makes antitrust standing appropriate." *Yellow Pages Cost Consultants*, 951 F.2d at 1163.

Defendants' arguments that this direct injury is somehow derivative in nature are not only factually incorrect, but easily refuted by the controlling case law. (*See* UPS's Motion to Dismiss at 10-12 (citing to various nonbinding Seventh Circuit opinions and ignoring relevant Ninth Circuit authority); FedEx's Motion to Dismiss at 5-7.) AFMS **is** a market participant, not a mere secondary supplier or purchaser of an actual market participant. *Compare* FAC ¶¶ 13-16, 19,

21, 25, *with Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 541-42 (9th Cir. 1987) (finding that employees and the union suffered derivative injuries compared to employers who were directly injured by the defendants' actions), *and Metro-Goldwyn-Mayer Studios*, 269 F. Supp. 2d at 1222 (finding that a secondary provider of services to a market participant did not have a direct injury where the refusal to deal was solely against the market participant). Additionally, as a third-party consultant, AFMS as an immediate victim of Defendants' decision to stop dealing with third-party consultants, is not a remote party. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540-42, 103 S. Ct. 897, 909-11 (1983) (finding that union plaintiff was not an immediate victim where coercion was directed at injuring specific contractors and subcontractors and not the union plaintiff itself); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 147 (9th Cir. 1989) (finding that damage claims of having "less resources to invest [was] an indirect consequence of the alleged royalty loss").

Similarly, FedEx's suggestion that AFMS's injuries are too speculative is also easily disposed of. (*See* FedEx's Motion to Dismiss at 6:24-7:8.) The Ninth Circuit held in a similar case, where it was clear that the injury suffered was caused by the defendant's actions, that the alleged damages were not speculative even though they were based on a portion of potential savings attained by consumers via the plaintiff. *American Ad Mgmt.*, 190 F.3d at 1059 ("[A]lthough ascertaining the amount of [defendant] American's damages is complicated by the fact that discounts given to customers were negotiated on a case-by-case basis and the fact that discounts varied over time, this complexity is not so unusual as to distinguish this case from other complex business disputes."). *See also Yellow Pages Cost Consultants*, 951 F.2d at 1163 (stating that evidence of canceled contracts and decline in overall revenue was sufficient and that possible alternative explanations for revenue decline did not render alleged damages

speculative). Likewise, the assertion that "AFMS's claims create the obvious risk of duplicative recovery" lacks merit because, even though both injuries resulted "from the same anti-competitive conduct," the loss suffered by AFMS is distinct and different from that suffered by the shippers for whom it facilitated deals. *See* FedEx's Motion to Dismiss at 7:21-8:7; *American Ad Mgmt.*, 190 F.3d at 1059-60 (involving damages based on an apportionment of savings); *Yellow Pages Cost Consultants*, 951 F.2d at 1163 (same).

Therefore, because AFMS's injuries are direct, demonstrable, distinct and apportionable, AFMS has adequately alleged antitrust standing.[4]

B. AFMS Has Adequately Alleged a Plausible Conspiracy to Survive a Motion to Dismiss

Contrary to Defendants' assertions, *Twombly* does not create a sea change in the federal pleading requirements. Instead, *Twombly* holds that "[o]n a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters.*, 588 F.3d at 662. *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 968 (9th Cir. 2009) (stating that "the Court appeared to signal that *Twombly* should not be read as effecting a sea change in the law of pleadings"); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("We conclude that *Twombly* leaves the longstanding fundamentals of notice pleading intact."). A plaintiff need only

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[4] Although Defendants have not addressed the fifth factor of "complexity in apportioning damages," AFMS asserts that this case does not present any unusual apportionment problems and is not overly complicated. *See American Ad Mgmt.*, 190 F.3d at 1060 (commenting that in a case with a similar fact pattern, that "apportioning damages in this case would require only a determination of the damages suffered by the [plaintiffs] and their customers"); *Yellow Pages Cost Consultants*, 951 F.2d at 1163 (finding no difficulty in apportioning damages in a case involving a consulting plaintiff).

"nudge[] their claims across the line from conceivable to plausible" to survive a motion to dismiss. *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. Moreover, *Twombly* does not impose a "probability requirement," instead "**it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement**." *Id.* at 556, 127 S. Ct. at 1965 (emphasis added). *See also Airborne Beepers & Video, Inc. v. AT & T Mobility, LLC*, 499 F.3d 663, 667 (7th Cir. 2007) ("[W]e understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1141 (N.D. Cal. 2009) ("'Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests.'" (quoting *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 2200 (2007) (per curiam))).

AFMS has alleged facts adequate to suggest that Defendants conspired to exclude third-party consultants from the relevant markets, thus raising prices for consumers. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965), *petition for cert. filed,* 79 U.S.L.W. 3128 (U.S. Aug. 20, 2010) (No. 10-263). The six main points are as follows:

- After seventeen years of dealing with third-party consultants, in October 2009, both Defendants announced they would be implementing **a new policy of exclusion on the very same day at the very same industry event**. (*See* FAC ¶¶ 13-14.)
- When questioned about the simultaneously announced policy, Defendants "did not deny collusion between the companies in reaching their decision." (*Id.* ¶ 13.)
- The no third-party consultant policy was put into effect, via internal

memoranda, by both Defendants **on the exact same day**, April 23, 2010. (*See id.*)

- Defendants made retaliatory threats to shippers, including threats to raise rates and refusing to negotiate, if they were to use third-party consultants. (*See id.* ¶ 15.)
- Defendants' representatives met and conferred regarding the implementation of this policy and to ensure its uniform application between both companies. (*See id.* ¶¶ 13, 15.)
- It would not have made any economic sense for either Defendant on its own to implement the no third-party consultant policy if an agreement between both companies had not been reached, because, without reciprocal implementation, it would have resulted in a serious advantage to the other Defendant. (*See id.* ¶ 14.)

This is very different from the claims raised in *Twombly* that hinged primarily on inaction and passive conduct versus refusals to deal and retaliatory threats. In *Twombly* it was not only natural for the Baby Bells to resist competition, but it also made economic sense to refrain from entering each other's territory. *See Twombly*, 550 U.S. at 566-68, 127 S. Ct. at 1971-73; *Starr*, 592 F.3d at 322-23. Here, in contrast, Defendants' actions would have "contravene[d] each defendant's self-interest 'in the absence of similar behavior by rivals.'" *Starr*, 592 F.3d at 327 (quoting 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1415a (2d ed. 2003)). Because it would not have been a rational or beneficial business decision to discontinue dealing with third-party consultants without a reciprocal agreement in place, there is a strong inference that an agreement was entered into between Defendants. *See Twombly*, 550 U.S. at 554, 127 S. Ct. at 1964. The fact that the markets in question are conducive to such price fixing because they are "highly concentrated with high barriers to entry" only heightens the plausibility of

conspiracy. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d at 1146. *See also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (stating that there was nothing implausible about a "garden-variety price-fixing conspiracy").

These allegations of parallel conduct, in conjunction with the unique factual situation in which they are presented, are more than sufficient to meet the pleading burden because it shows that Defendants' conduct "'would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'"[5] *Twombly*, 550 U.S. at 556 n.4, 127 S. Ct. at 1965 n.4 (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1425, at 167-85 (2d ed. 2003)). *See also Starr*, 592 F.3d at 322. Moreover, at the motion to dismiss level, one does not have to present facts that would rule out the possibility of independent action. *See Starr*, 592 F.3d at 325. AFMS merely has to allege facts that, in connection with the reasonable inferences from those facts, demonstrate that it is plausible that Defendants entered into an agreement to implement a no third-party consultant policy. *See Moss*, 572 F.3d at 969. Nor does AFMS, contrary to Defendants' assertions, have to identify a specific time, place or set of persons involved in its conspiracy allegations to satisfy the pleading requirements.[6] *See* UPS's Motion to Dismiss at

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[5] In addition, the Department of Justice has recently opened an investigation into Defendants' no third-party consultant policy. (*See* Declaration of Maxwell M. Blecher, filed concurrently herewith, ¶ 2.)

[6] Defendants repeatedly confuse the level of proof needed to survive a motion for summary judgment after discovery has been conducted, with the much lesser burden contained in the federal notice pleading requirements. *See* UPS's Motion to Dismiss at 18:3-6, 19:24-20:1; FedEx's Motion to Dismiss at 11:9-15, 14:8-18; *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1304-05 (11th Cir. 2003) (reviewing the district court's application of the antitrust summary judgment standard); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102-03 (9th Cir. 1999) (concluding that, in the context of a motion for summary judgment where the only evidence was of parallel pricing, "that the evidence does not tend to exclude the possibility that [defendant] acted legally in its pricing decisions"); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906

13 n.12, 18:22-27; FedEx's Motion to Dismiss at 10:22-11-2, 21:1-11; *Starr*, 592 F.3d at 325; *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404-05 (7th Cir. 2010) (stating that although antitrust cases may require more detail, the key concern is whether enough information is contained in the allegations "to present a story that holds together" and gives "the opposing party notice of what the case is all about"); *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (commenting, in a case where discovery had been permitted and depositions had been taken, that bare assertions of conspiracy may not provide a defendant with an idea of how to respond to such allegations and that in those situations the Court in *Twombly* had suggested that specific facts regarding time, place or person involved might be needed); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1024 ("This is not to say that to survive a motion to dismiss, plaintiffs must plead specific back-room meetings between specific actors at which specific decisions were made.").

On top of incorrectly construing the case law, both Defendants also incorrectly believe that their simultaneously issued internal memoranda are evidence that no agreement was reached between them because the internal memoranda are not completely identical and facially may not completely preclude dealings with consultants.[7] (*See* UPS's Motion to Dismiss at 13-15, 17:18-24; FedEx's Motion to Dismiss at 12-14.) However, both of these assertions are incorrect because the differences between the two memoranda are inconsequential and the straightforward allegations contained in the FAC support AFMS's claims that Defendants did indeed conspire to remove third-party consultants from the

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F.2d 432, 445 (9th Cir. 1990) (finding that "additional evidence beyond mere price parallelism [was needed] in order to avoid summary judgment").

[7] UPS even goes so far as to say that the internal memoranda should trump any allegations in the FAC regarding **how** the no third party consultant policy was actually implemented. (*See* UPS's Motion to Dismiss at 14 n.13.) In contrast, AFMS asserts that both the allegations contained in the FAC and the exhibits attached to the FAC should be read together as both shed light on Defendants' agreement not to deal with third-party consultants.

market. First, at no point does UPS's internal memorandum authorize a sales person to deal directly with a third-party consultant, rather it states that if a customer cannot be persuaded to stop using a consultant the sales person "MUST notify [their] Director of sales **and** contact the Corporate Sales Team" "before taking any other action with the customer." (FAC, Exh. 1 at 14.) Similarly, FedEx's internal memorandum does not permit direct dealing with third-party consultants unless an exception is specifically approved by the DSM, the MD and the VP, after which point all dealings "will be tracked at the VP level" and "reviewed at Pre-RMC meeting on a quarterly basis." (*Id.,* Exh. 2 at 22.) Additionally, even if an exception were to be granted, and it is not currently known if any have been granted, FedEx still requires that it be allowed to deal directly with the customer. (*See id.* at 23.) Overall, FedEx's internal memorandum, like UPS's, encourages sales associates to dissuade customers from using consultants, encourages sales associates to decline to deal with consultants and establishes that the general message is a "no" for direct dealings with consultants. (*See generally id.,* Exhs. 1 and 2.) Nonetheless, Defendants' conduct suggests that even if the internal memoranda facially appear to allow some continued dealings with third-party consultants, this is not what actually happened. (*See id.* ¶¶ 13 (stating that a customer was simply told by Defendants' representatives "that neither company would deal with the customer if a third party consultant was involved"), 15 (stating that Defendants informed shippers that they would "refuse to discuss rates and terms or negotiate any price changes and will actually raise the rates of those shippers" that used third-party consultants).) Thus, the allegations in the FAC, especially when viewed together with Defendants' internal memoranda, further strengthen the inference of a plausible conspiracy.

UPS also tries desperately and without success to assert that AFMS has not pled an injury to competition and therefore has not properly alleged conspiracy. (*See* UPS's Motion to Dismiss at 20-21.) In doing so, UPS completely ignores the

two obvious injuries to competition that are repeatedly stated in the FAC. First, that this resulted in a significant price increase for consumers in the market for the delivery of time-sensitive letters, documents and packages. (*See* FAC ¶¶ 10-13, 20.) Second, that Defendants' agreement to refuse to deal with third-party consultants devastated the consulting market by virtually eliminating everyone from the market except for Defendants. (*See id.* ¶¶ 13, 15, 19-21.)

Likewise, FedEx makes a similarly unsupported assertion that concerns about confidentiality were one of the main reasons behind this new policy. Contrary to FedEx's assertions that the FAC contains evidence of such concerns and that "AFMS's central complaint" is "FedEx's use of confidentiality terms in its contracts with customers," AFMS has alleged no such thing. (*See* FedEx's Motion to Dismiss at 11:16-18, 16:8-17.) Moreover, FedEx's argument does not hold water because AFMS (and presumably other third-party consultants) has always kept information regarding Defendants' pricing data and contract terms confidential and has routinely signed confidentiality and non-disclosure agreements with the carriers prior to entering into any negotiations. If selective third-party consultants were breaching the confidentiality agreements than Defendants could have refused to deal with them on a case-by-case basis. The fact that Defendants have thrown out the baby with the bath water, strongly suggests that confidentiality does not explain the refusal to deal with **all** third-party consultants. Finally, this is an inappropriate attempt by FedEx, on a motion to dismiss, to bring in facts not in the FAC. Such factual arguments should await summary judgment.

Despite Defendants' best efforts to muddy the waters, when AFMS's allegations are placed in the appropriate context – that it would not have been feasible or economically viable for either Defendant to implement the no third-party consultant policy unless the other Defendant had agreed to do the same – AFMS's allegations of collusion, identical implementation dates and Defendants'

attempts to make sure both companies carried out the policy consistently, all suggest that Defendants reached a mutual agreement to refuse to deal with third-party consultants. *See Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966 (emphasizing that it is the specific context in which activities are placed that determines if an allegation of conspiracy is plausible); *Starr*, 592 F.3d at 329 (Newman, J., concurring).

If the Court finds, however, that the FAC does not sufficiently identify the particulars of the agreement reached between Defendants, AFMS requests that the Court grant it both the opportunity to conduct limited discovery to develop the facts necessary to plead an antitrust violation, facts that are known solely to Defendants, and leave to amend the FAC. *See Kendall*, 518 F.3d at 1046-47, 1051-52; *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1032-33.

C. AFMS Has Sufficiently Pled That Both Defendants Either Attempted to Monopolize or Have Monopolized the Market

Both Defendants incorrectly assert that they were not acting in an anticompetitive manner by deciding after nearly twenty years of working with third-party consultants, to exclude all such consultants from the market, but rather that they were merely exercising their rights to choose with whom they wanted to deal. (*See* UPS's Motion to Dismiss at 22:14-23:12; FedEx's Motion to Dismiss at 8:22-9:10.) First, Defendants fail to mention that this is a qualified "right" and is not absolute. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S. Ct. 2847, 2856 (1985); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155, 72 S. Ct. 181, 187 (1951); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209-11 (9th Cir. 1997). Second, Defendants ignore that the Supreme Court and the Ninth Circuit have explicitly held that refusals to deal in similar circumstances amount to unlawful anticompetitive behavior. Defendants will likely contend that the decisions in *Aspen Skiing*, *Lorain Journal*

and *Image Technical Services* have been limited by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, but those arguments will fail. *See* 540 U.S. 398, 409-12, 124 S. Ct. 872, 879-81 (2004). Whereas in *Trinko* there was **no** history of cooperating with rivals and Verizon was simply choosing not to enter into an entirely new market system created by the regulation of that specific industry, in this case there is a substantial history of dealing with third-party consultants and the market is not highly regulated. *Compare id.* at 409, 124 S. Ct. at 880 ("Here, . . . the defendant's prior conduct sheds no light upon the motivation of its refusal to deal-upon whether its regulatory lapses were prompted not by competitive zeal but by anti-competitive malice."), *with* FAC ¶ 14. This case, then, parallels *Aspen Skiing* and is precisely within the *Trinko* interpretation of that case.

In *Lorain Journal*, a local newspaper that dominated the field for local advertising dropped advertisers who were also using a competing local radio station's advertising service, thus significantly impairing the advertisers' ability to reach the community. 342 U.S. at 147-50, 153, 72 S. Ct. at 183-85, 186. This boycott effectively destroyed the local radio station. *Id.* at 150, 153, 72 S. Ct. at 184, 186. Like Defendants in this case, the local newspaper argued that it had a right to refuse to deal with specific customers. *Id.* at 155, 72 S. Ct. at 187. The Supreme Court found that this was a clear violation of Section 2 of the Sherman Act (15 U.S.C. § 2), and that the "right" to determine with whom one wanted to deal offered no protection for the local newspaper's anticompetitive actions. *Id.* at 154-55, 72 S. Ct. at 186-87.

Thirty years later, the Supreme Court revisited the holding in *Lorain Journal*, but this time in the context of an actual monopoly versus an attempted monopoly. *See Aspen Skiing*, 472 U.S. at 601-04, 105 S. Ct. at 2856-58. Once again the Supreme Court acknowledged that the right "to deal with whom he pleases" is not absolute and that a "decision by a monopolist to make an important

change in the character of the market" that detrimentally affected a competitor, was sufficient to establish anticompetitive conduct. *Id.* at 603-04, 105 S. Ct. at 2857-58. In looking at the specific facts of the case, the Court noted that this was "not merely [a] reject[ion of] a novel offer to participate in a cooperative venture" with a competitor, but rather an election "to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603, 105 S. Ct. at 2858.

The Ninth Circuit applied the same reasoning found in these two Supreme Court decisions in another similar case where Kodak used its monopoly in the market of Kodak products to develop a second monopoly in the market for servicing Kodak equipment. *Image Technical Servs.,* 125 F.3d at 1200-01, 1209-11. The court articulated that "Section 2 of the Sherman Act prohibits a monopolist's unilateral action, like Kodak's refusal to deal, if that conduct harms the competitive process in the absence of a legitimate business justification." *Id.* at 1209. Additionally, despite the factual differences between Kodak's situation and those in *Aspen Skiing*, the Ninth Circuit pointed out that the key issue was the same: that "a monopolist made a conscious choice to change an established pattern of distribution to the detriment of competitors." *Id.* at 1211.

In this case, both Defendants have attempted to exclude third-party consultants from the market. (*See* FAC ¶¶ 13, 15, 24.) Furthermore, like Kodak in *Image Technical Services*, both Defendants, respectively and individually, have succeeded in excluding such consultants from providing consulting services regarding either UPS's or FedEx's delivery services. *See id.*; *Image Technical Servs.,* 125 F.3d at 1200-01, 1209-11. Both Defendants chose to do this after dealing successfully with third-party consultants for nearly twenty years, consequently making a significant change to an established pattern in a market that consultants had helped to make competitive. *See* FAC ¶¶ 12, 14; *Aspen Skiing*, 472 U.S. at 603, 105 S. Ct. at 2858. Both Defendants, individually,

threatened potential consumers with higher prices and refusals to deal if they utilized third-party consultants, thus forcing a boycott like in *Lorain Journal.* *See* FAC ¶¶ 13, 15, 24; *Lorain Journal,* 342 U.S. at 149-50, 153, 72 S. Ct. at 184-85. Additionally, as discussed above, third-party consultants are indeed rivals of Defendants because they offer competition to Defendants' efforts to advise shippers about Defendants' delivery services. (*See* AFMS's Omnibus Opposition at III.A.1.) Moreover, Defendants' anticompetitive behavior resulted in significant price increases for the shipment of time-sensitive letter, documents and packages. (*See* FAC ¶¶ 9-12.)

FedEx also argues that its 41.2% share of the market is automatically insufficient to establish a Sherman Act Section 2 violation. (*See* FedEx's Motion to Dismiss at 9:20-10:5.) In making this argument, FedEx appears to completely ignore that AFMS alleged in the FAC that if Defendants had not actually monopolized the market, that they were **attempting** to achieve a monopoly, and thus FedEx applies the wrong standard in its arguments to dismiss AFMS's second cause of action. (*See* FAC ¶¶ 23-25.) For example, the two cases from outside of the Ninth Circuit that FedEx cites to involve claims of actual monopoly versus attempts to monopolize, and one even states that in some circumstances, "[a] less than predominant share of the market" might be sufficient to establish a monopoly. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Bailey v. Allgas, Inc.,* 284 F.3d 1237, 1245, 1250 (11th Cir. 2002).

In contrast, both the Ninth Circuit and the Central District of California have stated that a market share in the 40% range is "sufficient as a matter of law to support a finding of market power for attempted monopolization." *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1035 (C.D. Cal. 2007). *See also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995). *Accord Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 n.3 (9th Cir. 2008) (noting that in an attempted monopolization case, defendant "'has not yet achieved

a position of power in the market but is trying to build up such a position'" (quoting A.D. Neale & D.G. Goyder, *The Antitrust Laws of the United States of America* 93 (3d ed. 1980))). Moreover, Defendant FedEx enjoys "the larger market share of air shippers for time sensitive letters, documents and packages (as between it and UPS)." (FAC ¶ 7.) Thus, AFMS has adequately pled that FedEx has a sufficient market share to attempt to monopolize the market. In addition, for the same reasons that FedEx's alleged market share of 41.2% satisfies the pleading requirements, UPS's larger 58.8% share of the market for time-sensitive letters, documents and packages, not to mention its larger share of the ground segment of the market, is likewise sufficient.[8]

Furthermore, the question at this stage is not, as framed in Defendants' Motions to Dismiss, whether either Defendant actually created a monopoly or had the actual ability to create one. (Such a question is a factual one and cannot be answered without a complete evidentiary record.) Rather, the issue before the Court is whether AFMS has adequately **pled** these issues. Therefore, because AFMS has sufficiently pled that Defendants have either monopolized or attempted to monopolize the relevant market, Defendants' motions to dismiss AFMS's second cause of action should be denied.

IV.

CONCLUSION

For the foregoing reasons, both of Defendants' motions to dismiss should be

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[8] UPS also claims that AFMS has alleged a "theory of shared monopoly power" and therefore cannot bring a claim under Section 2 of the Sherman Act. (UPS's Motion to Dismiss at 24:3-25:3.) This incredibly creative reading of the FAC is inaccurate. AFMS does **not** allege, and has **not** alleged, any such thing. Instead, AFMS is claiming that each Defendants' **individual** refusal to deal with third-party consultants amounted to a monopolization or an attempt to monopolize. (FAC ¶¶ 23-25.) Each Defendant **individually** has enough market share to do this, and, no matter their respective market shares, **has already created a monopoly as to providing consulting services regarding their respective delivery services**. *See Image Technical Servs.*, 125 F.3d at 1200-01, 1209-11. The fact that both Defendants also conspired to constrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) does not affect the analysis of their individual attempts to monopolize.

denied in full. Alternatively, AFMS should be given a chance to amend the FAC after having an opportunity to engage in limited discovery related to Defendants' agreement to refuse to deal with third-party consultants and Defendants' individual attempts to monopolize the market.

Dated: December 13, 2010

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