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

AMERICAN AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 4:11-cv-00244-Y
vs.	)	
	)	
SABRE, INC., et al.,	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF TRAVELPORT'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Statutes

ARGUMENT

AA's response to Travelport's[1] Rule 12(b)(6) Motion to Dismiss [Doc. No. 85] confirms that AA has not plausibly alleged a relevant product market and other essential elements of a federal antitrust lawsuit. The assertion that AA and some other airlines rely on Travelport for Travelport's services is not a sufficient basis to plead a Travelport-only single-brand product market. For this and the additional reasons stated below, AA's First Amended Complaint should be dismissed.

I. IT IS THE QUALITY, NOT THE QUANTITY, OF FACTUAL ALLEGATIONS THAT MATTERS.

AA suggests that its Amended Complaint should survive because it contains "myriad specific factual allegations." (Resp. [Doc. No. 107] at 6.) But it is not enough to fill an antitrust complaint with innocuous details of business conduct. The factual allegations must be sufficient to state an antitrust claim "that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). AA's Amended Complaint fails to meet this standard.[2]

II. AA HAS NOT PLAUSIBLY ALLEGED TRAVELPORT'S DOMINANCE IN A U.S. GDS MARKET.

The Amended Complaint alleges that Travelport accounts for just 34% of bookings made by U.S.-based travel agencies. (Am. Compl. [Doc. No. 70] ¶ 120.) Such a low market share dooms AA's Sherman Act Section 2 claims as a matter of law to the extent they are based on the

[1] "AA" refers to American Airlines, Inc.; "Travelport" refers to Defendants Travelport Limited and Travelport LP.

[2] AA's pleading failures are not excused by reference to a pending DOJ investigation. *See In re Florida Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1316 (S.D. Fla. 2010) (refusing to take judicial notice of CIDs issued by Florida Attorney General because they did not make the complaint's allegations any more plausible); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258-59 (W.D. Wash. 2009) (allegations of parallel government investigation are insufficient to state a plausible claim); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (DOJ investigation "carries no weight" in pleading antitrust claim because it may not result in litigation and may be broader or narrower than allegations in complaint).

alleged monopolization of a U.S. GDS market.[3] (Opening Mem. [Doc. No. 86] at 6-7.) AA never responds to this argument, and thus appears to have conceded the point. (*See* Resp. at 13 (arguing only that "the Complaint plausibly alleges that TVP has market power ***for Section 1 purposes***") (emphasis added).)[4]

Recognizing that Travelport's alleged market share is too low to support its claims, AA argues there is another way to state the market power element: by alleging "the defendant had control over price"—*i.e.*, the power to impose and maintain supracompetitive prices in the relevant market. (Resp. at 14.) AA suggests it has pleaded facts supporting this conclusion, pointing to its assertion that Travelport "doubl[ed] AA's booking fees for certain ticket sale[s]." (*Id.*) But this allegation of a temporary price increase to *a single customer* in a *different market* (the alleged increase occurred *outside the United States* (*see* Am. Compl. ¶ 96)) is woefully insufficient. AA cannot point to a single case holding that a price increase to a single customer is direct evidence of market power.[5] *Cf. Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (market power requires showing of ability to "restrict *marketwide*

[3] The same is true for AA's conspiracy to monopolize claim (Count Three). (*See* Opening Mem. at ¶¶134-36.) AA alleges that the conspiracy was to "preserv[e]" an existing monopoly (Am. Compl. at ¶135), and a 34% market share is not enough to support a monopoly.

[4] AA does not cite any case in which even a Section 1 claim was based on an alleged market share as low as 34%. The cases cited by AA hold only that, whereas the Supreme Court found 30% market share insufficient in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), any market share below 30% is also insufficient. These cases do not hold that a share slightly over 30% is sufficient. *See Breux Bros. Farms, Inc. v. Teche Sugar Co., Inc*., 21 F.3d 83, 87 (5th Cir. 1994); *Bodet v. Charter Commc'ns Inc*., 2010 WL 5094214, at *5 (E.D. La. July 26, 2010). In any event, even if a 34% market share were sufficient to plead the market power element of a Section 1 claim, AA's Section 1 claim (and its Section 2 conspiracy claim) fail on other grounds. (*See* Opening Mem. at 17-23; *infra* §§ V-VI.)

[5] AA does not make specific, non-conclusory allegations showing that Travelport can impose and maintain supracompetitive prices upon network airlines generally, whether in the U.S. or elsewhere. AA makes only the conclusory allegation that Travelport's "discounted" booking fees are "still well above competitive levels," (Am. Compl. ¶ 55), which begs the question why a supposed monopolist would be discounting its prices at all.

output and, hence, increase *marketwide* prices") (emphasis added). Nor can it establish market power in a U.S. market by alleging a price increase in a different market altogether.[6]

III. AA HAS NOT PLAUSIBLY ALLEGED A SINGLE-BRAND SUBMARKET.

This leaves, as the only possible relevant market for AA's claims, a proposed market "for the provision of airline booking services to Travelport subscribers" in the United States.[7] (Am. Compl. at ¶ 126.) AA argues that this proposed market is not subject to challenge on a motion to dismiss because market definition is a question of fact (Resp. at 6.), but courts regularly dismiss at the pleading stage antitrust claims based on implausible relevant markets.[8] And according to a case AA cites, "[c]ases in which dismissal on the pleadings is appropriate frequently involve … failed attempts to limit a product to a single brand…" *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 443 (4th Cir. 2010).

Single-brand markets cannot survive a motion to dismiss unless the plaintiff plausibly alleges that consumers are locked into a single brand of a product in the aftermarket as the result of a purchase in the primary market. *See Eastman Kodak v. Image Tech. Servs.*, 504 U.S. 451 (1992). AA freely admits that "this is not an aftermarkets case" (Resp. at 9), but argues that its

[6] Indeed, this allegation confirms the implausibility of AA's market power allegation. If Travelport has the power to control marketwide prices in the United States, why had Travelport not *already* doubled its prices in the United States? Why have AA and other airlines not been forced to accept such price increases in the current contract negotiations? Why was Travelport forced to agree to double-digit discounts in its last round of contract negotiations with AA? AA does not, and could not, allege any such pricing conduct by Travelport in the United States.

[7] Travelport has shown that the Foreign Trade Antitrust Improvements Act (the "FTAIA") deprives courts of subject matter jurisdiction over claims relating to the monopolization or restraint of foreign markets. (Opening Mem. at 15-16.) AA apparently agrees. (*See* Resp. at 15 n.10 ("The Complaint does not allege that TVP monopolized 'foreign travel agency services.").) Therefore, AA's claims should be dismissed to the extent they allege the monopolization or restraint of Belgian, Swiss and UK markets. To the extent AA apparently now seeks to convert its allegations into a claim of monopoly leveraging (see Resp. at 15), no such claim is asserted in the Amended Complaint and AA has alleged no effect in the United States.

[8] *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (dismissing single-brand market on the pleadings); *Rohlfing v. Manor Care*, 172 F.R.D. 330, 346 (N.D. Ill. 1997) (same); *see also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488-89 (5th Cir. 1994) (single-brand market is without merit as a matter of law and not entitled to factual determination).

proposed single-brand market is nevertheless cognizable under *Kodak* because AA has no choice but to use Travelport's GDS if it wants to reach travelers who purchase tickets through Travelport's travel agency subscribers. (Resp. at 12 & n.9.)

Courts rightly reject attempts to define single-brand markets on the basis of allegations that the defendant controls access to a particular group of customers. In *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494 (3d Cir. 1998), for example, the plaintiff alleged a single-brand market defined to include only U.S. Healthcare members with prescription drug benefits. *Id.* at 513. The plaintiff's allegations were strikingly similar to those AA asserts here: plaintiff alleged that, from the perspective of a local pharmacy, other purchasers of prescription drugs (i.e., those not insured by U.S. Healthcare) were not substitutes, and it argued that its proposed single-brand market satisfied *Kodak* because U.S. Healthcare had allegedly "locked in" its members, which in turn "locked in" those members to the pharmacies included in U.S. Healthcare's provider network. *Id*. at 515. In rejecting plaintiff's proposed single-brand market, the Third Circuit held that in order to fall within *Kodak's* concept of lock-in (and the narrow set of circumstances in which it can support a single-brand market), plaintiff needed to show that pharmacies (and not U.S. Healthcare's members) were locked into selling to U.S. Healthcare-insured drug purchasers to the exclusion of other reasonably substitutable customers, such as drug purchasers insured by other prescription plans or those uninsured by any plan.[9] *Id*.; *see also Continental Orthopedic Appliances v. Health Ins. Plan of Greater N.Y.*, 994 F. Supp. 133, 140-41 (E.D.N.Y. 1998) (granting 12(b)(6) dismissal of single-brand market based on access to single HMO's enrollees).

[9] That *Brokerage Concepts* was decided after a trial does not diminish its relevance to the single-brand market issue before this Court. The Third Circuit rejected the plaintiff's arguments regarding the single-brand market as misplaced even assuming that the plaintiff's arguments were factually correct. *See id*. at 515.

Similarly, AA's argument that it "has no ability to substitute another GDS…if it wants to access the thousands of travel agents…that each GDS has locked up" (Resp. at 4; *see also id*. at 12) is irrelevant under the *Kodak* test. Rather, to limit the market to Travelport's single brand, AA would need to demonstrate that it is locked in to using only Travelport's brand of GDS to the exclusion of other brands of GDS and other distribution channels. This AA cannot do. Just as the Third Circuit in *Brokerage Concepts* found that a pharmacy "considers members of other prescription plans, or uninsured persons, completely interchangeable with U.S. Healthcare members," 140 F. 3d at 514, from AA's perspective, consumers of air travel making purchases via other brands of GDS, via direct booking channels such as AA's own website, and through all other means are in fact "completely interchangeable" with Travelport subscribers.

AA tries to focus on Travelport's brand alone to define the market because it is the only way AA can create the false appearance that Travelport is a monopolist. If AA were to define the market properly based on product characteristics and interchangeability instead of brand, AA would need to include Sabre and other competitors in the market. AA does not allege any facts distinguishing Sabre's products from Travelport's products or Sabre's subscribers from Travelport's subscribers (other than the fact that they have chosen to use one competitor's GDS over another for some period of time). In businesses where there are multiple suppliers of the same product, a plaintiff cannot limit the market to only one supplier's brand unless lock-in conditions prevent consumers from using the other suppliers' brands. *See Leegin*, 615 F.3d at 418 (rejecting market for "Brighton women's accessories" at pleading stage because there were other available suppliers of women's accessories); *Domed Stadium*, 732 F.2d at 488 ("one brand in a market of competing brands cannot constitute a relevant product market"). AA does not allege, as it must under *Kodak*, that it is locked into Travelport's brand of GDS as the only means

of distributing its products, to the exclusion of, *inter alia*, competing brands of GDS. To the contrary, AA alleges that it uses all GDSs for distribution.

Indeed, if AA's "access to customers" theory of single-brand markets were taken to its logical conclusion, every distributor having a contractual relationship with a particular group of customers would "control access" to those customers and be a monopolist in a "market" comprised exclusively of those customers.[10] Every insurer would be a monopolist with respect to its current members. Every bank would be a monopolist with respect to its current account holders. In the travel industry, not only would each GDS be a monopolist over its current set of subscribers, but every travel agent with a contract to provide services to a particular corporate customer would be a monopolist as well. This is not the law.[11]

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[10] AA's theory cannot be salvaged by allegations about the number of customers the distributor allegedly controls. That approach does not support a single-brand market but rather collapses the analysis into one addressing the defendant's share of the *broader* market. *See Elliott v. United Ctr.*, 126 F.3d 1003, 1005 (7th Cir. 1997) (stadium's control over distribution of food sales to its guests does not support a single-brand market – the question is the stadium's market share in the "expanded market" of all comparable facilities).

[11] AA points to a number of cases in an apparent effort to establish that it need not meet the *Kodak* lock-in exception to allege a single-brand market. (Resp. at 9.) Not only does each of AA's cases pre-date *Kodak*, but each is inapposite. AA's cases do not involve markets conveniently defined around only one of several suppliers' brands; instead, they feature markets defined around products for which there happens to be only one supplier. For example, in *International Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 249-50 (1949), the market was defined around "championship boxing," not the defendant's particular league or brand of championship boxing. *See also NCAA v. Univ. of Okla.*, 468 U.S. 85, 95 (1984) ("live college football television" not "NCAA live college football television"); *Poster Exch., Inc. v. National Screen Serv. Corp*., 431 F.2d 334, 336 (5th Cir. 1970) ("standard accessories for motion pictures," not "National Screen standard accessories for motion pictures"). Unlike these cases, AA cannot define its single brand market without using the word "Travelport." Take the reference to "Travelport" away, and all that is left is AA's broader market in which Travelport has only a modest share.

AA's citation to *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), is perplexing. That case did not involve a single supplier market, but rather a market in which four suppliers competed to sell air-conditioning units for use on air-cooled rear-engine automobiles manufactured by three companies, Volkswagen, Porsche, and Audi. *Id.* at 980-81. AA's reliance on *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), is similarly misplaced; the alleged market in that case consisted of five suppliers performing services on a type of aircraft. *Id.* at 1352. The alleged market in *C.E. Services Inc. v. Control Data Corp*., 759 F.2d 1241, 1246 (5th Cir. 1985), consisted of multiple third-party service providers who were distinguished from the original manufacturer on the basis of price and quality differences, not by brand. *IBM Corp. v. United States*, 298 U.S. 131 (1936), is an aftermarkets case that is entirely consistent with *Kodak*.

AA's reliance on credit-card industry cases is misplaced. AA argues that the credit-card industry is analogous to the GDS industry because "merchants must participate in all major card networks or risk losing a substantial amount of business." (Resp. at 12 n.5.) This is precisely the same "access to customers" argument rejected by the Third Circuit in *Brokerage Concepts*. *See also Elliott v. United Center*, 126 F.3d 1003 (7th Cir. 1997) (affirming 12(b)(6) dismissal of single-brand market based on a stadium's control over food sales to its guests). Not surprisingly, none of the plaintiffs in the credit-card cases cited by AA attempted to plead a single-brand market on that basis. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (finding that four companies competed in a market for "network services"); *United States v. American Express*, No. CV-10-4496, at ¶ 33 (E.D.N.Y) (Am. Compl. filed Dec. 21, 2010) (alleging markets for "general purpose card network services" and "general purpose card network services for merchants in travel and entertainment businesses," neither of which was defined by reference to just one of the four competing defendants' brands).

The only credit-card case AA cites that featured a single-brand market allegation involved misuse of market power conferred by customer lock-in, as in *Kodak*. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*. 562 F. Supp. 2d 392, 403-04 (E.D.N.Y. 2008). Specifically citing *Kodak* lock-in conditions as the "paradigm" for single-brand markets, the court allowed the plaintiff's single-brand market to proceed because of aftermarket restrictions imposed by MasterCard, including one requiring merchants who accept MasterCard for payment to use only MasterCard for network services despite the availability of other options. *Id*. Nowhere in that court's analysis of the single-brand market did the court adopt AA's argument that each credit card constitutes a single-brand market because some merchants choose to use them all. Thus, *Payment Card* provides no support for AA's suggestion that a

single-brand market is sustainable where, as here, the *Kodak* aftermarket exception does not apply.

IV. AA HAS NOT PLAUSIBLY ALLEGED A CONSPIRACY.

As discussed more fully in Orbitz's reply brief, AA's Section 1 claim cannot be predicated on a contract, combination or conspiracy between Travelport and Orbitz. (*See* Doc. No. 111 at 7-9.) AA is simply wrong to the extent is suggests that the holding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), has not been routinely applied outside of the parent / wholly-owned subsidiary context.[12]

Nor has AA adequately pled a Section 1 claim based on an alleged conspiracy between Travelport and unnamed industry participants. As Travelport pointed out in its opening memorandum, such vague and conclusory assertions fall far short of meeting a plaintiff's burden under *Twombly*. (Opening Mem. at 22-23.) AA never responds to this point.

V. AA HAS NOT PLAUSIBLY ALLEGED SUBSTANTIAL FORECLOSURE.

AA's Section 1 claim also fails because AA has not alleged substantial foreclosure. AA's response on this issue is feeble at best. With regard to the foreclosure of travel agents, AA makes only the vague and conclusory statement that it has alleged "most" of Travelport's contracts contain provisions that require or induce agents to use one GDS exclusively. (Resp. at 19.) This is insufficient, particularly in light of AA's admission that it "does not allege that TVP exercises monopoly power with respect to travel agents." (*Id*. at 12.)

[12] *See, e.g., Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp*., 849 F. Supp. 702, 706 (N.D. Cal. 1994) ("Two sister subsidiaries of the same parent over which the parent has legal control are legally incapable of conspiring in violation of § 1 for the same reasons *Copperweld* found that a parent and its wholly-owned subsidiary could not conspire."); *Rohlfing v. Manor Care*, 172 F.R.D. 330, 344-45 (N.D. Ill. 1997) (collecting cases where sister corporations were held incapable of conspiring despite less than full ownership).

AA's argument that it need not allege the share of software developers foreclosed because Travelport has "effectively foreclosed AA from all of them" (*id.* at 20) likewise fails *Twombly*'s plausibility and specificity requirements. In any event, AA does not state a cognizable "refusal to deal" claim regarding software developers under settled law.[13]

VI. AA'S STATE-LAW CLAIMS ARE PREEMPTED.

AA cannot and does not dispute that the Airline Deregulation Act ("ADA") broadly preempts claims "related to the prices, routes, or service of an air carrier," including claims brought against independently owned GDSs. *See* 49 U.S.C. § 41713(b)(1); *Galileo Int'l v. Ryanair*, 2002 U.S. Dist. LEXIS 3317, at *14 (N.D. Ill. Feb. 27, 2002) (independently owned GDS services are "services" under the ADA and state-law claim for booking overcharges is preempted). Instead, AA argues that its state-law claims are not preempted because they constitute only "enforcement of contract rights" and will have "no impermissible regulatory effect on the airline or market competition." (Resp. at 25.) However, unlike the cases on which AA relies,[14] AA's business tort claims seek not to enforce specific contractual terms, but rather

[13] AA is correct that *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ("*Trinko*"), did not overrule *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985), but *Trinko* confirmed that a refusal-to-deal claim that does not meet the narrow *Aspen Skiing* exception must be dismissed on the pleadings. *See Trinko*, 540 U.S. at 407-11. Here, AA has not alleged (and could not allege) that, in foreclosing access to developers, Travelport "elected to make an important change in distribution that had originated in a competitive market and had persisted for several years." *Aspen Skiing*, 472 U.S. at 603. Thus, AA has no viable refusal-to-deal claim. *See also ASAP Paging Inc. v. Centurytel of San Marcos Inc.*, 137 Fed. Appx. 694, 698 (5th Cir. 2005) (affirming dismissal since "the Sherman Act generally does not restrict a private entity's refusal to deal, except in certain egregious circumstances such as those in [*Aspen Skiing*]"); *Whitehurst v. Showtime Networks, Inc.*, 2009 WL 3052663, at *13 (E.D. Tex. Sept. 22, 2009) (granting motion to dismiss) ("The Court concludes that the *Aspen Skiing* case does not apply here, because there is no factual allegation of a 'willingness to forsake a short-term profit to achieve an anticompetitive end' in the context of a prior voluntary course of dealing.") (quoting *Trinko*); *Dealer Computer Servs., Inc. v. Ford Motor Co.*, 2006 WL 801033, at *4 (S.D. Tex. Mar. 28, 2006) (rejecting claim where there was no termination of "course of dealing," noting: "Plaintiff bears a heavy doctrinal burden to capture *Aspen Skiing*'s narrow exception.") (quotations omitted). AA's citation to *United States v. Microsoft*, 253 F.3d 34, 70-71 (D.C. Cir. 2001), is inapposite since that court was not addressing a refusal-to-deal claim.

[14] *See Alaska Airlines, Inc. v. Carey*, 395 Fed. Appx. 476 (9th Cir. 2010) (enforcing frequent flyer rules); *United Air Lines, Inc. v. Gregory*, 716 F. Supp. 2d 79 (D. Mass. 2010) (enforcing flight voucher rules); *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc*., 281 S.W.3d 215 (Tex. App. 2009) (enforcing frequent flyer rules).

to regulate broadly the way in which Travelport and Sabre compete against AA Direct Connect for travel agents. (*See* Am. Compl. at ¶¶ 143-57.) Instead of pointing to contractual rights allegedly breached, AA makes far-reaching allegations that Sabre and Travelport are competing unfairly, in violation of the Texas Deceptive Trade Practices-Consumer Protection Act, to win potential AA Direct Connect subscribers like Orbitz. (*See id*.) The Supreme Court has made it clear that such claims are preempted under the ADA. *See Am. Airlines v. Wolens*, 513 U.S. 219, 227 (1995) (ADA preempts claims based on state law prohibiting "unfair methods of competition and unfair or deceptive acts" because that law has the "potential for intrusive regulation" and "does not simply give effect to bargains"). Moreover, where as here AA seeks permanent injunctive relief to control the way Sabre and Travelport operate their GDSs (Am. Compl. ¶ 159) and to "create market conditions" favoring single-carrier distribution (*id.* ¶ 160), AA cannot plausibly argue that its business-tort claims merely enforce contractual rights and are not intended to impact market competition or the ways in which airlines distribute tickets.

CONCLUSION

The pleading failures described above are symptomatic of the fact that this antitrust suit is merely a negotiating device in the renewal of a Travelport contract that AA described at the time of signing as a "competitive distribution agreement" that "helps us…broaden the distribution of [AA's] fares at lower costs." (TP App. at 5.) The Amended Complaint should be dismissed on the pleadings with prejudice.

Dated: Aug. 4, 2011 Respectfully submitted,

/s/ Michael L. Weiner
Michael L. Weiner
michael.weiner@dechert.com
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036-6797
212.698.3608
212.698.3599 (Fax)

Mike Cowie
mike.cowie@dechert.com
Craig Falls
craig.falls@dechert.com
DECHERT LLP
1775 I Street, NW
Washington, D.C. 20006-2401
202.261.3300
202.261.3333 (Fax)

ATTORNEYS FOR DEFENDANTS TRAVELPORT LIMITED and TRAVELPORT, LP

Of Counsel to Travelport Defendants:

/s/ Walker C. Friedman
Walker C. Friedman
State Bar No. 07472500
wcf@fsclaw.com
Christian D. Tucker
State Bar No. 00795690
tucker@fsclaw.com
FRIEDMAN, SUDER & COOKE, P.C.
Tindall Square Warehouse No. 1
604 East 4th Street, Suite 200
Fort Worth, Texas 76102
817.334.0400
817.334.0401 (Fax)

John T. Schriver
JTSchriver@duanemorris.com
Paul E. Chronis
pechronis@duanemorris.com
DUANE MORRIS LLP
Suite 3700
190 South LaSalle Street
Chicago, Illinois 60603-3433
312.499.6700
312.499.6701 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, Fort Worth Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Craig G. Falls
Craig G. Falls