American Airlines Inc v. Travelport Limited et al Doc. 107

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

American Airlines, Inc., a Delaware corporation, Plaintiff, vs. Sabre, Inc., a Delaware corporation; Sabre Holdings Corporation, a Delaware corporation and Sabre Travel International Ltd., a foreign corporation, d/b/a Sabre Travel Network; Travelport Limited, a foreign corporation and Travelport, LP, a Delaware limited partnership, d/b/a Travelport; and Orbitz Worldwide, LLC, a Delaware limited liability company, d/b/a Orbitz; Defendants.	)	Civil Action No.: 4:11-cv-0244-Y

AMERICAN AIRLINES INC.'S RESPONSE IN OPPOSITION TO TRAVELPORT'S RULE 12(b)(6) MOTION TO DISMISS

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INTRODUCTION

This antitrust case is of great importance to the manner in which information regarding fares and availability of airline tickets is distributed to travel agents and, thus, how tickets are sold to consumers and the prices they pay. As a result of the antitrust violations alleged in this case, Plaintiff American Airlines, Inc. ("AA") has been saddled with excessive distribution costs at a time when finding ways to reduce costs is an imperative, and has been prevented from providing more flexible pricing and innovative service options to its own customers. Air travelers, in turn, have had less choice in airline flight and fare options, and paid higher ticket prices than they would but for Defendants' unlawful conduct. The facts on which this case is based are straightforward.

Defendants Travelport ("TVP") and Sabre (together the "GDS Defendants") are global distribution systems ("GDSs") that connect airlines and other travel suppliers with travel agents. The GDSs obtain airline flight, fare, and availability information from airlines and disseminate it to travel agents, and enable travel agents to send reservations and ticketing information to the airlines' internal reservations systems. As alleged in the First Amended Complaint (the "Complaint"), AA, like other network airlines, is heavily dependent on revenue from business travelers, most of whom purchase tickets through travel agents, not directly from airlines. Whenever those business travelers make reservations through travel agents, the GDSs charge AA, not the travel agents or business travelers, "booking fees."

Approximately 95% of travel agents in the United States subscribe to a GDS provided by Sabre or TVP. Almost every one of those travel agents relies on a *single* GDS to obtain flight and fare information and to book tickets for business travelers. Moreover, travel agents cannot easily switch to another GDS because they rely on software applications that interoperate with their current GDS, because of the significant training costs involved in changing GDSs and,

importantly, because the GDSs engage in a variety of practices designed to make it even harder for travel agents to change GDSs. These practices include entering into long-term contracts with provisions that require the agents to use the GDS exclusively or nearly exclusively.

As a result, when a GDS charges AA excessive booking fees, or degrades the quality of the services it provides AA (for example, by biasing its displays to disfavor AA's flights), or fails to invest in more modern, efficient technologies for collecting and disseminating information, AA has little ability to shift bookings of business travelers away from that GDS to another GDS or other distribution channel. Moreover, the GDSs include anticompetitive terms in their contracts with AA that have the purpose and effect of choking off the only option available to AA to encourage travel agents and their business customers to use other distribution channels. Most-favored nation ("MFN") provisions that require AA to offer all of its fares in TVP's GDSs ensure that AA cannot, for example, broadly offer corporate customers a discount if they book their travel through a less expensive GDS or other distribution channel. Thus, the GDSs have tremendous market power—indeed monopoly power—over AA, and they use that monopoly power to charge excessive prices, and to exclude competition from other distribution channels.

In an attempt to reduce its dependency on the GDSs, reduce its distribution costs, and improve the efficiency and flexibility of its distribution system, AA, working with Farelogix and ITA Software, has developed and implemented a new technology for distributing its flight and fare content information directly to travel agents, called AA Direct Connect. Recognizing the competitive threat posed by AA Direct Connect, the GDSs have wielded their power to destroy that threat and preserve the monopolistic GDS airline ticket distribution system. Within the past year, the GDSs, individually and collectively, have punished AA for pursuing AA Direct

Connect with Orbitz by *doubling* booking fees charged to AA for bookings made by their travel agency subscribers in certain countries, and by "biasing"—or displaying in a deliberately misleading manner—AA's flight and fare information in their GDSs so that AA's flights and fares would appear less attractive to their travel agency subscribers and be more difficult to find. The GDSs have also exercised their monopoly power by, among other things: 1) enforcing restrictive provisions in their contracts that prevent travel agents from using AA Direct Connect; and 2) refusing to do business with technology companies that have worked with AA on the AA Direct Connect alternative that threatens the GDS Defendants' monopolies.

In light of this, AA commenced this lawsuit asserting that TVP has monopoly power over AA and that its conduct constitutes monopolization, conspiracy to monopolize, restraints of trade, and tortious interference in violation of Sections 1 and 2 of the Sherman Act, as well as provisions of Texas law. TVP has reflexively moved to dismiss. Its principal argument is that it does not have monopoly power, that a single brand product market is implausible as a matter of law, and that the Complaint is based on an "outdated" view of the industry. TVP focuses on this issue for good reason. It is well aware that if the relevant markets alleged in the Complaint are accepted, not only will its motion to dismiss be denied, but it will inevitably be subject to liability. That is because the detailed facts alleged in the Complaint regarding the Defendants' exclusionary conduct are largely undisputed, and not only are sufficient to withstand a motion to dismiss, but clearly describe violations of the antitrust laws under well-established precedent.

TVP's attempt to attack the sufficiency of the allegations in the Complaint regarding the relevant markets and the market power the GDS Defendants wield is meritless. First, it is well-settled that defining the relevant market is an intensely factual issue that can rarely be resolved on a motion to dismiss. Second, the Complaint's detailed factual allegations concerning the

relevant markets and market power are clearly sufficient because they show that AA has no ability to substitute another GDS or distribution channel if it wants to access the thousands of travel agents—and thus the millions of business travelers—that each GDS has locked up. These allegations are entirely consistent with the position of both the Department of Justice ("DOJ") and the Department of Transportation ("DOT")—the federal agencies responsible for overseeing competition in this industry for decades. Third, TVP's claim that the Complaint is based on nothing but ancient history is baseless. The Complaint clearly alleges that with respect to business travelers, little has changed since the DOJ and DOT first analyzed competition in the industry—business travelers still rely on travel agents, travel agents still rely on single GDSs, and the GDSs still use their monopoly power to foreclose competition. The Complaint alleges that those are *today's* market realities. And the plausibility of those allegations is confirmed by the fact that the DOJ is currently pursuing a major investigation of the GDSs' conduct and has recently issued Civil Investigative Demands ("CIDs") to TVP and Sabre, as well as AA. Accordingly, the Complaint satisfactorily alleges that, just as DOJ and DOT have maintained, ***"from an airline's perspective, each [GDS] constitutes a separate market and each [GDS] possesses market power . . . ."*** (Compl. ¶ 43 (emphasis added).)

As noted above, Defendants' desperate attempts to disparage the Complaint's allegations concerning the relevant markets reflect their recognition that unless the case is dismissed on that basis, they will have little chance of avoiding liability—and there certainly is no basis for dismissal at the pleading stage. While TVP reflexively attempts to invoke *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), this Complaint contains myriad, detailed allegations regarding the GDS Defendants' anticompetitive conduct, many of which will be undisputed, that not only are plausible as a matter of fact and law—but also can only be explained by the GDSs' enormous

market power, which they have brashly wielded to protect their respective monopolies and destroy the competitive threat posed by AA Direct Connect.

The bottom line is that this Complaint is plainly sufficient, and TVP's motion is merely part of the defendants' campaign to delay this case. AA respectfully submits that the Court should deny TVP's motion to dismiss and, in the interim, permit discovery to proceed.

LEGAL STANDARD

As this Court has stated, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Null v. Easley*, No. 4:09-CV-296-Y, 2009 WL 3853765 (N.D. Tex. Nov. 18, 2009) (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)). Under *Twombly*, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" and his "factual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555, 570. "The complaint need not contain 'detailed factual allegations' but must state 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010) *cert. denied*, 131 S. Ct. 1476 (2011) (quoting *Twombly*, 550 U.S. at 555). The plaintiff is aided by the requirement that, in reviewing the sufficiency of his pleadings, a court must indulge "the assumption that all the [factual] allegations in the complaint are true (even if doubtful in fact)." *Null*, 2009 WL 3853765, at *2. "That is, the Court must accept as true all well pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff." *Id.* (citing *Kaiser*, 677 F.2d at 1050).

I. AA Has Adequately Pleaded Relevant Markets And TVP's Market Power And Monopoly Power In Them

As the court observed in *Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934, 949 (E.D. Tenn. 2008), "arguing that plaintiffs have not pleaded sufficient facts appears to have become the mantra of defendants in antitrust cases." Thus, despite the myriad specific factual allegations in the Complaint explaining why alternative methods of distributing airline tickets are not reasonable substitutes for participation in TVP's GDSs, TVP has moved to dismiss AA's Complaint, contending that it fails to allege facts sufficient to establish that TVP has monopoly power in a plausible relevant market. The motion, which takes as true not the facts alleged in the Complaint, as required, but instead TVP's contrary version of the facts,[1] is clearly groundless, not the least because the markets and monopoly power alleged in the Complaint are entirely consistent with the findings of the federal agencies that have overseen competition in this industry.

A. The Complaint Alleges Plausible Relevant Markets

It is well-settled that "[d]efinition of the relevant market is basically a fact question heavily dependent upon the special characteristics of the industry involved." *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975). Accordingly, "dismissals at the pre-discovery, pleading stage remain relatively rare and are generally limited to certain types of glaring deficiencies, such as failing to allege a relevant market." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 444 (4th Cir. 2011) (internal quotation marks omitted) (reversing dismissal of a § 2 claim). Courts generally will not usurp the fact-finder's role by

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[1] *See, e.g.*, Memorandum in Support of Travelport's Rule 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint [Docket No. 86] ("TVP MTD") at 3 (asserting that the Complaint's allegations "describe a world that no longer exists" and that they are contradicted by "contemporary business realities"). TVP's attempt to raise fact arguments in a motion to dismiss should be rejected, especially when the Complaint includes dozens of allegations in the Complaint that describe competitive realities that exist today. What is noteworthy about any similarity between the allegations in the Complaint and earlier descriptions of the GDSs' monopoly power is that the fact that the GDSs' monopolies have endured for so long.

holding relevant market allegations insufficient as a matter of law. *See, e.g.*, *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985) (denying summary judgment in light of "the ad hoc, fact-specific core embedded in any determination of relevant market"); *accord Elec. Data Sys. Corp. v. Computer Assocs. Int'l, Inc.*, 802 F. Supp. 1463, 1466-67 (N.D. Tex. 1992); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5th Cir. 1977).

The Complaint identifies two "product" (actually service) markets. The first is "[t]he 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.')" (Compl. ¶ 117.) The second relevant market, which is a submarket[2] of the first, is "[t]he provision of airline booking services to TVP subscribers." (*Id.* ¶ 119.)

The scope of a relevant market is defined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *C.E. Servs*, 759 F.2d at 1245 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). In other words, to define a relevant product market, one asks what customers would do if an alleged monopolist raised its prices above the competitive level (or reduced the quality of its product or service below the competitive level). If customers could readily switch enough of their purchases to substitute products, so that the price increase would not be profitable to the alleged monopolist, those substitute products are included in the market. But if customers cannot shift enough of their purchases to substitute products to make the price increase unprofitable to the

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[2] TVP attempts to cast aspersions on the Complaint's characterization of this market as a submarket, but there is nothing mystical or magical about submarkets. As the Supreme Court explained in its seminal decision in *Brown Shoe v. United States*, 370 U.S. 294 (1962): "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* at 325. "The requirements for pleading a submarket are no different from those for pleading a relevant broader market." *PSKS, Inc.*, 615 F.3d at 418.

monopolist, then those alternatives should not be included in the relevant market.[3] The Complaint in this case is replete with specific factual allegations that, taken as true, are more than sufficient to demonstrate that AA cannot shift its ticket distribution from TVP's GDSs to other channels—another GDS or its own website—when TVP exercises its monopoly power by raising the prices AA pays or reducing the quality of the services AA receives.[4]

Relying on *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992), TVP repeatedly invokes the phrase "single-brand market," as if that label alone is sufficient to resolve the question of market definition and market power. TVP further argues that the provision of airline booking services to TVP subscribers cannot be a relevant market because the Complaint does not allege the specific set of facts that led the *Kodak* Court to decide that a single brand market was plausible in that case. In so arguing, TVP ignores both the factual allegations in the Complaint and the holding of the *Kodak* Court.

Kodak was an aftermarkets case. In other words, Kodak faced competition from other copier manufacturers when consumers were deciding what copy machine to purchase, but the plaintiffs alleged that Kodak had monopoly power in the market for the supply of parts and services consumers need to maintain Kodak copiers that consumers had already purchased—the so-called aftermarket. Kodak argued that because it faced competition in the copier market, any attempt to raise prices in the aftermarket for parts and service would lead to a disastrous drop in its copier sales: consumers would decide to purchase copiers from other makers whose parts and

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[3] *Compare HTI Health Servs., Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104 (S.D. Miss. 1997) (accepting, *following a trial*, plaintiff's definition of ob/gyn medical services and primary care medical services as separate markets in light of evidence that patients did not view them as substitutes), *with Henderson Broad. Corp. v. Houston Sports Ass'n, Inc.*, 647 F. Supp. 292, 297 (S.D. Tex. 1986) (rejecting, *following discovery*, plaintiff's contention that advertising on Houston Astros hometown baseball broadcasts constituted a relevant market where evidence showed that all radio stations compete).

[4] TVP does not challenge the sufficiency of the Complaint's allegation that distribution of airline tickets through distribution channels such as websites are not part of the broader market for the provision of booking services to travel agents. (*See* TVP MTD at 6.)

service were less expensive. Thus, Kodak urged the Court to adopt a substantive legal rule that competition in an original equipment market *necessarily* precludes any finding of monopoly power in a single-brand aftermarket. The Court rejected Kodak's proposed rule, noting that it depended upon factual assumptions about cross-elasticity of demand for equipment and parts that would not always exist. *Id.* at 465-71. Subsequent aftermarkets cases have identified various factors that are relevant to whether a manufacturer can have market power in a single-brand aftermarket, including whether consumers are "locked-in" to the brand and whether the defendant changed its policies concerning aftermarket sales. *See, e.g.*, *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 783 (5th Cir. 1999). But whether a single brand of a product or service is a relevant market remains a question of fact. *E.I. du Pont de Nemours*, 637 F.3d at 442.

As TVP points out, this is not an aftermarkets case. From this undisputed proposition, TVP leaps to the conclusion that provision of booking services to TVP subscribers, which it calls a single-brand market, is not a plausible product market. But nothing in *Kodak* or its progeny suggests that a single brand can constitute a market *only* in an aftermarket case. In fact, *the Court in Kodak squarely rejected that contention*: "This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market." *Id.* at 482 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 112 (1984); *Int'l Boxing Club of N.Y., Inc. v. United States,* 358 U.S. 242, 249-52 (1959); and *IBM Corp. v. United States,* 298 U.S. 131 (1936)).

The Fifth Circuit is in accord: where a complaint adequately alleges a lack of substitutes outside the alleged markets, a single brand can constitute a market. *See, e.g.*, *E. Servs., Inc.*, 759 F.2d at 1245 (upholding on summary judgment plaintiff's claim that first-party and third-party

maintenance of IBM machines were separate submarkets); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1349 (5th Cir. 1980) (affirming jury finding that avionics systems in Grumman Gulfstream II aircraft was a single-brand relevant market); *Heatransfer Corp.*, 553 F.2d at 980 (approving market definition of air conditioners for automobiles manufactured by Volkswagen); *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 431 F.2d 334, 338 (5th Cir. 1970) (affirming monopolization of a single-brand market—distribution of movie promotion products—where defendant had 100% market share and MFN clauses foreclosed entry); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 562 F. Supp. 2d 392, 403, 404 (E.D.N.Y. 2008) (denying a motion to dismiss a complaint that alleged a single-brand market for "network services for MasterCard-branded credit cards," stating that plaintiffs had pleaded "facts that, if established, could suffice to prove that network services for MasterCard-branded credit cards are not interchangeable with such services for other forms of payment, and that the Single-Brand Market they propose does exist for purposes of their Section 2 claims").[5]

In each of the cases TVP cites in support of its argument, the court rejected a single-brand market definition *not* because such a market is implausible as a matter of law, but because the plaintiff did not allege (or could not prove) a lack of reasonably interchangeable substitute products.[6] In *PSKS,* 615 F.3d at 418, for example, the court rejected a market composed only of

[5] In many important respects, the market for credit cards is similar to the GDS market. Like travel agents, credit card users are free to choose among cards offered by a number of different card networks, but when a credit card user makes a purchase, it is the merchant that pays the credit card network a fee for the transaction. In part because consumers decide which card to use when they make a purchase, and in part because of restrictive contract terms put in place by the card networks, merchants cannot shift purchases from one card network to another if the network raises its fees above the competitive level, and the merchants must participate in all major card networks or risk losing a substantial amount of business. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003); *United States v. Am. Express Co.*, No. CV-10-4496 (E.D.N.Y. 2010); *In re Payment Card*, 562 F. Supp. 2d at 400.

[6] In its motion to stay discovery, TVP asserted that "[s]ince the governing Supreme Court decision in this area, no antitrust actions against a GDS . . . have survived a motion to dismiss on this single-brand product market theory." Travelport's Memorandum in Support of Motion to Stay Discovery Pending a Decision on Travelport's Rule 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint [Docket No. 89] at 6. TVP cites no case law in support of this statement. While it may be literally true, it is at best misleading. We are unaware of any post-*Kodak* case in which a court has *granted* a motion to dismiss on the grounds that there cannot be a single GDS market; it is

the Brighton brand of women's handbags and accessories, because the plaintiff failed to allege facts showing that the defendant's products were not interchangeable with other manufacturers' products. In *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494, 514 (3d Cir. 1999), following a *trial*, the Third Circuit reversed because the "only" evidence presented to the jury to support a single-brand health insurer market was that pharmacies did not drop out of the insurer's network when it lowered the prices it would pay to pharmacies for the purchase of prescription drugs by network members. The Court concluded that "it would not be necessary for [pharmacies] to drop out of the [insurer's] network in order to pursue, or acquire, [higher profit] customers." *Id.*[7]

AA's Complaint contains detailed allegations about the commercial realities faced by AA as a consumer of GDS services (*see* Compl. ¶¶ 29-48.)[8] In sum: AA, like other network airlines, relies heavily on business travelers for its business. (*Id.* ¶ 30-31.) The overwhelming majority of business travelers purchase their tickets through travel agents. (*Id.*) The vast majority of

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simply a question that courts have not decided. *But see In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1458 (C.D. Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) (holding pre-*Kodak* that a reasonable finder of fact could find that Sabre is a single-brand market).

[7] *See also Apani Sw. v. Coca Cola Enters., Inc.*, 300 F.3d 620, 628, 633 (5th Cir. 2002) (rejecting the alleged *geographic* market because plaintiff "simply attempted to artificially narrow a broader economic market, the City of Lubbock, to specific City-operated venues" when the plaintiff itself "had done business in and throughout Lubbock, Texas with customers other than the City"); *Cont'l Orthopedic Appliances, Inc. v. Health Ins. of Greater N. Y., Inc.*, 994 F. Supp. 133, 141 (E.D.N.Y. 1998) (rejecting plaintiff's market definition because allegations about market share were inconsistent and incomplete); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill 1997) (plaintiff in an aftermarkets case failed to allege that customers were "locked-in" to their primary purchase or otherwise unable to shift to alternative suppliers); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) (dismissing on summary judgment plaintiff's alleged product market consisting of only those hospitals actually used by the defendant's insureds where the choice of hospital was due to incentives in the contracts and not because the patients considered the other hospitals not to be reasonable substitutes).

[8] The allegations about the relevant market that the Fourth Circuit approved in *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 444 (4th Cir. 2011), bear some striking similarities to AA's allegations in this case. In particular, AA's allegations of distinct national markets, including the U.S. (*see* Compl. ¶ 120), high prices (*see id.* ¶ 112), high barriers to entry (*see id.* ¶¶ 121-22), and domination of the market through the use of essentially exclusive multi-year contracts (*see ¶¶*63-68), all correspond to similar allegations in *Kolon*. On top of these allegations, AA has also alleged a number of additional relevant facts above and beyond those that the *Kolon* court deemed sufficient.

travel agents, in turn, rely on single GDSs and are locked in to using those GDSs by long-term contracts, exclusivity requirements or incentives, and switching costs. (*Id.* ¶ 34-40.) Accordingly, if AA wants to sell tickets to the millions of business travelers who purchase tickets through travel agents who are TVP subscribers, AA has no choice but to suffer TVP's monopoly prices and inferior service. These allegations are plainly sufficient to establish that other distribution channels are not interchangeable with TVP's GDSs, and that provision of airline booking services to TVP subscribers is a plausible antitrust product market. As a result, and as both the DOJ and the DOT have asserted, TVP possesses the monopolist's power to control prices.[9]

In an apparent attempt to confuse the issues in this case, TVP contends that the alleged product market—the provision of airline booking services to TVP subscribers—is implausible because the Complaint fails to allege harm to travel agents. It further argues that the Complaint suggests that travel agents are overcompensated by TVP and other GDSs and that this is inconsistent with TVP exercising monopoly power over travel agents.

There is no inconsistency. The Complaint does not allege that TVP exercises monopoly power with respect to travel agents; rather, it alleges that TVP has monopoly power with respect to AA and other network airlines. AA is TVP's customer. It is AA that purchases the booking services that TVP provides to TVP travel agency subscribers, and pays supracompetitive booking fees. (*Id.* ¶ 6.) It is AA that would lose significant ticket sales if it did not participate in

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[9] The presence or absence of reasonable substitutes is the touchstone of relevant market analysis, and it is what separates this case from TVP's hypotheticals about grocery stores and athletic shoe manufacturers. Customers of grocery and sporting-goods stores can and do routinely switch stores in response to changes in price, or if one store stops carrying a favored brand. The fact that both manufacturer and consumer can substitute other distributors ensures that even a valuable distributor cannot exercise monopoly power. If the commercial realities of the grocery industry were such that Kroger could sign long-term contracts with its customers forbidding them to shop at any other stores, force Kellogg's to agree to contract terms barring discounts to any other stores, terminate other companies who dared to work with Kellogg's to lower costs, and arbitrarily double their prices with impunity, then Kellogg's might well be justified in alleging that Kroger was a monopolist.

TVP's system, sales that it cannot shift to alternative booking channels when the GDSs exercise their monopoly power. That is why, as alleged in the Complaint (*see id.* ¶¶ 96, 103), the GDS Defendants were able to double AA's booking fees in 2010, without concern that AA would be able to respond to such a massive price increase by shifting ticket sales to other distribution channels. Indeed, for over eight months, AA had no choice but to pay TVP's increased booking fees, because it could not shift enough of the sales it makes through TVP subscribers to less costly distribution channels. The fact that TVP is able to raise prices so precipitously without losing sales is conclusive evidence that it possesses monopoly power over AA.

B. The Complaint Alleges Facts Sufficient To Establish TVP's Market Power In The Relevant Markets

TVP's arguments that AA has not adequately pleaded market power run contrary to the law in this and other circuits. The Complaint contains specific allegations that are more than sufficient to establish TVP's monopoly power at the motion-to-dismiss stage. TVP argues that its 34% share of the market for airline distribution services to travel agents is insufficient to establish market power under Sherman Act § 1. In making this argument, it ignores the fact that the Complaint alleges that TVP has virtually a 100% share in the submarket of the provision of airline booking services to TVP travel agency subscribers, which is clearly sufficient to adequately plead market power. (*Id.* ¶¶ 4, 119, 126.) But even in the broader market of the provision of airline booking services to travel agents, the Complaint plausibly alleges that TVP has market power for § 1 purposes.

The courts have indicated repeatedly that 30% market share is sufficient to establish market power for § 1 purposes. *See, e.g.*, *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 87 (5th Cir. 1994) ("Some circuit courts have used 30% as a rough benchmark for the minimum amount of market power necessary to give rise to a *per se* violation of antitrust law.");

Bodet v. Charter Commc'ns Inc., No. 09-3068, 2010 WL 5094214 (E.D. La. July 26, 2010) ("[T]here is some suggestion that thirty percent may serve as a required minimum" to establish market power for a § 1 tying claim.).

Moreover, alleging that a defendant has a sufficiently high share of a relevant market is only one means of alleging market power. "Market power is the ability to raise prices above those that would be charged in a competitive market." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 136 (1984). Where there is direct evidence that the defendant possesses the power to raise prices, the courts will find market power irrespective of the defendant's market share. *See, e.g.*, *Breaux Bros. Farms*, 21 F.3d at 87 n.3 (plaintiffs may "provide direct evidence of market power, obviating the need to inquire into the percentage of the tying market that the defendant commanded"); *Wilson v. Mobil Oil Corp.*, 984 F. Supp. 450, 458 (E.D. La. 1997) ("Market power is generally measured by market share, but it can be demonstrated by direct evidence that defendants raised prices and drove out competition in the tied product market."). Courts have found market power at even lower market-share levels when there were other factors indicating that the defendant had control over price. *See Visa U.S.A., Inc.*, 344 F.3d at 240 (finding market power with 26% market share where "merchants testified that they could not refuse to accept payments by Visa or MasterCard," even if faced with significant price increases, because of customer preference); *see also In re Payment Card*, 562 F. Supp. 2d at 400 ("[A] finding that MasterCard's market share is less than 30 percent would not, in any event, foreclose the possibility that the Individual Plaintiffs may succeed on their section 2 claims."). The Complaint in this case alleges not only that TVP has sufficient market power to raise prices with impunity *but, like Defendant Sabre, has actually done so within the past year, doubling AA's booking fees for certain ticket sale*. (*See, e.g.*, Compl. ¶ 4, 119, 126.)

II. AA Has Sufficiently Alleged Cognizable Exclusionary Conduct By TVP

Once TVP's attempts to attack the sufficiency of the Complaint's relevant market allegations are disposed of, it is clear that this motion should be denied because the Complaint contains detailed factual allegations of outrageous exclusionary conduct intended to destroy AA's Direct Connect competitive initiative and preserve the GDSs' monopolies. (*Id.* ¶¶ 43-76.) Not only are those facts sufficient to defeat this motion, but many of the GDS Defendants' acts were open and notorious, and will be undisputed—virtually guaranteeing the GDS Defendants' liability if either of the relevant markets described in the Complaint is accepted after discovery. The GDS Defendants' anticompetitive conduct includes brash punitive actions to destroy the Direct Connect competitive threat—taken against not only AA directly, but other firms that have either worked with AA to develop and implement Direct Connect or considered doing so. As explained below, TVP's hypertechnical attempts to dissuade this Court from considering different aspects of the anticompetitive scheme are baseless as a matter of law.

A. The FTAIA Does Not Bar This Court From Considering TVP's Retaliatory Price Increases and Biasing

TVP contends that the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, bars this Court from considering whether TVP has monopolized foreign markets, citing *Turicentro SA v. American Airlines, Inc.*, 303 F.3d 293, 303 (3d Cir. 2002). Although we disagree with TVP's position,[10] the Complaint's allegations with respect to TVP's market share and conduct in certain foreign markets are not intended to demonstrate that TVP has unlawfully monopolized those markets. Rather, the Complaint alleges that Travelport used its monopoly

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[10] Relying on *Turicentro,* TVP contends that the FTAIA divests this court of jurisdiction over claims that it monopolized foreign markets because "foreign travel agency service" is not "import commerce." (TVP MTD at 15.) This is a red herring. The Complaint does not allege that TVP monopolized "foreign travel agency services." *Turicentro* says nothing about whether the provision of booking services to foreign travel agents, in which GDSs transmit information from airlines in the U.S. to foreign travel agencies, and then transmit information from those travel agencies back to the internal reservations systems of the U.S. airlines, involves import commerce.

power in those markets in order to quash AA's attempt to introduce competition to TVP's GDSs *in the United States*. (Compl. ¶¶ 96-100.) TVP also claims that because these retaliatory acts related to ticket sales outside the U.S., under the FTAIA those acts are "irrelevant and outside the scope of U.S. antitrust law." (TVP MTD at 18.)

The Complaint alleges that TVP's decision to double its booking fees outside the United States was intended to punish AA for its efforts to implement AA Direct Connect *in the United States*, and to pressure it to continue to sell tickets through Orbitz *in the United States* through TVP's much higher cost GDS.[11] (Compl. ¶¶ 96-100.) The Complaint further alleges TVP intended to "send a message to other airlines, travel agents, and technology providers that efforts intended to erode the power of the GDS distribution model and/or to introduce more competition into the provision of airline booking services will be met with a quick, collective, and harsh response" and that they succeeded in doing so. (*Id.* ¶¶ 97-98.) TVP's conduct was specifically intended to stifle AA's willingness and ability to compete with TVP *in the United States*. "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993). Thus, this Court should reject TVP's claim that the FTAIA renders its retaliatory conduct off-limits when its purpose and effect was to buttress its domestic monopoly.

B. TVP's Enforcement Of An Anticompetitive MFN Is Not Immune From Challenge Here By The Statute of Limitations

The Complaint alleges that TVP uses MFN clauses, in the form of "full content" and "content parity" clauses, that prevent AA and other major airlines from encouraging travel agents

[11] AA learned only later that Orbitz's unwillingness to live up to its obligations was driven at least in part by a back-office deal with TVP whereby TVP paid Orbitz sizeable payments in exchange for Orbitz's refusal to implement AA Direct Connect. (*See* Compl. ¶¶ 73, 101.)

or their corporate customers from using alternative, less costly and more efficient distribution channels, including AA Direct Connect, by offering them special or additional fares when they book flights through those channels. TVP argues that the allegations in the Complaint about TVP's use of an MFN clause in the Galileo Preferred Fares Amendment ("PFA") between AA and TVP are time-barred by the Sherman Act's four-year statute of limitations, 15 U.S.C. § 15b.[12] Because the PFA was originally signed in July 2006, TVP argues that AA's claims that TVP's MFNs are anticompetitive are time-barred. TVP's argument is meritless, particularly at the pleading stage.

First, even if TVP were correct that its entry into a contract containing an MFN provision falls outside the statute of limitations, the Court could consider TVP's anticompetitive enforcement of the MFN in the PFA in determining whether TVP is *liable* for monopolization. The Complaint alleges numerous exclusionary acts by TVP that are within the limitations period. (*See, e.g.*, Compl. ¶¶ 96-101.) A plaintiff may introduce evidence of acts that took place outside the statute of limitations as evidence of a violation inside the statute of limitations. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 217 (3d Cir. 2008) (holding that although plaintiff could collect damages only for harm suffered within the limitations period, it was "entitled to present evidence from outside that period to sustain its burden of proof" of an illegal antitrust conspiracy). And, of course, the Court could impose injunctive relief for TVP's anticompetitive behavior, even if it could not award monetary damages. *See Rite Aid Corp. v. Am. Exp. Travel Related Servs. Co., Inc.,* 708 F. Supp. 2d 257, 272 (E.D.N.Y. 2010).

[12] TVP does not argue that the complaint's allegations about MFN provisions in other TVP contracts—either with AA or with other participating airlines—are time-barred. (*See, e.g.*, Compl. ¶ 51 ("TVP make[s] widespread use of [MFN] provisions in the form of 'full content' or 'content parity' provisions in [its] participating carrier agreements . . . ."); *id.* ¶ 55 ("In reality, an airline has no economically reasonable alternative but to accept the MFN clause. . . ."); *id.* ¶ 57 ("An airline negotiating with a GDS knows that its competitors have signed agreements that contain an MFN.").) Accordingly, AA has confined its response to discussing why, to the extent its claims rely on allegations about the MFN in the PFA, they are not time-barred.

More importantly, TVP's argument is contrary to Fifth Circuit law. According to *Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029, 1037 (5th Cir. 1977), which TVP cites, a "plaintiff's cause of action . . . continues to accrue for as long as the defendant takes advantage of the contract in question" for anticompetitive purposes. *See also Rx.com v. Medco Health Solutions, Inc.*, 322 Fed. App'x 394, 397 (5th Cir. 2009) ("Under the continuing violation theory, 'each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . the statute of limitations runs from the commission of the act.'"); *Powers v. Nassau Dev. Corp.*, 753 F.2d 457, 1961 (5th Cir. 1985).[13]

In this case, AA specifically alleges facts showing that the MFN in the PFA is anticompetitive. (*See, e.g.,* Compl. ¶¶ 51-52, 54-55.) AA alleges that TVP continues to make "widespread use of [MFN] provisions in the form of 'full content' or 'content parity' provisions . . . that limit participating airlines' ability to encourage the use of one GDS over another or the use of alternative providers of airline booking services other than GDSs." (*Id.* ¶ 51.) It is unquestionable that the PFA remains in force and that TVP continues to enforce it to this day for anticompetitive purposes.[14]

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[13] According to *Imperial Point*, "it does not lie well in the mouth of a defendant to argue that he is immunized from suit for his recent acts simply because a pre-limitations contract, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts." *Id. City of El Paso v. Darbyshire Steel*, 575 F.2d 521, 523 (5th Cir. 1978), is inapposite. Unlike the PFA, which governs the on-going relationship between AA and TVP, the contract in *City of El Paso* was a one-time bid to provide structural steel for a construction project. The alleged harm in that case occurred once, at the time the contract was entered into, based on an allegedly collusive bid. *Id.* Here, on the other hand, alleged harm occurs to AA every time TVP uses the PFA to prevent AA from attempting to incentivize consumers to employ lower cost distribution alternatives.

[14] Indeed, in the Illinois state court litigation, which TVP filed in November 2010, TVP has attempted to thwart AA's efforts to obtain a lower cost method of providing airline booking services to consumers by suing under the terms of the PFA to Enjoin AA's Termination Of Orbitz. (*See* Complaint filed in *Travelport v. American Airlines*, Case No. 2010 CH-48028 (Cook County, Illinois) (App. at 1-12 (Ex. 1).) At a minimum, TVP's lawsuit to enforce the PFA in this manner is a new "overt act … and thus by its very nature [] a continuing antitrust violation" on which AA can sue. *Powers*, 753 F.2d at 461.

In other words, to the extent AA's claims are based on the MFN in the PFA (which, as discussed above, is only one of many anticompetitive actions AA has alleged), those claims continue to accrue to this day, as provided by *Imperial Point,* and are not time-barred. 549 F.2d at 1037; *see also Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 502 n.15 (1968) (statute of limitations does not bar an antitrust plaintiff from suing for damages for a continuing violation of the Sherman Act, even if the violation began outside of the limitations period).

C. The Complaint Adequately Alleges That TVP's Exclusionary Conduct Foreclosures A Substantial Share Of The Relevant Markets

TVP claims that AA has not pled facts showing that TVP's exclusionary conduct has foreclosed a substantial share of the relevant market because the Complaint does not specify "[h]ow much of the alleged travel agency market do TVP's multi-year contracts cover" and how many "software developers TVP supposedly walled off from AA." (TVP MTD at 17.) TVP's argument is groundless. To state a valid claim under section 1 of the Sherman Act based on exclusive dealing, the Complaint must allege that Defendants' conduct foreclosed "a substantial share" of the affected market. It does.

The Complaint alleges that in the past year, over $2.7 billion of AA's sales were booked through TVP's GDSs (Compl. ¶ 3); that TVP enters into long term contracts with travel agents (*id.* ¶ 63); that "most" of those contracts include one or more provisions that require or induce the agents to use one GDS exclusively (*id.*); and that in order to reach the corporate customers of travel agencies AA has no alternative but to participate in TVP's GDSs. With respect to third-party technology companies and software developers, the Complaint alleges that TVP has unreasonably refused to deal with Farelogix and *any* technology company or software developer who works with AA on AA Direct Connect, and has terminated and threatened others for doing

so. (*See id.* ¶¶ 79-87.)[15] Thus, it is irrelevant precisely how many companies exist that *might* work with AA Direct Connect (*see* TVP MTD. at 17) because TVP has effectively foreclosed AA from *all* of them. The Complaint further alleges that through these exclusionary acts, TVP has been successful in its quest to impede the development and adoption of non-GDS distribution methods. (Compl. ¶ 87.)[16]

There is no basis for TVP's assertion that AA must plead, without the benefit of discovery, facts that are uniquely within TVP's possession, such as the exact percentage of travel agents whose contracts contain terms that require exclusivity. To do so would impose a heightened pleading requirement on antitrust plaintiffs, contrary to the Supreme Court's decision in *Twombly*, 550 U.S. at 570 ("we do not require heightened fact pleading of specifics").

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[15] In order for AA Direct Connect to be a practicable substitute for use of a GDS from the perspective of a travel agent, both flight and fare content must be aggregated from AA Direct Connect and a GDS, and information must be exchanged with the other software applications used by the travel agencies that interoperate with a GDS. (Compl. ¶¶ 76-77.)

[16] The cases relied on by TVP are inapposite. In *Rick-Mik Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972 (9th Cir. 2008), and *Rockbit Indus. U.S.A., Inc. v. Baker Hughes,* 802 F. Supp. 1544, 1550 (S.D. Tex. 1991), the complaints were devoid of *any* factual allegations that a substantial share of the relevant market was foreclosed. In *Insignia Sys., Inc. v. News Corp.*, No. 04-4213, 2005 WL 2063890 (D. Minn. Aug. 25, 2005), the complaint permitted the inference that the plaintiff and a third party-competitor each had a 25% share of the relevant market and there were no allegations of barriers to entry other than the challenged exclusive contracts. Here, by contrast, TVP is alleged to have virtually a 100% share in the market for the provision of booking services to its travel agent subscribers, TVP has effectively foreclosed AA Direct Connect from the market, and AA has alleged technological and other barriers to entry besides the challenged exclusive contracts. (Compl. ¶¶ 121-22.)

D. AA's Allegations Regarding "Applications Developers" State A Cognizable Claim

TVP cites *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), for the general proposition that "a private company has the right to choose with whom it does business and has no duty to aid competitors," and argues that its refusal to do business with software developers cannot be challenged under the antitrust laws. (TVP MTD at 21). However, *Trinko* did not overrule a long line of cases, including *Lorain Journal v. United States*, 342 U.S. 143 (1951), *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985), and *United States v. Microsoft,* 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc), in which courts have found defendants liable for refusing to deal with rivals or companies that worked with rivals, under circumstances analogous to those alleged in the Complaint. For example, in *Lorain Journal*, the Court found that a newspaper was liable when it refused to do business with advertisers that also did business with a new competitor. In *United States v. Microsoft*, the D.C. Circuit held that Microsoft violated section 2 of the Sherman Act when it conditioned its willingness to cooperate with various third parties on their agreement to work exclusively or near exclusively with Microsoft. TVP ignores the allegation in the Complaint that TVP has told developers they will be terminated if they work with AA Direct Connect (Compl. ¶ 73), and that it terminated Farelogix because it was "not aligned" with Travelport (*Id.* ¶ 82). AA's well-pleaded allegations must be accepted as true.

III. AA Has Sufficiently Pled The Conspiracy To Monopolize Claim

TVP contends it is immune under the antitrust laws for conspiring with Orbitz because they are "controlled by the same majority owner, The Blackstone Group." (TVP MTD at 22.) For the reasons stated in AA's response to Orbitz's motion to dismiss, which are incorporated herein by reference, TVP is wrong as a matter of law and seeks to broaden the scope of what is

known as the "single entity doctrine" far beyond the parent-wholly-owned subsidiary relationship in which it arose in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767 (1984). In any event, resolution of the single-entity defense is inappropriate before discovery given the complex relationship between The Blackstone Group, TVP, and Orbitz.

IV. AA's State Law Claims Are Not Preempted By The Airline Deregulation Act

TVP's contention that AA's state law tortious interference claims are preempted by the Airline Deregulation Act (the "ADA") is meritless. When Congress enacted the ADA to deregulate the airline industry, it determined that "maximum reliance on competitive market forces" would further "efficiency, innovation, and lower prices." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The Supreme Court therefore explained that it is "the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995); *see Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (emphasizing "*and not at all to States*"). To "ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378, Congress provided that States "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).

ADA preemption turns on the "distinction between what the State dictates and what the airline itself undertakes." *Wolens*, 513 U.S. at 233. When state law is used to dictate what rates, routes, or services an airline must provide, it is preempted; but when state law is used to enforce actions undertaken voluntarily by airlines, it is not preempted. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337 (5th Cir. 1995) (en banc) ("[T]he ADA was concerned solely with

economic deregulation, not with displacing state tort law."). Thus, the Supreme Court has found that state-law claims are only preempted by the ADA if they result in regulating how airlines do business. *See, e.g.*, *Wolens*, 513 U.S. at 228-29 (state-law consumer protection statute preempted); *Morales*, 504 U.S. at 390 (state-law deceptive advertising statutes preempted). But the ADA does *not* preempt claims based on "breach of [an airline's] own, self-imposed undertakings," because these are "privately ordered obligations." *Wolens*, 513 U.S. at 228.

Consequently, state-law tort claims are not preempted when they are brought to enforce legitimate contracts. *See id.* at 230 ("Market efficiency requires effective means to enforce private agreements"; "The FAA's text, we note, presupposed the vitality of contracts governing transportation by air carriers."). That is because "the [ADA] was intended to preempt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts." *United Air Lines, Inc. v. Gregory*, 716 F. Supp. 2d 79, 90 (D. Mass. 2010) (quoting *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 221-22 (Tex. App.—Fort Worth 2009, pet. denied), *cert. denied*, 130 S. Ct. 2061 (2010)). This is congruent with the text and purpose of the ADA: Congress sought to eliminate federal regulation of the airline industry, while simultaneously preempting state laws that would impose *de facto* state-mandated prices and trade practices.

Courts routinely reject ADA preemption of state-law tort claims brought by airlines to enforce their own contracts. *See, e.g.*, *Alaska Airlines Inc. v. Carey*, 395 Fed. App'x 476, 478 (9th Cir. 2010); *Gregory*, 716 F. Supp. 2d at 90; *Frequent Flyer Depot*, 281 S.W.3d at 221-22. Indeed, these claims "would not frustrate the purpose of the [ADA]" because the airline is trying to avail itself of agreements made in the competitive marketplace—not impose state regulation

on the airline industry. *Alaska Airlines*, 395 Fed. App'x at 478. In contrast, courts have held that the ADA preempts claims when they would have had a regulatory effect on the prices, routes, or services of an airline. The cases cited by TVP all fall into this category and are therefore distinguishable. *See Lyn-Lea Travel Corp.*, 283 F.3d at 287 (finding preemption when travel agency was "seeking the application of Texas common law in a way that would regulate AA's pricing policies, commission structure and reservation practices"); *Galieo* [sic] *Int'l, L.L.C. v. Ryanair, Ltd.*, No. 01-C-2210, 2002 WL 314500, at *5 (N.D. Ill. Feb. 27, 2002) ("general consumer fraud law [is] preempted by the ADA"); *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1409-11 (D. Colo. 1989) (state claims based on airline's marketing of GDS services to travel agents was preempted).[17]

TVP makes no effort to acknowledge the specific context within which this case arises. AA's fourth claim for relief alleges that TVP tortiously interfered with two contracts made between AA and Orbitz: the Orbitz Supplier Link Agreement (OSLA) and the Second Amended and Restated Airline Charter Associate Agreement (ACAA). (Compl. ¶ 124.) In fact, TVP's interference has prevented development of AA's Direct Connect technology (s*ee id.*), which undermines the entire purpose of the ADA: promotion of "maximum reliance on competitive market forces" to further "efficiency, innovation, and lower prices." *Morales*, 504 U.S. at 378. And AA's fifth claim alleges that TVP tortiously interfered with AA's contracts with numerous travel agents and corporate partners. (Compl. ¶ 143-51.) Thus, AA's tortious interference claims do not seek to transform state tort law into *de facto* state regulation of the airline industry;

[17] TVP also cites an unpublished District of Utah case, which, at best, stands for the proposition that punitive damages are preempted by the ADA. *Manassas Travel, Inc. v. Worldspan, L.P.*, No. 2:07-CV-701-TC, 2008 WL 1925135, at *2 (D. Utah Apr. 30, 2008). And even that holding is questionable because the unpublished decision did not analyze whether the plaintiff travel agency's *claims* were an attempt to use tort law to establish *de facto* state airline regulation. Insofar as claims do not have a regulatory effect on the airline industry, they are not preempted by the ADA.

these claims merely seek to remedy interference with AA's specific "privately ordered obligations." *Wolens*, 513 U.S. at 228. Enforcement of contract rights has no impermissible regulatory effect on the airline or market competition, and TVP has not cited a single decision in conflict with that proposition. AA's tortious interference claims are not preempted by the ADA.

CONCLUSION

AA respectfully requests that the Court deny TVP's Rule 12(b)(6) motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 18th day of July, 2011.

/s/ Robert S. Velevis
Robert S. Velevis