

1 of the Northern Mariana Islands (“the Commonwealth” or “CNMI”) to provide commercial
2 passenger flights between Saipan, Tinian, and Rota. (*See generally* Compl., ECF No. 1.) After
3 Defendants obtained a partial dismissal of the Complaint (*see* Mins., ECF No. 33; Mem. Decision
4 Den. in Part, & Granting in Part S. Airways Express, LLC’s Mot. to Dismiss, ECF No. 53), on
5 December 5, 2024, Plaintiff filed a First Amended Complaint (“FAC”) (ECF No. 34), again
6 alleging that Defendants violated the Sherman Antitrust Act across six counts:¹

- 7 • Counts I and II alleges that Defendant Southern Airways had violated sections 1 and 2 of
8 the Sherman Antitrust Act, respectively (FAC ¶¶ 44-52, 53-62);
- 9 • Counts III and IV alleges that Defendant Marianas Southern had violated sections 1 and 2
10 of the Sherman Antitrust Act, respectively (*id.* ¶¶ 63-81, 82-101); and
- 11 • Counts V and VI alleges that Defendant Stewart had violated sections 1 and 2 of the
12 Sherman Antitrust Act, respectively (*id.* ¶¶ 102-121, 122-141).

13 Plaintiff seeks actual and treble damages, prejudgment interest, and reasonable costs and fees
14 against all Defendants jointly and severally. (*Id.* at 25-26 (prayer for relief).)

15 Defendants sought to dismiss Plaintiff’s First Amended Complaint for failure to join the
16 Commonwealth as a necessary and indispensable party, to no avail. (Mins., ECF No. 48; Mem.
17 Decision Den. S. Airways Express, LLC’s Mot. to Dismiss 1st Am. Compl. Pursuant to FRCP
18 12(b)(7), 19, ECF No. 55.) As such, on February 27, 2025, Defendant Southern Airways filed its
19 Answer and Affirmative Defenses (ECF No. 51); Defendants Marianas Southern and Stewart filed
20 a joint Answer (ECF No. 56) a week later.

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23 ¹ The Court previously recounted the factual allegations set forth in the First Amended Complaint in its
24 Memorandum Decision Denying Defendant Southern Airways Express, LLC’s Motion to Dismiss First
Amended Complaint Pursuant to FRCP 12(b)(7), 19. (*See* Mem. Decision Den. Def. S. Airways Express,
LLC’s Mot. to Dismiss 1st Am. Compl. Pursuant to FRCP 12(b)(7), 19, at 2-5, ECF No. 55.)

1 “unadorned, the-defendant-unlawfully-harmed-me accusation[s]” as insufficient to state a facially
2 plausible claim (quoting *Twombly*, 550 U.S. at 555, 557)). A complaint that “pleads facts that are
3 ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and
4 plausibility of “entitlement to relief.”” *Id.* (quoting *Twombly*, 550 U.S. at 557); *see also Starr v.*
5 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (explaining that plausibility pleading requirement
6 ensures that claims are such that “it is not unfair to require the opposing party to be subjected to
7 the expense of discovery and continued litigation”); *Twombly*, 550 U.S. at 558-60 (justifying
8 plausibility pleading standard in need to curb discovery abuse in private antitrust litigation).

9 “For purposes of the [Rule 12(c)] motion, the allegations of the non-moving party must be
10 accepted as true, while the allegations of the moving party which have been denied are assumed
11 to be false.” *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.
12 1989). The Court must construe factual allegations in the complaint “in the light most favorable
13 to the non-moving party,” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009), but “need not . . .
14 accept as true allegations that contradict matters properly subject to judicial notice or by
15 exhibit^[2] . . . [or] are merely conclusory, unwarranted deductions of fact, or unreasonable
16 inferences,” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “Judgment on
17 the pleadings is properly granted when there is no issue of material fact in dispute, and the moving
18 party is entitled to judgment as a matter of law.” *Fleming*, 581 F.3d at 925.

21 ² “Judgment on the pleadings is limited to material included in the pleadings.” *Yakima Valley Mem’l Hosp.*
22 *v. Wash. State Dep’t of Health*, 654 F.3d 919, 925 n.6 (9th Cir. 2011); Fed. R. Civ. P. 12(d) (“If, on a motion
23 under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court,
24 the motion must be treated as one for summary judgment under Rule 56.”). The Court “may, however,
consider certain materials—documents attached to the complaint, documents incorporated by reference in
the complaint, or matters of judicial notice—without converting the motion . . . into a motion for summary
judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

III. ANALYSIS³

A. The Parties' Arguments

Defendants contend that judgment on the entirety of Plaintiff's First Amended Complaint is appropriate because Plaintiff fails to state a claim against any Defendant. First, Defendants contend that monopolization and attempted monopolization claims under the Sherman Antitrust Act require a showing of exclusionary conduct by the alleged monopolist, but that Plaintiff's allegations fail to suggest that Defendants engaged in any such conduct. (S. Airways Express's Mot. for J. on Pleadings 10-14 (contending allegations do not show "predation" because Defendants did not set prices below cost, contract subsidizing Defendants was of limited duration, and Plaintiff monopolized the market prior to Defendants' entry) [hereinafter "Defs.' Mot."], ECF No. 80.) Second, Defendants contend that Plaintiff's allegations fail to show that Defendants were able to "recoup" their losses to the detriment of consumers, another required element of monopolization and attempted monopolization claims. (*Id.* at 14-17.) Third, Defendants contend that Plaintiff relies upon the wrong provisions of the Sherman Antitrust Act (*id.* at 17 (contending that 15 U.S.C. §§ 1-2 do not apply to activities in the Commonwealth)) and, in any event, that Plaintiff's allegations fail to show that Defendants engaged in "interstate" commerce as required for applicability of any relevant provision of the Sherman Antitrust Act (*id.* at 17-19 (noting that Plaintiff only alleges that Defendants "substantially affected interisland travel **in the CNMI**" and contending that 15 U.S.C. § 3, as applied to the Commonwealth, still requires interstate commerce for liability thereunder (quoting FAC ¶¶ 51, 61))).

In opposition, Plaintiff first contends that its factual allegations "plausibly support an inference of anticompetitive conduct," namely, that Defendants entered the Commonwealth's

³ In citing the Parties' filings, the Court uses the pagination in the header generated by CM/ECF across all documents.

1 interisland commercial passenger air travel market with the assistance of funds from the sole-
2 source contract with the Commonwealth, set prices below “economically sustainable levels for
3 the purpose of eliminating” Plaintiff, and that such conduct “tend[ed] to impair the opportunities
4 of rivals” without “further[ing] competition on the merits[.]” (Pl. Star Marianas Air, Inc.’s Resp.
5 in Opp’n to Def. S. Airways Express, LLC’s Mot. for J. on Pleadings 7 [hereinafter “Pl.’s Opp’n”],
6 ECF No. 84; *see also id.* at 8-10 (contending that allegations concerning the characteristics of the
7 market and Defendants’ ability to charge below-market prices support inference that Defendants
8 engaged in unlawful exclusionary conduct); *id.* at 13-14 (asserting that contract with the
9 Commonwealth does not immunize Defendants); *id.* at 16-18 (asserting that allegations plausibly
10 show an unlawful conspiracy among Defendants).) Plaintiff next contends that Defendants’
11 arguments erroneously seek Plaintiff to prove its claims at the pleading stage, as opposed to merely
12 setting forth factual allegations giving rise to a plausible claim for relief. (*Id.* at 9-12 (identifying
13 “[w]hether [Southern Airways’s] pricing was below an appropriate measure of cost,” “whether it
14 was sustained through subsidy rather than efficiency,” and issues concerning recoupment as factual
15 issues that cannot be resolved at the pleading stage); *see also id.* at 18-20 (contending that
16 Defendants’ arguments improperly seek the Court to accept Defendants’ version of facts, draw
17 inferences against Plaintiff, and rely upon materials outside of the pleadings).) Plaintiff then
18 contends that its allegations plausibly establish that Defendants engaged in “interstate” commerce
19 as required for liability under the Sherman Antitrust Act. (*Id.* at 14-16 (asserting that prior
20 decisions and federal regulations deem air transportation activities as inherently “interstate” and,
21 in any event, “practical and economic realities” indicate that the market is not “purely local”); *id.*
22 at 20-21 (asserting that 15 U.S.C. § 3’s “prohibitions . . . are virtually identical to the prohibitions”
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1 in 15 U.S.C. §§ 1 and 2).) Plaintiff further requests that, should the Court find that judgment is
2 warranted, that Plaintiff be afforded leave to amend. (*Id.* at 12-13, 20-21.)

3 In reply, Defendants first highlight that Plaintiff fails to address their arguments concerning
4 the short duration of the contract. (S. Airways Express’s Reply in Supp. of Mot. for J. on Pleadings
5 2-3 [hereinafter “Defs.’ Reply”], ECF No. 85.) Defendants then reiterate their arguments asserting
6 that Plaintiff’s allegations fail to show predation or recoupment (*id.* at 3-8), are brought under the
7 wrong provisions of the Sherman Antitrust Act (*id.* at 8), and fail to establish that Defendants’
8 activities had a substantial effect on “interstate” commerce (*id.* at 8-9).

9 **B. Discussion**

10 The Court first addresses Defendants’ arguments challenging the applicability of the
11 Sherman Antitrust Act due to their jurisdictional nature.⁴ The Court then turns to Defendants’
12 remaining arguments concerning the substantive elements of Plaintiff’s claims under sections 1
13 through 3 of the Sherman Antitrust Act. The Court concludes that Defendants’ Motion is well
14 taken.

17 ⁴ Though Defendants recognize in their Motion that their “interstate commerce” challenge is jurisdictional
18 (*see* Defs.’ Mot. 13), Defendants do not cite any rule apart from Rule 12(c) in moving for disposition of
19 Plaintiff’s First Amended Complaint. Courts have addressed motions asserting a jurisdictional challenge
to the applicability of the Sherman Antitrust Act under Rules 12(b)(1), (b)(6), and 56. *Thornhill Publ’g
Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 732-33 (9th Cir. 1979).

20 Here, as Defendants’ challenge rests on the substance and sufficiency of Plaintiff’s allegations in
21 disputing jurisdiction, Defendants’ challenge at this juncture is appropriately treated as a facial attack on
22 the Court’s subject-matter jurisdiction under Rule 12(b)(1). *Id.* at 733; *Leite v. Crane Co.*, 749 F.3d 1117,
1121 (9th Cir. 2014) (“A ‘facial’ attack accepts the truth of the plaintiff’s allegations but asserts that they
23 ‘are insufficient on their face to invoke federal jurisdiction.’ The district court resolves a facial attack as it
24 would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and drawing
all reasonable inferences in the plaintiff’s favor, the court determines whether the allegations are sufficient
as a legal matter to invoke the court’s jurisdiction.” (citations omitted) (quoting *Safe Air for Everyone v.
Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004))). Therefore, engaging in further factual analysis or converting
Defendants’ challenge to a Rule 56 motion at this juncture is unnecessary.

1 **1. Jurisdiction**

- 2 **a. “Interstate commerce” or “commerce with a foreign nation” is required to**
3 **establish subject-matter jurisdiction under sections 1 and 2 of the Sherman**
4 **Antitrust Act, while jurisdiction under section 3 over conduct arising in the**
5 **Commonwealth requires such conduct to be part of commerce with the District of**
6 **Columbia or a territory other than the Commonwealth.**

7 In enacting the Sherman Antitrust Act, ch. 647, §§ 1 *et seq.*, 26 Stat. 209 (1890) (current
8 version at 15 U.S.C. §§ 1 *et seq.*), “Congress meant to deal comprehensively and effectively with
9 the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that
10 end to exercise all the power it possessed.” *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427,
11 435 (1932). As relevant here, the first three sections of the Sherman Antitrust Act set forth textually
12 identical prohibitions against anticompetitive conduct, differing only in the location of, or the
13 jurisdictional entities engaged in, trade and commerce.⁵ *Compare* 15 U.S.C. § 3(a) (prohibiting
14 “[e]very contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or
15 commerce”), *with id.* § 1 (identical prohibitory text); *compare id.*, § 3(b) (making it unlawful to
16 “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons,
17 to monopolize any part of the trade or commerce”), *with id.* § 2 (identical prohibitory text).
18 Sections 1 and 2, codified at 15 U.S.C. §§ 1 and 2, respectively, prohibit anticompetitive conduct
19 involving “trade or commerce *among the several States*, or with foreign nations[.]” 15 U.S.C.
20 §§ 1, 2 (emphasis added). In contrast, section 3 applies to “trade or commerce *in any Territory of*
21 *the United States*[,]” “between any such Territory and another,” or “between any such Territory or
22 Territories and any State or States or the District of Columbia, or with foreign nations[.]” *Id.*
23 § 3(a), (b) (emphasis added). The difference in language concerning location or jurisdictional

24 ⁵ Though sections 1 to 3 of the Sherman Antitrust Act only provide for a criminal penalty (and thus vest enforcement authority solely in the United States, *see* 15 U.S.C. § 4), section 4 of the Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15), authorizes private parties who are injured “by reason of anything forbidden in the antitrust laws” to “sue therefor[.]” 15 U.S.C. § 15(a).

1 entity reflects two distinct sources of authority for Congress to regulate anticompetitive conduct,
2 with corresponding ramifications for subject-matter jurisdiction.

3 On one hand, in enacting sections 1 and 2, Congress relied upon its “broad authority . . .
4 under the Commerce Clause” to regulate not only “activities *in* interstate commerce” but also
5 “other activities, while wholly local in nature, [that] nevertheless substantially *affect* interstate
6 commerce.” *McLain v. Real Est. Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980) (“This Court
7 has often noted the correspondingly broad reach of the Sherman Act.”). Thus, sections 1 and 2
8 contain a “jurisdictional requirement” that the activities complained of must either be “in
9 commerce” or have an “effect on commerce.” *Id.* at 242; *Thornhill Publ’g Co., Inc. v. Gen. Tel.*
10 *& Elecs. Corp.*, 594 F.2d 730, 737 (9th Cir. 1979) (quoting *Las Vegas Merch. Plumbers Ass’n v.*
11 *United States*, 210 F.2d 732, 739 n.3 (9th Cir. 1954), in explaining the two bases for jurisdiction
12 under the Sherman Antitrust Act: “[t]hat the acts complained of, occurred within the flow of
13 interstate commerce” or “occurred wholly on the state or local level, in intrastate commerce, but
14 substantially [a]ffected interstate commerce”); *see also Atl. Cleaners*, 286 U.S. at 434 (observing
15 that section 1, “having been passed under the specific power to regulate commerce,” is “necessarily
16 . . . limited by the scope of that power”).

17 On the other hand, Congress’s enactment of section 3 relied upon its “general power” to
18 legislate for “all territories to which its powers might extend,” *Puerto Rico v. Shell Co.*, 302 U.S.
19 253, 259 (1937), regardless of incorporated or unincorporated status, *United States v. Standard Oil*
20 *Co. of Cal.*, 404 U.S. 558, 560 (1972); *see also Norman’s on the Waterfront, Inc. v. Wheatley*, 444
21 F.2d 1011, 1016-19 (3rd Cir. 1971). As such, section 3 extends to trade and commerce carried out
22 in the territories without the requirement that the activities at issue must be in, or have a substantial
23 effect on, interstate commerce. *See, e.g., Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299

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1 (9th Cir. 1986) (reversing summary judgment on Guam souvenir shop owners’ complaint alleging
2 tour operators and competing souvenir vendors directed tourists visiting Guam to the vendors, and
3 away from plaintiffs’ shop, in exchange for payments that the vendors paid but plaintiffs refused
4 to pay); *Standard Oil Co.*, 404 U.S. at 558 (reversing dismissal of complaint for conspiracy to
5 monopolize distribution and sale of petroleum products in American Samoa); *Wheatley*, 444 F.2d
6 at 1016-19 (invalidating alcohol fair-trade scheme enacted by Virgin Islands Legislature); *Tribolet*
7 *v. United States*, 95 P. 85, 88 (Ariz. 1908) (affirming conviction for conspiracy and attempted
8 monopolization of slaughter and sale of meat in single municipality within then-territory of
9 Arizona).

10 Defendants assert, however, that even if Plaintiff’s claims were construed as section 3
11 claims,⁶ section 3, as applied to the Commonwealth through the Covenant to Establish a
12 Commonwealth of the Northern Mariana Islands in Political Union with the United States of
13 America (“the Covenant”), Pub. L. 94-241, 90 Stat. 263 (1976) (reproduced at 48 U.S.C. § 1801
14 note), still maintains the requirement that the conduct complained of must occur in, or substantially
15 affect, interstate commerce. The Court concludes that Defendants are partially correct.

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19 ⁶ Although plaintiffs are well-advised to research and identify the correct legal authority underlying a cause
20 of action, *see McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996) (detailing “unfair burdens on
21 litigants and judges” where complaint is “confusing,” including risk of surprise to defendants, “wast[ing]”
22 the time of judges in determining “what claims are made against whom,” and impact on rights of litigants
23 in other cases), “[a] complaint should not be dismissed if it states a claim under any legal theory, even if
24 the plaintiff erroneously relies on a different legal theory,” *Haddock v. Bd. of Dental Examiners*, 777 F.2d
462, 464 (9th Cir. 1985); *see also* Fed. R. Civ. P. 8(e) (“Pleadings must be construed so as to do justice.”).
The Court further notes that dismissal based on Plaintiff’s citing sections 1 and 2, instead of section 3,
would be particularly inappropriate here as the conduct prohibited by sections 1 and 2 would also be
prohibited by section 3, the provisions are all immediately adjacent to each other within the Sherman
Antitrust Act and its codified reproduction in the U.S. Code, and Defendants are plainly on notice of the
factual and legal bases for Plaintiff’s claims.

1 The Commonwealth is unique among the territories because the relationship between the
2 United States and the Commonwealth was created in 1976 through the ratification, by both the
3 United States and the Commonwealth, of a legal document—the Covenant—that

4 acknowledges Congressional power over territories as provided in
5 the Constitution’s territorial clause which provides that “Congress
6 shall have Power to dispose of and make all needful Rules and
7 Regulations respecting the Territory or other Property belonging to
8 the United States.” However, although the territorial clause
9 provides the Constitutional basis for Congress’s legislative authority
10 in the Commonwealth, *it is by the Covenant that we measure the*
11 *limits of that power.*

12 *Saipan Stevedore Co. Inc. v. Dir., Off. of Workers’ Comp. Programs*, 133 F.3d 717, 721 (9th Cir.
13 1998) (emphasis added) (quoting U.S. Const. art. IV, § 3, cl. 2); *see also United States ex rel.*
14 *Richards v. De Leon Guerrero*, 4 F.3d 749, 754-55 (9th Cir. 1993) (explaining that the Covenant
15 limits Congress’s authority to pass legislation with respect to the Commonwealth such that “the
16 United States must have an identifiable federal interest that will be served by the relevant
17 legislation,” and such federal interest must be balanced “against the degree of intrusion into the
18 internal affairs of the CNMI” in view of the Covenant’s provisions guaranteeing the right of self-
19 government and requiring mutual consent of the United States and the Commonwealth to modify
20 any fundamental provisions of the Covenant). In other words, the Covenant constitutes a
21 prospective and retrospective *statutory* limit Congress imposed on its exercise of its *constitutional*
22 “general power” under the Territorial Clause, *Puerto Rico*, 302 U.S. at 259, to legislate with respect
23 to the Commonwealth. Consequently, whether Congress elected to “exercise all the power it
24 possessed,” *Atl. Cleaners*, 286 U.S. at 435, in extending the Sherman Antitrust Act to encompass
the Commonwealth turns on the Covenant’s “certain provisions” providing that “the United States
Constitution and certain United States statutes will apply to the CNMI. For those laws not

1 explicitly addressed, the Covenant provides formulae for determining whether a federal law will
2 apply to the CNMI.” *Salas v. United States*, 116 F.4th 830, 836 (9th Cir. 2024).

3 Sections 501 and 502 of the Covenant enumerate specific laws of the United States that are
4 applicable to the Commonwealth. The Sherman Antitrust Act is not among those enumerated laws.
5 See Covenant §§ 501, 502(a)(1), 90 Stat. at 267-68. As such, section 502(a) provides the
6 “formula[] for determining whether a federal law will apply,” *Salas*, 116 F.4th at 836, as follows:

7 (a) *The following laws of the United States in existence on the*
8 *effective date of this Section and subsequent amendments to such*
9 *laws will apply to the Northern Mariana Islands, except as*
10 *otherwise provided in this Covenant:*

11 (1) those laws which provide federal services and financial
12 assistance programs and the federal banking laws as they apply
13 to Guam; Section 228 of Title II and Title XVI of the Social
14 Security Act as it applies to the several States; the Public Health
15 Service Act as it applies to the Virgin Islands; and the
16 Micronesian Claims Act as it applies to the Trust Territory of the
17 Pacific Islands;

18 (2) *those laws not described in paragraph (1) which are*
19 *applicable to Guam and which are of general application to the*
20 *several States as they are applicable to the several States; and*

21 (3) those laws not described in paragraph (1) or (2) which
22 are applicable to the Trust Territory of the Pacific Islands, but
23 not their subsequent amendments unless specifically made
24 applicable to the Northern Mariana Islands, as they apply to the
Trust Territory of the Pacific Islands until termination of the
Trusteeship Agreement, and will thereafter be inapplicable.

19 Covenant § 502(a), 90 Stat. at 268 (emphasis added). “Thus, previously enacted laws which are
20 of general application to the States and which apply to Guam, apply to the Northern Mariana
21 Islands.” *Saipan Stevedore Co.*, 133 F.3d at 721.

22 The Sherman Antitrust Act plainly satisfies both conditions for applicability to the
23 Commonwealth. First, the Sherman Antitrust Act is applicable to Guam by virtue of the expansive
24 definition of “commerce” as used therein. See 15 U.S.C. § 12(a) (defining “commerce” to include

1 “trade or commerce among the several States and with foreign nations,” “between . . . any Territory
2 of the United States and any State, Territory, or foreign nation,” “between any insular possessions
3 or other places under the jurisdiction of the United States,” “between any such possession or place
4 and any . . . Territory of the United States,” and “within . . . any Territory or insular possession or
5 other place under the jurisdiction of the United States” but explicitly only excluding the
6 Philippines); *see also Salas*, 116 F.4th at 840 (“[A] statute that references the United States and its
7 territories and possessions is a strong indication that it is meant to apply in the CNMI.”). In
8 addition, as “[t]he Covenant’s framers considered the term ‘applicable to Guam’ to mean not only
9 ‘applicable with respect to’ Guam, but also to mean ‘applicable within’ Guam,” *Northern Mariana*
10 *Islands v. United States*, 279 F.3d 1070, 1073 (9th Cir. 2002), the Sherman Antitrust Act’s lack of
11 an exemption for Guam is sufficient: a federal law need not “have a practical effect in Guam for
12 the law to apply,” *Salas*, 116 F.4th at 841; *Northern Mariana Islands*, 279 F.3d at 1073 (“That is,
13 the amendments, regardless of their treatment of Guam, are law within Guam. Thus, these
14 amendments *are* ‘applicable to Guam’ . . .”).

15 Second, the Ninth Circuit has explained that the phrases “applicable to” and “application
16 to” in section 502(a)(2) of the Covenant are to be construed identically: “Because application to
17 Guam is understood to mean ‘applicable with respect to’ and ‘applicable within’ Guam, it follows
18 that ‘application to the several States’ likewise means ‘applicable with respect to’ and ‘applicable
19 within’ the several States.” *Salas*, 116 F.4th at 841 (citing *Northern Mariana Islands*, 279 F.3d at
20 1073). As the Sherman Antitrust Act does not exclude or exempt any States from its provisions,
21 the Sherman Antitrust Act is generally applicable to the States.

22 Thus, with both conditions set forth in section 502(a)(2) of the Covenant satisfied, that
23 same section provides how the Commonwealth is to be treated under the Sherman Antitrust Act:
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1 the Sherman Antitrust Act “will apply to the Northern Mariana Islands” as it is “applicable to the
2 several States.” Covenant § 502(a)(2), 90 Stat. at 268. Such language “requires [the Court] to
3 treat the CNMI as if it were a State for the purposes of the [Sherman Antitrust Act.]” *Northern*
4 *Mariana Islands*, 279 F.3d at 1072; *see, e.g., DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992)
5 (holding that section 502(a)(2) of the Covenant rendered the Commonwealth as not a “person”
6 within the meaning of 42 U.S.C. § 1983 in light of Supreme Court decisions holding that Guam
7 and the States are not “persons” within the meaning of 42 U.S.C. § 1983). Conduct arising in a
8 State is not subject to the Sherman Antitrust Act unless it touches upon interstate commerce or
9 commerce with a foreign nation, 15 U.S.C. §§ 1, 2; *McLain*, 444 U.S. at 242, or if it involves trade
10 and commerce with a territory or the District of Columbia, 15 U.S.C. § 3(a), (b). Accordingly,
11 conduct arising in the Commonwealth is not subject to sections 1 and 2 of the Sherman Antitrust
12 Act unless it touches upon interstate commerce or commerce with a foreign nation,⁷ and not subject
13 to section 3 of the Sherman Antitrust Act unless it involves trade and commerce with the District
14 of Columbia or a territory other than the Commonwealth.⁸

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16 ⁷ To be clear, allegations premised on commerce between the Commonwealth and another territory or the
17 District of Columbia without accompanying allegations describing the impact on commerce with another
18 State or foreign nation would be insufficient to establish jurisdiction under sections 1 and 2. Such
interterritorial commerce would still be “commerce” between two entities that are not States for
constitutional purposes—and thus not within Congress’s authority under the Commerce Clause.

19 The Court need not pass on whether the Covenant acts as a later-in-time legislative act that amended
20 sections 1 and 2 to be premised also on Congress’s authority under the Territorial Clause because the plain
text of sections 1 and 2, combined with the provisions of the Covenant, would still require a showing of
interstate commerce to establish jurisdiction under those sections over conduct arising within the
Commonwealth.

21 ⁸ The Court’s conclusion here is confirmed by materials produced by the Marianas Political Status
22 Commission, the Northern Mariana Islands Commission on Federal Laws, and the Department of the
23 Interior’s Office of the Solicitor, three entities tasked with reviewing the applicability of federal law to the
Commonwealth in differing contexts.

24 The Marianas Political Status Commission (MPSC) was the body representing the people of the
Northern Marianas in negotiations with the United States concerning the documents that would create the

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3 current political and legal relationship between the United States and what would become the
4 Commonwealth. The MPSC produced a “contemporaneous analysis of the Covenant,” *De Leon Guerrero*,
5 4 F.3d at 754, that is “authoritative” in “assist[ing the Court] in discerning the meaning of the Covenant[,]”
6 *Northern Mariana Islands*, 399 F.3d at 1065. As to section 502(a)(2) of the Covenant, the MPSC explained:

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8 Subsection (a)(2) is the general formula for the application of federal laws.
9 It contains a two-prong test: applicability to Guam and applicability
10 generally to the states. This test is employed for two reasons. . . . Second,
11 it is intended to prevent the application of laws so as to reach
12 intraterritorial matters within the Northern Mariana Islands where similar
13 intrastate matters within the states are not reached. To reach such matters
14 in the Northern Marianas would be inconsistent with the guarantee of local
15 self-government contained in the Covenant.

16 Marianas Pol. Status Comm’n, Section by Section Analysis of the Covenant to Establish a Commonwealth
17 of the Northern Mariana Islands 53 (1975).

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19 The Covenant provided for the establishment of the Northern Mariana Islands Commission on
20 Federal Laws “to survey the laws of the United States and to make recommendations to the United States
21 Congress” as to whether federal laws not applicable to the Commonwealth should be made applicable and
22 whether federal laws applicable to the Commonwealth should be made inapplicable. Covenant § 504, 90
23 Stat. at 268; *Salas*, 116 F.4th at 837. In its second interim report, the Commission engaged in a title-by-
24 title survey of the United States Code. *See* N. Mar. I. Comm’n on Fed. L., *Welcoming America’s Newest
Commonwealth: The Second Interim Report of the Northern Mariana Islands Commission on Federal Laws
to the Congress of the United States 21-22 (1985) (explaining methodology) [hereinafter “2d Interim
Report”]*. As to the Sherman Antitrust Act, the Commission observed:

25
26 Present applicability.

27 The Sherman Antitrust Act and the Clayton Act apply to the
28 Territories and insular possessions as well as the States. . . .

29 Guam is an insular possession of the United States and well within
30 the ambit of congressional power. The antitrust laws are consequently
31 applicable to Guam. By operation of section 502(a)(2) of the Covenant,
32 those laws also apply to the Northern Mariana Islands.

33 [. . .]

34 Discussion.

35 The residents of the Northern Mariana Islands, few in number and
36 distant from alternative suppliers, are particularly vulnerable to
37 anticompetitive practices. The federal antitrust laws should continue to
38 apply to the Northern Mariana Islands for the protection of those residents.

39 If the antitrust laws were made inapplicable to the Northern
40 Mariana Islands, the Northern Mariana Islands could become a haven for
41 arrangements that would have adverse effects not only on competition and

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5 consumers in the Northern Mariana Islands but also on competition and
6 consumers in the United States. . . .

7 2d Interim Report at 314.

8 The Department of the Interior generally supervises the relations between the Commonwealth and
9 the United States. Exec. Order No. 12,572, 51 Fed. Reg. 40,401 (Nov. 3, 1986). In 1993, its Office of the
10 Solicitor published a three-volume work titled *The Application of Federal Laws in: American Samoa, Guam, The Northern Mariana Islands, The U.S. Virgin Islands*, also surveying the U.S. Code title-by-title as it applied to the four territories. See Ruth G. Van Cleve, Dep’t of Interior Off. of Solicitor, *The Application of Federal Laws in: American Samoa, Guam, The Northern Mariana Islands, The U.S. Virgin Islands xxv-xxx* (1993) [hereinafter “Van Cleve”]. As to the Sherman Antitrust Act, the Office observed:

11 Few legal conclusions in this study are more certain than that the principal
12 Federal laws pertaining to Monopolies and Combinations in Restraint of Trade (15 U.S.C. 1-36)—namely, the Sherman Act enacted in 1890 (15 U.S.C. 17 [sic]), and the Clayton Act, in 1914 (15 U.S.C. 12-27)—apply to the territories of the Virgin Islands, Guam, Samoa, and the Northern Marianas[.]

14 The Sherman Act has contained from the outset a provision
15 concerning its application to the “Territories” of the United States (15 U.S.C. 3), making clear that its constraints apply within each “Territory”, as well as to commerce between the Territories, a Territory and a State, and a Territory and a foreign country. . . .

17 The Puerto Rico and Samoa cases [*Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558 (1972)] make clear that the Sherman Act applies to the Virgin Islands and Guam. . . . By operation of section 502(a)(2) of the Covenant, the Sherman Act also applies to the Northern Marianas, but only to commerce between the Northern Marianas and a place outside of it, owing to the language of the section 502(a)(2) of the Covenant. (As has often been pointed out in this study, section 502(a)(2) operates to extend to the Northern Marianas those laws, enacted before January 9, 1978, that are both applicable to Guam and “of general application to the several States”, but such laws then become applicable to the Northern Marianas “as they are applicable to the several States”. Because the Congress cannot regulate intra-State commerce, so section 502(a)(2) results in its not regulating intra-Northern Marianas commerce.)

24 Van Cleve at 276-77 (Memorandum No. 15-1, Sept. 1986).

1 **b. Plaintiff’s allegations plead sufficient factual material to show that Defendants’**
2 **activities had a substantial effect on “interstate commerce” for jurisdiction under**
3 **sections 1 and 2 of the Sherman Antitrust Act.**

4 Defendants’ challenges to Plaintiff’s reliance on sections 1 and 2 of the Sherman Antitrust
5 Act turn on whether Plaintiff’s allegations of Defendants’ conduct establishes that Defendants’
6 conduct was “in” interstate commerce or “substantially affect[ed]” interstate commerce. *McLain*,
7 444 U.S. at 242 (emphasis removed). “In determining jurisdiction under the Sherman Act, the
8 focus of the inquiry is the defendant’s business activities.” *Musick v. Burke*, 913 F.2d 1390, 1395
9 (9th Cir. 1990). Plaintiff’s First Amended Complaint repeatedly asserts that Defendants’ activities
10 “substantially affected interisland travel in the CNMI, directly causing disruption and
11 unreasonable restraint on trade within the flow of commerce.” (FAC ¶¶ 51, 61, 80, 99, 119, 139.)
12 Thus, the relevant inquiry is whether Plaintiff’s allegations set forth sufficient factual material to
13 establish that Defendants’ activities, “local in nature, . . . [have] an effect on some other appreciable
14 activity demonstrably in interstate commerce.” *McLain*, 444 U.S. at 242. The Ninth Circuit has
15 explained:

16 Whether the defendant’s activities sufficiently affect interstate
17 commerce to create Sherman Act jurisdiction is a highly fact-based
18 question calling for common sense judgment. Applying such
19 common sense judgment means that while no specific dollar amount
20 need be alleged and a plaintiff may show aggregated effects on
21 commerce of defendant’s activities, the alleged effect still must be
22 considered in proportion to the parties’ businesses as a whole.

23 *Musick*, 913 F.2d at 1395 (internal quotation marks and citations omitted); *see also McLain*, 444
24 U.S. at 242-43 (plaintiff’s burden to demonstrate “substantial effect” does not require the “more
25 particularized showing” of actual effect caused by the alleged anticompetitive conduct because
26 “liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect”).

27 Here, Plaintiff’s allegations demonstrate that Defendants’ commercial passenger air travel
28 services were intended to, *inter alia*, provide passengers with increased opportunities to fly to

1 Guam to transit to other destinations, including Honolulu. (FAC ¶¶ 31-32.) Furthermore, the
2 language of the contract and accompanying documents indicate that Defendants’ services were
3 part of a bid to “maintain or revive tourism and tourism-related activities” after “the COVID-19
4 pandemic severely curtailed tourism to the CNMI from outside the CNMI” (*Id.*, Ex. A, at 3
5 (contract), ECF No. 34-1; *see also id.*, Ex. E, at 29 (justification letter) (observing that “[t]he
6 CNMI’s economy . . . is solely reliant on *international travel and tourism*” and COVID-19
7 pandemic “halted” the CNMI’s economy and “commercial activities on all three islands have been
8 detrimentally impacted” (emphasis added)), ECF No. 34-1.) Defendants’ provision of additional
9 flights to Guam would “allow tourists and potential visitors a secondary accommodation option
10 and additional flight schedules for travel into the island of Saipan transiting from the island of
11 Guam” through same-day connectivity with the once-daily Honolulu-Guam flight operated by a
12 national air carrier. (FAC, Ex. E, at 32; *id.*, Ex. F, at 36 (“Airline Incentive Framework”)
13 (agreement to provide same-day connectivity with United Airlines’s Honolulu-Guam flight in
14 exchange for funding from the Commonwealth), ECF No. 34-1.) And Defendants’ alleged
15 business activities would involve the purchase and relocation of aircraft from the U.S. mainland
16 (*i.e.*, other States) to the Commonwealth alongside the establishment of facilities to host transient
17 personnel drawn from Defendant Southern Airways’s activities in other regions of the U.S.
18 mainland. (FAC, Ex. F, at 40-43 (Defendants’ air services proposal in support of funding request).)
19 As such, Plaintiff has plausibly alleged that Defendants’ activities fall within the jurisdiction of
20 sections 1 and 2 of the Sherman Antitrust Act because Defendants’ activities have a substantial
21 effect on interstate commerce arising from passenger air traffic—namely, increasing passenger
22 volume and lower consumer costs tied to Guam, Honolulu, and other international routes—and
23 accompanying logistical and support activities, involving resources and personnel from the U.S.

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1 mainland, for Defendants’ services. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-30
2 (1991) (“necessary interstate nexus” existed where limited services were regularly performed for
3 out-of-state persons, generated revenues from out-of-state sources, and were “part of the entire
4 operation” of the enterprise); *Musick*, 913 F.2d at 1398 (jurisdiction exists where plaintiff provides
5 sufficient material to “at least support an inference that some quantifiable effect on commerce of
6 defendant’s intended interference with plaintiff’s business has occurred”); *McLain*, 444 U.S. at
7 246 (“not insubstantial effect” on interstate commerce exists where allegations bear on impact to
8 activities that “necessarily affect both the frequency and the terms” of ultimate interstate
9 commercial transactions).

10 Therefore, the Court finds that Plaintiff’s allegations have set forth sufficient factual
11 material, accepted as true, to establish jurisdiction under sections 1 and 2, *i.e.*, that Defendants’
12 conduct falls within Congress’s authority to regulate interstate commerce pursuant to the
13 Commerce Clause.

14 **c. In the alternative, Plaintiff’s allegations plead sufficient factual material to show**
15 **that Defendants’ activities involve trade or commerce with a territory other than**
16 **the Commonwealth for jurisdiction under section 3 of the Sherman Antitrust Act.**

17 In the alternative, jurisdiction over Plaintiff’s claims under section 3 of the Sherman
18 Antitrust Act also exists. As discussed *supra*, Defendants are alleged to have entered into the
19 contract with the Commonwealth to provide additional flights to Guam and subsequently did
20 operate such flights. Such allegations are sufficient to establish that Defendants’ conduct touched
21 upon “trade or commerce . . . between any . . . Territory [*i.e.*, Guam] . . . and any State [*i.e.*, the
22 Commonwealth].” 15 U.S.C. § 3(a), (b).

23 Therefore, as the Court finds that it has subject-matter jurisdiction over Plaintiff’s claims,
24 the Court now turns to the merits of whether Plaintiff states a claim under sections 1, 2, or 3 of the
Sherman Antitrust Act.

1 **2. Merits⁹**

2 “The Sherman Act contains two principal prohibitions.” *Epic Games, Inc. v. Apple, Inc.*,
 3 67 F.4th 946, 973 (9th Cir. 2023). Section 1, “target[ing] concerted action,” *id.* at 973-74, forbids
 4 “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade
 5 or commerce among the several States, or with foreign nations,” 15 U.S.C. § 1. Section 2,
 6 “target[ing] independent action,” *Epic Games*, 67 F.4th at 974, makes it unlawful to “monopolize,
 7 or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize
 8 any part of the trade or commerce among the several States, or with foreign nations,” 15 U.S.C.
 9 § 2. *See also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-69 (1984) (discussing
 10 rationale underlying Congress’s intent to distinguish between concerted and independent action).

11 **a. Section 1 Claims (Counts I, III, V)**

12 To state a claim under section 1, Plaintiff

13 must plead facts which, if true, will prove “(1) a contract,
 14 combination or conspiracy among two or more persons or distinct
 15 business entities; (2) by which the persons or entities intended to
 16 harm or restrain trade or commerce among the several States, or with
 17 foreign nations; (3) which actually injures competition.” In addition
 to these elements, [Plaintiff] must also plead (4) that [it was] harmed
 by the [Defendants’] anti-competitive conduct, combination, or
 conspiracy, and that this harm flowed from an “anti-competitive
 aspect of the practice under scrutiny.”

18 *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (internal citations omitted)
 19 (first quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008), then quoting *Atl.*
 20 *Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Although the Parties’ arguments
 21 do not expressly address the elements of a section 1 claim, as the Parties recognized at oral

22 _____
 23 ⁹ Although the Court’s remaining discussion *infra* is framed under sections 1 and 2, as discussed *supra*,
 24 section 3 proscribes the same conduct as sections 1 and 2. *See supra* Part III-B-1-a. As such, failure to
 state a claim under section 1 would also constitute a failure to state a claim under section 3(a), and a failure
 to state a claim under section 2 would also constitute a failure to state a claim under section 3(b).

1 argument, Defendants’ challenge based on the insufficiency of Plaintiff’s allegations as to
2 predation also bears on the second and third elements of a section 1 claim: whether Defendants
3 “intended to harm or restrain trade or commerce” and whether Defendants’ alleged anticompetitive
4 agreement “actually injures competition.” *Brantley*, 675 F.3d at 1197. (See Defs.’ Mot. 12-14
5 (contending that contractual language dispels any suggestion that Defendants and the
6 Commonwealth sought to eliminate competition and citing Plaintiff’s existing monopoly status).)
7 Based on the allegations set forth in the First Amended Complaint, the Court finds that only the
8 second element need be addressed, as failure to establish either element is fatal to Plaintiff’s
9 section 1 claims.

10 As to the second element, Plaintiff’s allegations fail to provide sufficient factual content to
11 permit the inference that Defendants had the requisite intent to harm or restrain trade or
12 commerce.¹⁰ Plaintiff relies upon the language of the contract and accompanying justification
13 letter in asserting that Defendant Marianas Southern “entered into a predatory pricing scheme with
14 the other Defendants . . . with the goal of running Star Marianas out of its free market business.”

16 ¹⁰ The Supreme Court has distinguished between conduct that is *per se* violative of the Sherman Antitrust
17 Act and conduct that requires further assessment under a rule of reason, with “no further inquiry into the
18 practice’s actual effect on the market or the parties’ intentions . . . necessary” if the conduct falls within the
19 former category. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191-92 (9th Cir.
20 2015). “Classic examples [of *per se* violative conduct] include agreements among competitors to fix prices,
divide markets, and refuse to deal.” *Id.* at 1191; see also *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781,
784 (9th Cir. 1996) (also listing “group boycotts, tying arrangements, and output limitations” among *per se*
violations but cautioning that “the *per se* approach is not to be readily expanded to new arrangements or to
business relationships with which the courts are inexperienced”).

21 Here, Plaintiff’s allegations based on Defendant Marianas Southern’s contract with the
22 Commonwealth does not establish that Defendants’ conduct is *per se* violative of the Sherman Antitrust Act
23 because the agreement is not an “agreement[] among competitors” within the Commonwealth’s passenger
24 air travel market: the Commonwealth, as the counterparty to the contract fixing ticket prices, was not in
the business of providing passenger air travel. Nor does Plaintiff contend that Defendants’ conduct was a
per se violation. Thus, “[t]he parties do not dispute that the rule of reason applies in this case, and the
pleading requirements for a rule of reason case therefore apply.” *Brantley*, 675 F.3d at 1197. Plaintiff must
plead facts bearing on Defendants’ intent in executing the contract with the Commonwealth.

1 (FAC ¶ 17; *see also id.* ¶¶ 22-27, 31-33.) But a review of the contract and justification letter, as
2 attached to Plaintiff’s First Amended Complaint, belies Plaintiff’s allegations as mere “‘naked
3 assertions’ devoid of ‘further factual enhancement,’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,
4 550 U.S. at 557), that are insufficient to establish Defendants’ intent.

5 First, the only text within the body of the contract that sets forth the substantive basis for
6 the contract provides:

7 **IV. GENERAL PURPOSE**

8 The purpose of this contract is for the Commonwealth to procure
9 from the Contractor the services described in this contract and in the
10 attached exhibits and to enjoy any warranty or other goods provided
11 for by this contract. The services being procured are described as
12 follows:

13 Tourism is a vital part of the economy of the CNMI[;] however, the
14 COVID-19 pandemic severely curtailed tourism to the CNMI from
15 outside the CNMI and also reduced inter-island travel within the
16 CNMI. The federal government, through the American Rescue Plan
17 Act (“ARPA”), U.S. P.L. 117-2, subtitle M, section 602(c), provided
18 funds to the CNMI whereby the CNMI could, in turn, provide
19 funding to maintain or revive tourism and tourism related activities
20 in the CNMI.

21 The purpose of this contract is to establish an incentive framework
22 between the Commonwealth and the Contractor whereby the
23 Contractor would be incentivized to provide inter-island passenger
24 and cargo service in the Marianas Islands. This incentive framework
will take the form of an Initial Incentive Fund, a Flight Incentive
Program, and Government Related Pricing.

19 (FAC, Ex. A, at 3.) The plain text of the contract does not provide any basis for the inference that
20 Defendant Marianas Southern and the Commonwealth intended for the contracted-for services to
21 eliminate Plaintiff to the detriment of consumers. *See Manglona v. Baza*, 2012 MP 4 ¶ 27 (N. Mar.
22 I. 2012) (“The intent of contracting parties is generally presumed to be encompassed by the plain
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1 language of contract terms.” (quoting *Riley v. Pub. Sch. Sys.*, 4 N.M.I. 85, 88 (N. Mar. I. 1994));¹¹
2 *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781 789 (9th Cir. 1996) (although defendants
3 consolidated payment practices, facially benefitting consumers, defendants were alleged to be
4 ultimately seeking to increase prices, and record suggested that elimination of certain payment
5 practices “does appear likely to increase the prices paid by the end consumer”). Instead, the
6 contract merely indicates that the Commonwealth merely sought Defendant Marianas Southern to
7 enter the market. The only reference to Plaintiff as a trigger for the agreement appears in the
8 recitals at the beginning of the document setting forth the “Airline Incentive Framework”:

9 WHEREAS, *the recent temporary closure of the only current*
10 *inter-island air carrier demonstrated the vulnerability of the CNMI*
11 *economy, including its tourist economy, to only having one air*
12 *carrier in the CNMI.*

13 WHEREAS, [Marianas Southern Airways] was formed as a
14 joint venture between MP Enterprises, LLC and Southern Airways
15 in order to provide inter-island scheduled and chartered air and cargo
16 passenger service between the islands of the Marianas Islands
17 including Saipan, Tinian, Rota, and Guam. However, Marianas
18 Southern needs economic incentives in order to begin operations in
19 the CNMI.

20 WHEREAS, the government of the CNMI has the means and
21 desire to provide incentive funding to Marianas Southern in order to
22 promote tourism to and within the CNMI and to provide increased
23 economic security for the people of the CNMI.

24 WHEREAS, as part of this incentive agreement, the CNMI
government will provide start-up funding and per flight incentive
funding for a set period of time to Marianas Southern. In turn,
Marianas Southern agrees to operate certain flights at set rates as
well as provide other consideration.

(FAC, Ex F, at 35 (emphasis added).) Such language obliquely identifies Plaintiff as the sole inter-
island air carrier but does not indicate that Defendant Marianas Southern and the Commonwealth

¹¹ Commonwealth law governs the interpretation of the contract. (*See* 1st Am. Compl., Ex. A, at 10 (“This contract shall be interpreted under the laws of the Commonwealth of the Northern Mariana Islands.”).)

1 intended to displace or eliminate Plaintiff. To the contrary, such language suggests that Defendant
2 Marianas Southern was being contracted to provide services that Plaintiff would or could not
3 provide within the market—*i.e.*, increasing competition within a market otherwise monopolized
4 by Plaintiff.

5 Second, the justification letter, while critical of Plaintiff’s alleged activities, does not
6 provide sufficient factual material to conclude that Defendants intended to harm or restrain trade
7 or commerce. The text of the justification letter expressly notes that (1) Plaintiff is the sole
8 provider of commercial passenger flight travel within the Northern Mariana Islands; (2) Plaintiff
9 curbed its services to Tinian and Rota with little to no notice; and (3) Plaintiff previously has
10 cancelled flights due to “unanticipated airline or aircraft predicaments.” (*Id.*, Ex. E, at 29-30.) But
11 the remainder of the letter contradicts any suggestion that Defendant Marianas Southern’s
12 contracted-for services were intended to drive Plaintiff out of the market. Defendants’ services
13 were to be “a *secondary* accommodation option and *additional* flight schedule for travel into the
14 island of Saipan transiting from the island of Guam,” a solution for providing “immediate and
15 critical inter-island travel *alternatives* to safeguard the health and safety of Tinian and Rota,” and
16 a means of overcoming the “lack of resources, staffing, and capacity” hampering reliable service
17 to Tinian and Rota after extended, unfruitful discussions with Plaintiff—and *not* to “duplicate any
18 previously performed work or services.” (*Id.* (emphasis added).)

19 Given such language, without further allegations based on conduct and state of mind
20 outside of the four corners of the contract and accompanying documents—and Plaintiff alleges
21 none—Plaintiff’s allegations fall short of setting forth a basis for drawing the plausible inference
22 that Defendants intended to harm or restrain trade or commerce as required for a section 1 claim.
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1 Therefore, all of Plaintiff’s section 1 claims against each Defendant (Counts I, III, and V) must be
2 dismissed for failure to state a claim. *Balistreri*, 901 F.2d at 699; *Fleming*, 581 F.3d at 925.

3 **b. Section 2 Claims (Counts II, IV, VI)**

4 Plaintiff’s claims, alleging that Defendants engaged in monopolization and attempted
5 monopolization, fall under section 2 of the Sherman Antitrust Act. *Verizon Commc’ns Inc. v. Law*
6 *Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *see also Alaska Airlines, Inc. v. United*
7 *Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991) (identifying monopolization and attempted
8 monopolization claims as “the two traditional grounds for relief” under section 2, with attempted
9 monopolization “aris[ing] when the danger of monopolization is clear and present, but before a
10 full-blown monopolization has necessarily been accomplished”). A monopolization claim
11 “requires, in addition to the possession of monopoly power in the relevant market, ‘the willful
12 acquisition or maintenance of that power as distinguished from growth or development as a
13 consequence of a superior product, business acumen, or historic accident.’” *Verizon Commc’ns*,
14 540 U.S. at 407 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)); *see also*
15 *Epic Games*, 67 F.4th at 998 (discussing two-step analysis for monopolization claims). As to a
16 claim for attempted monopolization, there must be allegations establishing “(1) that the defendant
17 has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and
18 (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports, Inc. v. McQuillan*,
19 506 U.S. 447, 456 (1993). “For both claims, [a plaintiff] must . . . plausibly allege that the
20 defendant engaged in anticompetitive conduct to achieve (or attempt to achieve) monopoly power
21 and caused antitrust injury.” *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.*, 150 F.4th 1056, 1067
22 (9th Cir. 2025); *accord Alaska Airlines*, 948 F.2d at 541-42 (“[T]he elements of attempted
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1 monopolization, like the elements of monopolization, emphasize monopoly power and the
2 acquisition or perpetuation of this power by illegitimate ‘predatory’ practices.”).

3 Here, Defendants’ alleged conduct is the setting of ticket prices for inter-island commercial
4 passenger air travel at artificially low rates, with Defendants able to absorb any losses they would
5 otherwise suffer on the market by virtue of the federal funding guaranteed under the contract with
6 the Commonwealth. (FAC ¶¶ 17, 28-33, 41.) For such conduct to constitute predatory pricing—
7 and thus, anticompetitive conduct—prohibited by section 2 of the Sherman Antitrust Act, Plaintiff’s
8 allegations must plausibly establish “two prerequisites”: first, that “the prices complained of are
9 below an appropriate measure of its rival’s costs”; and second, that “the competitor had . . . a
10 dangerous probability[] of recouping its investment in below-cost prices.” *Brooke Grp. Ltd. v.*
11 *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993).

12 Setting aside the Parties’ dispute concerning what Plaintiff must allege at a minimum to
13 establish “an appropriate measure of [Defendants’ costs]” (*see* Defs.’ Mot. 11; Pl.’s Opp’n 8-9;
14 Defs.’ Reply 5-6), Plaintiff’s allegations fail to set forth any plausible basis for concluding that
15 Defendants enjoyed “a dangerous probability[] of recouping [their] investment in below-cost
16 prices.” *Brooke Grp.*, 509 U.S. at 224. The Supreme Court has explained:

17 “For its investment to be rational, the predator must have a
18 reasonable expectation of recovering, in the form of later monopoly
19 profits, more than the losses suffered.” [*Matsushita Elec. Indus.*
20 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).]
21 Recoupment is the ultimate object of an unlawful predatory pricing
22 scheme; it is the means by which a predator profits from predation.
Without it, predatory pricing produces lower aggregate prices in the
market, and consumer welfare is enhanced. Although unsuccessful
predatory pricing may encourage some inefficient substitution
toward the product being sold at less than its cost, unsuccessful
predation is in general a boon to consumers.

23 That below-cost pricing may impose painful losses on its
24 target is of no moment to the antitrust laws if competition is not
injured: It is axiomatic that the antitrust laws were passed for “the

1 protection of *competition*, not *competitors*.” [*Brown Shoe Co. v.*
2 *United States*, 370 U.S. 294, 320 (1962).]

3 *Brooke Grp.*, 509 U.S. at 224. Plaintiff’s allegations merely complain of losses to Plaintiff (*see*
4 FAC ¶ 42) without any mention of Defendants’ pricing activities beyond what is set forth in the
5 contract and accompanying documents (*see id.* ¶¶ 31-33) and a statement by Defendant Stewart
6 about apparent savings to consumers (*id.* ¶ 41). None of Plaintiff’s allegations even begin to
7 suggest that Defendants did or were able to raise their prices above the contract’s alleged below-
8 cost prices during the period when Defendants “existed as the main competitor to Star Marianas
9 in the CNMI,” *i.e.*, “[b]eginning August 2022 until April 2023”—a period within the contract’s
10 effective term. (*Id.* ¶ 16; *id.*, Ex. A, at 4 (“This contract will remain in effect for a two-year period
11 beginning on the date the Notice to Proceed was issued.”); *id.*, Ex. B, at 22 (“Notice to Proceed”
12 dated March 21, 2022), ECF No. 34-1.) And although Plaintiff alleges (once per count) that
13 “Defendants possessed market power in the CNMI’s air carrier market, and working together
14 became direct competitors of Star Marianas in the CNMI’s air carrier travel business” (FAC ¶¶ 45,
15 54, 64, 83, 103, 123), such allegations are unaccompanied by any other factual material elucidating
16 the extent of Defendants’ market power such that the Court could draw the reasonable, plausible
17 inference that Defendants “obtain[ed] enough market power to set higher than competitive prices,
18 and then [could] sustain those prices long enough to earn in excess profits what they earlier gave
19 up in below-cost prices.” *Brooke Grp.*, 509 U.S. at 225-26 (quoting *Matsushita*, 475 U.S. at 590-
20 91). In this case, the contract with the Commonwealth expired in 2024, prior to Plaintiff’s filing
21 this lawsuit. Yet Plaintiff’s First Amended Complaint fails to allege any facts showing Defendants’
22 efforts toward recoupment—even though the Supreme Court has unequivocally explained that
23 “[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme.” *Brooke Grp.*, 509
24 U.S. at 224.

1 Because the First Amended Complaint fails to allege facts to even begin to indicate that
2 Defendants were able to recoup their losses or otherwise had a dangerous probability of
3 recoupment, Plaintiff’s allegations fail to state both monopolization and attempted monopolization
4 claims under section 2 of the Sherman Antitrust Act. Therefore, all of Plaintiff’s section 2 counts
5 against all Defendants (Counts II, IV, and VI) must be dismissed. *Balistreri*, 901 F.2d at 699;
6 *Fleming*, 581 F.3d at 925.

7 **C. Leave to Amend**

8 “[A] district court should grant leave to amend even if no request to amend the pleading
9 was made, unless it determines that the pleading could not possibly be cured by the allegation of
10 other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe v. United States*,
11 58 F.3d 494, 497 (9th Cir. 1995)). Here, Plaintiff requests leave to amend its First Amended
12 Complaint. (Pl.’s Opp’n 12-13 (asserting that Plaintiff is able to set forth additional allegations on
13 recoupment and attempted recoupment); *id.* at 20-21 (requesting leave to amend to substitute
14 sections 1 and 2 with section 3).) This is the first time that Plaintiff’s claims are being dismissed
15 for failure to state a claim. The Court notes Defendants’ arguments asserting that Plaintiff’s claims
16 must still fail due to the short duration and nature of the contract underlying this litigation being
17 insufficient as a matter of law to establish exclusionary conduct (*see* Defs.’ Mot. 6-7; Defs.’ Reply
18 2-3); however, at this juncture, it does not appear that Plaintiff would be unable to cure the pleading
19 defects identified herein with further factual allegations—allegations that may possibly also
20 address Defendants’ conduct in light of the duration and nature of the contract.¹² Therefore, the
21 Court is bound by precedent to afford Plaintiff leave to amend.

22 _____
23 ¹² Furthermore, it is unclear whether Defendants’ cited cases on contractual length and nature are on all
24 fours with the facts of this case, as Defendants’ cited cases arise in the context of “exclusive dealing” and
Plaintiff’s claims turn not on the contract unto itself as a means of excluding Plaintiff from the commercial
passenger air travel market, but rather on Defendants’ alleged predatory pricing.

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IV. CONCLUSION

The Court has jurisdiction to adjudicate Plaintiff’s claims under the Sherman Antitrust Act; however, the First Amended Complaint fails to allege sufficient facts to support Plaintiff’s claims under sections 1, 2, or 3 of the Act. For the foregoing reasons, Defendant Southern Airways’s Motion for Judgment on the Pleadings (ECF No. 80), as joined by Defendants Marianas Southern and Keith Stewart, is GRANTED. Plaintiff’s First Amended Complaint (ECF No. 34) is DISMISSED in its entirety WITH LEAVE TO AMEND.¹³ Should Plaintiff desire to file a second amended complaint, Plaintiff shall file such pleading, curing all deficiencies as identified in this order, by **March 23, 2026**. Defendants will file responsive motions or pleadings to Plaintiff’s second amended complaint in accordance with Rule 15(a)(3) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 9th day of March, 2026.



RAMONA V. MANGLONA
Chief Judge

¹³ The Parties’ Stipulated Motion to Reset Expert Discovery Deadlines (ECF No. 94) is DENIED AS MOOT.