

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE DOMESTIC AIRLINE TRAVEL
ANTITRUST LIGATION

This Document Relates To:

ALL CASES.

MDL Docket No. 2656
Misc. No. 15-1404 (CKK)

EXECUTIVE SUMMARY

(September 5, 2023)

This Executive Summary accompanies the Court’s Memorandum Opinion and Order DENYING Defendant Delta Air Lines, Inc.’s [464] Unredacted Sealed Motion for Summary Judgment AND Defendant United Airlines, Inc.’s [495-1] Unredacted Sealed Corrected Motion for Summary Judgment. The Court’s rulings may be summarized as follows:

Issues

Defendants Delta Air Lines, Inc. (“Delta”) and United Airlines, Inc. (“United”) (together, the “Moving Defendants”) move for summary judgment in this multidistrict class action civil lawsuit, which is based on allegations of antitrust violations by Moving Defendants as well as Defendants American Airlines, Inc. (“American”) and Southwest Airlines Co. (“Southwest”) (together, the “Settling Defendants”).

Plaintiffs allege that between January 2009 and mid-2015, Defendants conspired in violation of Section 1 of the Sherman Antitrust Act by agreeing to limit industry capacity growth on domestic flights (herein referred to as “capacity discipline”) for the purpose of increasing airfares. “Capacity” is synonymous with the supply of airline seats, most commonly measured by available seat miles (“ASMs”), which is equivalent to one seat flown one mile, and capacity depends at least in part on size and composition of certain inputs such as fleet, cockpit and cabin crew, access to runways (such as through takeoff and landing “slots”), gates and other

infrastructure at origin and destination airports.

All parties acknowledge that the airline industry is an oligopoly, and the industry became more concentrated during the alleged conspiracy period as a result of the several mergers between 2008 and 2013. Furthermore, the parties agree that Defendants had a controlling market share of the United States' domestic market during the alleged conspiracy period.

Argument

To survive summary judgment on an antitrust conspiracy claim based on circumstantial evidence, Plaintiffs must prove a “pattern of parallel behavior” as well as “the existence of one or more plus factors that tends to exclude the possibility that the alleged conspirators acted independently.” *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1368 (N.D. Ga. 2017), *aff'd sub nom. Siegel v. Delta Air Lines, Inc.*, 714 F. App'x 986 (11th Cir. 2018).

First, this Court considered Moving Defendants' argument that there is no evidence of parallel capacity behavior based on allegations that: (1) Defendants' changes in domestic capacity (capacity growth) differed substantially and sometimes exceeded Gross Domestic Product (“GDP”), which is referenced as a benchmark when discussing capacity growth; (2) Defendants' capacity growth rates did not deviate from historical patterns; (3) Moving Defendants' competition at the route level and in other hubs rebuts an inference of conspiracy; (4) Plaintiffs present no evidence that Delta was punished for its above-GDP capacity growth; and (5) there is no evidence of Defendants engaging in private conspiratorial communications.

Second, the Court looked at whether Moving Defendants had legitimate, non-conspiratorial reasons for their capacity actions and their statements about capacity. Finally, the Court considered Moving Defendants' argument that Plaintiffs' plus factors are equally consistent with independent action.

In the course of considering Moving Defendants' arguments, this Court addressed most of Plaintiffs' asserted plus factors; namely, that (a) Defendants had a significant and common motive

for colluding – to increase profitability; (b) Defendants’ announcements and statements expressed commitment to a common plan; (c) Defendants shared sensitive data in order to facilitate the conspiracy, and they engaged in a high level of interfirm communication; (d) economic evidence demonstrates that capacity restraints and fare increases were not explained by reasons other than collusion; (e) airline investors and analysts facilitated and enforced capacity restraints; (f) this was a structural break from Defendants’ past conduct; and (g) economic evidence demonstrates that capacity restraints and fare increases are not explained by reasons other than collusion.

The Court addressed separately Plaintiffs’ asserted plus factor that there were admissions (by certain Defendants) that Defendants’ conduct raised antitrust concerns, and further, that Defendants’ conduct changed after the Department of Justice (“DOJ”) initiated an investigation, in 2015, pertaining to potential anticompetitive conduct by Defendants

In support of their respective arguments, both sides relied upon numerous exhibits as well as opinions proffered by economic and other experts.

Findings Relevant to Parallel Capacity Behavior

(1) Defendants’ Capacity Changes and Relationship to GDP

Moving Defendants asserted that – even while accepting GDP as a benchmark – Defendants’ capacity actions were not parallel because some Defendants’ capacity growth exceeded GDP, such as Delta (during some years), while others did not, such as United. Plaintiffs’ analysis distinguished between price-fixing and supply restriction conspiracies, arguing that with the latter, there need not be uniform changes in capacity or capacity growth in order to restrain capacity, where such restraint elevates prices resulting in benefits to all participants. Both sides relied in large part on expert analysis to support their arguments on this issue. The Court found that inferences by both sides’ experts diverged significantly, but because Plaintiffs’ experts’ inferences were justifiable in the context of a capacity-restricting conspiracy, which permits variable capacity changes, regarding this argument, summary judgment in favor of Moving Defendants was not supported or sustained.

(2) Capacity Changes and “Historical Patterns”

Moving Defendants asserted that, to create an inference of conspiracy, Plaintiffs must demonstrate that,

during the alleged conspiracy period, Defendants clearly deviated from historical industry business practices. Moving Defendants argued that Plaintiffs failed to do so. In this case, all parties agreed that the United States experienced one of the worst economic recessions (the “Great Recession”), beginning in or about December 2007. At the same time, the producer price index for jet fuel capped a series of increases, rising by 60 percent over early 2007 levels by the third quarter of 2008, and peaking at \$4.81 per gallon in September 2008. The parties acknowledged that capacity discipline was a strategy used by airlines in response to the Great Recession and rising fuel prices. Plaintiffs questioned however why the practice of capacity discipline continued after the Great Recession, as demand had increased and fuel prices had stabilized by the second half of 2008 and early 2009 (ultimately hitting \$1.11 per gallon in March 2009). Plaintiffs proffered also that capacity discipline was a marked change from past practice by airlines, evidenced in part by statements made by airline executives. Accordingly, the Court denied summary judgment in favor of Moving Defendants on this argument.

(3) Competition at the Route Level and other Hubs

Moving Defendants asserted that an absence of parallel behavior is demonstrated by the fact that Moving Defendants added capacity in the form of new regular service on each other’s routes, and they built new hubs in the existing hubs of the other Defendants. Plaintiffs argued that a domestic supply-restriction conspiracy does not require parallel conduct at the route level, and furthermore, that Moving Defendants’ focus on capacity changes for selected hubs provided an incomplete picture because those gains were offset by decreases elsewhere. Accordingly, because there were undisputed facts subject to divergent inferences as well as disputed material facts with regard to this argument, summary judgment was neither supported nor sustained.

(4) Punishment or Mechanism to Punish Delta for Above-Capacity Growth

Delta proffered that for a conspiracy to make sense, there must be some sort of punishment mechanism to enforce it; *i.e.*, to discourage Delta from capacity growth in excess of GDP. In this case, there were allegations by Plaintiffs that, after Delta announced its intent to activate previously unused aircraft, Delta was pressured by other Defendants and conceded receiving communications perceived as attempts by other airlines to influence Delta’s pricing and capacity decisions. Delta argued also that it engaged in aggressive capacity growth from 2013-2015, but Plaintiffs pointed again to pressure applied by other airlines and the investment community. Plaintiffs noted further that despite increases in capacity, Delta’s overall capacity during this time frame remained lower than prior to the alleged conspiracy. The Court noted that Plaintiffs provided evidence of pressure by other airlines and investors, as well as the

conflicting statements in the record as to Delta's intention around 2010 to either grow its capacity or commit to upholding capacity limits. Furthermore, in assessing Delta's alleged aggressive capacity growth during 2013-2015, the Court took into account the context of historical capacity rates and movement at hubs. Accordingly, with regard to this argument, summary judgment was neither supported nor sustained.

(5) Lack of Evidence of Defendants Engaging in Private Conspiratorial Communications

Moving Defendants argued that mere contacts, communications and memberships are inadequate to support an inference of a conspiracy. Plaintiffs discussed Defendants' use of airline industry analysts and institutional investors as conduits to facilitate monitoring and enforcement of capacity discipline. Moving Defendants contested that they used private interactions with analysts and investors in order to have conspiratorial communications with each other, or that such analysts and investors did anything other than seek information normally sought. The Court found that where, as here, there are disputed issues of fact, determining the purpose behind the communications by third parties (within the larger framework of the ongoing communications by Defendants) is appropriate for a factfinder. Accordingly, the Court denied summary judgment on this argument.

Findings Relevant to Capacity Actions and Statements

Moving Defendants alleged that there were legitimate, non-conspiratorial reasons for their capacity conduct and statements, which were consistent with their independent economic interest. With regard to capacity actions, Delta proffered that such actions were a response to macroeconomic conditions as Delta emerged from bankruptcy with new management, and then, during 2009-2013, Delta exercised cautious growth. Similarly, United proffered that it responded to economic conditions in 2008-2009, and then, after its merger with Continental, its focus from 2010-2013 was on long-term stability. Beginning around 2013 or 2014, Delta alleged that it increased capacity in an amount greater than GDP, while United asserts that its growth plans were hindered by management turmoil. Plaintiffs focused their argument on the industry profitability that resulted from a unified policy of capacity discipline, and the fact that capacity discipline by any one Defendant would have been impracticable if the others were competing for fares and increasing capacity. While Moving Defendants have proffered economic justifications for their alleged unilateral capacity discipline actions, Plaintiffs' arguments cast doubt on this justification. Plaintiffs proffered evidence that supports their theory that Defendants' capacity actions were not

unilateral but were instead coordinated to limit capacity and drive up prices industrywide. Upon consideration of Defendants' capacity discipline actions, the Court could not rule out that a factfinder could reasonably infer from the evidence the existence of a conspiracy. Accordingly, summary judgment on this basis was denied.

With regard to capacity statements, Moving Defendants asserted that because of the history of airline bankruptcies, investors were wary regarding airlines' excessive capacity growth. In order to attract investors, management began to focus on margin over market share, and in connection therewith, airlines made statements about capacity discipline. Moving Defendants proffered this business justification in support of their capacity statements. In contrast, Plaintiffs argued that Defendants' announcements about capacity plans and the need for capacity discipline were neither useful to consumers nor did such information foster an efficient market. Accordingly, Plaintiffs asserted that such statements could be viewed as messages among Defendants to coordinate capacity. Furthermore, while Moving Defendants discussed the public sharing of capacity information, Plaintiffs proffered that commercially sensitive data was also shared, which was against independent self-interest. The Court concluded that the record in this case was replete with references to public statements pertaining to the need to restrict capacity as well as more private communications regarding the need for Defendants to maintain together this course of action. Plaintiffs presented evidence about the manner, purposes, and effects of sharing such information. That evidence tends to exclude the possibility that it was merely part of the normal course of business – regarding informing investors and keeping track of competitors – as opposed to pressuring and unifying Defendants to keep capacity low, which inured to the benefit of all Defendants. Accordingly, with regard to capacity statements, summary judgment was neither supported nor sustained.

Findings Relevant to Plus Factors

United argued briefly that Plaintiffs' plus factors were equally consistent with independent action because they applied to airlines that were not accused of conspiring, but this ignored the small market share/power of non-defendant airlines. As previously mentioned, most of the plus factors highlighted by Plaintiffs were discussed within the context of this Court's analysis of parallel behavior and capacity actions/statements. The remaining plus factor was Defendants' admissions and change in conduct after

the DOJ investigation began. Plaintiffs explained that Delta airline executives indicated that they experienced communications viewed as inappropriate signaling and attempts to influence Delta's decisions and actions regarding capacity. In opposition, Delta alleged that these communications and attempts at influence were rebuffed. Plaintiffs asserted that after the DOJ commenced its investigation, Defendants changed their practices insofar as they stopped making public statements referencing capacity discipline. Conversely, Moving Defendants proffered that changes in their conduct and practices were cautionary only and not a sign of guilt. Furthermore, according to Plaintiffs' economic expert, after the DOJ started its investigation, airfares began to decline and operating profits fell. In turn, Moving Defendants challenged the regression analysis used by Plaintiffs' expert. In sum, the parties disagreed on the significance of Defendants' admissions and Defendants' changes in practices and actions after the DOJ commenced its investigation. Accordingly, summary judgment regarding this plus factor was denied.

Judgment

This Court concluded that Plaintiffs presented enough evidence demonstrating a pattern of parallel behavior and the existence of one or more plus factors (that tended to exclude the possibility that Defendants acted independently) to survive the motions for summary judgment by Defendants Delta and United, and accordingly, the Court DENIED both motions.

_____/s/_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE