United States District Court
for the
Southern District of Florida

Bryan Ray, and others, Plaintiffs	)	
	)	
v.	)	Civil Action No. 12-61528-Civ-Scola
	)	
Spirit Airlines, Inc., Defendant	)	

Order on Reopened Motion to Dismiss

THIS MATTER is before the Court on Defendant Spirit Airlines, Inc.'s ("Spirit") Motion to Dismiss (ECF No. 39). The Court has carefully considered the applicable law, the parties' briefing, and supplemental memoranda. For the reasons explained below, the Court grants the Motion.

A. Factual and Procedural Background

Spirit is an "ultra low cost" commercial passenger airline carrier. Plaintiffs allege that Spirit advertises lower fares but adds additional charges and fees to generate "non-ticket revenue." One such fee—the "Passenger Usage Fee" ("PUF")—is charged to consumers who purchase tickets on Spirit's website or through Spirit's call center. Plaintiffs claim that this PUF is actually a supplementary fare hidden amid official taxes and fees. Plaintiffs allege that this scheme allows Spirit to advertise competitive low base fares, but recover the revenue under the pretense of a service fee.

When searching for a flight, a consumer sees only the base fare—the PUF is concealed. Before completing the purchase, the consumer is directed to "confirm" the flights selected. The "Confirm Flights" webpage displays both the base fare and an amount labeled "Taxes & Fees." The webpage does not contain any breakdown of the taxes and fees charged, unless the consumer clicks on a drop-down tab or an additional link labeled "more information." A drop down box reveals numerous official government taxes and fees, along with the PUF. Although the PUF was listed with official governmental taxes and fees, Plaintiff alleges that Spirit kept the PUF to increase its profit margin and induce consumers into believing its fares are lower than its competitors' fares.

The Department of Transportation ("DOT"), which regulates the way in which airlines can advertise fares and fees, permits airlines to charge only

three types of fees: (1) the base airfare, (2) official governmental taxes and fees that are remitted to a governmental or regulatory authority, and (3) carrier-imposed ancillary charges, including baggage fees, change fees, and advance-seat-assignment fees. Plaintiffs allege that the PUF does not fall within any of these three categories. Plaintiffs allege that in addition to the misleading placement of the PUF, the PUF itself is impermissible.

Spirit has a long history of flouting DOT rules and regulations, including rules regarding convenience fees like Spirit's PUF. The DOT issued notices and warnings advising the airline industry that failing to adequately disclose additional fees would violate DOT regulations. In 2008, when Spirit failed to comply, the DOT found that Spirit's failure to include the PUF in the advertised base fare violated the rules prohibiting airlines from engaging in unfair and deceptive trade practices and unfair methods of competition. (*See* Dec. 23, 2008 Consent Order, ECF No. 35-3.) In September 2009, the DOT again found the way in which Spirit advertises the PUF and its fares to be an unfair and deceptive trade practice and unfair method of competition. (*See* Sept. 17, 2009 Consent Order, ECF No. 35-4.) And the DOT found that Spirit failed to adequately disclose its own additional fees in November 2011. (*See* Nov. 21, 2011 Consent Order, ECF No. 35-5.)

Plaintiffs brought this action alleging that Spirit violates the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), by concealing the existence and true purpose of the PUF. The Second Amended Class Action Complaint was filed on February 28, 2013 (ECF No. 35). This Court entered an Order granting the Defendant's Motion to Dismiss and holding that comprehensive federal regulation of the airline industry precluded the RICO claims. Plaintiffs appealed to the Eleventh Circuit, which reversed this Court, and held that federal law does not preempt other federal laws and thus subsequent legislation could preclude Plaintiffs' claims only if Congress had repealed the provision of RICO. *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1221 (11th Cir. 2014). The Eleventh Circuit did not consider the Court's remaining findings. On remand, the Court vacated its earlier ruling and reopened the Motion to Dismiss (ECF No. 39). Defendant filed a Supplemental Memorandum in Support of its Motion (ECF No. 76), Plaintiffs filed a Response (ECF No. 77), and Defendant filed a Reply (ECF No. 78). Accordingly, the Court reviews the Second Amended Complaint with the guidance of the Eleventh Circuit's opinion, and careful review of the supplemental memoranda.

B. Legal Standard

When considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all of the complaint's well-pled factual allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Though the Rule does not require detailed factual allegations, it does require "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (brackets, internal citation, and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

RICO claims must include what is called a predicate act, that is, an act upon which the racketeering activity is based. 18 U.S.C. § 1962(c). Predicate acts include murder, kidnapping, gambling, arson robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical. 18 U.S.C. § 1961. Any act that is indictable under Title 18 is also considered racketeering activity and constitutes a predicate act. Plaintiffs' single claim is based on the predicate acts of wire fraud and mail fraud, criminalized in 18 U.S.C. §§ 1341, 1343. (2d Am. Compl. ¶¶ 14–15, 81; ECF No. 35.) Because Plaintiffs' claim is based on an alleged pattern of racketeering consisting of wire fraud, their substantive RICO allegations must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal* but also with Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. The rule requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010); s*ee also Ambrosia Coal & Constr. Co. v. Pages Morales,* 482 F.3d 1309, 1316 (11th Cir. 2007) (holding that civil RICO claims, which are "essentially a certain breed of fraud claims, must be pled with an increased level of specificity" under Rule 9(b)).

Under Rule 9(b), a plaintiff must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the

alleged fraud." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1380–81 (11th Cir.1997) (applying the requirements to a RICO fraud complaint). The plaintiff must allege facts with respect to each defendant's participation in the fraud. *American Dental Ass'n*, 605 F.3d at 1291; *Brooks*, 116 F.3d at 1381. In order to establish a federal civil RICO violation, Plaintiffs "must satisfy the four elements of proof: (1) conduct (2) of an enterprise (3) through a pattern of (4) racketeering activity." *Williams v. Mohawk Indus., Inc.*, 465 F. 3d 12787, 1282 (11th Cir. 2006).

C. Analysis

In Spirit's Supplemental Memorandum of Law in support of its Motion to Dismiss (ECF No. 76), Spirit argues that the Second Amended Complaint should be dismissed because Plaintiffs fail to plead with specificity any plausible acts of mail or wire fraud, and fail to allege that they were injured by Spirit's conduct. Because the Court finds that Plaintiffs fail to plead sufficient allegations to support the predicate RICO offenses, and fail to plead the existence of an enterprise sufficiently, the Court does not address the injury argument.

Plaintiffs' Complaint must contain several sufficiently alleged layers in order to plead a proper RICO claim. First, they must allege, with sufficient factual support, a RICO violation. Second, they must adequately allege the elements of the predicate act upon which the purported conspiracy is based. And third, the Plaintiffs must include sufficient facts to support their predicate fraud allegations.

1. Plaintiffs fail to plead a conspiracy with requisite specificity.

18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." To state a RICO claim, Plaintiffs must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an enterprise (7) the activities of which affect interstate or foreign commerce." *McCulloch v. PNC Bank, Inc.,* 298 F.3d 1217, 1225 (11th Cir. 2002).

Plaintiffs are unable to allege an enterprise because the Second Amended Complaint lacks allegations that show relationships among those associated

with the enterprise. Plaintiffs allege that Spirit was engaged in an association-in-fact enterprise. (2d Am. Compl. ¶¶ 78(b)(iv); 79.) Association-in-fact enterprises must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

Plaintiffs allege that the enterprise here consists of: (1) Spirit; (2) Spirit's officers and executives; (3) Accenture/Navitarie consulting; (4) Colt Cooper; (5) Objectart Solutions, LLC; and (6) MSP Communications. (2d. Am. Compl. ¶ 78.) None of these purported enterprise-members are named as co-defendants, and the alleged participation consisted of software, consulting, advertising, and communications services provided by the distinct entities. Plaintiffs fail to allege that the companies were engaged in an ongoing relationship with the common purpose of defrauding Spirit's customers. There are no allegations that these other associates intentionally acted to commit fraud and no allegations that the other associates received kickbacks or compensation other than a typical payment/fee for services rendered.

Plaintiffs' Complaint lacks allegations that there were relationships among the purported associates, which centered on a common purpose. Instead, Plaintiffs' descriptions of the alleged RICO enterprise resemble a wheel-and-spoke model conspiracy. In other words, Spirit was the center of the wheel and separately instructed each of the purported participants to assist with various distinct aspects of the alleged enterprise. There are no allegations that the participants interacted or worked in furtherance of the common purpose together. In order for a wheel-and-spoke RICO conspiracy claim to survive a motion to dismiss, the complaint must allege that the conspirators had sufficient awareness of the existence of the other alleged conspirators. *Merrill Lynch v. Young*, 1994 U.S. Dist. LEXIS 2929, 1994 WL 88129 at 100 (S.D.N.Y. March 15, 1994); *Am. Arbitration Ass'n v. Defenseca*, 1996 U.S. Dist. LEXIS 9160 (S.D.N.Y. June 27, 1996). The conspirators do not have to know the identities of all the other conspirators but the conspirators must have knowledge of the other conspirators.

The RICO conspiracy claims in both *Merrill Lynch* and *American Arbitration Association* were dismissed because the complaint alleged no facts which showed that the defendants "manifested a conscious agreement to commit predicate acts or showing knowledge by each of the defendants of the existence of the other spokes of the wheel." *Merrill Lynch v. Young*, 1994 U.S. Dist. LEXIS 2929, 1994 WL 88129 at 102 (S.D.N.Y. March 15, 1994). Similarly here, Plaintiffs only allege that Spirit instructed the named entities. There are

no allegations that the entities knew of one another, let alone allegations of relationships *among* the various entities. *Boyle*, 556 U.S. at 946.

A plaintiff does not need to offer direct evidence of a RICO agreement; its existence "may be inferred from the conduct of the participants." *Am. Dental Ass'n*, 605 F.3d at 1293 (quoting *Republic of Panama v. BCCI Holdings*, 119 F.3d 935, 950 (11th Cir. 1997)). But the allegations in the Complaint do not support an inference of an agreement to the overall objective of the enterprise. Besides including a generic, blanket allegation that the alleged associates' activities "allowed for the concealment of the PUF," Plaintiffs' descriptions of the alleged associates describe the companies' typical business activities. (2d Am. Compl. ¶¶ 77–87.) In other words, the described involvement does not "plausibly suggest a conspiracy." *Am. Dental Ass'n*, 605 F.3d at 1294. This conclusion is "especially true where, as here, there is an 'obvious alternative explanation' for each of the collective actions alleged that suggests lawful, independent conduct." *Id.* at 1295. Here, Plaintiffs' descriptions of the associates' behavior "may just as easily have developed from independent action in a competitive environment as it would from an illegal conspiracy." *Id.* That is, the services the alleged associates rendered are legitimate services that ostensibly make up each companies' day-to-day business activities. As such, Plaintiffs have not plausibly alleged sufficient facts regarding an agreement between Spirit and the other entities to engage in the ongoing *criminal* conduct of an enterprise. *Id.* The allegations of conduct, "absent a plausibly-alleged 'meeting of the minds,' fails to nudge" Plaintiffs' claims "across the line from conceivable to plausible." *Id.* at 1296.

These deficiencies are regulated by the standards set out in in *Bell Atlantic Corp. v. Twombly.* There, the Court explained that although the plaintiff had alleged facts that "could very well signify" an unlawful act, the Court need not accept that inference when there is "an obvious alternative explanation." *Twombly*, 550 U.S. 544, 567 (2007). The Court later explained that in "[d]etermining whether a complaint states a plausible claim for relief" a "reviewing court" should "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not shown that the pleader is entitled to relief." *Id.* (internal punctuation omitted) (quoting Fed. R. Civ. P. 8(a)(2)); *accord Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010).

As this Court has warned in other cases that failed to meet the *Twombly* standard, the troubling thing about claims that ultimately allege permissive behavior is that, if accepted, they "create a precedent for virtually endless liability for parties doing business with each other based on misplaced

conjecture over the use of common words." *McIntyre v. Marriott Ownership Resorts, Inc.*, No. 13-80184, 2015 WL 162948, at *3 (S.D. Fla. Jan. 13, 2015) (Scola, J.). Plaintiffs' claims here include allegations of business activities typically carried out by the purported associates but fail to include any allegations that the associates knew of each other's existence or that they worked in concert with each other. For example, Plaintiffs allege that Accenture/Navitaire provided "comprehensive airline passenger sales and management solutions platform that has been specifically customized for concealment and assessment of the PUF." (2d. Am. Compl. ¶ 78(c).) But there is no allegation that Accenture/Navitarie intended to conceal the fee or had knowledge that Spirit intended to conceal the fee. Instead, the allegations of the purported associates' involvement supports a wheel-and-spoke model in which Spirit is the only member of the enterprise with intent to commit fraud. Without more specific allegations and allegations of intent and knowledge, allegations like this create "virtually endless liability." For instance, a homeowner could sue a merchant as a RICO associate for selling a hammer to a robber who used the hammer to enter the homeowner's home, despite the merchant's lack of knowledge that his typical business activities were being used to commit an illegal act.

Because Plaintiffs fail to allege an enterprise sufficiently, dismissal is appropriate.

2. Plaintiffs' Complaint includes the requisite elements of the predicate acts but Plaintiffs fail to plead the purported fraud with sufficient detail.

Plaintiffs are able to allege sufficiently the next layer of their claims—the elements of the predicate acts in which the enterprise engages. The elements of mail fraud and wire fraud are essentially identical. *United States v. Ward*, 486 F.3d 1212, 1221–22 (11th Cir. 2007). Both offenses require (1) intentional participation in a scheme or artifice to defraud another of money or property; and (2) use or "cause to be used" the mails or wires for the purpose of executing the scheme or artifice. *Id.* (citing *United States v. Hewes*, 729 F.2d 1302, 1320 (11th Cir. 1984). The first element—a scheme or artifice to defraud—"involves the making of misrepresentations intended and reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 1222 (quoting *Beck,* 162 F.3d 1090, 1095.) As for the second element, a person "causes" the mails to be used within the meaning of 18 U.S.C. § 1341, or the wires to be used within the meaning of 18 U.S.C. § 1343, when he acts "with knowledge that the use of the mails [or wires] will follow in the ordinary

course of business, or where such use can reasonably be foreseen, even though not actually intended." *Id.* (quoting *Pereira v. United States*, 347 U.S. 1, 8–9 (1954)).

Plaintiffs allege the first element, alleging that Spirit "deliberately encourage[ed]" customers to purchase tickets while failing to "clearly inform those customers that tickets would be cheaper if purchased at the airport." (2d Am. Compl. ¶ 94(b)). Spirit's conduct was intentional, Plaintiffs allege, and intended to collect "excessive and unconscionable PUF" payments. (*Id.* at ¶¶ 90, 95.) Plaintiffs also include allegations that "Spirit repeatedly used the interstate wire facilities (including the Internet) in the development and in furtherance of its PUF Scheme." (2d Am. Compl. ¶ 91.) Plaintiffs also allege that "Spirit repeatedly sent marketing material to its customers in furtherance of" their scheme. (*Id.* at ¶ 90.) Therefore, Plaintiffs have included the elements of wire and mail fraud in their Second Amended Complaint.

However, simply including the predicate acts' framework within the factual anecdote is not enough. To survive a motion to dismiss, Plaintiffs must allege, with sufficient detail, the purported fraud that comprises the predicate acts. Plaintiffs allege that Spirit's marketing materials tout the benefits of purchasing tickets on Spirit's website but fail to disclose that an additional fee applies to any online purchases. According to the Second Amended Complaint, these advertisements were fraudulent because they omitted material information regarding the actual price of a Spirit airline ticket. But Plaintiffs fail to include detailed factual allegations necessary to sustain a fraud claim. For example, Plaintiffs do not plead the precise statements made in Spirit's advertisements, fail to include examples of advertisements, or when they saw advertisements. Plaintiffs do not include descriptions of what advertisements they saw—whether it was in a newspaper, on television, online, in a mailing or some other medium. Plaintiffs also fail to include costs of purchased tickets, and locations of travel. Plaintiff Dorta alleges that she purchased round trip tickets "in or about February 2010; May 2010; July 2010; and perhaps other dates." (2d Am. Compl. ¶ 20.) She does not allege the exact date *she* purchased tickets, the advertised ticket price, where she saw it advertised, or the steps she went through on the website to purchase the tickets. She also fails to allege when she visited the website. These are the types of detail—the who, what, where, and when—that Rule 9(b) demands.

The other Plaintiffs' allegations fare no better. Plaintiffs Diorio, Gibson, Sily, Rubin, Tilton, and Badaczweski fail to include the advertised ticket price

or where they saw the price advertised. They also fail to include when they visited the website, how many times, and what steps were taken on the website to purchase the tickets—for example, did the Taxes & Fees section have a drop-down menu as the Complaint later alleges in Paragraph 47 or was the website completely lacking any indication that the PUF was included. Plaintiffs also fail to include general information to buttress their allegations, such as where they saw advertisements or how much they paid for their tickets. (2d Am. Compl. ¶¶ 21–26.)

The Second Amended Complaint includes general allegations of how "Class members" entered Spirit's website and selected flight segments, but there is no indication of which Plaintiffs did this at what time, and whether the website was the same for every Plaintiff. (2d Am. Compl. ¶¶ 44–46.) Notably, the Plaintiffs claim that Spirit "was constantly redesigning or reconfiguring the Website and the information contained within." (*Id.* at ¶ 43.) Thus, it is impossible to ascertain with sufficient certainty and detail the manner in which the Spirit website operated for each individual plaintiff and how each plaintiff utilized the website. Dismissal is appropriate for failure to allege sufficiently the predicate fraud.

D. Conclusion

While it is true that the "nondisclosure of material information, even in the absence of any patently false statements, can also constitute a violation of the mail and wire fraud statutes where a defendant has a duty to disclose," Spirit's website *did* disclose the material information Plaintiffs argue is missing. *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1359–60 (11th Cir. 2004). According to the Complaint, despite the PUF's exclusion from the fare-fee, the genesis of the extra fee and its existence were available prior to purchasing the ticket. Plaintiffs devote significant portions of their complaint to several Department of Transportation notices and consent orders in an attempt to prove RICO. (2d. Am. Compl. ¶¶ 57–70). Those notices and orders may support a cause of action finding Spirit's behavior to be deceptive, but not all deceptive and unfair practices are actionable under RICO. *Ray v. Spirit Airlines, Inc.*, 767 F. 3d 1220, 1226 (11th Cir. 2014). The "DOT's administrative process provides for a lower level of culpability [than RICO] but less severe sanctions." *Id.* Specifically, the DOT "need not find deceptive intent, fraud, or injury before levying penalties or ordering a carrier to alter an unfair or deceptive practice or an unfair method of competition." *Id.* "In sharp

contrast, in order to sustain a private civil RICO action, the plaintiffs must plead far more than the existence of an unfair or deceptive practice or an unfair method of competition." *Id.* at 1227.

For the reasons stated above, the Court **grants** Spirit's Motion to Dismiss (ECF No. 39). If Plaintiffs have a good faith basis to believe that they can overcome the deficiencies noted in this Order, Plaintiffs are given leave to file a third amended complaint no later than ***June 18, 2015***. If Plaintiffs do not file an amended pleading by that date, the Court will close the case.

Done and Ordered in chambers at Miami, Florida on June 4, 2015.

Robert N. Scola, Jr.
United States District Judge