PAUL T. FRIEDMAN (CA SBN 98381)
PFriedman@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

GREGORY B. KOLTUN (CA SBN 130454)
GKoltun@mofo.com
SEAN P. GATES (CA SBN 186247)
SGates@mofo.com
MORRISON & FOERSTER LLP
555 West Fifth Street, Suite 3500
Los Angeles, California 90013-1024
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Defendant
UNITED PARCEL SERVICE CO.

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)

MEMORANDUM OF POINTS AND AUTHORITIES 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

A fundamental principle of antitrust law is the "long recognized right" of a private business "to exercise [its] own independent discretion as to parties with whom [it] will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Consistent with this long recognized right, businesses may choose not to deal with their customers through intermediaries, and instead to deal directly with their own customers without interference from a third party. The Sherman Act thus allows a business unilateral discretion to conclude, for example, that working with a customer through a third party (as opposed to directly) is undesirable and counterproductive to legitimate business goals.

Plaintiff AFMS, Inc. ("AFMS") describes itself as the "industry leader in providing small parcel and freight consulting services and assisting shippers negotiate competitive and small parcel and freight contracts." (First Amd. Compl. ("FAC") ¶ 3.) In its Amended Complaint, AFMS complains that UPS and FedEx determined "that serious losses of revenues and profits would result from the increasing use of third party consultants, and they decided to discontinue dealing with third party consultants." (*Id*. ¶ 13.) Based on these allegations, the Amended Complaint attempts to assert claims under sections 1 and 2 of the Sherman Act. It seeks recovery from UPS and FedEx because it has allegedly been "deprived of its ability to function as a third party consultant." (*Id*. ¶ 21.)

The allegations that UPS or FedEx decided not to deal with AFMS, however, do not state a claim for relief under the antitrust laws, for the following independent reasons:

First, *AFMS has no standing* to assert the claims alleged in the Amended Complaint. AFMS does not bring this action as a purchaser of shipping services from UPS or FedEx. Instead, it alleges that it is a consultant to shippers, and that it has been harmed in that capacity. The antitrust laws, however, give standing only to those whose alleged injuries flow from harm in the restrained market, not to

peripheral players who operate in separate markets, such as for consulting services. *See, e.g.*, *Legal Economic Evaluations v. Metropolitan Life Ins. Co.*, 39 F.3d 951 (9th Cir. 1994) (holding consultants lack antitrust standing).

Second, AFMS's allegations of conspiracy are insufficient as a matter of law, which requires (particularly in the antitrust context) that a plaintiff plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. AFMS alleges that UPS and FedEx simultaneously issued policies allegedly choosing not to deal with consultants such as AFMS or shippers that employ them. But this allegation is refuted by internal memoranda describing the policies, which AFMS has attached to the Amended Complaint. *The internal UPS memorandum states that UPS will continue to deal with third-party consultants where it is in UPS's individual interests to do so. The FedEx memorandum states that FedEx will continue to deal with any third-party consultant offering "value added services" and any other consultant where the situation warrants, such as when the result might be taking away a UPS customer.* Thus, these are not "no dealing" policies. It is inherently implausible that UPS and FedEx would agree to deal with consultants in their own individual discretion – that would be nothing more than an agreement to compete.

Moreover, the Amended Complaint does not allege sufficient facts to show that a conspiracy is more plausible than independent conduct. The facts alleged by AFMS are wholly consistent with lawful independent behavior; each carrier was faced with the same market developments, resulting in not unexpected parallel business behavior. The exercise of a company's right to choose with whom to deal to protect its customer relationships, and the implementation of some management control over that process, is not unusual. Further, AFMS itself alleges that the carriers compete in a concentrated industry, and the courts have repeatedly recognized that the economic dynamics of concentrated industries often lead to similar business policies.

Third, AFMS fails to allege facts sufficient to show monopolization. AFMS does not allege that UPS engaged in "anticompetitive conduct," i.e., unilateral conduct that impairs the opportunities of rivals. To the contrary, AFMS alleges that if UPS refused to deal with third-party consultants, without first entering into an agreement with FedEx, UPS would hand FedEx (its rival) a huge competitive advantage. Moreover, AFMS fails to allege that UPS can gain monopoly power. Instead, AFMS alleges that *both* UPS and FedEx will monopolize the market. But as a matter of law only one firm can monopolize a market – a shared monopoly, such as AFMS alleges, is not actionable under the Sherman Act.

These flaws are fatal and cannot be remedied. The Court should therefore dismiss the amended complaint with prejudice.

THE AMENDED COMPLAINT'S ALLEGATIONS

AFMS alleges that UPS and FedEx "have emerged in recent years as the only two commercial entities engaged in the business of delivering time sensitive letters, documents and packages" in the United States. (FAC ¶ 6; *see also id.* ¶ 19.)

AFMS does not compete with UPS or FedEx, nor is it a customer of those companies' services. AFMS is a "parcel consultant," which provides "small parcel and freight consulting services." (*Id.* ¶ 3.) Consultants such as AFMS allegedly help "shippers negotiate competitive small parcel and freight contracts" with UPS or FedEx. (*Id.* ¶¶ 3, 9.) According to AFMS, "many, if not most, shippers employ specialists" to assist with UPS and FedEx shipping contracts (*id.* ¶ 8), but only "11% of all shippers use a consultant" (*id.* ¶ 10). Of those shippers using consultants, only 49% "enjoyed a greater discount" than shippers not using consultants. (*Id.*) AFMS nonetheless alleges that shippers' use of consultants has reduced the profits of both UPS and FedEx. (*Id.* ¶¶ 10-12.)

The crux of AFMS's complaint is that both UPS and FedEx "decided to discontinue dealing with third party consultants." (*Id.* ¶ 13.) AFMS alleges that

"both UPS and FedEx respectively inform[ed] shippers" that the carrier would not negotiate with shippers that either "share[d] contract data with third party consultants in violation of non-disclosure agreements" or engaged third-party consultants. (*Id.* ¶ 15.) According to the complaint, UPS and FedEx announced their "no third-party consultant policies" in October 2009. (*Id.* ¶ 13.) AFMS further alleges that the carrier policies were confirmed in subsequent writings and attaches to its complaint internal memoranda, each dated April 23, 2010, explaining the two policies. (*Id.* ¶ 13, Exs. 1, 2.) But AFMS also alleges that FedEx, at one point, was "not working with third party consultants" and UPS would be "doing the same thing soon." (*Id.* ¶ 15.)

The UPS memorandum, attached to AFMS's complaint, does *not* state that UPS will refuse to negotiate with customers using consultants. That document does state that "UPS has a legitimate business interest in avoiding improper interference with our customer relationships." (*Id.* Ex. 1; Dkt. No. 31 at 13.) But it also indicates that UPS *will* deal with third-party consultants, in its management's discretion, depending on the "type and size of the risk or opportunity for UPS," the "specific reason(s) the customer is going to use" the consultant, and the "customer's expected timeframe" for engagement of the consultant. (*Id.*; Dkt. No. 31 at 14.) In addition, while stating that "UPS must protect proprietary information from improper use and disclosure," the policy memorandum indicates that UPS *will* provide information to consultants if "the customer and the [consultant] have signed" a confidentiality agreement. (*Id.*; Dkt. No. 31 at 13, 14.)

The FedEx memorandum, on the other hand, states that FedEx *will* deal with *any* third-party consultant that offers the customer "value added services." (*Id.* Ex. 2; Dkt. No. 31 at 18.) Although the FedEx document states the "message to the market place is 'no' for direct engagement of consultants" that do not provide such services, *the policy memorandum also states that FedEx will deal with such consultants where the opportunity for FedEx "warrants" doing so*. (*Id.*; Dkt. No.

31 at 17, 22.) For example, FedEx's document indicates that it will work with third-party consultants if doing so "provides an opportunity to win an entrenched competitor customer." (*Id.* Ex. 2; Dkt. No. 31 at 24.)

AFMS claims that the third-party-consultant policies are the result of an agreement between UPS and FedEx that restrains competition in the market for the delivery of time-sensitive parcels in violation of Section 1 of the Sherman Act. (*Id.* ¶¶ 16-18.) In addition, AFMS alleges that the policies amount to refusals to deal that, even if not undertaken pursuant to an agreement, have "resulted in each defendant actually monopolizing the delivery of letters, documents and packages in the United States" in violation of Section 2 of the Sherman Act. (*Id.* ¶ 25.)

GOVERNING STANDARD

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must thus plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949. The factual content must do more than show that conduct is possibly unlawful: "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotations omitted).

Sufficient factual allegations are required "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 558 (internal quotation omitted). This requirement is especially important in antitrust cases such as this; "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive … a district court

must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (citations and internal quotations omitted).

ARGUMENT

I. AFMS LACKS STANDING TO BRING ITS ANTITRUST CLAIMS.

Even though AFMS casts itself as the victim of a supposed joint boycott and refusals to deal by UPS and FedEx, AFMS lacks standing to bring its antitrust claims. "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business …." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983) ("*AGC*"). To have standing, AFMS must (1) suffer "antitrust injury," and (2) its alleged injury cannot be indirect and derivative. *Id.* at 538-39; *see also Atl. Richfield Co. v. USA Petroleum, Inc.*, 495 U.S. 328, 334 (1990). AFMS's allegations demonstrate that it cannot meet this threshold requirement.

A. AFMS Lacks Antitrust Injury.

In particular, "[a]ntitrust injury requires [AFMS] to have suffered its injury in the market where competition is being restrained." *Am. Ad Mgmt., Inc. v. Gen. Tel. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999). AFMS, however, alleges that it has suffered injury in a market for consulting services, not in the allegedly restrained market for time-sensitive package delivery. AFMS's allegation that its alleged injury was caused by alleged anticompetitive conduct is therefore insufficient: "Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Id.*

This principle is well established. The Ninth Circuit has consistently applied it to hold that plaintiffs lack standing under the antitrust laws.[1] Other circuit and district courts have applied the principle to deny antitrust standing to the following plaintiffs: a pharmaceutical marketing company,[2] a pay telephone servicing contractor,[3] a broker of snack foods,[4] a company that solicited orders for sunscreen products,[5] a consultant to dairy farmers,[6] an energy consulting firm,[7] a sales agent for automotive parts dealers,[8] and a travel agency.[9] In each of these cases, the plaintiff's alleged injury – loss of consulting fees, loss of commissions, etc. – did not occur in the allegedly restrained market but in some other market.

---

[1] *Compare Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 704-05 (9th Cir. 2001) (holding no antitrust injury where plaintiff alleged competitive harm in nicotine delivery market but experienced injury in the market for health care) *and Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d 574, 578-79 (9th Cir. 1986) (licensing agent did not suffer antitrust injury flowing from film exhibitor market division agreement; though "injured as a result of activity that also violated the antitrust laws," the licensing agent "was not a participant in the restrained market" for film distribution) *with Amarel v. Connell*, 102 F.3d 1494, 1510 (9th Cir. 1997) ("Although a plaintiff normally lacks standing where that plaintiff's customer is the immediate victim of the defendant's conduct, standing is appropriate where that plaintiff also competes with the defendant."); *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1161-62 (9th Cir. 1991) (consultant *did* suffer antitrust injury because it competed with defendant in restrained market for advice regarding Yellow Pages advertising).

[2] *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997).

[3] *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995).

[4] *Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F2d 287, 290-91 (6th Cir. 1992).

[5] *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213-14 (8th Cir. 1991).

[6] *Cargill Inc. v. Budine*, No. CV-F-07-349-LJO-SMS, 2007 WL 2506451, at *5 (E.D. Cal. Aug. 30, 2007).

[7] *Martorano v. PP&L Energy Plus, LLC*, 334 F. Supp. 2d 796, 801 (E.D. Pa. 2004), *aff'd*, 137 F. App'x 491 (3d Cir. 2005).

[8] *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, No. C-3-90-165, 1991 WL 1092500, at *4 (S.D. Ohio June 12, 1991), *aff'd*, 956 F.2d 269 (6th Cir. 1992).

[9] *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, 674 F. Supp. 782, 787 (C.D. Cal. 1986).

More important, the Ninth Circuit has held that consultants such as AFMS do not suffer antitrust injury, and therefore lack antitrust standing – even where the consultants are a target of an alleged joint boycott or refusal to deal. In *Legal Economic Evaluations v. Metropolitan Life Ins. Co.*, 39 F.3d 951 (9th Cir. 1994), three companies that provided consulting services to tort plaintiffs regarding structured settlements alleged that several life insurance carriers and brokers formed a joint boycott to drive consultants to tort plaintiffs out of the annuities brokering business. *Id.* at 953. The consulting companies (referred to by the court as "Weil") alleged that the carriers and defense-side brokers jointly blocked tort plaintiff consultants' access to critical pricing information and refused to deal with such consultants. *Id.* According to the plaintiffs, the alleged conduct "depressed the consideration liability carriers paid to settle claims below the cash value of those claims; reduced the sale of annuities …; and produced a boycott of consultants and agents … who provided services to tort plaintiffs." *Id.* at 954.

Although the consultants were the targets of the alleged boycott and refusals to deal, the Ninth Circuit held that their alleged loss of consulting revenue did not constitute antitrust injury. Noting that a "private plaintiff must link its own injury to the *anticompetitive* aspect of the defendants' conduct," *id.* at 954, the court found that the consultants' injury – lost consulting business – was not an *antitrust injury* because it did not flow from the alleged harm to competition:

> [T]he alleged harm to competition – decreased annuity benefits to tort plaintiffs and increased annuity costs to liability carriers – nevertheless occurs in markets in which Weil does not compete. Weil is neither a liability carrier nor a tort plaintiff. Thus, even if price fixing of structured settlements injures tort plaintiffs, and restriction on output increases the cost of annuities and thereby injures Life Carriers, Weil's injury does not flow from these competitive harms.

Id. at 955. As the court explained, Weil "stands to suffer harm in the market for brokerage or consulting services – either by limiting its choice of clients or receiving less in fees; but the asserted harm to competition takes place in different markets, for settling lawsuits or selling annuities." *Id.* at 956.

That is precisely the type of harm AFMS alleges: harm that occurred in a market other than the one in which competition is allegedly injured. According to AFMS, defendants' conduct has restrained competition in an alleged market for the delivery of time-sensitive parcels. (FAC ¶ 16 ("The violations of the antitrust laws alleged hereafter in Counts One and Two have had the effect of substantially lessening … competition in the business of delivering time sensitive letters, documents and packages"); *see also id.* ¶¶ 18, 25.) AFMS specifically alleges that the supposed boycott and refusals to deal have the effect of "stabilizing and raising of prices in the delivery of time sensitive materials." (*Id.* ¶ 18.)

AFMS's alleged injury, however, does not occur in the market for time-sensitive package delivery. *AFMS does not even participate in that market*. Its alleged injury does not flow from any increase in package delivery prices. Instead, AFMS alleges that it has suffered "financial injury in its business and property in that it is being deprived of its ability to function as a third party consultant." (FAC ¶ 21.) *AFMS's alleged injury thus occurs, if at all, in some market for consulting services; AFMS has not suffered antitrust injury.*[10] *See, e.g., Legal Econ. Evaluations*, 39 F.3d at 956.

[10] These facts distinguish AFMS from the agent in *American Ad Management, Inc.*, 190 F.3d 1051. The agent in that case worked for the *seller*, not the *customer*, and received commissions by receiving orders from customers, purchasing the product (advertising space) from the seller, and then reselling the product. *Id.* at 1053-54. In that situation, the Ninth Circuit found the sellers' agent was "a participant in the relevant market," *id.* at 1057, i.e., the agent was in the line of distribution for the product in the relevant market. Unlike the *American Ad Management* agent, AFMS does not purchase and resell UPS's product. Indeed, AFMS does not purchase anything in the relevant market; it merely "consults" with shippers.

This conclusion is not surprising. Other courts facing similar consultant-brought antitrust claims have also held consultants lack antitrust injury. In *Martorano v. PP&L Energy Plus, LLC*, 334 F. Supp. 2d 796 (E.D. Pa. 2004), *aff'd*, 137 F. App'x 491 (3d Cir. 2005), for instance, the court held that a consultant to end-users of electricity failed to plead antitrust injury based on an alleged restraint in the wholesale energy market, explaining that the consultant was "merely a peripheral rather than an integral player" in that market. *Id.* at 801. Similarly, in *Cargill Inc. v. Budine*, No. CV-F-07-349-LJO-SMS, 2007 WL 2506451 (E.D. Cal. Aug. 30, 2007), a feed formulation consultant to dairy farmers alleged that defendants monopolized the market for a key input to feed formulae (beef blood meal) and charged higher prices for this input to farmers using third-party consultants. *Id.* at *1. The court held that the consultant – which did not buy, sell, or manufacture beef blood meal – failed to plead antitrust injury because the consultant's injury – "loss of clients for its nutritional consulting business" – occurred "in a different market" than the allegedly restrained beef blood meal market. *Id.* at *5.

AFMS has not pled facts that would show it suffered antitrust injury, and its claims must be dismissed. *See, e.g., Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 704-05 (affirming dismissal for failure to allege facts showing antitrust injury); *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996).

B. AFMS's Alleged Injury is Too Indirect and Derivative to Confer Standing.

AFMS also lacks antitrust standing for a wholly separate reason: its alleged injury is too indirect and derivative. See AGC, 459 U.S. at 540; *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 541-42 (9th Cir. 1987). AFMS alleges that the goal of the supposed conspiracy and anticompetitive conduct is to raise the price that shippers pay for time-sensitive delivery services. (FAC ¶¶ 11, 18.) *Shippers, as consumers of delivery services, are direct market participants. Consultants like*

AFMS, however, are not direct market participants but only suppliers of consulting services to such participants (shippers). (FAC ¶¶ 3, 9.)

"Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect." *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995); *see also Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 335 (S.D.N.Y. 2003) (dismissing complaint brought by supplier of market participant). Antitrust standing requires "a direct causal link between the antitrust violation and the resulting injury"; "to permit treble damages suits by every … supplier of goods and services that might be affected … would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519-20 (7th Cir. 1982). "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as [AFMS] to perform the office of a private attorney general." *AGC*, 459 U.S. at 542.

AFMS's assertion that the alleged boycott and refusals to deal are directed at consultants does not avoid this rule. In *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Assoc.*, 830 F.2d 1374 (7th Cir. 1987), for instance, SSBR, a supplier of a multiple listing service (MLS) to real estate brokers, alleged that the defendants conspired to restrain trade in the real estate brokerage market by boycotting brokers who used SSBR's service. *Id.* at 1376, 1379. Despite this "direct action" against the supplier, the appellate court held that SSBR lacked antitrust standing because "any injury which SSBR sustained by virtue of the defendants' alleged boycott of the MLS was only indirectly related and incidental to the anticompetitive scheme, the intent and effect of which was allegedly to gain control of real estate brokerage services in [the relevant area]." *Id.* at 1379. AFMS's alleged injury is no less indirect and incidental to the alleged scheme to

stabilize and raise the price of time-sensitive package delivery. AFMS therefore lacks standing.

The Court need go no further; standing is a threshold issue. AFMS's complaint must be dismissed.

II. AFMS'S CONSPIRACY CLAIM FAILS.

A. AFMS Fails to Plead a Plausible Conspiracy.

AFMS must plead sufficient facts to make its claim that UPS and FedEx conspired plausible. *Twombly*, 550 U.S. at 555. AFMS does allege that UPS and FedEx engaged in parallel business behavior (each instituted a third-party-consultant policy). Firms in a concentrated industry, however, may engage in parallel business behavior without entering into an unlawful agreement.[11] *Id.* at 553-54. Such behavior is therefore inadequate to make allegations of an agreement plausible; it is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554.

Here, AFMS alleges industry conditions in which parallel business behavior may be expected: a market with only two viable competitors (FAC ¶ 6), that has experienced a recent exit by a major competitor (*id.*), and is already exhibiting parallel pricing behavior (*id.* ¶ 12). *See, e.g.*, *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 443 (9th Cir. 1990) ("as the number of firms in a market declines, the possibilities for interdependent pricing increase substantially"). To

[11] "A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 53 (7th Cir. 1992); *see also Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54-55 & n.8 (3d Cir. 2007) (applying conscious parallelism analysis to alleged group boycott).

state a plausible claim, AFMS must therefore plead facts putting its allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement," i.e., facts "pointing toward a meeting of the minds." *Twombly*, 550 U.S. at 557; *see also Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (plaintiff must allege "not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove … [a] conspiracy").

Putting aside (as the court must) the conclusory allegations that UPS and FedEx entered into a "boycott," "combined," and "conspired" (FAC ¶¶ 15, 18),[12] *see Iqbal*, 129 S. Ct. at 1950, AFMS seeks to meet this pleading requirement by alleging that UPS and FedEx simultaneously announced their respective policies, that the companies issued internal policy memoranda on the same day, and that either company implementing the policy without a prior agreement with the other would be against self-interest. When viewed in light of the internal policy memoranda attached to the complaint and the allegations of the complaint as a whole, none of these allegations withstands scrutiny.

B. The Documents Attached to the Amended Complaint Show There Was No Agreement.

While AFMS focuses on the *dates* of the alleged policies (allegedly announced in October 2009 and confirmed in memoranda issued on the same day six months later), the *content* of the documents it attaches refutes the inference that UPS and FedEx entered into an agreement. According to AFMS, UPS and FedEx have agreed to (1) "boycott[] (refus[e] to deal with) any third party shipping consultant" and (2) "refus[e] to negotiate with … shippers who either share contract

[12] AFMS makes no allegations of direct evidence of an agreement. *Twombly*, 550 U.S. at 565 n.10 (requiring allegation of "specific time, place, or person involved").

data with a third party consultant or actually retain such a third party consultant." (FAC ¶ 18.) That is not what the policy memoranda state.[13]

The UPS policy memorandum states that UPS *will* deal with third-party consultants. (*Id.* Ex. 1; Dkt. No. 31 at 14.) Although that document explains why UPS believes it customers should not use such consultants – UPS can better serve the customer "through a direct relationship" and consultants can eat up "upwards of 50% or move of any savings that *might* be negotiated" – the document specifically recognizes that some customers are "still going to use a [consultant]." (*Id.*) In those instances, the document indicates that UPS management may choose to deal with a third-party consultant, depending on the "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. (*Id.*) In addition, it indicates that UPS *will* provide information to a third-party consultant, in cases where UPS chooses to work with a particular consultant, if "the customer and the [consultant] have signed" a confidentiality agreement. (*Id.*; Dkt. No. 31 at 14.)

The FedEx document attached to the amended complaint states that FedEx *will* deal with third-party consultants – in particular that FedEx will deal with *any* third-party consultant that offers the customer "value added services." (FAC Ex. 2; Dkt. No. 31 at 18.) Although the document suggests sending a "no" message regarding consultants that do not provide such services, it also states that FedEx *will* deal with such consultants where the opportunity for FedEx – as determined by its management – "warrants" doing so. (*Id.*; Dkt. No. 31 at 17, 22.) For instance, the document states that FedEx will work with such consultants if doing so

[13] Given that AFMS attached the internal memoranda to its complaint, the Court need not accept as true any allegation contradicted by the language of the attached documents. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

"provides an opportunity to win an entrenched competitor customer." (*Id.* Ex. 2; Dkt. No. 31 at 24.)

This is not the stuff of which agreements to restrain trade are made. It makes no sense for UPS and FedEx to *agree* that each company will 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.) It makes no sense for UPS and FedEx to *agree* that UPS will deal with third-party consultants depending on the "type and size of the risk or opportunity for UPS." (FAC Ex. 1, Dkt. No. 31 at 14.) Nor does it make sense for UPS and FedEx to *agree* that FedEx will deal with third-party consultants when "warranted" by such factors as the opportunity to take a customer away from UPS. (FAC Ex. 2, Dkt. No. 31 at 22, 24.) And it would be absurd for UPS to agree that FedEx's sales force could deal with consultants offering value added services at will while UPS's sales force could not. (*Id.*, Dkt. No. 31 at 18.) Simply put, the alleged conspiracy is implausible.[14] *See, e.g., DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (affirming dismissal where complaint alleged "highly implausible" conspiracy); *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) ("Antitrust claims must make economic sense.").

C. The Alleged Behavior is Consistent with Independent Conduct.

AFMS's own allegations, and the documents it attaches to its amended complaint, also demonstrate that UPS and FedEx each issuing a third-party-consultant policy is consistent with "rational and competitive business strategy

[14] In addition, no agreement makes sense if there is no mechanism to deter cheating. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 137 (3d Cir. 1999). Here, the alleged conspiracy is irrationally self-defeating; it allows each company to cheat – deal with consultants – at its discretion.

unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554.

1. UPS and FedEx Faced the Same Problems Created by Consultants.

The complaint itself gives ample reasons for each company to independently implement its approach. According to AFMS, shipper use of consultants reduced each defendant's "revenue and profits." (FAC ¶ 11.) UPS's memorandum, for instance, states that third-party consultants "are individuals or companies that intervene between two other parties (in this context, UPS and our customer)." (FAC Ex. 1; Dkt. No. 31 at 13.) The memorandum then explains that UPS's approach is motivated by a desire to "avoid[] improper interference with our customer relationships." (*Id.*) In addition, it points out that "UPS must protect proprietary information from improper use and disclosure," and requires that both the customer and the consultant sign a confidentiality agreement before UPS shares information with a consultant. (*Id.*; Dkt. No. 31 at 14.)

FedEx's document also indicates a desire to ensure FedEx can "negotiate business relationships directly and exclusively with [its] customers." (FAC Ex. 2, Dkt. No. 31 at 17.) Even when dealing with consultants, it requires that FedEx still "have access to all individuals that are pertinent to the process." (*Id.*; Dkt. No. 31 at 23.) In addition, it indicates concerns about confidentiality: "Dealing directly with our customers ensures confidentiality for both the customer and FedEx." (*Id.*; Dkt. No. 31 at 20.) FedEx's document thus requires that the customer and consultant sign a "three-way Non Disclosure Agreement." (*Id.*; Dkt. No. 31 at 23.)

The complaint itself therefore presents an "obvious alternative explanation" for the similar approaches. Confronted with third-party consultants that were reducing profits, interfering with customer relationships, and improperly using confidential information, "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). In other words, the implementation of parallel approaches is entirely consistent with interdependent behavior; UPS and FedEx faced the same external pressure. *In re LTL Shipping Serv. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *16 (N.D. Ga. Jan. 28, 2009) (parallel behavior plausible given that each defendant faced "same dilemma" created by increased input prices); *see also LaFlamme v. Société Air France*, 702 F. Supp. 2d 136, 153 (E.D.N.Y. 2010) ("common external stimuli" explained parallel behavior).

2. UPS's Issuance of A Policy in the Absence of an Agreement Was Not Against Self-Interest.

AFMS attempts to avoid this conclusion by alleging 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.) Thus, AFMS concludes that the companies must have "had an understanding that both would terminate dealings" with consultants. (*Id.*)

This attempt fails for two reasons. First, neither the UPS nor the FedEx document terminates dealings with consultants. (FAC Ex. 1, Dkt. No. 31 at 14; Ex. 2, Dkt. No. 31 at 22, 24.) To the contrary, both policy memoranda contemplate continued dealings with third-party consultants at the discretion of the individual company's management. (*Id.*) Either company issuing its own policy in the absence of an agreement would *not* give the other a "huge potential competitive advantage."

Second, the courts have rejected the sort of false inference AFMS presses. In a concentrated industry, firms may take actions seemingly against their self-interest "expecting their neighbors to do the same thing." *Twombly*, 550 U.S. at 568; *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009) (affirming

dismissal of complaint despite allegation that conduct would give competitive advantage to rivals in absence of agreement), *petition for cert. filed*, 78 U.S.L.W. 3566 (U.S. Mar. 18, 2010) (No. 09-1138); *Petroleum Prods.*, 906 F.2d at 442-43 (rejecting argument that defendants' price increases were "too large and too risky" without an agreement; such behavior was "plausible … when the number of significant rivals in a market is sufficiently small"). In other words, action seemingly against self-interest "may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010). AFMS's allegations similarly restate the insufficient.

D. AFMS Allegations are thus Insufficient to State a Plausible Conspiracy Claim.

In light of the content of the policy memoranda and the market dynamics faced by each carrier, AFMS fails to allege facts that would show behavior that is not due to "chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding." *Twombly*, 550 U.S. at 557 n.4.

In fact, AFMS's own allegations imply that the two companies did not adopt the same policies simultaneously. AFMS alleges that "executives from UPS and FedEx appearing on a panel" at an unnamed, October 2009 industry event each announced their company's "no third-party" policy. (FAC ¶ 13.) AFMS does not allege when UPS or FedEx actually formulated its policy, it does not allege any communications between the companies prior to that formulation or even prior to the industry event, nor does it allege when UPS or FedEx issued its policy. In short, AFMS fails to allege facts that would "answer the basic questions: who, did what, to whom (or with whom), where and when?" *Kendall*, 518 F.3d at 1048.

AFMS also alleges that the unnamed executives at the unnamed industry event "did not deny collusion when confronted with and questioned about these newly announced policies." (FAC ¶ 13.) This allegation adds nothing to AFMS's vain attempt to make a plausible allegation of conspiracy. Notably, AFMS does *not* allege that anyone asked whether the companies colluded. In fact, AFMS fails to allege anything specific about the event: *what was asked, to whom it was asked, what were the responses, etc.* And even if one were to give AFMS the full benefit of the doubt, assuming that someone, somewhere, asked whether there was collusion, AFMS gives no reason to infer anything other than a non-response. The allegations are equally consistent with a speaker simply not answering a question shouted out after a "no further questions" announcement, or with a speaker told to announce the policy but with no details regarding its adoption and thus, not in a position to respond to such questions.

Although AFMS alleges that the policies were confirmed in writing *six months later* in internal memoranda issued the same day, AFMS also alleges 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.*'" (*Id.* ¶ 15 (emphasis added).) In other words, AFMS alleges just what one would expect in a concentrated industry: one company imposes a policy and the other follows.[15] *Twombly*, 550 U.S. at 557.

Likewise, AFMS's allegation that "representatives of FedEx and UPS actually sat and conferred" before "separately telling a customer that neither company would deal" with a consultant (FAC ¶ 13) is insufficient. AFMS fails to allege: (1) what was discussed between the representatives, i.e., if they even discussed the relevant policies, *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th

[15] AFMS's allegation that UPS "would not offer different pricing because they knew FedEx was not going to be pursuing the business" (FAC ¶ 15) is also fully consistent with interdependent behavior; each company in a concentrated industry works with the assumption that the other will abide by its policy.

Cir. 1999) (without details, communications insufficient to infer conspiracy); (2) why the conversation would make any difference given that each company's policy contemplates management, not sales representatives, making decisions regarding consultants, *Baby Food*, 166 F.3d at 125 (exchange of information among low-level employees not sufficient to infer agreement); (3) when the conversation took place, for example, if it took place after the October 2009 announcement, the representatives would have been aware of each company's independent policies and might simply be comparing how each company decided to deal with consultants; or (4) how this conduct is inconsistent with each representative abiding by its company's independently formulated and issued policy.

When viewed as a whole, AFMS's factual allegations are consistent with lawful, independent conduct. The Section 1 claim must be dismissed. *Twombly*, 550 U.S. at 567-68.

E. AFMS Fails to Plead Injury to Competition.

AFMS also fails to plead, as it must, that the alleged conspiracy "actually injures competition." *Kendall*, 518 F.3d at 1047. AFMS must allege facts that would show a "substantial adverse effect on competition." *Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1235 (9th Cir. 1982); *see also Gordon v. Lewistown Hosp.*, 423 F.3d 184, 211 (3d Cir. 2005); *Trans World Techs., Inc. v. Raytheon Co.*, No. 06-5012 (RMB), 2007 WL 3243941, at *6 (D.N.J. Nov. 1, 2007) (dismissing Section 1 claim for failure to plead substantial adverse effects). AFMS has not done so; its own allegations show that the alleged conspiracy could not have a substantial effect on competition.

As an initial matter, AFMS cannot avoid its burden by labeling the alleged conduct *per se* unlawful. (FAC ¶ 18.) Only group boycotts that "disadvantage[] competitors" may be *per se* unlawful. *Adaptive Power Solutions*, 141 F.3d at 950; *see also U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 788 (7th

Cir. 1981) ("([a] per se rule) should not be applied … to concerted refusals that are not designed to drive out competitors but to achieve some other goal") (citation and internal quotation omitted). AFMS's alleged boycott, however, is directed toward third-party consultants, not toward competitors of UPS or FedEx (FAC ¶ 18), and therefore do not state a *per se* claim. *See, e.g.*, *Cathedral Trading, LLC v. Chicago Bd. Options Exch.*, 199 F. Supp. 2d 851, 859-60 (N.D. Ill. 2002) (granting motion to dismiss *per se* boycott claim).

Without the *per se* label, the evidentiary facts alleged by AFMS cannot show injury to competition in the relevant market. An alleged restraint must affect more than only a small portion of a relevant market. *See DeVoto v. Pac. Fid. Life Ins. Co.*, 618 F.2d 1340, 1345 (9th Cir. 1980); *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 195 (N.D. Ill. 1986) (impact must be to "significant" portion of market), *aff'd*, 841 F.2d 770 (7th Cir. 1988). The alleged conduct, however, is directed only toward those shippers using third-party consultants (FAC ¶ 18), and AFMS admits that only "11% of all shippers use a consultant." (*Id.* ¶ 10.) At the same time, AFMS alleges that most shippers "employ specialists to help them understand the nuances of the [UPS or FedEx] agreements." (*Id.* ¶ 8.) AFMS thus admits that shippers have access to sources other than third-party consultants for advice regarding UPS or FedEx agreements. In fact, AFMS's allegations imply that nearly 89% of all shippers use alternative sources for this advice. These alleged facts are insufficient to show actual injury to competition. *Cf. Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (no foreclosure where alternative means of distribution available); *Minn. Mining & Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138, 1143 (D. Minn. 1999) ("Generally speaking, a foreclosure rate of at least 30 percent to 40 percent must be found to support a violation of the antitrust laws.").

III. AFMS'S MONOPOLIZATION CLAIM FAILS.

AFMS asserts that the alleged UPS conduct, even taken in the absence of any agreement between UPS and FedEx, violates Section 2 of the Sherman Act as monopolization or attempted monopolization. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 540-41 (9th Cir. 1991) ("Section 1 deals with concerted activity …. Section 2, on the other hand, concerns unilateral activity …"). For these claims, AFMS must plead facts that would show that UPS (1) engaged in anticompetitive conduct through which (2) UPS either maintains or threatens to obtain a monopoly. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The alleged conduct, however, is not "anticompetitive"; it does not impair the ability of rivals to compete with UPS. Nor do the allegations show that UPS has or could gain a monopoly.

A. AFMS Fails to Plead Anticompetitive Conduct.

According to AFMS, the "actual monopolization, or alternatively attempt to monopolize, has consisted of a deliberate course of conduct," by which UPS allegedly (1) refuses to deal with third-party shipping consultants, and (2) threatens to raise prices to shippers that shared confidential information with or used third-party consultants. (FAC ¶ 24.) This type of unilateral conduct is not anticompetitive and is not prohibited by the antitrust laws.

UPS has the right to choose with whom it will deal. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (every firm "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently"). The Sherman Act recognizes the so-called "trader's prerogative":

> "[t]he act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Harkins Amusement Enter. v. Gen. Cinema Corp., 850 F.2d 477, 483 (9th Cir. 1988) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

UPS's alleged exercise of its right to choose with whom it will deal is not "anticompetitive conduct." "Anticompetitive conduct is behavior that tends to impair the opportunities of *rivals* and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (emphasis added) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n. 32 (1985)). Although the alleged conduct supposedly impairs the opportunities of third-party consultants, AFMS does not allege that consultants are UPS's rivals; they only help "shippers negotiate with UPS." (FAC ¶ 3.) Instead, AFMS alleges that UPS's rival is FedEx. (*Id.* ¶ 7.)

The alleged UPS conduct, however, would not impair FedEx's opportunities. To the contrary, according to AFMS, "UPS unilaterally terminating its dealings with third party consultants" would give FedEx "a huge potential competitive advantage/opportunity." (*Id.* ¶ 14.) Unilateral conduct that gives rivals an advantage is not "anticompetitive." *Cascade Health Solutions*, 515 F.3d at 894.

Moreover, AFMS's allegation that "each defendant" (i.e., UPS and FedEx) independently engaged in an alleged refusal to deal (FAC ¶ 24) does not make the conduct anticompetitive. AFMS itself alleges that this sort of parallel conduct would *benefit* rivals, not impair their opportunities. (*See, e.g., id.* ¶ 11 (elimination of consultants would increase FedEx profits).) Independent but parallel conduct by competitors may result in such outcomes as higher prices, but without an agreement among the competitors it is not proscribed by the antitrust laws: "parallel business behavior" does not "itself constitute[] a Sherman Act offense." *Theatre Enter. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("conscious

parallelism" is "not in itself unlawful" though it may allow firms to "in effect share monopoly power").

B. AFMS Fails to Plead That UPS Possesses or Threatens to Obtain Monopoly Power.

Not only does AFMS fail to plead that UPS engaged in anticompetitive conduct, AFMS has also fails to plead that UPS has or threatens to achieve monopoly power. Monopoly power is the ability to "control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (internal quotation marks and citation omitted). Nowhere in AFMS's complaint is there any allegation that UPS possesses or threatens to possess this "unilateral power." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995).

Instead, AFMS pleads that the alleged conduct "has resulted in *each defendant* actually monopolizing [or threatening to monopolize] the delivery of letters, documents and packages in the United States." (FAC ¶ 25 (emphasis added).) In other words, AFMS alleges that UPS and FedEx *both* possess or threaten to obtain monopoly power, i.e., that UPS and FedEx either currently share or threaten to share a monopoly.

But a Section 2 "claim can only accuse one firm of being a monopolist." *Midwest Gas Serv., Inc. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003). Or, as the Ninth Circuit put it, "To pose a threat of monopolization, one firm *alone* must have the power to control market output and exclude competition." *Rebel Oil Co.*, 51 F.3d at 1443. The "theory of shared monopoly power" is therefore "beyond the reach of § 2 of the Sherman Act." *In re Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 481, 485 (C.D. Cal. 1991).[16] AFMS's monopolization and attempted

[16] *See also Standfacts Credit Servs. v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005) (allegation of "shared monopoly" does not plead a claim under Section 2), *aff'd*, 294 F. App'x 271 (9th Cir. 2008); *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 396 (E.D.N.Y. 2004) (dismissing Section 2 claim based on shared monopoly theory);

monopolization claims must be dismissed. *See Consol. Terminal Sys., Inc. v. ITT World Commc'ns, Inc.*, 535 F. Supp. 225, 229-30 (S.D.N.Y. 1982) (dismissing monopolization claims based on shared monopoly theory).

CONCLUSION

AFMS does not have standing to assert its antitrust claims. And neither claim can be repleaded to overcome its defects. The Court should dismiss the complaint with prejudice.

Dated: November 12, 2010

MORRISON & FOERSTER LLP

By: /s/ Paul T. Friedman
Paul T. Friedman

Attorneys for Defendant
UNITED PARCEL SERVICE CO.

la-1095273

Santana Prods., Inc. v. Sylvester & Assocs., Ltd., 121 F. Supp. 2d 729, 737-38 (E.D.N.Y. 1999) (shared monopoly theory "contrary to the plain language and legislative intent of the Sherman Act."); *Sun Dun, Inc. of Wash. v. Coca-Cola Co.*, 740 F. Supp. 381, 391-92 (D. Md. 1990) (rejecting shared monopoly claim).