

Client Bulletin

April 2010

Court Dismisses Antitrust Action Alleging Fixing Of Fuel Surcharges By Airlines

As if the skyrocketing cost of fuel did not have enough of a deleterious effect on the airline industry's bottom line, a spate of class action lawsuits alleging that the airlines conspired to fix fuel surcharges so as to improperly profit from the worldwide spike in aviation fuel prices has cost the airlines substantial legal fees and costs.

Following an investigation by the Department of Justice, fifteen airlines pled guilty to fixing surcharges in the air cargo industry, and class action lawsuits arising from those pleas continue in federal district court in Brooklyn, New York. *In re Air Cargo Shipping Services Antitrust Litigation*, 6-MD-1775(JG)(VVP).

Numerous other class action lawsuits have been filed against airlines, alleging that the carriers conspired to fix passenger ticket fuel surcharges on routes between the United States and Europe, and Asia. *In Re Transpacific Passenger Air Transportation Antitrust Litigation*, No. 07-CV-5634 (CRB).

The airline industry got a welcomed bit of relief when Judge Kiyoo Matsumoto, sitting in the U.S. District Court for the Eastern District of New York (Brooklyn) recently dismissed class action antitrust litigation alleging that Air France, KLM, Lufthansa and United conspired to fix prices for passenger fuel surcharges on transatlantic flights between the United States and the European Union between August 2004 and June 2006. *LeFlamme v. Societe Air France*, 2010 WL

1292262 (E.D.N.Y. 2010). In an exhaustive forty-three page opinion, which will be a significant decision in the aviation antitrust field, the Court exhibited keen common sense and pointed out that the increase in fuel surcharges

was at least as likely to have occurred from external factors, *i.e.*, rapidly increasing jet fuel costs, as they were from the alleged nefarious conduct of the airlines in conspiring to fix fuel surcharges.

The plaintiffs alleged that the membership of the defendant airlines in the International Air Transport Association (IATA), and their attendance at IATA Tariff Conferences, particularly one in July of 2003 where a Resolution for prorating fuel surcharge was discussed, gave the airlines ample opportunity to conspire to fix fuel surcharges. Moreover, the Complaint alleged that under the guise of limited antitrust immunity conferred by the U.S. Department of Transportation for certain airline alliances, the airlines improperly discussed such matters as increasing fuel surcharges.

Parsing through these generalized allegations, the Court found that the plaintiffs did not meet the standard announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal v. United States*, 129 S. Ct. 1937 (2009), for articulating a claim for relief sufficient to withstand a motion to dismiss in the context of a Sherman Antitrust Act claim. *Iqbal* and *Twombly* require a showing that there is more than a mere possibility that a defendant acted unlawfully.

The Court found that the discussions at the July 2003 Tariff Conference, alleged to be evidence of a pricing fixing agreement, failed to meet the *Twombly* standard because: (1) there were no specific facts pled which provided any basis to infer that an actual unlawful agreement by the defendants to implement a resolution on fuel surcharges without DOT approval had ever been made; (2) membership and participation in a trade association alone does not give rise to plausible inference of illegal agreement; and (3) the Complaint failed to state any allegations demonstrating that such an agreement, if immunized pursuant to DOT approval of the IATA resolution, would constitute an illegal

agreement to fix prices. In short, “plaintiffs have failed to allege facts establishing how such an agreement would constitute a price fixing agreement in violation of Section 1 of the Sherman Act.” *LaFlamme*, 2010 WL 1292262 at *10.

While generally a Court is willing to grant plaintiffs an opportunity to amend their Complaint, plaintiffs already had been given two chances to amend their pleadings. Accordingly, because plaintiffs did not request any further leave to appeal and had not suggested any additional facts that would merit an amended pleading, the case was dismissed with prejudice and without leave to replead.

Federal multidistrict class action cases are still pending in Brooklyn in the Air Cargo context and in the Northern District of California in the Transpacific Passenger Fuel Surcharge cases. While anticompetitive conduct which results in increased prices to the consumer or shipper cannot be condoned, the Court in *LaFlamme* clearly separated the wheat from the chaff in determining that the airline increase of fuel surcharges was a reasonable economic response to external stimuli, *i.e.* a spike in aviation fuel prices, and an action taken by the airlines without any evidence of underlining conspiratorial motives.



If you have any questions or would like further information, please contact:

Michael J. Holland, Esq.
Condon & Forsyth LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 894-6740
Fax: (212) 370-4482
E-mail:

mholland@condonlaw.com