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AIRLINE TARIFF PUBLISHING COMPANY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CYNTHIA PROSTERMAN ET AL.,

Plaintiffs,

v.

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

Defendants.

Case No. 3:16-cv-02017-MMC

**DEFENDANT AIRLINE TARIFF  
PUBLISHING COMPANY'S NOTICE OF  
MOTION AND MOTION TO DISMISS THE  
COMPLAINT**

Date: July 8, 2016  
Time: 9:00 a.m.  
Judge: Hon. Maxine M. Chesney  
Location: Courtroom 7

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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on July 8, 2016, at 9:00 a.m., or as soon thereafter as this motion may be heard, in Courtroom 7, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Maxine M. Chesney, Airline Tariff Publishing Company (“ATPCO”) will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing Plaintiffs’ Complaint for failure to state a claim upon which relief can be granted because it does not meet the pleading standards established by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the pleadings on file, oral argument of counsel, and such other material or argument as this Court may consider.

**STATEMENT OF THE ISSUES TO BE DECIDED**

Plaintiffs claim that ATPCO aided and abetted a purported conspiracy by three airlines to raise certain airfares for multi-city travel in violation of the Sherman Act. Aiding and abetting is not a cognizable legal theory of antitrust liability, and the Complaint contains no well-pleaded facts that ATPCO knew about or consciously joined the purported conspiracy. Should the Court dismiss the Complaint against ATPCO for failure to state a claim upon which relief can be granted?

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Defendant Airline Tariff Publishing Company (“ATPCO”) has a limited but important role in the airline industry: it operates an automated computer system which gathers fare information from airlines and distributes that information to the marketplace. It is an important part of an efficient system which allows airlines to sell, and consumers to buy, airline tickets quickly and easily. Misunderstanding ATPCO’s services, Plaintiffs allege that ATPCO aided and abetted an antitrust conspiracy by three airlines to raise the prices of certain airfares for multi-city travel. The Court should dismiss the Complaint against ATPCO as it contains neither a cognizable legal theory nor sufficient well-pleaded facts to state a claim upon which relief can be granted.

Plaintiffs’ claim fails first because “aiding and abetting is not an independent theory of civil liability under the Sherman Act.” *Top Rank, Inc. v. Haymon*, No. CV 15-4961-JFW, 2015 WL 9948936, at \*16 (C.D. Cal. Oct. 16, 2015). As a result, Plaintiffs must allege evidentiary facts showing that ATPCO knew about and consciously joined the purported conspiracy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The Complaint fails to do so. Instead of well-pleaded facts connecting ATPCO to the purported conspiracy, the Complaint lumps all defendants together and relies on little more than labels and conclusions. Indeed, the Complaint’s few well-pleaded facts do not raise any inference of a conspiracy.

Plaintiffs’ claim also fails as the conduct challenged must be judged under the rule of reason rather than the *per se* rule. The law is clear that the core functions of organizations like ATPCO – whether viewed as joint ventures, trade associations or something else – are not naked restraints of trade that can be condemned on a *per se* basis. Plaintiffs expressly disavow and fail to allege necessary elements of a rule of reason case. For this reason as well, their claim against ATPCO should be dismissed.

### **II. STATEMENT OF ALLEGED FACTS**

ATPCO is a District of Columbia corporation owned by a group of airlines. ECF 1, Complaint (hereinafter “Compl.”) ¶¶ 14, 15. Unlike its codefendants, ATPCO is not itself an airline. Nonetheless, ATPCO plays a crucial role in the efficient operation of the airline industry by

1 providing services which allow airlines to sell, and customers to buy, competitively-priced airline  
 2 tickets quickly and easily. *Id.* ¶¶ 25, 27. It accomplishes this primarily through “the collection and  
 3 dissemination of air passenger transportation fare data” to the marketplace. *Id.* ¶ 25.

4 This process begins when airlines individually set fares and transmit them to ATPCO’s  
 5 automated system. *Id.* Each fare is comprised of “many different types of information,” including  
 6 “a fare basis code (the name of the fare), the dollar amount, and the fare rules.” *Id.* ¶¶ 31, 29. The  
 7 fare rules – which “contain the conditions under which a fare can be used or sold (i.e., ‘fare  
 8 restrictions’)” – can be very complicated. *Id.* ¶ 29. One of the many fare rules that an airline must  
 9 set for each fare is the “so-called CAT 10” rule which governs the combinability of airfares. *Id.*  
 10 ¶ 32.

11 ATPCO maintains a database of the fare information submitted by each of the airlines. *Id.*  
 12 ¶ 29. The airlines submit “fare changes to ATP[CO] at least once each weekday.” *Id.* ¶ 30. ATPCO  
 13 “processes the changes and disseminates information on daily fare changes” by publishing the data  
 14 to its subscribers and the marketplace, including “computer reservation systems” and subsequently  
 15 the airlines. *Id.* ¶¶ 31, 33. Computer reservation systems combine the fare data with airline schedule  
 16 and inventory data so that passengers and travel agents can purchase tickets from the airlines. The  
 17 airlines also use the data “to monitor and analyze immediately” market changes and respond to their  
 18 competitors in real time by “easily and flexibly” adjusting their fares. *Id.* ¶¶ 33, 27.

19 Plaintiffs misunderstand ATPCO’s services, and allege that ATPCO “aided and abetted” an  
 20 unlawful agreement among United Airlines, Inc., American Airlines, Inc., and Delta Air Lines, Inc.  
 21 (the “Airline Defendants”) to “fix, raise, maintain, and or stabilize prices for air passenger  
 22 transportation services on multi-city trips.” *Id.* ¶¶ 1, 3. According to Plaintiffs’ conclusory  
 23 allegations, the Airline Defendants did so by each making changes to the “Cat 10” rules for certain  
 24 of their airfares around the same time. *Id.* ¶ 35. Plaintiffs do not allege that ATPCO agreed to any  
 25 such changes, that ATPCO had any control over the changes, nor even that ATPCO knew about the  
 26 changes in advance. *See generally id.* At most, Plaintiffs merely allege that the Airline Defendants  
 27 use ATPCO’s services to distribute their fares to the market. *Id.*

28 On these allegations, Plaintiffs sought a temporary restraining order and preliminary

1 injunction against the Airline Defendants and ATPCO. ECF 3. The Court denied both motions.  
2 ECF 7, 54.

### 3 **III. LEGAL STANDARD**

4 To survive a motion to dismiss, a plaintiff must provide “more than labels and conclusions”  
5 and “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at  
6 554-55. Instead, the Complaint must contain sufficient “[f]actual allegations . . . to raise a right to  
7 relief above the speculative level.” *Id.* In the Sherman Act Section 1 context, this requires a  
8 plaintiff to plausibly allege, among other things, “that there was a contract, combination, or  
9 conspiracy; [and] (2) that the agreement unreasonably restrained trade under either a per se rule of  
10 illegality or a rule of reason analysis.” *Tanaka v. USC*, 252 F.3d 1059, 1062 (9th Cir. 2001). Thus,  
11 a Section 1 complaint must be dismissed unless it contains “enough factual matter (taken as true) to  
12 suggest that an agreement was made.” *Twombly*, 550 U.S. at 556.

### 13 **IV. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST ATPCO**

14 In a Section 1 case, the “crucial question is whether the challenged anticompetitive conduct  
15 stems from independent decision or from an agreement, tacit or express.” *Twombly*, 550 U.S. at 553.  
16 The Complaint’s allegations against ATPCO do not survive this “crucial” test for several reasons.  
17 As the Airline Defendants brief in detail, the Complaint fails to plausibly allege *any* conspiracy  
18 (versus a series of independent decisions) to implement changes to each of the Airline Defendants’  
19 Cat-10 rules. As to ATPCO specifically, the Complaint’s assertion that ATPCO “aided and abetted”  
20 is deficient as the Sherman Act does not permit aiding and abetting liability. Moreover, to the extent  
21 Plaintiffs even attempt to, they fail to allege any well-pleaded facts that implicate ATPCO in a  
22 conspiracy. Indeed, the law makes clear that ATPCO’s role in the airline industry, even though it is  
23 owned by the Airline Defendants (among others), does not raise any inference of a conspiracy.  
24 Finally, the Complaint fails to state a claim because ATPCO’s conduct can only be judged under the  
25 rule of reason, but Plaintiffs only attempt to allege a *per se* violation of the Sherman Act.

#### 26 **A. Plaintiffs’ Allegations that ATPCO “Aided and Abetted” the Airline** 27 **Defendants Do Not State a Claim Under the Sherman Act**

28 Plaintiffs’ primary theory against ATPCO is that ATPCO “aided and abetted” the purported

1 conspiracy. Compl. ¶¶ 1, 26, 28. This theory, and thus Plaintiffs’ case against ATPCO, fails for  
 2 the simple reason that “aiding and abetting is not an independent theory of civil liability under the  
 3 Sherman Act.” *Top Rank*, 2015 WL 9948936, at \*16.

4 The Supreme Court squarely addressed the limited circumstances under which private civil  
 5 liability extends to those “who aid and abet the violation” in *Central Bank of Denver v. First*  
 6 *Interstate Bank of Denver*. 511 U.S. 164, 166-67 (1994). The Court held that claims based on  
 7 aiding and abetting a violation of federal law are only viable where the statute itself specifically  
 8 provides for such liability. *Id.* at 191. The Court reasoned that if “Congress intended to impose  
 9 aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the  
 10 statutory text.” *Id.* at 173, 176-77. The Court further observed that, while Congress has enacted a  
 11 general criminal aiding and abetting statute, 18 U.S.C. § 2, there is no “general civil aiding and  
 12 abetting statute.” *Id.* at 181-82. As a result, the Court held that where Congress enacts a statute  
 13 providing a civil right of action, “there is no general presumption that the plaintiff may also sue  
 14 aiders and abettors.” *Id.* In other words, absent proof Congress intended to impose aiding and  
 15 abetting liability under a particular statute, no such liability attaches. *Id.*

16 The principles articulated in *Central Bank* foreclose plaintiffs’ claim that ATPCO aided and  
 17 abetted a Sherman Act Section 1 violation. On its face, Section 1 does not provide for an aiding and  
 18 abetting violation. See 15 U.S.C. § 1. Indeed, courts that have applied *Central Bank*’s reasoning to  
 19 the Sherman Act have held that there is no aiding and abetting liability. See *Top Rank*, 2015 WL  
 20 9948936, at \*16 (granting motion to dismiss Sherman Act Section 1 claim because defendants  
 21 “cannot be held liable as ‘aiders and abettors’”); *MCI Telecomms., Corp. v. Graphnet, Inc.*, 881 F.  
 22 Supp. 126, 129 (D.N.J. 1995).<sup>1</sup> *MCI Telecommunications* is instructive. There, Graphnet, a  
 23 telecommunications carrier, argued that MCI Telecommunications (“MCIT”) aided and abetted  
 24

25 <sup>1</sup> That aiding and abetting is not an independent theory of Sherman Act liability is also  
 26 reflected by the fact that, in criminal antitrust prosecutions for aiding and abetting an antitrust  
 27 violation, the DOJ relies on the general criminal aiding and abetting statute found at 18 U.S.C. § 2.  
 28 See DOJ, Antitrust Division Manual, at II-7 (5th ed. April 2015) (indicating that to prosecute  
 conduct “accompanying a Sherman Act violation,” such as aiding and abetting, the Division relies  
 on 18 U.S.C. § 2).

1 Graphnet's direct competitor to monopolize the markets for telex and fax transmission services. *Id.*  
 2 at 128. The court dismissed the Sherman Act claim against MCIT, applying *Central Bank* to hold  
 3 that, "to the extent Graphnet's counterclaim asserts that MCIT aided and abetted [Graphnet's  
 4 competitor] in [its] monopolistic conduct, it fails to state a viable cause of action against MCIT." *Id.*  
 5 at 129-30. In doing so, the court noted Graphnet had failed "to cite any case law which supports its  
 6 contention that aiding and abetting exists as an independent theory of liability under the Sherman  
 7 Act." *Id.*

8 During the preliminary injunction proceedings, Plaintiffs made two arguments to support  
 9 their aiding and abetting theory. Neither is persuasive. First, Plaintiffs dusted off a century-old case  
 10 to argue that Sherman Act liability attaches to aiders and abettors. ECF 46 at 10 (citing *Lawlor v.*  
 11 *Loewe*, 209 F. 721, 725 (2d Cir. 1913); *Lawlor v. Loewe*, 235 U.S. 522, 534 (1915)). But, in *Lawlor*,  
 12 the defendants joined the conspiracy by acting "in pursuance of a general scheme to unionize" and  
 13 "delegat[ing] authority to their officers unlawfully to interfere with the plaintiffs' interstate  
 14 commerce" through a primary and secondary boycott. 235 U.S. at 533-35. *Lawlor* therefore only  
 15 applies to defendants that enter the conspiracy. In any event, even if *Lawlor* provided for  
 16 independent aiding and abetting liability, that holding would have been abrogated eighty years later  
 17 by *Central Bank*, which sets the modern standard for when aiding and abetting liability attaches to  
 18 federal statutes. 511 U.S. at 181-82. Tellingly, in their memoranda in support of a preliminary  
 19 injunction, plaintiffs failed to cite a single post-*Central Bank* authority holding that aiding and  
 20 abetting is an independent theory of Sherman Act liability. See ECF 46 at 10-11.

21 Second, citing no authority, Plaintiffs contend that *Central Bank* is confined to actions under  
 22 the Securities Exchange Act. ECF 46 at 10-11. But *Central Bank* was not so limited. 511 U.S. at  
 23 181-82 (discussing the general standards governing aiding and abetting liability under federal  
 24 statutes). As a result, courts have routinely applied *Central Bank* to a variety of federal statutes in  
 25 addition to the Sherman Act. See, e.g., *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004-06 (9th Cir.  
 26 2006) (relying on *Central Bank* to deny claim of aiding and abetting violation of Electronic  
 27 Communications Privacy Act); *Pa. Ass'n of Edwards Heirs v. Righenour*, 235 F.3d 839, 843-44 (3d  
 28 Cir. 2000) (applying *Central Bank* to reject a claim for aiding and abetting RICO violation). In

1 doing so, these courts have directly addressed, and rejected, the very argument plaintiffs have  
 2 pressed here. *Freeman*, 457 F.3d at 1006 n.1 (“Freeman argues that [*Central Bank*] is limited to the  
 3 securities law context. However, it is the Supreme Court’s approach to interpreting the statute, not  
 4 the actual statute itself, that is significant. Thus, the fact that the court was interpreting a different  
 5 act of Congress – the Securities Exchange Act – is inconsequential.”); *Rightenour*, 235 F.3d at 843  
 6 (“nothing in *Central Bank* indicates that its reasoning is specific to the particular statute presented in  
 7 that case”).

8 The Sherman Act simply does not provide for aiding and abetting liability. Because  
 9 Plaintiffs’ claims against ATPCO rely on this aiding and abetting theory, Plaintiffs have failed to  
 10 plead a “cognizable legal theory.” Their claims should be dismissed. See *Balistreri v. Pacifica*  
 11 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

## 12 **B. Plaintiffs Fail to Plausibly Allege ATPCO Entered any Price Fixing** 13 **Conspiracy**

14 To the extent Plaintiffs contend that ATPCO directly joined a conspiracy with the Airline  
 15 Defendants, that theory fares no better than their failed aiding and abetting theory. When properly  
 16 distilled to its “well-pleaded facts,” see *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), the  
 17 Complaint alleges conduct entirely consistent with lawful behavior and fails to allege any  
 18 conspiracy, much less that ATPCO joined one.

### 19 **1. The Complaint Does Not Specifically Connect ATPCO to any Alleged** 20 **Conspiracy**

21 “[A]t the heart of an antitrust conspiracy is an agreement and a conscious decision by each  
 22 defendant to join it.” *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341 JSW, 2009 WL 1458025, at  
 23 \*7 (N.D. Cal. May 21, 2009). Therefore, a complaint may not lump defendants together, but instead  
 24 it “must allege that *each individual defendant* joined the conspiracy and played some role in it.” *Id.*  
 25 (emphasis added); see also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)  
 26 (plaintiff must prove each defendant made a “conscious commitment to a common scheme designed  
 27 to achieve an unlawful objective”). To allege each defendant’s participation, a complaint must plead  
 28 “evidentiary facts” about each defendant, such as a “specific time, place, or person involved in the

1 alleged conspiracies.” *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Conclusory  
 2 statements, such as that the defendants “knowingly, intentionally and actively participated in an  
 3 individual capacity in the alleged scheme,” are insufficient absent facts answering basic questions  
 4 such as: “who, did what, to whom (or with whom), where, and when?” *Id.* at 1047-48.

5 Plaintiffs’ allegations fail to meet this standard. Indeed, the Complaint fails to allege *any*  
 6 well-pleaded evidentiary facts specifically connecting ATPCO to the purported Cat-10 conspiracy.  
 7 The Complaint offers no evidentiary facts as to when, where, how, or through whom ATPCO joined  
 8 the purported conspiracy. The Complaint fails to allege the terms of any agreement between  
 9 ATPCO and another defendant. The Complaint offers no evidentiary facts linking ATPCO to the  
 10 supposedly parallel conduct, such as that ATPCO itself changed any Cat-10 rules or made any  
 11 announcements to travel agents. Indeed, the Complaint does not even allege that ATPCO  
 12 communicated *at all* with any of the Airline Defendants regarding *any* Cat-10 changes. *Cf. Bona*  
 13 *Fide Conglomerate, Inc. v. Source America*, No. 14cv0751-GPC-DHB, 2014 WL 4162020, at \*13  
 14 (S.D. Cal. Aug. 20, 2014) (dismissing Sherman Act Section 1 claim because “Plaintiff fail[ed] to  
 15 allege that [a defendant] had any knowledge of any alleged conspiracy”). Instead, the Complaint  
 16 relies on statements like “the Airline Defendants and ATP changed the rules,” Compl. ¶ 32, which  
 17 (i) is a conclusion, not a well-pleaded evidentiary fact, and (ii) improperly lumps all defendants  
 18 together.

19 Courts regularly dismiss complaints that rely on conclusions and fail to plausibly connect  
 20 each defendant to the alleged conspiracy. *See, e.g., Kendall*, 518 F.3d at 1046, 1050; *Title*  
 21 *Insurance*, 2009 WL 1458025 at \*1-2. In *Kendall*, for example, the Ninth Circuit affirmed dismissal  
 22 of a Section 1 claim on remarkably similar facts. The Ninth Circuit first held that the complaint did  
 23 not plead a plausible conspiracy against the banks because it did not “answer the basic questions:  
 24 who, did what, to whom (or with whom), where, and when?” 518 F.3d at 1048. The Ninth Circuit  
 25 went on to hold that the complaint also failed to implicate the Consortiums (who were owned by the  
 26 banks through an association) in the supposed conspiracy, because plaintiffs “simply allege the  
 27 Consortiums are coconspirators . . . of the Banks without any evidentiary facts alleged to support  
 28 such conclusion.” *Id.* at 1046, 1050. Here, Plaintiffs allege no more than what the Ninth Circuit

found was insufficient in *Kendall*.<sup>2</sup>

Lacking evidentiary facts demonstrating how ATPCO conspired, the Complaint ultimately rests on the naked allegation that ATPCO's conduct is a "combination and conspiracy." *See, e.g.*, Compl. ¶¶ 35, 53 ("the Airline Defendants agreed to change ATP's 'CAT 10' rule . . . . This conduct constitutes a combination and conspiracy among the Airline Defendants [and] ATP"). Such "[t]hreadbare recitals of the elements of a cause of action" are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678-79. Plaintiffs' allegations are therefore insufficient to state a claim. *Twombly*, 550 U.S. at 556, 564 ("a bare assertion of conspiracy will not suffice"); *Kendall*, 518 F.3d at 1047-48 ("To state a claim under Section 1 of the Sherman Act, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts").

## 2. Plaintiffs' Allegations of Airline Defendants' Ownership of ATPCO Do Not Support an Inference of Conspiracy

Plaintiffs' allegations regarding the Airline Defendants' ownership of ATPCO do not rescue the claim. The Complaint repeatedly alleges that ATPCO is an airline-owned organization and that, as a result, the conspiracy was effectuated "through ATP." Compl. ¶¶ 15, 26, 29, 31, 32, 35, 37. But under the Ninth Circuit's rule in *Kendall*, mere allegations that industry-owned organizations (such as the consortiums considered in *Kendall* and ATPCO) are "coconspirators, without providing any facts to support such an allegation," do not meet the standard enunciated in *Twombly*. 518 F.3d at 1048, 1050 (dismissing claim that credit card consortiums, in which co-defendant banks had a "proprietary interest," were coconspirators because of the absence of evidentiary facts to support plaintiffs' legal conclusion).

Other courts have reached the same conclusion: allegations that participants in an industry organization conspired are insufficient to show the organization itself also entered the conspiracy.

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<sup>2</sup> Moreover, to state a Section 1 claim, plaintiffs must plead "evidentiary facts which, if true, will prove . . . [an agreement] by which the persons or entities intended to harm or restrain trade or commerce." *Kendall*, 518 F.3d at 1047-48. But plaintiffs here allege no evidentiary facts supporting that ATPCO entered any agreement "intended" to harm competition. *Id.*; *see also High Tek USA, Inc. v. Heat & Control, Inc.*, No. 12-CV-00805 YGR, 2012 WL 2979051, at \*3 (N.D. Cal. July 18, 2012) (dismissing complaint that "identifies" the challenged contract but "does not allege that either [party] entered into the contract for the purpose of harming or restraining commerce").

1 See, e.g., *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, No. 12-cv-3012-WJM-BNB,  
 2 2014 WL 560462, at \*6 (D. Colo. Feb. 13, 2014) (“[T]he Court will not impute the activities of an  
 3 organization’s members to the organization itself absent allegations that the entity participated in the  
 4 conspiracy.”); *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 753 (E.D. Pa. 2011)  
 5 (allegations that trade association members could have conspired “are not sufficient alone to  
 6 plausibly suggest that [the trade association itself] as an entity participated in the conspiracy”); see  
 7 also *Consol. Metal Prods., Inc. v. API*, 846 F.2d 284, 294 n.30 (5th Cir. 1988).

8 Further, an entity does not automatically become party to a purported Section 1 agreement  
 9 merely because that entity’s existence would assist it. See *AD/SAT v. Assoc. Press*, 181 F.3d 216,  
 10 242-43 (2d Cir. 1999) (fact that trade association “encouraged,” “assisted,” and “endorsed” the  
 11 challenged conduct did not prove it had conspired); *Kissing Camels*, 2014 WL 560462 at \*6 (fact  
 12 that trade association was “used as a conduit for bringing about actions detrimental to Plaintiffs”  
 13 insufficient to state Section 1 claim against association); *Hackman v. Dickerson Realtors, Inc.*, 520 F.  
 14 Supp. 2d 954, 964-65 (N.D. Ill. 2007) (dismissing claim that association defendants “encouraged”  
 15 and “contributed to” the violation; “defendant must do more than encourage other defendants in  
 16 order to be liable under the Sherman Act . . . . Encouragement absent an agreement is not enough.”).  
 17 Rather, plaintiff must plausibly allege that the obliging defendant itself made a “conscious  
 18 commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto*, 465 U.S.  
 19 at 764. The Complaint fails to do so.

### 20 3. ATPCO’s Conduct Is Entirely Consistent With Lawful Behavior

21 The Complaint’s allegations are also insufficient because “[a]llegations of facts that could  
 22 just as easily suggest rational, legal business behavior by the defendants as they could suggest an  
 23 illegal conspiracy are insufficient to plead a [Section 1] violation.” *Kendall*, 518 F.3d at 1049.  
 24 Stripped of its legal conclusion, the Complaint merely alleges that ATPCO “engaged in the  
 25 collection and dissemination” of fare data and operated a “fare dissemination system.” Compl.  
 26 ¶¶ 25, 54. This conduct is completely consistent with competitive marketplace behavior.

27 It is well recognized that “[g]athering competitors’ price information can be consistent with  
 28 independent competitor behavior.” *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir.

1999); *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (“If we allowed conspiracy to be inferred from [gathering pricing and other competitive information] alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action”). The Complaint’s allegations thus “just as easily suggest rational, legal business behavior by [ATPCO] as they could suggest an illegal conspiracy” and therefore “are insufficient to plead a [Section 1] violation.” *Kendall*, 518 F.3d at 1049; *see also Consol. Metal*, 846 F.2d at 294 n.30 (“The mere exchange of information . . . is insufficient to establish a conspiracy under section 1 . . . section 1 requires an actual agreement”).

In fact, the Complaint itself explains ATPCO’s “rational, legal business behavior” by acknowledging that ATPCO’s “service” provides airlines with the ability to “easily and flexibly” create and modify airfares and disseminate it to “computer reservation systems.” Compl. ¶¶ 27, 31, 33. This procompetitive and legitimate function does not support an inference of an illegal conspiracy. *In re Citric Acid*, 191 F.3d at 1098 (refusing to infer conspiracy based on gathering and discussing competitor information because “[g]athering information about pricing and competition in the industry is standard fare for trade associations” and serves “legitimate functions”); *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 584 (1925) (“members of trade associations [do not] become . . . conspirators merely because they gather and disseminate information”); *see also In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015) (“mere participation in trade organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement”); *Twombly*, 550 U.S. at 567 n.12 (fact that defendants “belong to various trade associations” did not show conspiracy).

### C. ATPCO’s Conduct Is Not Subject to *Per Se* Invalidation

The Complaint fails to state a claim against ATPCO for another reason: it relies exclusively on an inapplicable theory of *per se* antitrust liability. Plaintiffs ignore that the legality of procompetitive ventures, such as ATPCO, is assessed under the antitrust “rule of reason.” Indeed, the “rule of reason is the presumptive or default standard” applied to Sherman Act cases. *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 3-5 (2006) (this Court “presumptively applies rule of reason analysis”). To overcome this

1 presumption, Plaintiffs must show that ATPCO's conduct is a "naked restrain[t] of trade with no  
2 purpose except stifling of competition." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979).

3 Plaintiffs cannot overcome the presumption that ATPCO's conduct must be judged by the  
4 rule of reason for a number of independent reasons. *First*, the Complaint does not allege that the  
5 sole purpose of the ATPCO fare dissemination system is to stifle competition or ATPCO's conduct  
6 is devoid of *any* procompetitive benefits. Absent such allegations, the *per se* rule is off the table.  
7 *See, e.g., Broadcast Music*, 441 U.S. at 20 (*per se* rules apply only to restraints that have "no  
8 purpose except stifling of competition"); *Leegin Creative Leather Prods, Inc. v PSKS, Inc.*, 551 U.S.  
9 877, 886 (2007) ("[t]o justify a *per se* prohibition a restraint must have manifestly anticompetitive  
10 effects, and lack any redeeming virtue"). In fact, Plaintiffs foreclose applicability of the *per se* rule  
11 by acknowledging that ATPCO's service provides airlines with the ability to "easily and flexibly"  
12 create and modify airfares – a procompetitive function. Compl. ¶ 27; *e.g., Cal. Dental Ass'n v. FTC*,  
13 526 U.S. 756, 771, 775-76 (1999) (holding that if a restraint is justified by *plausible* procompetitive  
14 benefits it must be assessed under the rule of reason).

15 *Second*, Plaintiffs challenge ATPCO's role collecting and disseminating fare data, but  
16 "[i]nformation exchanges, or agreements to share information, are judged under the rule of reason."  
17 ABA Section of Antitrust Law, *Antitrust Law Developments* 97-98 (7th ed. 2012) (collecting cases);  
18 *see also United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975) ("the dissemination of  
19 price information is not itself a *per se* violation of the Sherman Act"); *Wilcox v. First Interstate*  
20 *Bank*, 815 F.2d 522, 527 (9th Cir. 1987) ("mere exchange of price information is not itself violative  
21 of the antitrust laws").

22 *Third*, to the extent Plaintiffs allege that ATPCO is itself a *per se* violation, their challenge  
23 fails because a venture itself is assessed under the rule of reason. *Dagher*, 547 U.S. at 6 n.1;  
24 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (venture that "hold[s] the  
25 promise of increasing a firm's efficiency and enabling it to compete more effectively" must be  
26 evaluated under the rule of reason); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1011-12  
27 (N.D. Cal. 2008) ("When a plaintiff challenges the joint venture itself, the venture must be judged  
28 under the rule of reason standard."). Likewise, a challenge to a venture's core functionality – here,

ATPCO's collection and dissemination of fare data – cannot be condemned *per se*. See *Dagher*, 547 U.S. at 7-8 (*per se* rule inapplicable “where the business practice being challenged involves the core activity of the joint venture itself”); *In re ATM Fee*, 554 F. Supp. 2d at 1013.

Plaintiffs have expressly disavowed a rule of reason claim. ECF 3 at 6, 13-16 (plaintiffs explaining that the Complaint states a *per se* claim with no mention of the rule of reason); ECF 46 at 1-6 (plaintiffs reiterating that the Complaint states a *per se* claim and characterizing ATPCO's “rule of reason” argument as “irrelevant”). And the Complaint does not contain evidentiary facts demonstrating the fundamental ingredients of a rule of reason claim, such as relevant geographic and product markets, market power, and anticompetitive effects. See *Tanaka*, 252 F.3d at 1063-64; *Universal Grading Serv. v. eBay, Inc.*, No. C-09-2755 RMW, 2012 WL 70644, at \*7 (N.D. Cal. Jan. 9, 2012). Because ATPCO's conduct and role must be judged under the rule of reason, the Complaint fails to state a claim against ATPCO. See *Dagher*, 547 U.S. at 7-8 & n.2 (2006) (denying relief where plaintiff pursued only a *per se* claim but conduct was subject to rule of reason); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 191 (7th Cir. 1985) (“Forest City has litigated the antitrust issue as one in which it prevails under the *per se* rule or not at all. ‘Not at all’ it must be.”).

## V. CONCLUSION

For the foregoing reason, ATPCO respectfully requests that the Court grant its motion and dismiss Plaintiffs' Complaint with prejudice.

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