

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

American Airlines, Inc.,

Plaintiff,

v.

Travelport Ltd., Travelport LP, Travelport,
Orbitz Worldwide, LLC, Sabre Inc., Sabre
Holdings Corp., Sabre Travel International
Limited,

Defendants.

Civ. No. 4:11-cv-00244-Y

**SABRE DEFENDANTS' MOTION TO CONSOLIDATE
AND MEMORANDUM IN SUPPORT**

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 42(a) and Local Rule 42.1, Defendants Sabre Inc., Sabre Holdings Corp., and Sabre Travel International Limited (collectively “Sabre”) bring this motion to consolidate the following two civil actions: Civ. No. 4:11-cv-00244-Y (which has been pending in this Court since April 12, 2011), and subsequently-filed Civ. No. 4:11-cv-00488-A (which was assigned to Judge McBryde on July 18, 2011). For the reasons set forth below, consolidation of both actions into first-filed Civ. No. 4:11-cv-00244-Y is appropriate because (1) both actions involve common questions of law and fact regarding identical issues of federal antitrust law, and (2) consolidation will promote the just and efficient conduct of the litigation by preventing duplicative actions from proceeding in multiple forums. Defendants Travelport and Orbitz do not oppose this motion.

Sabre filed this motion in this Court because the “Fifth Circuit adheres to the general rule that the court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed.” *USA Football, Inc. v. Robinson*, Civil Action Nos. H-03-4858 (NFA), V-03-0132 (JDR), 2004 U.S. Dist. LEXIS 28089, at *4 (S.D. Tex. Feb. 3, 2004) (citing *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997)).

BACKGROUND

American filed this federal antitrust lawsuit against Defendant Travelport in April 2011. Although American did not originally name Sabre, American amended its claims to add Sabre as a defendant on June 1, 2011. American asserts, among other things, a monopolization claim under the Sherman Antitrust Act. Both Sabre and Travelport have moved to dismiss American’s antitrust claims, and those motions are currently pending before this Court.

Apparently not satisfied with its lot in federal court, on July 8, 2011, American filed a parallel antitrust claim against Sabre in Texas state court. American's state antitrust claim raises the same "monopolization" claim as its existing federal suit, except that American purports to rely on the Texas Antitrust Statute as opposed to the Sherman Act.

On July 18, 2011, Sabre removed American's subsequently-filed state court action to the United States District Court for the Northern District of Texas. That removal action was assigned to Judge McBryde as Civ. No. 4:11-cv-00488-A. American's claims under the Texas Antitrust Statute raise a substantial federal question, especially in light of the unique procedural posture of the case. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). The Texas Antitrust Statute expressly provides that it must be construed "in harmony with federal judicial interpretations of comparable federal antitrust statutes." TEX. BUS. & COM. CODE § 15.04. Federal antitrust law, therefore, will dictate the outcome of both American's pending federal antitrust claim and its recently-removed state antitrust claim. Moreover, because American filed its federal antitrust claim *before* filing its state claim, resolution of the federal antitrust claim will necessarily dictate resolution of the state claim.

The overlap between American's two antitrust claims is clear. Both antitrust claims depend on the same market definition, the same factual allegations, the same theories of competitive harm, and the same allegations that Sabre's contractual provisions are anticompetitive. The following examples of American's allegations on the issues of purported barriers to entry, market power, the relevant product market, and Sabre's contractual provisions with American demonstrate the common nucleus between the two claims:

American’s Allegations in First-Filed Case Pending Before Judge Means	American’s Allegations in Subsequent-Filed Case Pending Before Judge McBryde
<p>117. The distribution of airline fare, flight, and availability information and the provision of reservations and ticketing capability to travel agents (“the provision of airline booking services”) is a relevant product market. Dkt. No. 46, Am. Compl. ¶ 117.</p>	<p>85. The distribution of airline fare, flight, and availability information and the provision of reservations and ticketing capability to travel agents (“the provision of airline booking services”) is a relevant product market for purposes of the Texas Free Enterprise and Antitrust Act of 1983 (‘TFEAA’). See Ex. 1, Appx. 27, Third Am. Pet. ¶ 85.</p>
<p>121. The relevant markets defined above are characterized by durable barriers to entry by new GDSs that protect the monopoly power of the incumbent GDS providers. Since 2004, at least three companies, ITA, G2 Switchworks, and Farelogix, have attempted to launch a new GDS, and all have failed. There has been no successful entry of a new GDS in the U.S. in over twenty-five years. <i>Id.</i> ¶ 121.</p>	<p>88. The relevant markets are characterized by durable barriers to entry by new GDSs that protect the monopoly power of the incumbent GDS providers. Since 2004, at least three companies, ITA, G2 Switchworks, and Farelogix, have attempted to launch a new GDS, and all have failed. There has been no successful entry of a new GDS in the U.S. in over 25 years. <i>Id.</i> at 28 ¶ 88.</p>
<p>124. Sabre possesses monopoly power in the submarket for the provision of airline booking services to Sabre subscribers in the United States. In this submarket, Sabre possesses a dominant market share. <i>Id.</i> ¶ 124.</p>	<p>91. Sabre possesses monopoly power in the submarket for the provision of airline booking services to Sabre subscribers in the United States. In this submarket, Sabre possesses a dominant market share. <i>Id.</i> at 28-29 ¶ 91.</p>
<p>129. Through the anticompetitive and exclusionary acts and practices described herein, Sabre has willfully maintained, and unless restrained by this Court, will continue to maintain and abuse, that monopoly power. Sabre has acted with intent to illegally maintain its monopoly over the provision of airline booking services to its subscribers and its illegal conduct has enabled it to do so in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. <i>Id.</i> ¶ 129.</p>	<p>103. Through the anticompetitive and exclusionary acts and practices described herein, Sabre has willfully maintained, and unless restrained by this Court, will continue to maintain and abuse, that monopoly power. Sabre has acted with intent to illegally maintain its monopoly over the provision of airline booking services to its subscribers and its illegal conduct has enabled it to do so in violation of the Texas Free Enterprise and Antitrust Act 1983, Section 15.05(b) of the Texas Business and Commercial Code. <i>Id.</i> at 30-31 ¶ 103.</p>
<p>130. American will be forced to continue paying monopoly prices for access to Sabre’s GDS, and Sabre will continue to block price competition among GDSs as well as competition from newer technology and more efficient means of distribution of airline services to travel agents. These injuries, in the form of higher prices and less innovation, are of the type the antitrust laws are intended to prohibit and thus constitute antitrust injuries. <i>Id.</i> ¶ 130.</p>	<p>104. American will be forced to continue paying monopoly prices for access to Sabre’s GDS, and Sabre will continue to block price competition among GDSs as well as competition from newer technology and more efficient means of distribution of airline services to travel agents. These injuries, in the form of higher prices and less innovation in Texas, are of the type the antitrust laws are intended to prohibit and thus constitute antitrust injuries in Texas. <i>Id.</i> at 31 ¶ 104.</p>

These allegations serve as examples only. There can be no credible dispute that both pending monopolization claims raise the same legal issues based upon the same factual

allegations. Accordingly, consolidation is appropriate to (1) allow resolution of common claims in a single court, and (2) promote efficiency and conservation of judicial resources.

ARGUMENT

Federal Rule of Civil Procedure 42(a) provides that “[i]f actions before the court involve a common question of law or fact, the court may: (2) consolidate the actions.” FED. R. CIV. P. 42(a)(2). A district court has broad discretion in deciding whether to consolidate related cases. *United States v. Rutherford Oil Corp.*, Civil Action No. G-08-0231, 2010 U.S. Dist. LEXIS 109356, at *3 (S.D. Tex. Oct. 14, 2010). In deciding whether to consolidate, courts often consider whether a related case is pending “before another judge in the same district and division,” whether the cases involve “a common party” and “common issues,” and whether the cases may be “more efficiently resolved before a single court.” *Id.* at *3-4.

Indeed, “if [the pending suits] overlap on the substantive issues, the cases would be required to be consolidated in . . . the jurisdiction first seized of the issues.” *Save Power*, 121 F.3d at 950 (internal quotations and citations omitted). This general rule is designed “to avoid duplication, possibly conflicting rulings and piecemeal resolution of the issues.” *Robinson*, 2004 U.S. Dist. LEXIS 28089, at *4 (citing *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999)). Here, each of these factors weigh heavily in favor of consolidation.

I. Both Pending Actions Involve Common Questions of Law and Fact

Consolidation is appropriate when the pending actions involve common questions of law and fact. FED. R. CIV. P. 42(a)(2); *see also In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 271 (5th Cir. 1974) (affirming district court’s decision to consolidate wrongful death action and limitation petition where cases arose from same barge explosion); *Canal Barge Co., Inc. v. Tubal-Cain Marine Servs., Inc.*, Civil Action No. 1:09-CV-533, 2009 U.S. Dist. LEXIS 114658, at *2-3 (E.D. Tex. Dec. 7, 2009) (consolidating cases that involved the “same subject matter and

many common issues surrounding the cause of an explosion”); *Trevizo v. Cloonan*, No. P-00-CA-028, 2000 U.S. Dist. LEXIS 22968, at *2 (W.D. Tex. Nov. 29, 2000) (consolidating actions stemming from same disaster).

In *Pittman v. Memorial Herman Healthcare & Mem. Herman Hosp. Sys.*, 124 F. Supp. 2d 446, 449 (S.D. Tex. 2000), for example, the district court *sua sponte* consolidated a removed state court case into a pending federal case. The court held that the two cases “involve common issues of law and fact, and that consolidation would serve to expedite resolution of the contested issues.” *Id.*; *see also Trevizo*, 2000 U.S. Dist. LEXIS 22968 at *7 (consolidating cases where the “factual scenario in these cases are virtually identical”).

Here, both actions currently pending in the Northern District of Texas raise common issues of law and fact. Because the “Texas legislature mandates that Texas antitrust law be harmonized with federal antitrust law,” the legal issues presented by American’s dual monopolization claims are the same, and courts do not even consider them independently. *See Texas Commercial Energy v. TXU Energy, Inc.*, C.A. No. C-03-249, 2004 U.S. Dist. LEXIS 13908, at *47-48 (S.D. Tex. Jun. 24, 2004) (citing *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 391 n.7 (5th Cir. 1996)).¹ Moreover, the allegations giving rise to both monopolization claims are virtually identical. American challenges as anti-competitive the same contractual provisions, and makes the same allegations regarding purported barriers to entry, market power and the relevant product market. This common nucleus justifies consolidation.

¹ The removed action also asserts claims for breach of contract and tortious interference with prospective business relations. Although there is no corollary in the case currently pending in this Court, the contract action derives from the same provisions that American has characterized as anticompetitive in its monopolization claims.

II. Consolidation Will Promote Efficiency

Consolidation also is appropriate to promote “the interests of judicial economy and efficiency” and to “avoid duplicative litigation.” *Robinson*, 2004 U.S. Dist. LEXIS, at *5-6 (citing *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) and *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th Cir. 1971) (first-filed court should determine whether there is substantial overlap requiring consolidation; district court did not err in ruling that the first-filed declaratory judgment action should proceed)).

Consolidation in this case promotes both goals. Consolidation ensures that a single court resolves what effectively amount to identical issues of antitrust law, and it precludes the potential for inconsistent rulings on the same issues—many of which are already being considered by this Court in connection with Sabre’s motion to dismiss. In contrast, allowing both cases to proceed in different courts would force different judges to resolve the same issues, allow a party to “forum-shop” by raising particular issues in one court over another, and require both sides to conduct discovery and substantive proceedings twice in different forums. This is precisely the situation Rule 42 was designed to prevent.

CONCLUSION

For each of the foregoing reasons, Sabre respectfully requests that this Court consolidate the removed action (Civ. Action No. 4:11-CV-00488-A) with the first-filed case currently pending in this Court (Civ. Action No. 4:11-CV-00244-Y), resulting in one lawsuit under Civil Action No. 4:11-CV-00244-Y.

DATED: July 18, 2011

Respectfully submitted,

/s/ Scott A. Fredricks

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CERTIFICATE OF CONFERENCE

I certify that on July 18, 2011, counsel for the Sabre Defendants conferred with counsel of record for all parties. Counsel for Travelport (Michael Cowie) and Orbitz (Brendan McShane) informed Sabre that those parties do not oppose this motion to consolidate. Ralph Duggins, counsel for Sabre, conferred with Bill Bogle, counsel for American. Mr. Bogle stated that he wanted to think about the motion and discuss it with other counsel for American before responding. Sabre assumes that American is opposed to this motion.

/s/ Scott A. Fredricks
*Counsel for Defendants Sabre Inc.,
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CERTIFICATE OF SERVICE

I certify that on July 18, 2011, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record.

/s/ Scott A. Fredricks

*Counsel for Defendants Sabre Inc.,
Sabre Holdings Corp, and Sabre Travel
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