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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15468

D.C. No. 3:16-cv-02017-MMC

[Filed August 23, 2018]

CYNTHIA PROSTERMAN; et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
AMERICAN AIRLINES, INC.; et al.,	)
	)
Defendants-Appellees.	)
	)

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted June 13, 2018
San Francisco, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER, EBEL,[**] and OWENS, Circuit Judges.

Every commuter knows the gas station effect. The prices on two gas stations on opposing corners of a busy intersection often move in near unison.

This phenomenon also occurs in the airline industry. With a market comprised of a few dominant players and publicly available pricing information, it is no surprise that consumer fares remain relatively uniform across the industry. That is not to say that unlawful agreements among air carriers never occur, nor that all claims based on Section 1 of the Sherman Act must fail. But in an interdependent oligopoly such as the U.S. airline industry, a plaintiff whose claim lies under Section 1 of the Sherman Act must plead more than conscious parallelism to survive a motion to dismiss. Because Plaintiffs here failed to offer sufficient "plus factors" suggesting more than conscious parallelism, see In re Musical Instruments, 798 F.3d 1186, 1194 (9th Cir. 2015), we AFFIRM.

I. BACKGROUND

Plaintiffs, who are "air travel passengers and travel agents," "First Amended Complaint" or "FAC" ¶ 5[1], brought this suit under Section 1 of the Sherman Act,

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[**] The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

[1] At the motion-to-dismiss stage we accept the FAC's well-pleaded factual allegations as true and construe all inferences in favor of Plaintiffs. Mashiri v. Epsten Grinnel & Howell, 845 F.3d 984, 988 (9th Cir. 2017).

alleging that United Airlines, Inc., American Airlines, Inc. and Delta Air Lines, Inc. (collectively, the "Airline Defendants") conspired amongst themselves and with the Airline Tariff Publishing Company ("ATPCO") to institute a "drastic change in the structure of pricing multi-city travel." FAC at 2–3. Prior to the events that precipitated this lawsuit, travel agents and consumers could sometimes combine multiple shorter nonstop flights to reduce the price of longer trips. This act of combining multiple one-way tickets to reduce the overall cost is known as "sum of sector" pricing.

On March 30, 2016, United announced that "multiple U.S. carriers recently made changes to the CAT 10[2] domestic combinability fare rules impacting some one-way fares." Id. On April 1, 2016, American Airlines announced that it "along with other U.S. carriers, made changes to the CAT 10 domestic combinability fare rules that impact certain one-way fares." FAC ¶ 64. That same day Delta Air Lines announced that it, too, had "recently made changes to the combinability of one-way fare products." Id. ¶ 67. The effect of the announced changes was to curtail the availability of sum-of-sector pricing at each of these airlines.

Plaintiffs allege that "sometime prior to mid-March 2016," Id. ¶ 3, the Airline Defendants colluded through ATPCO to make this change, which increased the cost of domestic multi-city trips. Defendants moved to dismiss for failure to state a claim, and the district

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[2] CAT 10 stands for Category 10, which is the category of pricing information distributed by ATPCO to airlines and travel agents concerning the combinability of multi-city airfares.

court granted that motion, and later denied a Rule 62.1 Motion for an Indicative Ruling that the court would entertain Plaintiffs' Rule 60(b) motion for relief from the judgment on the basis of new evidence. Both rulings are before us on appeal, and we AFFIRM.

II. DISCUSSION

A. The Motion to Dismiss

We review dismissal of the complaint de novo, Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir. 2008), using the now-familiar plausibility rubric established by Twombly[3] and its progeny. Under this framework, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Twombly, 550 U.S. at 557. "Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'" Id. at 553–54 (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)) (alterations in original). If a plaintiff fails to provide something more—to "nudge[] [his or her] claim[] across the line from conceivable to plausible"—a complaint which alleges conscious parallelism "must be dismissed." Id. at 570.

In the Ninth Circuit we have described the allegations required for this "nudge" as "plus factors,"

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[3] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

or "'some further factual enhancement,' a 'further circumstance pointing toward a meeting of the minds' of the alleged conspirators." In re Musical Instruments, 798 F.3d at 1193 (quoting Twombly, 550 U.S. at 557, 560, 570). These "plus factors" are often "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action," id. at 1194.

In re Musical Instruments is instructive. There, we rejected the proposed "plus factors" as insufficient to survive a motion to dismiss because the stated factors were simply activities one would expect in an interdependent market, where "firms may engage in consciously parallel conduct through observation of their competitors' decisions even absent an agreement." Id. at 1194-97.

So too here. Each of Plaintiffs' proposed plus factors is a restatement of the conscious parallelism endemic to an oligopoly. Under In re Musical Instruments, allegations of a "common motive" are insufficient to state a claim because "alleging 'common motive to conspire' simply restates that a market is interdependent." 798 F.3d at 1195. The same analysis applies to allegations the airlines acted against self-interest. While a company acting against self-interest can sometimes be a plus-factor, in an interdependent oligopoly it may be in a company's interest to raise prices in the hope that its competitors play "follow the leader." In re Musical Instruments, 798 F.3d at 1195. In this way, conscious parallelism also explains the Airline Defendants' decision to change their rules in such a way as to increase prices notwithstanding

"steeply falling costs." FAC ¶¶ 45–48; In re Musical Instruments, 798 F.3d at 1197.

As for the mechanics of the change itself, Plaintiffs argue the simultaneity of the decisions is evidence of an agreement. But again, In re Musical Instruments holds that simultaneity "does not reveal anything more than similar reaction to similar pressures within an interdependent market, or conscious parallelism." 798 F.3d at 1196. Similarly, while "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors" might suggest collusion, Twombly, 550 U.S. at 556 n.4, such complexity is absent here. Perhaps hardcoding the airlines' new rule changes into ATPCO's reservation and information systems may have been complex, but that is a question of implementation not determination. The airlines' decisions to eliminate sum-of-sector pricing are not so complex as to suggest an agreement.

Finally, Plaintiffs allege that the Airline Defendants used ATPCO as a "coordination facilitating device." FAC at 26. ATPCO—while not technically a trade association—plays a similar role in the marketplace. As the FAC describes, ATPCO provides a "clearinghouse" for pricing information, much like a trade organization. See In re Musical Instruments, 798 F.3d at 1196; FAC at 2; see also FAC ¶¶ 34-36. After that information has been made available to the public, ATPCO then publishes each airline's fares and rules to the other airline members of ATPCO, and those airlines use this information "for internal management purposes, including [deciding] whether or not to respond to the competitive actions of other airlines."

We have long been skeptical that participation in a trade organization is suggestive of collusion, see, e.g., In re Citric Acid Litig., 191 F.3d 1090, 1098 (9th Cir. 1999), and that skepticism has only hardened since Twombly and its progeny. In re Musical Instruments, 798 F.3d at 1196. And while it may be possible for participation in an ATPCO-like organization to suggest collusion, see, e.g., B&R Supermarket, Inc. v. Visa, Inc., No. C 16-01150, 2016 WL 5725010, at *8 (N.D. Cal. Sept. 30, 2016) (unreported)[4], the FAC here contains no factual allegations sufficient under Twombly to suggest that ATPCO coordinated collusive behavior.

Plaintiffs' final volley is that all of these potential plus factors, viewed under a totality-of-the-circumstances test, In re Musical Instruments, 798 F.3d at 1198, are sufficient to survive a motion to dismiss. But even viewed collectively, Plaintiffs' plus factors suggest only conscious parallelism in an interdependent oligopoly. Accordingly, we AFFIRM the district court's decision to grant the motion to dismiss.

B. The Motion under Rule 62.1

After filing a notice of appeal, Plaintiffs discovered "new" evidence that ATPCO hosted an online meeting on March 30, 2016 that Plaintiffs claim addressed the issues raised in this lawsuit. Following this discovery, Plaintiffs filed a motion in district court pursuant to Fed. R. Civ. P. 62.1 asking that court to issue an indicative ruling under Rule 62.1(a)(3) that it would

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[4] While we are generally hesitant to cite unreported district court orders, we note B&R Supermarkets because of the extent to which Plaintiffs relied on that case on appeal.

entertain Plaintiffs' motion for relief from judgment on the basis of newly discovered evidence. The district court denied that motion, see Fed. R. Civ. P. 62.1(a)(2), holding that relief would be futile because this evidence, "if alleged in a Second Amended Complaint, would [not] be sufficient to defeat a motion to dismiss." Reviewing this denial for an abuse of discretion, we AFFIRM.

First, in order to be relieved from the district court's judgment, Plaintiffs would have to establish that evidence of this online meeting could not have been discovered earlier with "reasonable diligence." Fed. R. Civ. P. 60(b)(2). This is doubtful given that Plaintiffs admit they found this evidence by "typ[ing] in a phrase from an attachment to Plaintiffs' FAC in an internet search[,]" and that "the document can be found by internet search engine[.]"

In any event, the online meeting, described in the agenda submitted by Plaintiffs as the "Second Quarter 2016 [Data Application] Working Group Meeting," occurred in response to a business request submitted in 2015 by non-Defendant ATPCO member Aegean Airlines. That agenda further outlines that the online meeting's goal was in part to "[r]evise ATPCO's User Interface . . . to make it easier for airlines to quickly and accurately specify and maintain Combination restrictions for their carrier fares." Id.

In this light the online meeting does nothing to make a conspiracy more plausible. Instead, it suggests that the airlines independently decided to disallow sum-of-sector pricing—which was clearly an issue in the industry as early as 2015—and thereafter worked with ATPCO to apply and implement the airlines'

decisions while still leaving discretion to the individual airlines to develop or revise their rules for sum-of-sector pricing.

Accordingly, we AFFIRM the district court's decision to deny the Rule 62.1 motion for an indicative ruling.

III. CONCLUSION

The district court's rulings are AFFIRMED in full.

APPENDIX B

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

Case No. 16-cv-02017-MMC

[Filed October 5, 2017]

CYNTHIA PROSTERMAN, ET AL.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR ORDER INDICATING COURT WILL ENTERTAIN PLAINTIFFS' RULE 60(B) MOTION

Before the Court is plaintiffs' motion, filed August 11, 2017, for an "Order Indicating That the Court Will Entertain Plaintiffs' Rule 60(b) Motion." Defendants have filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support

of and in opposition to the motion, the Court rules as follows.[1]

In the above-titled case, plaintiffs alleged that defendants American Airlines, Inc., United Airlines, Inc., and Delta Air Lines, Inc. conspired with defendant Airline Tariff Publishing Company ("ATPCO") to violate § 1 of the Sherman Act. Specifically, in the First Amended Complaint ("FAC"), plaintiffs alleged that said defendants "conspired to change [the] CAT 10 rules on airfare combinability in order to prevent air travelers from being able to combine the least expensive, non-refundable, one-way fares for multi-city destination flights." (See FAC ¶ 62.)[2]

By order filed December 8, 2016, the Court granted defendants' motions to dismiss the FAC, finding the factual allegations in the FAC insufficient to state a cognizable antitrust claim and concluding as follows:

> In sum, plaintiffs have failed to "plead[ ] sufficient facts to provide a plausible basis from

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[1] By order filed September 11, 2017, the Court took the matter under submission.

[2] According to plaintiffs, ATPCO "maintains" a "data base consisting of 32 categories of airfare rules" of each of its 400 airline members. (See FAC ¶ 28; Miller Decl. Ex. C.) The tenth such category, "CAT 10," consists of the rules each airline has set "for the combinability of airfares for multi-city flight itineraries." (See FAC ¶ 25.) Each airline "transmit[s] fare information, including fare rules and restrictions, to [ATPCO] which, in turn, disseminates the information to the airline industry" (see id.), including, for example, "airlines," as well as "computer reservations systems that use [ATPCO] data to issue tickets" and "travel agencies" (see Miller Decl. Ex. C).

> which [a court] can infer the alleged agreements' existence." See [In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193 (9th Cir. 2015)]. Plaintiffs at best have pleaded factual allegations that, assumed true, establish "conduct as consistent with permissible competition as with illegal conspiracy." See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). Establishing conduct "merely consistent with" a conspiracy, however, is, as a matter of law, insufficient to state a claim under § 1. See id.; see also In re Musical Instruments, 798 F.3d at 1189 (affirming dismissal of § 1 claim based on theory manufacturers entered into agreement to raise prices, where plaintiffs' allegations were "no more consistent with an illegal agreement than with rational and competitive business strategies, independently adopted by firms acting within an interdependent market").

(See Order, filed December 8, 2016, at 8:10-20.) The Clerk of Court entered judgment, and plaintiffs, after unsuccessfully moving for relief therefrom, filed a notice of appeal.

By the instant motion, plaintiffs again argue they are entitled to relief from the judgment. In particular, plaintiffs argue that, pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure, they are entitled to relief in light of newly discovered evidence.[3] As "[t]he

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[3] In the alternative, plaintiffs argue, they are entitled to relief pursuant to Rule 60(b)(3) based on defendants' having "made misrepresentations on the record as to the airlines' relationship

filing of a notice of appeal divests the district court of jurisdiction," see Gould v. Mutual Life Ins. Co., 790 F.2d 769, 772 (9th Cir. 1986), plaintiffs, pursuant to Rule 62.1, request the Court indicate "either that it would grant the [Rule 60(b)] motion if the court of appeals remands for that purpose or that the motion raises a substantial issue," see Fed. R. Civ. P. 62.1(a)(3) (setting forth procedure where "timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed").

A party seeking relief from a judgment on the basis of newly discovered evidence must establish that it "exercised due diligence" to obtain the evidence and that such evidence is "of such magnitude that production of it earlier would have been likely to change the disposition of the case." See Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) (internal quotation and citation omitted). Here, as the FAC was dismissed for failure to state a claim, the Court understands plaintiffs to be seeking relief under Rule 60(b) in order to file a Second Amended Complaint ("SAC") and include therein additional factual allegations consistent with the evidence submitted in support of the instant motion. See Lindauer v. Rogers, 91 F.3d 1355, 1357 (9th Cir. 1996) (holding "once judgment has been entered in a case, a motion to amend the complaint can be entertained only if the judgment is first reopened under a motion

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with ATPCO." (See Pls.' Mot. at 7-8.) As the Court's order makes clear, however, the FAC was dismissed based on plaintiffs' failure to allege sufficient facts to state a claim, not because of any representation made by defendants. (See Order, filed December 8, 2016, at 3:9-11; see also, e.g., id. at 7:7 - 8:9.)

brought under Rule 59 or 60"). Consequently, plaintiffs must demonstrate they exercised due diligence in obtaining the evidence on which the motion is based and that they could include in their complaint factual allegations, consistent therewith, that would suffice to cure the deficiencies identified in the Court's order of dismissal. The Court next turns to the question of diligence.

Plaintiffs' motion is based on evidence their counsel discovered on July 28, 2017 (see Miller Decl. ¶ 3), which evidence consists of agendas for ATPCO conferences held in, respectively, September 2015 and September 2016 (see id. ¶ 6 & Ex. E, F), and a document identifying topics for an ATPCO meeting held on March 30, 2016 (see id. ¶ 8 & Ex. D). Each document on which plaintiffs rely is located, and was found by plaintiffs' counsel, on a public website maintained by ATPCO. (See id. ¶¶ 12, 14-16 & Exs. D, E, F.) Although defendants argue plaintiffs, given the availability of the documents to the public, fail to demonstrate due diligence, the Court finds persuasive plaintiffs' explanation that the documents, albeit available, were not readily accessible, given the absence of any link thereto on the ATPCO website. (See Messina Decl. ¶¶ 4-7; Miller Reply Decl. Exs. G-J; Miller Decl. ¶¶ 3, 5-8 (describing serendipitous discovery of documents).)

The Court next turns to the question of whether an SAC that includes allegations based on the content of the newly discovered evidence would suffice to cure the deficiencies identified by the Court in its order dismissing the FAC. As discussed below, and for the

reasons stated by defendants in their opposition (see Defs.' Opp. at 9:6 - 14:3), the Court finds it would not.

The written documents submitted by plaintiffs include: (1) a request made on April 30, 2015, by Aegean Airlines, a non-party, that ATPCO "check the possibility of hardcoding" in the ATPCO system an Aegean Airlines rule under which Aegean Airlines does not allow "end-on-end combinations" for "travel within 24 hours" (see Miller Decl. Ex. E at 21);[4] (2) ATPCO's response that "the current system may not provide a way to qualify end-on-end combinations based on elapsed time over the combination" and proposal that the matter be included as "an agenda topic for the next Combinations (Category 10) Data Application Working Group" (see Miller Decl. Ex. E at 21); (3) ATPCO's statement, in the agenda for a conference held in September 2015, that carriers "prefer an automated solution to specify when and under what restrictions their fares can or cannot combine" and that ATPCO's goal is for carriers to "have full control of their combination requirements" (see id. Ex. E at 69); (4) ATPCO's proposal, in the above-referenced agenda, to "[a]dd functionality" to the ATPCO system for purposes of allowing an airline to specify that, if a "journey meets the definition of an Open Jaw" or a

[4] The parties agree that the term "end-on-end" refers to a trip where two or more fares are combined on one ticket. (See Pls.' Mot. at 4:27-28; Defs.' Opp. at 11:24-25.) The FAC provides as an example a trip from "New York to Ft. Lauderdale to Chicago and back to New York" in which the ticket is priced by "combining the fare for each leg of the trip." (See FAC ¶ 84(c).)

"Circle Trip,"[5] the journey "cannot be priced as an End-on-End solution" (see Miller Decl. Ex. E at 70); (5) a recommendation by ATPCO to convene "a 2016 Combinations Working Group" to "propose a solution" that would "include revised record layouts, field descriptions, and data application" (see id.); and (6) an ATPCO calendar showing the "2016 Working Group Meeting" was held online on March 30, 2016 (see id. Ex. A at 2, Exs. B, D).

Assuming, arguendo, the three airline defendants attended the online meeting organized by ATPCO, any such attendance is not, by itself, sufficient to support a finding that defendants entered into an unlawful agreement. See In re Musical Instruments, 798 F.3d at 1196 (affirming dismissal of Sherman Act claim; holding "mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement"). Although plaintiffs contend the above-described documents show "ATPCO arranged — and its airline customers participated in — an online meeting . . . to agree on CAT-10 Fare Rule changes" or, "at the very least," that defendants "met online and agreed to institute these structural changes to the CAT-10 Fare Rules on a common date" (see Pls.' Mot. at 14:8-9, 12-15), nothing in the documents states or even suggests

[5] According to plaintiffs, an "Open Jaw" trip is one in which "the destination and/or point of departure are not the same in both directions," e.g., "SFO to JFK (New York), plus DCA (Washington, D.C.) to SFO," and a "Circle Trip" is one that "involves more than a single destination, but which returns to the initial origin," e.g., "SFO to JFK, JFK to DCA, DCA to ORD [and] ORD to SFO." (See Pls.' Mot. at 4:25-27.)

that the entities attending the online meeting had an agreement to change fares or fare rules. Rather, the documents show the meeting was held for the purpose of addressing the best way for ATPCO to make changes to its technology to reflect each airline's combination requirements. (See Miller Decl. Ex D, Ex. E at 21, 70.) Indeed, after the meeting, ATPCO, in an agenda for a conference it held in September 2016, informed its members of a working group's proposal that "all combination restrictions be specified via automated data in Category 10 rather than hard coded," which change would "allow carriers to control fare combinations based on their individual business needs." (See id. Ex. F at 68.)

In sum, plaintiffs have failed to show the newly discovered evidence, if alleged in a Second Amended Complaint, would be sufficient to defeat a motion to dismiss. Under such circumstances, leave to file an amended pleading would serve no purpose as such amendment would be futile. See Carrico v. City and County of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011) (holding leave to amend "properly denied" where "amendment would be futile").

CONCLUSION

For the reasons stated above, plaintiffs' motion for an order indicating the Court will entertain plaintiffs' Rule 60(b) motion is hereby DENIED.

IT IS SO ORDERED.

Dated: October 5, 2017

/s/Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX C

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

Case No. 16-cv-02017-MMC

[Filed February 13, 2017]

CYNTHIA PROSTERMAN, ET AL.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT AND/OR TO ALTER OR AMEND JUDGMENT; VACATING HEARING

Re: Dkt. No. 109

Before the Court is plaintiffs' "Motion for Relief from Judgment and/or to Alter or Amend Judgment," filed January 5, 2017. Defendants have filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for determination on the parties' respective

written submissions, VACATES the ruling scheduled for February 17, 2017, and hereby rules as follows.

On December 8, 2016, the Court granted defendants' motions to dismiss the First Amended Complaint ("FAC"), and, that same date, the Clerk of Court entered judgment. In their motion, plaintiffs seek an order vacating the judgment, followed by an order denying defendants' motions to dismiss. Plaintiffs argue they are entitled to such relief under either Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure.

A. Rule 59(e)

A party is entitled to relief from a judgment under Rule 59(e) where, inter alia, the court has committed "manifest errors of law or fact" or the challenged decision is "manifest[ly] unjust." See Turner v. Burlington Northern Santa Fe Railroad Co., 338 F.3d 1058, 1063 (9th Cir. 2003) (internal quotations and citation omitted).[1] In reliance thereon, plaintiffs argue they thus are entitled to relief because, they assert, the Court erred in not finding plaintiffs had sufficiently alleged direct or circumstantial evidence of an unlawful conspiracy.[2] The Court disagrees.

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[1] A motion under Rule 59(e) may also be based on an "intervening change in controlling law" or "newly discovered or previously unavailable evidence." See id. Here, however, plaintiffs do not cite a change in controlling law or assert they have obtained any new or previously unavailable evidence.

[2] As explained in the Court's order of December 8, 2016, plaintiffs' claims were brought pursuant to § 1 of the Sherman Act, and, to state a cognizable claim thereunder, plaintiffs were required to

First, plaintiffs fail to identify any direct evidence alleged in the FAC, i.e., facts to support a finding of "actual agreement." See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564 (2007). Rather, the references in the FAC to the existence of an "agreement" or a "conspiracy" (see FAC ¶¶ 1-4, 8, 62, 78-79, 82, 88, 93-94) are "mere legal conclusions" that, as a matter of law, are insufficient to state a claim. See Twombly, 550 U.S. at 555; cf. B & R Supermarket, Inc. v. Visa, Inc., 2016 WL 5725010, at *6-7 (N.D. Cal. September 30, 2016) (finding plaintiffs sufficiently alleged direct evidence of agreement in light of allegations that defendants, inter alia, had "got in a room," where they "work[ed] together towards getting much more specific about what [they] all want[ed] to get done").

Second, contrary to plaintiffs' argument, the Court fully considered the question of whether plaintiffs had alleged sufficient "plus factors," see In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193-94 (9th Cir. 2015) (explaining circumstances under which allegations of "parallel conduct," coupled with "plus factors," would support finding of agreement), and a Rule 59(e) motion "may not be used to relitigate old matters," see Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008) (internal quotation and citation omitted); McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 2011) (observing "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly") (internal quotation and citation omitted).

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allege, inter alia, sufficient facts to support a finding that there existed an agreement by defendants to restrain trade.

Accordingly, plaintiffs have failed to show they are entitled to relief under Rule 59(e).

B. Rule 60(b)(6)

Under Rule 60(b), a court may "relieve a party" from a judgment "for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." See Fed. R. Civ. P. 60(b).

Here, plaintiffs fail to identify any circumstance that implicates the grounds set forth in Rule 60(b)(1)-(5), thus leaving for the Court's consideration whether plaintiffs have established grounds upon which to vacate the judgment under Rule 60(b)(6). Rule 60(b)(6), however, "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." See United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). Plaintiffs fail to identify nor does the record otherwise suggest any such extraordinary circumstances exist.

Accordingly, plaintiffs have failed to show they are entitled to relief under Rule 60(b).

CONCLUSION

For the reasons stated above, plaintiffs' motion for relief from, or to alter or amend, the judgment is hereby DENIED.

IT IS SO ORDERED.

Dated: February 13, 2017

/s/Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX D

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

Case No. 16-cv-02017-MMC

[Filed December 8, 2016]

CYNTHIA PROSTERMAN, ET AL.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Re: Dkt. Nos. 93, 94

Before the Court are two motions: (1) "Motion to Dismiss Amended Complaint," jointly filed September 2, 2016, by defendants American Airlines, Inc. ("American"), United Airlines, Inc. ("United"), and Delta Air Lines, Inc. ("Delta") (collectively, "Airline Defendants"); and (2) "Motion to Dismiss the First Amended Complaint," filed September 2, 2016, by defendant Airline Tariff Publishing Company ("ATPCO"). Plaintiffs have filed a consolidated

opposition to the motions, to which the Airline Defendants and ATPCO have separately replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.[1]

BACKGROUND

Plaintiffs are forty-one travel agents who assert two antitrust claims against American, United and Delta, three commercial passenger airlines that "together control over 51 percent of the market for domestic passenger air travel in the United States" (see First Amended Complaint ("FAC") ¶ 1), and against ATPCO, a "not-for-profit corporation" owned by a group of airlines that includes the Airline Defendants (see FAC ¶ 14) and "engaged in the collection, processing and dissemination of air passenger transportation fare data" and "publishing of airline rules" (see FAC ¶ 25).

In the First Cause of Action, titled "Price Fixing," plaintiffs allege "the Airline Defendants and [ATPCO] conspired" to change the "Category 10 airfare rules" ("CAT 10"), specifically, "to change [the] CAT 10 rules on airline combinability in order to prevent air travelers from being able to combine the least expensive, non-refundable, one-way fares for multi-city destination flights" and "to require instead that the passengers pay hundreds and even thousands of dollars more for the same multi-city flights than had been charged before the CAT 10 rule was changed." (See FAC ¶ 62.) For example, prior to the rule changes,

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

although United's fare for a flight from Los Angeles to New Orleans was $363, a passenger could obtain a ticket for a flight between those two cities at the lower cost of $189, by combining on one ticket the price for a one-way ticket from Los Angeles to Houston ($102) and the price for a one-way ticket from Houston to New Orleans ($87). (See FAC ¶ 66; Ex. C at 3.)[2]

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

LEGAL STANDARD

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader

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

is entitled to relief.'" See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

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

DISCUSSION

Plaintiffs' antitrust claims are brought pursuant to § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." See 15 U.S.C. § 1. To state a cognizable claim under § 1, a plaintiff must allege the existence of an "agreement, as distinct from identical,

independent action" by the defendants. See Twombly, 550 U.S. at 548-49. "[M]ere allegations of parallel conduct — even consciously parallel conduct — are insufficient to state a claim under § 1." In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193 (9th Cir. 2015). Rather, "[p]laintiffs must plead 'something more,' 'some further factual enhancement,' a 'further circumstance pointing toward a meeting of the minds' of the alleged conspirators." Id. (quoting Twombly, 550 U.S. at 557, 560). In that regard, courts have "distinguished permissible parallel conduct from impermissible conspiracy by looking for certain plus factors," id. at 1194 (internal quotation and citation omitted), namely, "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action," id.

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

Initially, the Court notes that the FAC includes greater specificity as to the timing of the Airline Defendants' actions. In the FAC, plaintiffs now allege that each of the Airline Defendants made the subject

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

In an effort to meet that additional requirement, plaintiffs have included in the FAC factual allegations from their initial complaint and factual allegations that provide additional detail regarding ATPCO as well as the airline industry in general.

First, with respect to the manner in which ATPCO operates, plaintiffs again allege that the Airline Defendants "transmit fare information, including fare amounts and restrictions, to [ATPCO]" (see FAC ¶ 25; Compl. ¶ 25), that the Airline Defendants submit to ATPCO changes "at least once each weekday" (see FAC ¶ 36; Compl. ¶ 30) and that ATPCO, upon receipt of such fare information, "processes the changes and disseminates [the] information . . . to the Airline

Defendants" and to "computer reservation systems" (see FAC ¶ 36; Compl. ¶ 31), after which the Airline Defendants receive from ATPCO "reports" that "allow the Airline Defendants to monitor and analyze immediately each other's fare rules, restrictions and price changes" (see FAC ¶ 38; Compl. ¶ 33). In the FAC, plaintiffs have supplemented those facts with allegations that the referenced "computer reservation systems" are "GDSs" (see FAC ¶ 47), i.e., reservation systems used by travel agents such as plaintiffs,[3] and that the reports ATPCO provides to the participating airlines are a "tool" called "Market View" that allows those airlines to view "competitors' public fares and rules data," as well as a "program" called "Fare Manager" that allows those airlines to "create, modify, match, or cancel airfares" in "seconds" (see FAC ¶¶ 48-49).

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

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

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

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

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

As plaintiffs acknowledge, the commercial passenger airline industry is an "oligopoly" (see FAC ¶ 30), i.e., "a market in which a few relatively large sellers account for the bulk of the output." See In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 n.10 (3rd Cir. 2015) (internal quotation and citation omitted). In such markets, "a single firm's change in output or price will have a noticeable impact on the market and on its rivals," and, consequently, any "rational decision by an oligopolist must take into account the anticipated reaction of the other firms," the "upshot" being that "oligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices." See id. at 397 (internal quotation, alteration and citation omitted); see also Rebel Oil v. Atlantic Richfield Co., 51 F.3d 1421, 1443 (9th Cir. 1995) (holding "[b]y definition,

oligopolists are interdependent"). Put another way, "one firm can risk being the first to raise prices, confident that if its price is followed, all firms will benefit." See In re Musical Instruments, 798 F.3d at 1195. "By that process ('follow the leader'), supracompetitive prices and other anticompetitive practices, once initiated, can spread through a market without any prior agreement." Id.

Here, plaintiffs' factual allegations do no more than support a finding that the Airline Defendants have engaged in conscious parallelism. The allegations essentially establish that the Airline Defendants use information obtained through ATPCO to match or otherwise quickly react to a competitor that has made a fare or rule change. (See, e.g., FAC ¶ 34 (alleging Airline Defendants "watch each other like hawks" and "assess changes competitors are making").) Reacting to a competitor's change by choosing to adopt the same or substantially similar change, however, does not support a § 1 claim. See In re Chocolate Confectionary, 801 F.3d at 397 (holding, although "this practice of parallel pricing, known as 'conscious parallelism,' produces anticompetitive outcomes, it is lawful under the Sherman Act"); see also Rebel Oil, 51 F.3d at 1443 (noting "gap" in Sherman Act).

Plaintiffs argue they nonetheless have sufficiently alleged "plus" factors, relying primarily on the Seventh Circuit's decision in In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010) ("Text Messaging I"). Text Messaging I, however, is distinguishable. The plaintiffs therein had alleged the defendants attended trade association meetings where they informed each other of proposed price changes, see id. at 628; see also

In re Text Messaging Antitrust Litig., 2010 WL 1782006, at *3 (N.D. Ill. April 30, 2010), and agreed "to raise prices by a certain amount within a certain time frame," see id. Further, the plaintiffs in Text Messaging I alleged the defendants "changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure," see Text Messaging I, 630 F.3d at 628, specifically, that "all four defendant companies, in a series of steps (10 steps in all for the four companies), raised each of their [prices] to 20 cents [per text message]," see In re Text Messaging Antitrust Litig., 782 F.3d 867, 875 (7th Cir. 2015) ("Text Messaging II").

Here, by contrast, plaintiffs fail to allege facts to support a finding that defendants were aware of each other's rule changes prior to those changes having been published,[5] nor do plaintiffs allege the Airline Defendants set identical or even substantially similar fares for any given route. Although plaintiffs place particular emphasis on their allegation that changes to

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

the combinability rules have resulted in higher prices at a time when the Airline Defendants' fuel costs have decreased (see, e.g., FAC ¶ 70), such "apparent anomaly . . . may be not because [competitors have] agreed not to compete but because all of them have determined independently that they may be better off with a higher price," see Text Messaging II, 782 F.3d at 871, i.e., a decision that in no way can be characterized as "extreme action against self-interest" that "may suggest prior agreement," see In re Musical Instruments, 798 F.3d at 1195.

In sum, plaintiffs have failed to "plead[ ] sufficient facts to provide a plausible basis from which [a court] can infer the alleged agreements' existence." See id. at 1193. Plaintiffs at best have pleaded factual allegations that, assumed true, establish "conduct as consistent with permissible competition as with illegal conspiracy." See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). Establishing conduct "merely consistent with" a conspiracy, however, is, as a matter of law, insufficient to state a claim under § 1. See id.; see also In re Musical Instruments, 798 F.3d at 1189 (affirming dismissal of § 1 claim based on theory manufacturers entered into agreement to raise prices, where plaintiffs' allegations were "no more consistent with an illegal agreement than with rational and competitive business strategies, independently adopted by firms acting within an interdependent market").[6]

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

CONCLUSION

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

IT IS SO ORDERED.

Dated: December 8, 2016

/s/Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-02017-MMC

[Filed December 8, 2016]

CYNTHIA PROSTERMAN, et al.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

The motions to dismiss are hereby GRANTED, and the First Amended Complaint is hereby DISMISSED.

Dated: 12/8/2016

Susan Y. Soong, Clerk

/s/Tracy Geiger
Tracy Geiger
Deputy Clerk

APPENDIX F

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

Case No. 16-cv-02017-MMC

[Filed May 13, 2016]

CYNTHIA PROSTERMAN, et al.,

Plaintiffs,

v.

AIRLINE TARIFF PUBLISHING COMPANY, AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., and UNITED AIRLINES, INC.,

Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 3

Before the Court is plaintiffs' "Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction," filed April 18, 2016. By order filed April 18, 2016, the Court denied the motion to the extent it sought issuance of a temporary restraining order, and directed defendants

to respond to the request for a preliminary injunction. Thereafter, each defendant filed timely opposition, to which plaintiff timely replied.

The matter came on regularly for hearing on today's date. Joseph M. Alioto, Jamie L. Miller, Thomas Paul Pier, and Gil D. Messina of the Alioto Law Firm appeared on behalf of plaintiffs. J. Parker Erkmann and John C. Dwyer of Cooley LLP appeared on behalf of defendant Airline Tariff Publishing Company; Daniel M. Wall and Sadik Huseny of Latham & Watkins LLP appeared on behalf of defendant American Airlines, Inc.; James P. Denvir and Michael Mitchell of Boies, Schiller & Flexner LLP appeared on behalf of defendant Delta Air Lines, Inc.; and Peter K. Huston of Sidley Austin LLP appeared on behalf of defendant United Airlines, Inc.

The Court having considered the parties' respective written submissions and the arguments of counsel, and for the reasons stated by the Court on the record at the hearing, the motion for a preliminary injunction is hereby DENIED.

IT IS SO ORDERED.

Dated: May 13, 2016

/s/Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15468

D.C. No. 3:16-cv-02017-MMC

[Filed October 16, 2018]

CYNTHIA PROSTERMAN; et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
AMERICAN AIRLINES, INC.; et al.,	)
	)
Defendants-Appellees.	)
	)

ORDER

Before: SCHROEDER, EBEL,* and OWENS, Circuit Judges.

Judge Owens has voted to deny the petition for rehearing en banc, and Judge Schroeder and Judge Ebel have so recommended.

* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' Petition for Rehearing En Banc, Docket No. 54, is denied.