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Posted at 5:54 PM on October 12, 2009 by Sheppard Mullin

Air Cargo Class Action to Proceed -- District Court Overrules Twombly Dismissal Recommendation

On August 21, 2009, Judge John Gleeson of the United States District Court for the Eastern District of New York overruled a magistrate judge's recommendation to dismiss antitrust and other claims asserted in a multi-district putative class action against domestic and foreign airlines that provide airfreight-shipping services. *See In Re Air Cargo Shipping Services Antitrust Litigation*, 06-MD-1775 (JG) (VVP) (MDL No. 1775) (the "Opinion"). The Air Cargo case arises from investigations into the air cargo industry by competition authorities around the globe. Plaintiffs are direct and indirect domestic and foreign purchasers of airfreight shipping services who purportedly paid uncompetitive fees as a result of price-fixing carried out by, *inter alia*, the defendants' concerted imposition of surcharges.

The defendants filed a motion to dismiss plaintiffs' complaint, including the Sherman Act antitrust claims that plaintiffs asserted in five of the seven counts and, on September 26, 2008, Judge Viktor V. Pohorelsky responded to those motions with an 86-page Report and Recommendation. At the time, nine of the defendants had entered guilty pleas in the United States to resolve claims relating to their participation in an alleged price-fixing conspiracy, and had agreed to pay fines ranging from $50 to $350 million dollars. Nonetheless, the magistrate judge recommended the dismissal of the Sherman Act claims without prejudice and with leave to replead, and also recommended the dismissal, with prejudice, of plaintiffs' claims under state antitrust statutes and common law, state consumer protection and unfair competition statutes, and claims arising under European antitrust law. Specifically, relying on the standards established by the United States Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and its recent progeny, the magistrate judge determined that the "the plaintiffs here have failed to give enough specifics to support a plausible conspiracy." *See* Report and Recommendation at 13. In particular, the court held that plaintiffs' general allegations, without supporting details, that there were "meetings," "secret meetings," "communications," and "joint agreements" entered into "at the highest levels" and "in various venues" were insufficient and failed to provide each defendant with fair notice of the specific claims against it. *Id.* at 14-15.

On review by the district court, Judge Gleeson rejected nearly all of the objections to the Report and Recommendation, but overruled the magistrate judge's determination to dismiss plaintiffs' Sherman Act claims with leave to replead because the district court disagreed that plaintiffs' allegations failed to allege enough specifics to support a plausible conspiracy, or failed to give

the defendants sufficient notice of the claims against them. The district court concluded that the allegations summarized in the Report and Recommendation establish plausible grounds to infer an agreement among the defendants to artificially inflate the prices of airfreight shipping services and provide sufficient notice of the claims against the defendants. The district court noted the "the facts have changed significantly" since the Report and Recommendation issued, because the number of defendants that have pled guilty had risen to 15, and three more defendants had entered the Department of Justice's leniency program in connection with criminal charges of fixing prices on air cargo shipments. The district court held that the admissions of price-fixing by so many of the defendants are "suggestive enough to render a § 1 conspiracy plausible." Opinion at 2, *citing Twombly*, 550 U.S. at 556.

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