American Airlines Inc v. Travelport Limited et al Doc. 126

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.	)	

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

Travelport Appendix Exhibit (TP APX ___)	Description	Page(s)
1	True and Correct Copy of Press Release, Galileo International and American Airlines Sign New Five-Year, Full Content Distribution Agreements, *available at* http://travelport.mediaroom.com/index.php?s=43&item=208	5
2	*Bodet v. Charter Comm'ns Inc.*, 2010 WL 5094214 (E.D. La July 26, 2010).	6-12
3	*Dealer Computer Servs., Inc. v. Ford Motor Co.*, 2006 WL 801033 (S.D. Tex. Mar. 28, 2006).	13-17
4	*Galileo Int'l, L.L.C. v. Ryanair, Ltd.*, 2002 U.S. Dist. LEXIS 3317 (N.D. Ill. Feb. 27, 2002).	18-24
5	*United States v. American Express Co.*, No. 10-CV-4496 (E.D.N.Y.) (Am. Compl. filed Dec. 21, 2010).	25-62
6	*Whitehurst v. Showtime Networks, Inc.*, 2009 WL 3052663 (E.D. Tex. Sept. 22, 2009).	63-78

Dockets.Justia.com

Dated: August 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 7 COOKE, P.C.
Tindall Square Warehouse No. 1
604 East 4th Street, Suite 200
Forth 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

Latest News Releases

Galileo International and American Airlines Sign New Five-Year, Full Content Distribution Agreements

Parsippany, NJ, 05.07.2006

Galileo International, a leading global distribution system (GDS), and subsidiary of Travelport Inc., formerly Cendant Travel Distribution Services, today announced a five-year, full content agreement with American Airlines. Through the agreement, all of American's published fares and inventory will be available to all users of the Galileo GDS system including Galileo-connected travel agencies, corporate customers and Travelport online agencies booking through Galileo. The agreement establishes Galileo as a competitive distribution channel for American Airlines ticket sales. Galileo previously this year announced long-term full content deals with US Airways, United, Delta and Continental.

"Ensuring continued access to full airline content is critical to our Galileo travel agency customers and this long-term enterprise agreement with American Airlines is an important milestone in achieving that objective," said Kurt Ekert, senior vice president, Supplier Services for Travelport. "Our travel agents, corporate travelers and consumers can be assured of continuing to get the fares, convenience and service they are used to receiving."

"Establishing a competitive distribution agreement with Galileo helps us meet key business objectives to broaden the distribution of American Airlines' fares at lower costs," said David Cush, senior vice president, Global Sales for American Airlines. "With its broad travel agency subscriber base both offline and online, Galileo offers competitive channels to providing a cost-effective and comprehensive distribution platform over the long-term."

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.
Gerald Paul BODET, Jr.
v.
CHARTER COMMUNICATIONS INC. et al.

Civil Action No. 09-3068.
July 26, 2010.

Jeffrey P. Berniard, Berniard Law Firm, LLC, Gregory Pius DiLeo, Gregory P. DiLeo, Attorney at Law, Jennifer B. Eagan, Law Offices of Greg DiLeo, Madro Bandaries, Madro Bandaries, PLC, New Orleans, LA, for Plaintiff.

David George Radlauer, Tarak Anada, Jones Walker, New Orleans, LA, Daniel T. Donovan, Pro Hac, Vice, Jeffrey S. Powell, Kirkland & Ellis, LLP, Chicago, IL, John C. O'Quinn, Kirkland & Ellis, LLP, Washington, DC, for Defendants.

ORDER AND REASONS

MARTIN L.C. FELDMAN, District Judge.

***1** Before the Court is the defendants' motion to dismiss. For the following reasons, the motion is DENIED.

Background

Gerald Paul Bodet, Jr. subscribes to premium cable television service through Charter Communications, Inc., and Charter Communications Holding Company LLC. [FN1] In this lawsuit, he submits that Charter forced him (and others similarly situated) to rent a cable set-top box as a condition of receiving premium cable service. This bundling of the set-top box rental and premium cable service, the plaintiff contends, creates a tying relationship in violation of the Sherman Act.

FN1. The defendants are referred to jointly as Charter.

Charter is one of the five largest providers of cable multichannel video programming distribution, providing service to customers in twenty-seven states. According to the FCC's 2009 Report, cable MPVD enjoys a nationwide market share of almost 70%. Like other cable MVPD providers, for a monthly fee, Charter offers two cable products: basic cable and premium cable. Basic cable consists of a relatively small number of networks or channels, including local channels. Premium cable includes a variety of additional programming and features, including an interactive programming guide, pay-per-view, on-demand, high definition channels, and a range of premium and speciality channels. Over three million people subscribe to premium cable through Charter. The tying product alleged here is premium cable.

The tied product is the set-top box, which performs two functions. It descrambles the cable signal so that a subscriber can access only those channels he has paid for. It also provides a two-way communication capability necessary for features like the interactive programming guide, pay-per-view, and on-demand. Charter does not manufacture set-top boxes, but instead purchases them from companies like Scientific Atlantic and Motorola before renting them to Charter customers. A set-top box can be purchased at a retail cost of about $110 and has a useful life of three to five years. The plaintiff insists that a customer who rents a set-top box soon pays more in rental fees than the worth of the box. Pursuant FCC regulations, Charter also provides customers with the option of renting a CableCARD that can be plugged into certain cable-ready televisions or non-Charter rented set-top boxes. The CableCARD performs the descrambling security function of the set-top box, but does not provide a customer with access to the two-way communication functions. The total number of Charter customers using a CableCARD is 30,165.

Bodet filed the present lawsuit on March 16, 2009, individually and on behalf of those similarly

2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

situated. He submits that in order to receive all of the premium cable functions, customers are forced by Charter, because of its market power, to rent set-top boxes from it. In May 2009, the case was dismissed pending a bankruptcy proceeding in which Charter was a debtor. The case was reopened on December 2009, and amended complaints were filed. Charter now moves to dismiss the plaintiff's third amended complaint.

***2** Charter argues that the plaintiff has failed to state a claim for a Sherman Act tying violation. First, Charter submits that the plaintiff has failed to allege a plausible market. Charter points out that the plaintiff has excluded satellite MVPD and wireline MVPD from the premium cable product market although, Charter insists, these are reasonably interchangeable substitutes for Charter's premium cable service. Charter adds that the plaintiff fails to properly allege a product market because the plaintiff has made no allegations about the commercial realities of the industry within the relevant communities. Next, Charter submits that the plaintiff has failed to adequately allege Charter's market power in the tying market of premium cable. Charter insists that simply alleging that Charter has raised the price of its cable service or alleging that cable MVPD (including companies other than Charter) has a 69% nationwide market share is not enough to establish Charter's economic power. Finally, Charter submits that the plaintiff's complaint must fail because he has not properly alleged that Charter actually coerced its subscribers to rent set-top boxes in order to receive premium cable services. Charter points out that it provides a CableCARD, which allows customers to access premium and specialty channels without renting a set-top box and insists that, therefore, customers could not have been coerced into renting a set-top box.

The plaintiff responds first that satellite MVPD are not part of the relevant market because customers do not consider satellite MVPD interchangeable with cable MVPD. He points out that consumer surveys show that satellite customers are more satisfied with their service than cable users. He adds that satellite and cable cannot be interchangeable because they function optimally in different settings: Cable MVPD tends to operate best in more densely populated areas where its wires can reach a large number of people and justify the cost of the network, while satellite MVPD tends to operate best in rural areas, where there is more space to place dishes, fewer regulations prohibiting dishes, and more clear sight-lines for the dishes to access the satellite signal. Further, the plaintiff claims that cable MVPD offers premium services not offered by satellite, and satellite providers do not always carry local channels. Plaintiff adds that because cable MVPD and satellite require different equipment, a customer seeking to change its type of service will incur switching costs.

As to the inclusion of wireline providers, plaintiff insists that this type of service, including cable providers and fiberoptic telephone lines, do not dent Charter's market power for premium cable. Plaintiff submits that relatively few consumers have a wireline alternative. Plaintiff adds that even if wireline and satellite service were included in the relevant market, Charter would still have sufficient market power to illegally tie set-top box rental to its premium cable service.

***3** Plaintiff submits that a tying claim is viable when a defendant possesses market power across approximately thirty percent of the market, *see In re Wireless Tel. Sys. Antitrust Litig.,* 385 F.Supp.2d 403, 418 (S.D.N.Y.2005)), and insists that according to Charter's own press release, it has a penetration of services to forty percent of its potential customers. The plaintiff adds that Charter is one of the largest cable MVPD providers in the country and has repeatedly raised its prices for premium cable.

Plaintiff argues that Charter's market power is also demonstrated by the barriers to entry to the Premium Cable market. He points to the huge cost of building a wireline MVPD system and notes that cable MVPD providers have invested over $100 billion to construct advanced two-way fiberoptic

networks. He adds that a tedious and costly franchising process in many localities creates a barrier to entry. For example, plaintiff claims that local franchising authorities often impose "build-out" requirements mandating that a new entrant overbuild all of the geographic area served by the incumbent cable MVPD provider and "level playing field" regulations requiring a new entrant to match all of the concessions provided by the incumbent. The plaintiff states that another entry barrier is created by incumbent cable MVPD providers offering valuable programming to which challengers do not have access. Additionally, the plaintiff points out that multiple dwelling units often have long term contracts with MVPDs with automatic renewal privileges that exclude challengers. These entry barriers, the plaintiff insists, prevent both satellite MVPD and other cable providers from competing with Charter.

Next, the plaintiff submits that he has properly defined the relevant geographic market as the areas in which Charter operates. This definition, plaintiff says, corresponds to the commercial realities because it defines the geographic market the same way the commercial realities have caused Charter to operate. Alternatively, the plaintiff submits that the geographic market is properly alleged as each of the local areas in which Charter operates: that is, certain communities in the twenty-seven states in which Charter operates.

Finally, the plaintiff insists that he has properly alleged coercion. He submits that the existence of the CableCARD does not prevent a finding of Charter's coercion. The plaintiff points out that Charter's website states that the CableCARD does not provide identical services to a set-top box. He adds that Charter's company representatives advise customers that they can only receive all premium cable services by renting a set-top box from Charter and that if the customers obtain a set-top box from any other source it will not work with Charter's cable MVPD system. Thus, the plaintiff insists, Charter explicitly conditions the sale of its premium cable on the rental of set-top boxes.

The plaintiff submits that CableCARDS are not substitutes for set-top boxes. CableCARDS do not provide access to the interactive programming guide, on-demand, or pay-per-view.

Law and Analysis

I.

*4 Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Such a motion is rarely granted because it is viewed with disfavor. *See Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997) (quoting *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982)). In considering a Rule 12(b)(6) motion, the Court "accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.' " *See Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464 (5th Cir.2004) (quoting *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir.1999)). But, in deciding whether dismissal is warranted, the Court will not accept conclusory allegations in the complaint as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982). Indeed, the Court must first identify pleadings that are conclusory and, thus, not entitled to the assumption of truth. *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949 (2009). A corollary: legal conclusions "must be supported by factual allegations." *Id.* at 1950. Assuming the veracity of the well-pleaded factual allegations, the Court must then determine "whether they plausibly give rise to an entitlement to relief." *Id.*

" 'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' " *Gonzalez v. Kay,* 577 F.3d 600, 603 (5th Cir.2009)(quoting *Iqbal,* 129 S.Ct. at 1949 (2009))(internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quotation marks, citations, and footnote omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly,* 550 U.S. at 557) (internal quotations omitted).

In deciding a motion to dismiss, the Court may consider documents that are essentially "part of the pleadings"-that is, any documents attached to or incorporated in the plaintiffs' complaint that are central to the plaintiffs claim for relief. *Causey v. Sewell Cadillac-Chevrolet, Inc.,* 394 F.3d 285, 288 (5th Cir.2004) (citing *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir.2000)). Also, the Court is permitted to consider matters of public records and other matters subject to judicial notice without converting a motion to dismiss into one for summary judgment. *See United States ex rel. Willard v. Humana Health Plan of Texas Inc.,* 336 F.3d 375, 379 (5th Cir.2003).

II.

***5** A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib.,* 520 F.3d 393, 405 (5th Cir.2008) (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 461 (1992)). Not all tying arrangements constitute antitrust violations. *See Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 36 (2006). To state a claim for an illegal tying arrangement, the plaintiff must allege: "(1) two separate products, the tying product and the tied product; (2) sufficient market power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetetive effects in the tied market." *Bob Maxfield, Inc. v. Am. Motors Corp.,* 637 F.2d 1033, 1037 (5th Cir.1981).

The Court's analysis of a tying arrangement "must focus on the market or markets in which the two products are sold." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 18 (1984) (abrogated on other grounds). The relevant market includes the characterization of the product itself and the geographic market in which the product is sold. *R.D. Imports Ryno Indus., Inc. v. Mazda Distribs. (Gulf) Inc.,* 807 F.2d 1222, 1224-25 (5th Cir.1987). "In ascertaining the relevant product market, courts consider the extent to which the seller's product is 'interchangeable in use' and the degree of 'cross-elasticity of demand between the product itself and substitutes for it.' " *Apani Sw., Inc. v. Coca-Cola Enters., Inc.,* 300 F.3d 620, 626 (5th Cir.2002) (quoting *C.E. Servs., Inc. v. Control Data Corp.,* 759 F.2d 1241, 1245 (5ht Cir.1985)). "The cross-elasticity of demand for substitutes measures consumers' propensity to switch from one product to another, similar product when relative prices change." *United Farmers Agents Assoc. v. Farmers Ins. Exchange,* 89 F.3d 233, 236 n. 2 (5th Cir.1996). The geographic market is the area of effective competition, and it "must correspond to the commercial realities of the industry and be economically significant." *Apani Sw.,* 300 F.3d at 626. Thus, in determining the geographic market, courts consider the size and cumbersomeness of the product, constraints on the free flow of competing goods into the area, and whether the area contains an appreciable segment of the product market. *Id.* at 626-27.

Market power, an essential element of the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

plaintiff's illegal tying claim, is "the power to force the purchaser to do something that he would not do in a competitive market." *Eastman Kodak,* 504 U.S. at 464 (quoting *Jefferson Parish,* 466 U.S. at 14). It is "the ability to control prices or exclude competition." *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.,* 28 F.3d 1379, 1386 (5th Cir.1994). Market power can be inferred from "the seller's possession of a predominant share of the market." *Id.* Market power can also be demonstrated with evidence that a defendant has raised prices and driven out competition. *See Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.,* 21 F.3d 83, 87 n. 3 (5th Cir.1994) (quoting *Eastman Kodak,* 504 U.S. at 477); *see also Wilson v. Mobil Oil Corp.,* 984 F.Supp. 450, 488 (E.D.La.1996). Courts may consider factors like "the strength of competition, probable development of the industry, the barriers to entry, the nature of the anticompetetive conduct, and the elasticity of consumer demand." *Ginzburg v. Mem'l Healthcare Sys., Inc.,* 993 F.Supp. 998, 1026 (S.D.Tex.1997) (quoting *Pastore v. Bell Tel. Co. of Penn .,* 24 F.3d 508, 513 (3d. Cir.1994)); *see Tops Markets, Inc. v. Quality Markets, Inc.,* 142 F.3d 90, 98 (2d Cir.1998). While the Supreme Court has explicitly found a thirty percent market share to be insufficient to show market power for a tying claim, *Jefferson Parish,* 466 U.S. at 26, there is some suggestion that thirty percent may serve as a required minimum. *Breaux Bros.,* 21 F.3d at 87 ("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."); *see In re Wireless Tel. Servs. Antitrust Lit.,* 385 F.Supp.2d 403, 417 (S.D.N.Y.2005).

***6** Actual coercion is an indispensable element of a claim of illegal tying. *Bob Maxfield,* 637 F.2d at 1037. While "strong persuasion, encouragement, or cajolery to the point of obnoxiousness" is permitted, an antitrust violation occurs when the seller "coerces or forces its customer to buy the tied product in order to obtain the tying product." *Id.*

III.

The defendants do not dispute that the plaintiffs have sufficiently pled that premium cable and set-top boxes are two separate products, the tying product and the tied product respectively. Premium cable is a service, and the set-top box is the hardware used to access that service. Charter does not manufacturer set-top boxes, and according to the plaintiff, set-top boxes are available for retail sale.

The main issue here is whether the plaintiff has adequately plead the second element, that Charter has sufficient market power in the tying market to coerce purchase of the tied product. *See Bob Maxfield,* 637 F.2d at 1037. The plaintiff must also allege actual coercion. *Id.*

The plaintiff has defined the product market for the tied product as "premium cable," which includes both premium channels and two-way communication features like the interactive guide, pay-per-view, and On-Demand. The plaintiff insists that satellite MPVD and other fiberoptic and wireline MPVD should not be included as part of the product market because they are not substitutes. But, as an alternative, the plaintiff argues that even if satellite and fiberoptic MPVD are considered part of the product market, he has shown that Charter has market power. The Court finds that the product market must include satellite and fiberoptic MPVD that provide the same premium cable channels and two-way communication services as Charter. Despite the hardware costs a customer must incur when switching from cable MPVD to satellite MPVD, it would be a stretch of the imagination to suggest that, to the extent both MPVDs provide the same premium cable services, they do not provide the customer with reasonable alternatives for video-programming.

The geographic market is vaguely defined as either one market encompassing all the areas in which Charter operates or each local area in which Charter operates. While the defendant challenges the plaintiff's geographic market definition, the Court notes that this is not a case where the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

plaintiff has tried to define the geographic market so narrowly so as to ignore the commercial realties of effective competition. *See Apani Sw.*, 300 F.3d at 626 (finding the plaintiffs' definition of geographic market inadequate where the plaintiff included only city-owned facilities and not other facilities in the city where the product, bottled water, was sold). The geographic market, as defined by the plaintiff here, includes all areas where Charter operates.

Thus, using these definitions, the plaintiff must show that Charter has sufficient market power in every area in which it operates to coerce customers for premium cable into renting set-top boxes as a condition of receiving the full premium cable product. The plaintiff's complaint alleges that out of all MPVD available to consumers nation wide, cable MPVD penetrates 69% of the market (compared to about 27% market share for satellite MPVD). While this statistic applies generally to all cable MPVD providers,[FN2] the plaintiff points out that Charter is one of the five largest cable companies nationally. Recognizing that being one of the largest does not necessarily reflect a dominant market share,[FN3] the plaintiff clarifies that "relatively few consumers have a second wireline alternative."[FN4] The plaintiff adds that due to the difference in premium operating environment between cable (urban) and satellite (rural), the market penetration by Charter in the more urban areas in which it provides service is likely even higher. Notably, the plaintiff does not explicitly allege Charter's market share in the markets in which it operates. To buttress its allegation of market power, the plaintiff adds that average cable MPVD prices (again, generally) have increased over 90% during the last ten years. He points out that Charter is able to bundle its MPVD services with broadband internet access and phone service, added features that satellite MPVD cannot offer. Further, the plaintiff notes that a potential cable MPVD competitor faces significant barriers to entry including infrastructure costs and burdensome franchise regulations. Although the plaintiff may have some hurdles to cross in proving that Charter has market power, the allegations in the complaint are sufficient to make such a finding plausible.

FN2. If the FCC report, which is relied on in the plaintiff's complaint for the above allegations, is considered, Charter has a 6.2% share of the MPVD market nationwide. But, this statistic does little to clarify Charter's market share in the geographic markets in which it operates.

FN3. Simply being one of the largest companies in a market "says nothing of a firm's ability to affect competition." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 210 n. 20 (4th Cir.2002); *see Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1387 (5th Cir.1994) (finding that without more, descriptions that the defendant had the "lead product" and was the "market leader" were insufficient to show substantial market power). If the five largest companies each have eight percent of the market share, and the remaining competitors six percent each, it cannot be concluded that any one of the five largest companies has a predominant market share. *See Dickson,* 309 F.3d at 210 n. 20.

FN4. The FCC Report heavily relied on by the plaintiff in his complaint seems to confirm that "[A]lmost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two [direct broadcast satellite] providers."

*7 The plaintiff must also allege actual coercion. While he defines premium cable as including both premium channels as well as two-way communication features like the interactive guide, pay-per-view, and on-Demand, the plaintiff's allegations of actual coercion, concern the two-way communication features specifically. That is, the plaintiffs allege, and the defendants do not disagree, that in order to receive the complete premium cable product,

a customer must rent a set-top box from Charter. Without the set-top box, the customer can, at best, receive only part of the premium cable product. The defendants suggest that coercion only occurs when the entire product is unavailable without purchase or rental of the tied product. *See In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litig.,* No. 08-MDL-1995 (PKC), 2010 882989, at *8 (S.D.N.Y.2010) ("As a matter of law, plaintiffs have failed to allege actual coercion with respect to those Premium cable Services that are available through the use of a CableCARD because they have not alleged that Time Warner's sale of all Premium Services was conditioned on the lease of a cable box.").[FN5] The Court is unwilling to subscribe to such a broad rule. In this case, the plaintiffs allege that without the set-top box, a customer cannot "access valuable Premium cable services that they have purchased." Plaintiffs also allege that a customer choosing to receive only premium cable channels by use of a CableCARD is also required to pay a monthly rental fee for the CableCARD and an installation fee. It is at least not irrational that coercion possibly occurs where a seller ensures that a valuable part of a tying product can only be accessed if the customer also rents the tied product from the seller.

FN5. In *In re Time Warner,* the Southern District of New York dismissed the plaintiff's complaint but granted leave to amend noting that two-way communication services might form a separate product that could be classified as the tying product. 2010 WL 882989, at *8. In finding that the plaintiffs had not shown coercion, the court distinguished another case where a district court, on similar facts, had found that actual coercion had been alleged because the plaintiffs in that case had alleged that they were charged higher fees for CableCARDs than for set-top boxes and the defendant had informed customers that CableCARDS were only available through the defendant for a monthly fee. *Id.*

Accordingly, the motion to dismiss is DENIED.

E.D.La.,2010.
Bodet v. Charter Communications Inc.
Slip Copy, 2010 WL 5094214 (E.D.La.)

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

H

United States District Court,
S.D. Texas, Houston Division.
DEALER COMPUTER SERVICES, INC., f/k/a
Ford Dealer Computer Services, Inc.
v.
FORD MOTOR COMPANY

No. Civ.A. H-06-175.
March 28, 2006.

John Carlton Allen, Attorney at Law, Houston, TX, for Dealer Computer Services, Inc.

Keith A. Langley, Godwin Pappas Langley Ronquillo LLP, Dallas, TX, William L. Monts, III, Hogan & Hartson, Washington, DC, for Ford Motor Company.

ORDER DENYING PRELIMINARY INJUNCTION
HARMON, J.

*1 Plaintiff Dealer Computer Services, Inc. (DCS) has brought antitrust claims against Ford Motor Company (Ford), alleging violation of the Sherman Act, 15 U.S.C. Sec. 1, *et seq.* This Court has subject matter jurisdiction pursuant to 28 U.S.C. Sec. 1331; 15 U.S.C. sec 4.

DCS seeks a preliminary injunction against Ford, prohibiting Ford from withholding its parts catalog data from DCS. An evidentiary hearing was held on the application for preliminary injunction on March 9, 2006. For the reasons expressed in this Order, the preliminary injunction is DENIED.

DCS provides an electronic parts catalog known as the Computerized Publication Display (CPD) to Ford and Lincoln-Mercury dealers across the United States. The CPD system includes DCS's proprietary CPD software, customized hardware, support, and maintenance. The system is used on 8,247 workstations in the parts departments of 2,471 Ford and Lincoln-Mercury dealers across the United States. The gravamen of DCS's complaint concerns the monthly parts catalog data subscription updates, which DCS has received from Ford pursuant to a ten year license with Ford. The parties agree that the parts data is the property of Ford and obtainable only from Ford. The ten year license expired by its own terms in September 2005. DCS and Ford attempted to negotiate a new licensing agreement, but DCS maintains that the terms of the new agreement proposed by Ford are too restrictive, are unreasonable, and will cause harm to its business.

Two other electronic parts catalog data providers, ProQuest and Infomedia (Microcat), compete with DCS. Like DCS, they receive data from Ford and provide electronic catalogs to Ford and Lincoln-Mercury dealers. Ford has offered them new licensing agreements on terms similar to those offered to DCS. One of the agreements is in place. Ford has announced its intentions to enter the electronic parts catalog data market itself, and DCS argues that the onerous conditions on renewal of the data licensing agreement, demanded by Ford, constitute an attempt to monopolize the electronic parts catalog data market and an attempt unlawfully to tie the license of parts catalog data to services, including software and software support.

The issuance of a preliminary injunction must be based on the applicant's satisfaction of four factors: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable injury or harm for which there is no adequate remedy at law; (3) threatened injury to the party seeking the injunction outweighs any harm that the injunction might cause to the party to be enjoined; (4) an injunction will not disserve the public interest. *Sugar Busters, LLC v. Brennan,* 177 F.3d 258, 264 (5th Cir.1999).

At the March 9, 2006 hearing DCS attempted to show likelihood of success on the merits by focusing on the attempted monopolization claim. DCS provided no evidence or argument supporting

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

its tying theory. DCS argued that it is likely to succeed on the merits because Ford's withholding of monthly updates of its parts catalog data from DCS is an attempt to monopolize the electronic parts catalog market by seeking to eliminate competition in what has been a competitive marketplace. Attempted monopolization is a violation of the antitrust laws. DCS called an expert witness, David Silbey, professor of economics, The University of Texas at Austin, to testify to Ford's antitrust violations.

***2** DCS further argues that there is a substantial threat of injury or harm to it, for which there is no adequate remedy at law because without the parts catalog data updates DCS cannot fulfill its contractual obligations to provide accurate and usable data to thousands of Ford and Lincoln-Mercury dealers. This data is critical to the service and repair operations performed by those dealers, who will suffer irreparable injury from the delays and errors in the repair and maintenance of Ford and Lincoln-Mercury vehicles. The errors and delays will result in the dealers being unable to rely upon DCS to provide accurate and updated information about parts. It is even possible, DCS maintains, that injury to unrelated consumers is threatened when the affected repaired and maintained vehicles enter the public roadways. Without a preliminary injunction forcing Ford to share its updates with DCS, any decision of this court will be rendered meaningless because DCS will be forced out of the market.

DCS argues that all it wishes to do is preserve the *status quo* until trial. The threatened injury to DCS far outweighs any harm to Ford because it has customarily provided the data for the past ten years. Moreover, Ford will update and publish the data whether DCS receives it or not. Ford stipulated at the hearing that it will go to no greater effort or expense to provide the data to DCS.

Finally DCS maintains that the injunction will not disserve the public interest because it will promote the public interest in competition and innovation, as well as by ensuring that Ford and Lincoln-Mercury dealers will continue to receive accurate, updated information.

Ford argues precisely the opposite. It maintains that DCS does not have a substantial likelihood of success on the merits because even if Ford has attempted monopolization, which it does not, of course, concede, Ford has not engaged in predatory or anti-competitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power.

DCS brought forth two theories of likelihood of success on the merits. The first is the essential facilities doctrine, and the second is "refusal to deal," a doctrine developed in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The essential facilities doctrine has been described by Judge Lake as "often criticized ... [,but] nevertheless ... a viable part of the federal antitrust laws." *The David L. Aldridge Company, et al. v. Microsoft Corporation,* 995 F.Supp. 728, 751 (S.D.Tex.1998), *citing* IIIA P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶ 771c, at 176 (rev. ed.1996). [FN1] Judge Folsom was less charitable:

> FN1. DCS argues that three judges of the Southern District of Texas have adopted the "essential facilities doctrine." It is more accurate to say that these judges addressed the doctrine in their opinions, since none of the three found that the requirements of the doctrine had been met in each of their cases. *Aldridge,* 995 F.Supp. 728; *City of College Station, Texas v. City of Bryan, Texas,* 932 F.Supp. 877 (S.D.Tex.1996) (Atlas, J.); *TCA Building Company v. Northwestern Resources Co.,* 873 F.Supp. 29 (S.D.Tex.1995) (Kent, J.).

The so-called "essential facility" doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman Section 2 liability. The antitrust world would almost certainly be a

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

better place if it were jettisoned, with a little fine tuning of the general doctrine of the monopolist's refusal to deal to fill in the resulting gaps.

***3** *Z-Tel Communications, Inc. v. SBC Communications, Inc.,* 331 F.Supp.2d 513, 540 (E.D.Tex.2004) *quoting* Herbert Hovenkamp, *Federal Antitrust Policy, the Law of Competition and its Practice* 305 (2d ed.1999).

The essential facilities doctrine requires, at a minimum, even before the analysis of its factors, that there be a "facility." As Judge Lake pointed out in *Aldridge,* "In the usual essential facilities case the alleged facility is a conduit for the distribution of another product." 995 F.Supp. at 752. Judge Lake then lists the cases in which such facilities have been discussed:

> Sports stadiums facilitate the display of indoor sports. *See Fishman v. Estate of Wirtz,* 807 F.2d 520, 532 (7th Cir.1986); *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 989 (D.C.Cir.1977). Railroad bridges permit continuation of rail service and delivery of freight. *See United States v. Terminal R.R. Ass'n,* 224 U.S. 383, 392-94, 32 S.Ct. 507, 56 L.Ed. 810 (1912). Telecommunications networks distribute information. *See MCI Communications Corp. v. AT & T,* 708 F.2d 1081, 1093 (7th Cir.1983). Ski mountains provide access to recreational skiing. *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,* 738 F.2d 1509, 1521 (10th Cir.1984), *aff'd on other grounds,* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

Id.

Judge Lake goes on to point out, "While Windows95 does facilitate the use of application software, Cache86 is not such a product; it is a utility program designed to improve the distributing product." *Id.* Similarly, in the instant case, what DCS is alleging as the "essential facility" is the proprietary parts data of Ford Motor Company. Data It is not a conduit for the distribution of anything. Rather, data requires a conduit for its distribution. The electric parts catalog, not the data, is a conduit.

If it is assumed for the purposes of argument, however, that the parts data could in some way be viewed as a "facility," we must turn to the four part,[FN2] or Judge Lake's six part, test for an "essential facility,"[FN3] In order to win an "essential facility" case, DCS must prove:

> FN2. *Cf.* Judge Atlas's opinion in *City of College Station,* 932 F.Supp. at 887 (S.D.Tex.1996)

> FN3. *Cf.* Judge Lake's opinion in *Aldridge,* 995 F.Supp. at 752, n. 138.

(1) the defendant is a monopolist

(2) the facility is essential

(3) the defendant has the type of control over the facility that is forbidden by the Sherman Act.

(4) duplication of the facility is unreasonable or impractical;

(5) the defendant denied the plaintiff use of the facility; and

(6) providing access to the plaintiff was feasible.[FN4]

> FN4. *Id.*

DCS has a problem with factor three. "Obviously, every manufacturer has a natural monopoly over the distribution of its products. That monopoly, however, does not contravene the antitrust laws." *Sports Center, Inc. v. Riddell, Inc.,* 673 F.2d 786, 791 (5th Cir.1981). The product at issue in the instant case is automobile parts, not data about automobile parts. An electronic catalog for automobile parts merely facilitates the distribution of those automobile parts. The Sherman Act does not forbid a manufacturer of automobile parts from exercising monopolistic control over the manner in which it chooses to distribute those parts.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

***4** Judge Folsom, relying upon Professor Hovenkamp, *supra,* found in *Z-Tel,* "Essential facilities refers to a particular embodiment of the refusal to deal legal theory. Professor Hovenkamp explains that the logical foundation of the refusals to deal legal concept applies with persuasive force to the essential facilities concept." *Z-Tel,* 331 F.Supp.2d at 540.

DCS's refusal to deal is based on its position that the negotiations for a new license agreement after the September 2005 expiration of the ten year license constituted a refusal to deal because the terms of the new contract, specifically Ford's insistence on a one year contract with a three year wind down period, were onerous and unreasonable and would eventually force all three current electronic parts catalog suppliers out of the business. DCS relies almost exclusively upon " *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). In that oft cited, but rarely applied, case Aspen Skiing Co. unilaterally terminated a profitable arrangement with its competitor Aspen Highlands Skiing Corp. to use a common lift ticket for the four mountains in the Aspen, Colorado area. Three of the mountains were owned by Aspen Skiing and one of the mountains by Aspen Highlands. The facts of the case established that there was no commercial reason for the termination of the arrangement, and that Aspen Skiing was attempting to monopolize skiing in Aspen. In discussing the plaintiff in *Z-Tel,* Judge Folsom opined, "Plaintiff bears a heavy doctrinal burden to capture *Aspen Skiing's* narrow exception." *Z-Tel,* 331 F.Supp.2d 513, 539. This is undoubtedly because the Supreme Court recently stated, *Aspen Skiing* is at or near the outer boundary of Section 2 liability." *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko,* 50 U.S. 398, 409, (2004). The Supreme Court in *Trinko* discussed *Aspen Skiing* and noted three distinctive features of the facts in *Aspen Skiing* that made imposition of liability appropriate: (1) The parties in *Aspen Skiing* had been engaged in a continuing cooperative arrangement that was profitable for both. *Trinko,* 540 U.S. 398, 409, 124 S.Ct. 872, 157 L.Ed.2d 823; (2) Aspen Skiing Co. refused to continue the joint marketing arrangement and took great pains to keep Aspen Highlands from providing its customers with a substitute 4-mountain lift ticket, even going so far as to refuse to sell to Aspen Highlands the Aspen Skiing Co. lift tickets at retail prices. Such conduct, the Supreme Court noted, suggested that Aspen Ski Co. was willing to forego short-term profits to achieve a long-term anticompetitive end. *Aspen Skiing,* 472 U.S. 585, 606-607, 105 S.Ct. 2847, 86 L.Ed.2d 467; and (3) Aspen Skiing offered no "normal business purpose" for its conduct.

In the instant case the license agreement between Ford and DCS had an expiration date. It was not a "course of dealing," but a single agreement. The parties had expressly contemplated that their licensing relationship would end at a definite point. Ford gave notice of the termination, as contemplated by the contract, and began negotiations with DCS for a new contract. The new contract was not acceptable to DCS, but its terms were not unreasonable. An unacceptable offer is not, by itself, a refusal to deal. When DCS rejected the new contract and filed this lawsuit, the licensing relationship between the parties was over. Were this Court to grant DCS's preliminary injunction, it would not be maintaining the *status quo,* but would be imposing upon the parties a new licensing agreement. The antitrust laws do not encourage courts to take such steps. "Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill-suited." *Trinko,* 540 U.S. 398, 408, 124 S.Ct. 872, 157 L.Ed.2d 823.

***5** Ford is not making an unreasonable offer because it is not sacrificing short term profits for long term anticompetitive gains. The license fee charged by Ford to DCS was $100,000 per year. Testimony at the preliminary injunction hearing revealed that DCS used the property Ford licensed to DCS to make millions of dollars in revenue annually to distribute Ford's data on DCS's electronic

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

parts catalogs. During the negotiations for the new contract, however, Ford did not attempt to gain a higher licensing fee, but offered a minimum four year license (1 year contract plus three year wind down period) at exactly the same $100,000 annual fee. Aspen Skiing Co., in contrast to Ford, acted against its own business interests in an effort to drive Aspen Highlands out of the skiing market. The Supreme Court found that such seemingly irrational business behavior pointed to Aspen Skiing Co's expectation that its actions would reap long-term reduction in competition. Ford is not in the business of selling parts catalog data to consumers. It sells automobiles and replacement parts for its vehicles, through Ford-franchised dealerships. It competes against others who manufacture parts that car owners purchase. Electronic parts catalogs are but a tool used by the dealers to sell automobile parts and service.

Unlike Aspen Skiing Co., Ford has a legitimate business reason for its conduct. John L. Sullivan, Global Quality and Service Manager for Ford, testified at the hearing that Ford's decision to provide its own electronic parts catalog is nothing more than an attempt to provide actual parts at a lower cost to its dealers so that dealers can compete against other sources of parts that car owners require. He also testified that the circumstances of 1995, which led Ford to licensing its parts data to DCS, is very different from the situation in 2005, when it began its negotiations for a new contract. A ten year contract in 1995 was advantageous to Ford as well as to DCS, but in 2005, with all of the developments in the utilization of computer technology, short term contracts are more advantageous to Ford. There is nothing unusual or economically irrational about this fact, and the antitrust laws do not require a businessman to offer to enter into a long term contract when a short term one is to his advantage.

DCS has not established that it has a substantial likelihood of success on the merits of its antitrust claims against Ford. For that reason, its Motion for Preliminary Injunction is hereby DENIED.

S.D.Tex.,2006.
Dealer Computer Services, Inc. v. Ford Motor Co.
Not Reported in F.Supp.2d, 2006 WL 801033 (S.D.Tex.), 2006-1 Trade Cases P 75,212

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

LEXSEE

Positive
As of: Aug 04, 2011

GALIEO INTERNATIONAL, L.L.C., Plaintiff/Counter-Defendant, v. RYANAIR, LTD., Defendant/Counter-Plaintiff.

01 C 2210

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 3317

February 21, 2002, Decided
February 27, 2002, Docketed

DISPOSITION: [*1] Plaintiff's Motion to Dismiss Counts III and IV of Defendant's Amended Counterclaims was granted as to Counts III and IV. Defendant was granted leave to properly replead its good faith claim (Count IV), consistent with Illinois law.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff service provider sued defendant airline for breach of contract. The airline filed counterclaims alleging breach of contract, breach of the implied duty of good faith, and violation of the Illinois Consumer Fraud and Deceptive Practices Act (ICFA). The service provider moved to dismiss the latter two claims for failure to state a claim, Fed. R. Civ. P. 12(b)(6).

OVERVIEW: The airline agreed to pay the service provider booking fees for including the airline on the service provider's computerized reservation system. The servicer provider alleged the airline was wrongfully refusing to pay fees due under the parties' contracts. The airline alleged the servicer provider had used an "incentive scheme" that encouraged subscriber travel agents to book fictitious and highly speculative fares to increase the booking fees owed by the airline. Moving to dismiss two claims, the service provider argued, inter alia, that the Airline Deregulation Act (ADA) preempted the airline's ICFA claim and that Illinois did not recognize an independent claim for breach of the duty of good faith. The court agreed. Regarding the statutory claim, the allegations in the ICFA claim related to airline "services" within the scope of the ADA's preemption clause. Further, application of the ICFA to the parties' dispute would alter the parties' contractual bargain by supplying external norms. Regarding the common law claim, under Illinois law, a party could only assert a claim for breach of the duty of good faith as part of a breach of contract claim.

OUTCOME: The court granted the service provider's motion and, thus, dismissed two of the airline's amended counterclaims. However, the court granted the airline leave to replead its good faith claim consistent with Illinois law.

CORE TERMS: airline, good faith, reservation, preempted, counterclaim, flight, breach of contract, travel agents, external, fare, ticket, state law, deceptive, preemption clause, economic impact, bargain, travel, booked, seat, termination, consumer fraud, air carrier, original agreement, trade practice, punitive damages, transportation, advertising, passenger, customers, breached

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN1]In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must assume the truth of all

facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the non-moving party. Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. The court will accept all well-pled factual allegations in the complaint as true. In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Charters
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN2]The Airline Deregulation Act (ADA) largely deregulated the domestic airline industry. To prevent states from undoing the ADA, Congress included a preemption clause, which provides that a state 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. 49 U.S.C.S. § 41713(b)(1).

Legal Ethics > Legal Services Marketing > Advertising
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN3]The plain language of the preemption clause in the Airline Deregulation Act (ADA) expresses a broad preemptive purpose. State provisions that relate to airline rates, routes, or services are preempted by the ADA.

Contracts Law > Breach > General Overview
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN4]Where a state statute served as a means to guide and police the marketing practices of the airlines, it is related to airline "rates and services" and is preempted by the Airline Deregulation Act (ADA). However, the ADA does not preempt a plaintiffs' contract claims, which seek recovery solely for the airline's alleged breach of its own, self-imposed undertakings.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN5]Claims under state law are preempted by the Airline Deregulation Act if either the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic impact upon them.

Governments > Agriculture & Food > Processing, Storage & Distribution
Transportation Law > Air Transportation > Commercial Airlines > Luggage > Handling
[HN6]For purposes of the Airline Deregulation Act, the United States Court of Appeals for the Seventh Circuit has adopted the definition of "services" set forth by the United States Court of Appeals for the Fifth Circuit: Services generally represent a bargained-for or anticipated provision of labor from one party to another. This leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > Reservations
Transportation Law > Air Transportation > Consumer Protection
[HN7]Preemption under the Airline Deregulation Act extends to all of the economic factors that go into the provision of the quid pro quo for a passenger's fare, including reservation practices.

Transportation Law > Air Transportation > Commercial Airlines > Reservations
[HN8]A customer reservation system is a "service" within the meaning of the Airline Deregulation Act.

Banking Law > Consumer Protection > State Law > General Overview
Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN9]General consumer fraud law is preempted by the Airline Deregulation Act.

Transportation Law > Air Transportation > Airline Deregulation Act > Preemption
Transportation Law > Air Transportation > Commercial Airlines > General Overview
[HN10]To determine, for purposes of Airline Deregulation Act preemption, whether a state statute will have a significant economic impact on air carriers' rates, routes, or services, courts look to whether application of the state law will alter the parties' contractual bargain by "supplying external norms."

Contracts Law > Breach > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN11]Illinois law does not permit a party to seek an independent claim for breach of the implied obligation of good faith which Illinois law incorporates into all contracts. To bring a claim for breach of the obligation of good faith, a party must include such a claim within a breach of contract claim. Where a party fails to properly plead a claim for good faith within a count for breach of contract, the court should properly dismiss the separate claim for good faith.

COUNSEL: For GALILEO INTERNATIONAL, L.L.C., plaintiff: Kathleen Lynn Roach, Erin Elaine Kelly, Patricia Michelle Petrowski, Daniel Moore Twetten, Sidley Austin Brown & Wood, Chicago, IL.

For RYANAIR LTD., defendant: William G. Schopf, Jr., Patrick Joseph Heneghan, Robert John Palmersheim, Schopf & Weiss, Chicago, IL.

For RYANAIR LTD., counter-claimant: William G. Schopf, Jr., Patrick Joseph Heneghan, Robert John Palmersheim, Schopf & Weiss, Chicago, IL.

For GALILEO INTERNATIONAL, L.L.C., counter-defendant: Kathleen Lynn Roach, Erin Elaine Kelly, Patricia Michelle Petrowski, Daniel Moore Twetten, Sidley Austin Brown & Wood, Chicago, IL.

JUDGES: BLANCHE M. MANNING, U.S. DISTRICT COURT JUDGE.

OPINION BY: BLANCHE M. MANNING

OPINION

MEMORANDUM AND ORDER

Plaintiff/Counter-Defendant Galieo International, L.L.C. ("Galieo") filed an Amended Complaint against Defendant/Counter-Plaintiff [*2] Ryanair, Ltd. ("Ryanair") alleging breach of contract. Ryanair responded by filing four amended counterclaims alleging: breach of contract (Counts I and II); a claim under the Illinois Consumer Fraud and Deceptive Practices Act ("the ICFA") (Count III); and a claim for breach of the implied duty of good faith (Count IV). The current matter is before the Court on Galieo's Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the motion is GRANTED.

BACKGROUND

[1]

1 The facts set forth in the Background section are taken from Ryanair's Answer and Amended Counterclaims.

In 1993, Galieo, a provider of computerized airline reservation services, and Ryanair, an airline, entered into the Galieo International Global Airline Distribution Agreement ("the Distribution Agreement"). Under the Distribution Agreement, travel agents that subscribe to Galieo's Customer Reservation System ("CRS") would be able to access [*3] Ryanair's schedules, prices, seat availability and book seats on Ryanair flights for their customers. In return for making Ryanair part of Galieo's CRS, Ryanair agreed to pay Galieo a fee for each booking made on Ryanair through the CRS.

The parties operated under the Distribution Agreement until April 14, 2000, when Ryanair notified Galieo that it was terminating the Distribution Agreement effective July 31, 2000. Ryanair contends that Galieo breached the Distribution Agreement by overbilling Ryanair for payments Ryanair made to Galieo for reservations that were made on the CRS. According to Ryanair, Galieo used an "incentive scheme," whereby Galieo offered travel agents using its CRS services commissions based on the number of fares they booked on Ryanair. Ryanair contends travel agents booked thousands of fictitious and speculative fares which did not result in the issuance of a ticket on a Ryanair flight. Galieo, however, allegedly obtained payment from Ryanair for these bookings. As a result of the "incentive scheme," Ryanair alleges that it was left with "an inordinate number of empty, unpaid seats on [its] flights" and "lost the opportunity to sell many tickets on its flights. [*4] "

Ryanair contends that under the Distribution Agreement, Galieo was required to issue Ryanair credits for payments made for reservations the passengers cancelled prior to the issuance of a ticket. Pursuant to the Distribution Agreement, Ryanair requested that Galieo issue credits for fees charged to Ryanair for reservations that did not result in the actual purchase of a ticket. Rya-

nair contends that Galieo refused to issue the proper credits under the Distribution Agreement.

Subsequent to notifying Galieo that it was terminating the Distribution Agreement, Ryanair sought assurances from Galieo that it would service reservations booked on Ryanair flights booked on the CRS prior to the termination of the Distribution Agreement, July 31, 2000, but for which travel was not to occur until after that date. Ryanair alleges that Gallieo initially agreed to service reservations for flights set to commence after the termination date. However, Ryanair alleges that Gallieo reversed its earlier position and later stated that it would only service the reservations if Ryanair paid additional fees beyond the fees already paid to Gallieo under the Distribution Agreement.

After refusing to service [*5] reservations after the termination date, Gallieo sent Ryanair an invoice for reservations made on the CRS in May and June of 2000. Ryanair, however, refused to pay these invoices because Galieo allegedly breached the Distribution Agreement by: (1) overbilling Ryanair for reservations that did not result in the actual purchase of tickets; and (2) refusing to service reservations after the termination date.

In response to Ryanair's refusal to pay the May and June invoices, Galieo filed the instant action for breach of the Distribution Agreement. Ryanair responded by filing four amended counterclaims alleging: breach of contract (Counts I and II); a claim under the ICFA (Count III); and a claim for breach of the implied duty of good faith (Count IV). The current matter is before the Court on Galieo's Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims, pursuant to Federal Rule of Civil Procedure 12(b)(6).

STANDARD OF REVIEW

[HN1]In ruling on a motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6), the court must assume the truth of all facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the [*6] non-moving party. See, e.g., McMath v. City of Gary, 976 F.2d 1026, 1031 (7th Cir. 1992); Gillman v. Burlington N. R.R. Co., 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Kunik v. Racine County, Wis., 946 F.2d 1574, 1579 (7th Cir. 1991) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)).

The court will accept all well-pled factual allegations in the complaint as true. Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977). In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. Craigs, Inc. v. General Electric Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993). However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts [*7] set forth in the complaint that undermine the plaintiff's claims. Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992).

DISCUSSION

Galieo has moved this Court to dismiss Counts III and IV of Ryanair's amended counterclaim and to strike Ryanair's request for attorney's fees in Counts I and II. The Court will address each of these arguments. [2]

2 Because Ryanair has withdrawn its request for attorney's fees in Counts I and II (Resp. at 2 n.1), the Court will not discuss this contention and denies it as moot.

I. Claims Under the ICFA

Galieo contends that this Court should dismiss Count III (the ICFA claim) because: (A) it is preempted under the Airline Deregulation Act ("ADA"); (B) Ryanair has failed to state a cause of action under the ICFA; (C) the ICFA claim is duplicative of Ryanair's contract claim; and (D) Ryanair has not sufficiently pled standing. Because this Court finds that Count III (the ICFA claim) is preempted under the ADA, the Court will only address the preemption [*8] issue.

Congress enacted the Airline Deregulation Act ("ADA") "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services." H.R.Conf.Rep. No. 95-1779, 95th Cong., 2d Sess. 53 (1978), reprinted in, 1978 U.S.C.C.A.N. 3737, 3773. [HN2]The ADA largely deregulated the domestic airline industry. American Airlines, Inc. v. Wolens, 513 U.S. 219, 222-23, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995). To prevent states from undoing the ADA, Congress included a preemption clause, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992), which provides that "a State . . . 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. . . ." 49 U.S.C. § 41713(b)(1).

The Supreme Court first visited the scope of the ADA's preemption clause in Morales, 504 U.S. at 378, where the court addressed the "Travel Industry Enforcement Guidelines ("the Guidelines")," which were promulgated by the National [*9] Association of Attorneys

General to govern the content and format of airline fare advertising. Several states attempted to enforce the Guidelines through their consumer protection laws to stop allegedly deceptive advertising by airlines. Id. Noting that [HN3]the plain language of the preemption clause "expresses a broad preemptive purpose," the court determined that the states' actions "related to [airline] rates, routes, or services," and therefore, held that the fare advertising provisions of the Guidelines were preempted by the ADA. Id. at 388-89. The court noted that the Guidelines set "binding requirements as to how airline tickets may be marketed," which "would have [had] a significant impact upon . . . the fares [airlines] charged." Id. at 390. The court further noted that the airlines would not have "*carte blanche* to lie and deceive customers" because the Department of Transportation retained the power to prohibit advertisements that did not further competitive pricing. Id. at 390-91.

The Supreme Court revisited the scope of the ADA preemption clause in Wolens, 513 U.S. at 224, where the court addressed [*10] claims brought in two class actions that arose from changes made by American Airlines to its frequent flyer program. The plaintiffs complained that American Airlines violated the ICFA by modifying its frequent flyer program, devaluing credits that the members of the program had already earned. Id. The Illinois Supreme Court ruled that the lawsuits were not preempted because the frequent flyer program was not "essential" to American Airlines' services, but was only of "peripheral" importance. Id. (quoting Wolens v. American Airlines, Inc., 147 Ill. 2d 367, 589 N.E.2d 533, 168 Ill. Dec. 133 (Ill. 1992)).

The United States Supreme Court reversed the Illinois Supreme Court's decision to permit the plaintiffs' consumer fraud claims, but affirmed its holding that the plaintiffs' breach of contract claims were not preempted. The court held that [HN4]the ICFA served as a means "to guide and police the marketing practices of the airlines," and therefore, was related to airline "rates and services" and was preempted by the ADA. 513 U.S. at 228-29. However, the Court held that the ADA did not preempt the plaintiffs' contract claims, which sought "recovery solely for the airline's [*11] alleged breach of its own, self-imposed undertakings." Id.

Following the Supreme Court's decisions in Morales and Wolens, the Seventh Circuit in Travel All Over the World v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 (7th Cir. 1996) and United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 609 (7th Cir. 2000), held that [HN5]claims under state law are "preempted if *either* the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic impact upon them." Mesa, 219 F.3d at 609 (emphasis in original).

Here, Galileo contends that the ADA preempts Ryanair's third amended counterclaim because the ICFA: (1) relates to airline "services"; and (2) will have a significant economic impact upon airline services. The Court will address each of these contentions in turn.

1. Scope of "Services" Under the ADA

To determine whether the application of the ICFA to Galieo's CRS relates to airline "service," the Court first looks to Travel All Over the World, 73 F.3d at 1433, where [HN6]the Seventh Circuit adopted the Fifth Circuit's [*12] definition of "services" set forth in Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995):

> Services generally represent a bargained-for or anticipated provision of labor from one party to another . . . . [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

Travel All Over the World, 73 F.3d at 1433 (quoting Hodges, 44 F.3d at 336).

Unfortunately, neither Travel All Over the World nor any other decisions in this circuit have specifically addressed whether a CRS is related to airline services. [3] Therefore, the Court will look to courts outside this jurisdiction which have addressed the instant issue. For example, in Lyn-Lea Travel Corp. v. American Airlines, Inc., 1997 U.S. Dist. LEXIS 21119, No. CA3:96-CV-2068-BC (N.D. Tex. Dec. 2, 1997), aff'd, 139 F.3d 899 (5th Cir.1998), a travel agency filed an action under several theories [*13] of state law stemming from an agreement relating to the use of a CRS system. The district court, following the Hodges's definition of "services," held that claims under the Texas Deceptive Trade Practices Act were preempted because the use of a CRS system had a "connection with the airline's 'rates' and 'services.'" Id. at *20-23, 30. In making this decision, the court noted that under Hodges, [HN7]"preemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger's fare, including . . . reservation . . . practices." Id. at *21 (quoting Hodges, 44 F.3d at 337).

3 Although the instant issue has not been addressed in this circuit, the Court notes that in Mesa, the Seventh Circuit noted that "because Wolens held general consumer-fraud law

preempted, [counter claimants] have big problems." 219 F.3d at 608.

Likewise, in Frontier Airlines, Inc. v. United Airlines, Inc., 758 F. Supp. 1399, 1402 (D. Col. 1989), [*14] the plaintiff alleged that the defendant airline's marketing of CRS services to travel agents violated Colorado's antitrust and unfair competition statutes. In holding that [HN8]a CRS is a "service" within the meaning of the ADA, the court noted that "CRS services are unique to the airline industry. Centralized reservation systems for competing airlines, which serve functions beyond reservations for a single airline, are unlike services provided in any other industry." Id. at 1408-09. Consequently, the court held that the ADA preempted the Colorado statutes. Id.

Here, given the above decisions holding that a CRS is a "service" within the ADA and the Seventh Circuit's broad proposition that [HN9]"general consumer fraud law [is] preempted" by the ADA, Mesa, 219 F.3d at 608, this Court finds that Ryanair's third amended counterclaim under the ICFA is preempted by the ADA. Ryanair contends that its ICFA claim stems from its purchase of Galieo's CRS services for Ryanair's "own use in making its flight information available to travel agents and enabling travel agents to book reservations on Ryanair's flights." (Ryanair's Countercl. at P 31) According to Ryanair, [*15] Galieo used an "incentive scheme," whereby Galieo offered travel agents using its CRS services to earn commissions based on the number of fares they booked on Ryanair. (Id. at PP 33-34.) Ryanair contends Galieo violated the ICFA by directing these travel agents to book over 29,000 fictitious and speculative fares which were later cancelled but for which Galieo obtained payment from Ryanair. (Id. at P 41.) As a result of the "incentive scheme," Ryanair alleges that it was left with "an inordinate number of empty, unpaid seats on [its] flights"(id. at P 38) and "lost the opportunity to sell many tickets on its flights." (Id. at P 46.) Consequently, based on the above facts alleged by Ryanair, this Court finds that the allegations relating to Ryanair's ICFA claim relate to airline "services" within the scope of the ADA's preemption clause, and therefore, Count III is preempted by the ADA.

2. Definition of "Significant Economic Impact" Under the ADA

Additionally, Galieo contends that Count III is preempted because application of the ICFA will have a significant economic impact upon airline services. [HN10]To determine whether a state statute will have a significant [*16] economic impact, courts look to whether application of the state law will alter the parties' contractual bargain by "supplying external norms." Mesa, 219 F.3d at 609. See also Travel All Over the World, 73 F.3d at 1432. In Travel All Over the World, the Seventh Circuit allowed the plaintiffs' claim for compensatory damages pursuant to the Wolens exception, but held that the plaintiffs' claims for punitive damages did not fit into the Wolens exception because, "rather than merely holding parties to the terms of a bargain, [a claim for] punitive damages represent[s] an 'enlargement or enhancement of [the bargain] based on state laws or policies external to the agreement.'" Travel All Over the World, 73 F.3d at 1432 n.8.

Similarly, the plaintiff in Lyn-Lea alleged that the defendant had breached an agreement by capping commissions the defendant paid to its travel agents. See Lyn-Lea, 1997 U.S. Dist. LEXIS 21119 at *25. The court noted that the plaintiff was contractually bound to the agreement, which granted the defendant the right to modify the commission structure at its discretion. Id. at [*17] *29-30. However, citing Wolens, the court declined to allow the plaintiff to "invoke state laws and policies external to the agreement," such as good faith and the Texas Deceptive Trade Practices Act, because these claims were "external" to the parties' original agreement and therefore imposed external requirements upon the defendant airline. Id. at *30.

Here, Count III requests that this Court find Galieo's "incentive scheme" constituted a "deceptive trade practice" under the ICFA and award the following damages: (1) damages for the "lost volume of Ryanair passenger seats"; and (2) punitive damages "in an amount sufficient to deter Galieo and other business [sic] from engaging in deceptive and misleading conduct." (Ryanair Countercl. at 24.) These proposed damages and claims rely on the ICFA which is external to the parties' original agreement. If this Court were to apply the ICFA to this action, "rather than merely holding parties to the terms of [their] bargain," the Court would allow Ryanair to enlarge or enhance the original agreement "based on state laws or policies external to the agreement." Travel All Over the World, 73 F.3d at 1432 n.8. As noted [*18] above, the parties may not invoke state laws external to the contract, and therefore, this Court finds that Count III is preempted by the ADA for the reasons stated herein.

II. A Claim for Breach of Good Faith Under Illinois Law

Galieo further contends that this Court should dismiss Court IV of Ryanair's amended counterclaim because Ryanair cannot assert an independent claim for breach of good faith under Illinois law.

Galileo is correct in that [HN11]Illinois law does not permit a party to seek an independent claim for breach of the implied obligation of good faith which Illinois law incorporates into all contracts. Baxter Healthcare Corp.

v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995). To bring a claim for breach of the obligation of good faith, a party must include such a claim within a breach of contract claim. Solon v. Kaplan, 2001 U.S. Dist. LEXIS 1384, 2001 WL 123769, at *5 (N.D. Ill. Feb. 13, 2001) (denying motion to dismiss breach of good faith claim that was included in breach contract of count). Where a party fails to properly plead a claim for good faith within a count for breach of contract, the court should properly dismiss the separate claim for [*19] good faith. Echo, Inc. v. Whitson Co., Inc., 121 F.3d 1099, 1105-06 (7th Cir. 1997); Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough, 1999 U.S. Dist. LEXIS 11229, 1999 WL 528499, at *9 (N.D. Ill. July 19, 1999).

Here, Ryanair concedes that it cannot state an independent claim for breach of good faith. However, Ryanair contends that its good faith claim is part of a count for breach of contract, and therefore is properly pled. Count IV is titled "BREACH OF CONTRACT (Obligation of good faith)" and incorporates by reference Ryanair's breach of contract claims (Counts I and II). This position is contrary to the Seventh Circuit's interpretation of Illinois law in Echo, Inc., 121 F.3d at 1105-06, where the court clearly stated independent claims of breach of duty of good faith are not permitted under Illinois law. Consequently, this Court GRANTS Galieo's motion to dismiss Count IV but grants Ryanair leave to properly replead its good faith claim consistent with Illinois law.

CONCLUSION

For the reasons set forth above, Plaintiff/Counter-Defendant Galieo International, L.L.C.'s Motion to Dismiss Counts III and IV of Ryanair's Amended Counterclaims [*20] [15-1], pursuant to Federal Rule of 12(b)(6), is GRANTED as to Counts III and IV. The Court, however, grants Ryanair leave to properly replead its good faith claim (Count IV) consistent with Illinois law. It is so ordered.

ENTER:

BLANCHE M. MANNING

U.S. DISTRICT COURT JUDGE

DATE: 2-21-02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
STATE OF ARIZONA,
STATE OF CONNECTICUT,
STATE OF HAWAII,
STATE OF IDAHO,
STATE OF ILLINOIS,
STATE OF IOWA,
STATE OF MARYLAND,
STATE OF MICHIGAN,
STATE OF MISSOURI,
STATE OF MONTANA,
STATE OF NEBRASKA,
STATE OF NEW HAMPSHIRE,
STATE OF OHIO,
STATE OF RHODE ISLAND,
STATE OF TENNESSEE,
STATE OF TEXAS,
STATE OF UTAH, and
STATE OF VERMONT,

Plaintiffs,

v.

AMERICAN EXPRESS COMPANY,
AMERICAN EXPRESS TRAVEL
RELATED SERVICES COMPANY, INC.,
MASTERCARD INTERNATIONAL
INCORPORATED, and
VISA INC.

Defendants.

Civil Action No.
CV-10-4496 (NGG)(RER)

AMENDED COMPLAINT FOR EQUITABLE RELIEF
FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

The United States of America, by its attorneys acting under the direction of the Attorney General; the State of Arizona, by its Attorney General Terry Goddard; the State of Connecticut, by its Attorney General Richard Blumenthal; the State of Hawaii, by its Acting Attorney General Russell A. Suzuki; the State of Idaho, by its Attorney General Lawrence G. Wasden; the State of Illinois, by its Attorney General Lisa Madigan; the State of Iowa, by its Attorney General Thomas J. Miller; the State of Maryland, by its Attorney General Douglas F. Gansler; the State of Michigan, by its Attorney General Michael A. Cox; the State of Missouri, by its Attorney General Chris Koster; the State of Montana, by its Attorney General Steve Bullock; the State of Nebraska, by its Attorney General Jon Bruning; the State of New Hampshire, by its Attorney General Michael A. Delaney; the State of Ohio, by its Attorney General Richard Cordray; the State of Rhode Island, by its Attorney General Patrick C. Lynch; the State of Tennessee, by its Attorney General Robert E. Cooper, Jr.; the State of Texas, by its Attorney General Greg Abbott; the State of Utah, by its Attorney General Mark L. Shurtleff; and the State of Vermont, by its Attorney General William H. Sorrell (collectively, "Plaintiffs"), bring this civil antitrust action against Defendants American Express Company and American Express Travel Related Services Company, Inc. (collectively, "American Express"), MasterCard International Incorporated ("MasterCard"), and Visa Inc. ("Visa") (collectively, "Defendants") to obtain equitable relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Plaintiffs allege:

I. INTRODUCTION

1. Defendants operate the three largest credit and charge card transaction networks in the United States. In 2009, a substantial amount of interstate commerce – over $1.6 trillion in transaction volume – flowed through Defendants' networks. Every time a consumer uses one of Defendants' credit or charge cards to pay for a purchase from a merchant, the merchant must pay a fee, often called a "card acceptance fee," "merchant discount fee," or "swipe fee." In 2009 alone, Defendants and their affiliated banks collected more than $35 billion in such fees from U.S. merchants. Defendants' fees are a significant cost for merchants that accept Defendants' cards, and merchants pass these costs on to all consumers through higher retail prices.

2. Plaintiffs bring this action to prevent Defendants from imposing on merchants certain rules, policies, and practices ("Merchant Restraints") that insulate Defendants from competition. The Merchant Restraints impede merchants from promoting or encouraging the use of a competing credit or charge card with lower card acceptance fees. Each Defendant's vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition.

3. Each Defendant has suppressed competition with rival networks at the "point of sale," where merchants interact directly with customers, by disrupting the ordinary give and take of the marketplace. Most consumers who use credit or charge cards carry more than one. Defendants' Merchant Restraints, however, prevent merchants from offering their customers a discount or benefit for using a network credit card that is less costly to the merchant. Merchants cannot reward their customers based on the customer's card choice. Merchants cannot even suggest that their customers use a less costly alternative card by posting a sign stating "we prefer"

another card or by disclosing a card's acceptance fee. In short, Defendants' Merchant Restraints prohibit merchants from fostering competition among credit card networks at the point of sale.

4. By incorporating and enforcing its Merchant Restraints in agreements with merchants, each Defendant has violated and continues to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. DEFENDANTS

5. Defendant American Express Company is a New York corporation with its principal place of business in New York, New York. Defendant American Express Travel Related Services Company, Inc., a wholly owned subsidiary of American Express Company, is a Delaware corporation, with its principal place of business in New York, New York. It is the principal operating subsidiary of American Express Company. In 2009, cardholders used American Express credit and charge cards for purchases totaling $419.8 billion.

6. Defendant MasterCard is a Delaware corporation with its principal place of business in Purchase, New York. In 2009, cardholders used MasterCard credit and charge cards for purchases totaling $476.9 billion.

7. Defendant Visa is a Delaware corporation with its principal place of business in San Francisco, California. Visa has offices, transacts business, and is found in New York. In 2009, cardholders used Visa credit and charge cards for purchases totaling $764.2 billion.

III. JURISDICTION AND VENUE

8. Plaintiff United States of America brings this action pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, to obtain equitable and other relief to prevent and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs Arizona, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, Tennessee, Texas, Utah and Vermont, by and through their respective Attorneys General, bring this action in their respective sovereign capacities and as parens patriae on behalf of the citizens, general welfare, and economy of their respective States under their statutory, equitable and/or common law powers, and pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent Defendants from violating Section 1 of the Sherman Act.

9. This Court has subject-matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4.

10. This Court has personal jurisdiction over each Defendant and venue is proper in this District under 15 U.S.C. § 22 because each Defendant transacts business and/or is found within this District. Defendants' credit and charge cards are and have been used for billions of dollars of purchases in this District.

IV. TRADE AND COMMERCE

11. Defendants operate credit and charge card networks in the United States, and sell products and services in the flow of interstate commerce. Defendants' products and services

involve a substantial amount of interstate commerce. In 2009, credit and charge card transaction volume on Defendants' networks in the United States exceeded $1.6 trillion.

V. INDUSTRY BACKGROUND

12. General purpose credit and charge cards ("General Purpose Cards") are payment devices that a consumer can use to make purchases from a wide variety of merchants without accessing or reserving the consumer's funds at the time of the purchase. There are two principal types of General Purpose Cards:

a. credit cards, which usually permit the cardholder to pay either (i) all charges within a set period after a monthly bill is rendered, or (ii) only a portion of the charges within that time and pay the remainder in monthly installments, including interest; and

b. charge cards, which require the cardholder to pay all charges within a set period after a monthly bill is rendered.

13. General Purpose Cards include cards for personal use (issued to individuals for their personal use), cards for small business (issued to individuals for use with a small business), and commercial and corporate cards (issued to individuals, organizations, and businesses for business use).

14. General Purpose Cards do not include cards that can be used at only one merchant (such as department store cards) or cards that access funds on deposit in a checking or savings

account or on the card itself (such as signature debit cards, PIN debit cards, prepaid cards, or gift cards).

15. In Visa and MasterCard transactions, the "card acceptance fee" or "merchant discount fee" that a merchant pays has three principal components: the interchange fee, the assessment fee, and the acquiring fee. To comply with the Visa and MasterCard rules, the merchant's bank (called the "acquiring bank"), which manages the merchant's relationship with Visa and MasterCard, must withhold the full card acceptance fee from the amount it pays the merchant for each transaction, meaning the merchant receives less than the retail price it charges to the consumer.

16. The largest component of the card acceptance fee is the interchange fee, which is received by the Visa or MasterCard "issuing bank" (or "issuer") that issues the card used by the customer. The interchange fee typically is set as a percentage of the underlying transaction price. Visa and MasterCard set interchange fees and have raised them significantly over time.

17. Visa and MasterCard themselves keep a part of the fee paid by merchants (the "assessment fee").

18. Finally, the acquiring bank keeps one component of the card acceptance fee, the acquiring fee, for its services.

19. American Express issues most of its General Purpose Cards to cardholders directly, combining issuer and network functions with respect to those General Purpose Cards. American Express generally provides network services directly to merchants as well. Some American Express cards are issued through agreements with issuing banks, in which case American Express

operates only as a network. For all purposes relevant to this Complaint, such bank-issued cards function substantially the same as those issued by American Express directly, and American Express imposes the same Merchant Restraints for acceptance of its bank-issued cards.

20. Like the Visa and MasterCard networks, American Express' network imposes a fee on the merchant for each transaction. Like Visa and MasterCard, American Express' card acceptance fee typically is set as a percentage of the transaction price. For example, American Express imposes a card acceptance fee of 3% for some transactions. In such transactions, merchants would receive $97 on a $100 retail transaction. American Express would extract the remaining $3 from the transaction. The cost borne by merchants for customers' use of American Express General Purpose Cards is often substantially higher than the cost of customers' use of competing networks' General Purpose Cards. Any other General Purpose Card selected by the customer from the options in his or her wallet – such as a Discover, MasterCard, or Visa General Purpose Card – generally would be less costly to the merchant.

21. Merchants charge higher retail prices to customers to cover the cost of paying these fees to Defendants.

VI. RESTRAINTS ON COMPETITION

22. Each Defendant has instituted its own set of Merchant Restraints prohibiting or restricting a merchant that accepts that Defendant's General Purpose Card from encouraging its customers to use any other network's card at the point of sale. Defendants' Merchant Restraints impose a competitive straightjacket on merchants, restricting decisions by them to offer discounts,

benefits, and choices to customers that many merchants would otherwise be free to offer.

23. Each Defendant applies its Merchant Restraints through agreements with merchants or with merchants' acquiring banks. Each Defendant's set of vertically imposed restrictions independently restrains competition among networks. Each Defendant's Merchant Restraints violate Section 1 of the Sherman Act apart from the existence of the other two Defendants' Merchant Restraints.

24. Visa and MasterCard include their Merchant Restraints in contracts with acquiring banks. Through these contracts, Visa and MasterCard require acquiring banks to obtain agreement from merchants to abide by Visa's and MasterCard's rules, including the Merchant Restraints. Visa and MasterCard require their acquiring banks to penalize merchants that do not adhere to the Merchant Restraints. American Express includes its Merchant Restraints in its contracts with merchants that accept its cards. In circumstances where American Express contracts with the merchant's acquiring bank, American Express requires the acquiring bank to ensure the merchant complies with the Merchant Restraints.

25. Merchants must accept the Merchant Restraints in order to accept Defendants' cards. Merchants clearly understand and expressly agree that they must comply with the Merchant Restraints. Defendants actively monitor and vigorously enforce the Merchant Restraints.

26. Visa's Merchant Restraints prohibit a merchant from offering a discount at the point of sale to a consumer who chooses to use an American Express, Discover, or MasterCard General Purpose Card instead of a Visa General Purpose Card. Visa's rules do not allow discounts for other payment cards that generally require a signature at the point of sale, unless such discounts are

equally available for Visa transactions. Visa International Operating Regulations at 445 (April 1, 2010) (Discount Offer – U.S. Region 5.2.D.2).

27. Similarly, MasterCard's Merchant Restraints prohibit a merchant from "engag[ing] in any acceptance practice that discriminates against or discourages the use of a [MasterCard] Card in favor of any other acceptance brand." MasterCard Rule 5.11.1 (May 12, 2010). This means that merchants cannot offer a discount, or any other benefit, to persuade consumers to use an American Express, Discover, or Visa General Purpose Card instead of a MasterCard General Purpose Card. *Id.* MasterCard does not allow merchants to favor competing card brands. *Id.*

28. American Express' point-of-sale rules on merchants restrict competition more than the rules of its rival networks. American Express' Merchant Restraints are described in its "Merchant Reference Guide–US" (April 2010), Section 3.2. The language in Section 3.2 is inserted in identical or substantially similar form in most of American Express' contracts with merchants. In many agreements, the Guide is expressly incorporated by reference. The Merchant Restraints described in Section 3.2 impose the following restrictions on merchants that accept American Express:

> Merchants must not[1]:
>
> –indicate or imply that they prefer, directly or indirectly, any Other Payment Products over [American Express'] Card,
>
> –try to dissuade Cardmembers from using the Card,
>
> –criticize . . . the Card or any of [American Express'] services or programs,

---

[1] In October 2010, American Express amended Section 3.2 to add the introductory phrase "Except as expressly permitted by applicable law" preceding "Merchants must not."

–try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (*e.g.*, payment by check),

–impose any restrictions, conditions, [or] disadvantages . . . when the Card is accepted that are not imposed equally on all Other Payment Products, except for ACH funds transfer, cash, and checks, . . . or

–promote any Other Payment Products (except the Merchant's own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes [American Express'] Card.

Merchants may offer discounts from their regular prices for payments in cash or by ACH funds transfer or check, provided that they clearly disclose the terms of the offer (including the regular and discounted prices) to customers and that any discount offered applies equally to Cardmembers and holders of Other Payment Products.[2]

Whenever payment methods are communicated to customers, or when customers ask what payments are accepted, the Merchant must indicate their acceptance of the Card and display [American Express'] Marks according to [American Express'] guidelines and as prominently and in the same manner as any Other Payment Products.

---

[2] In October 2010, American Express amended this paragraph of 3.2 to state: "Merchants may offer discounts or in-kind incentives from their regular prices for payments in cash, ACH funds transfer, check, debit card or credit/charge card, provided that (to the extent required by applicable law): (i) they clearly and conspicuously disclose the terms of the discount or in-kind incentive to their customers, (ii) the discount or in-kind incentive is offered to all of their prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of issuer or, except as expressly permitted by applicable state statute, payment card network (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this paragraph will not constitute a violation of the provisions set forth above in this section 3.2."

29. The American Express Merchant Reference Guide–US defines the term "Other Payment Products" used in Section 3.2 as "[a]ny charge, credit, debit, stored value or smart cards, account access devices, or other payment cards, services, or products other than the [American Express] Card."

30. Defendants' rules and practices described in paragraphs 26-29 constitute the Merchant Restraints challenged in this action because and to the extent that they deter or obstruct merchants from freely promoting interbrand competition by offering customers discounts, other benefits, or information to encourage the customer to use a General Purpose Card or payment method other than that Defendant's General Purpose Card.

31. Defendants' Merchant Restraints thus forbid, among other things, the following types of actions a merchant could otherwise use at the point of sale to foster competition on price and terms among sellers of network services:

–promoting a less expensive General Purpose Card brand more actively than any other General Purpose Card brand;

–offering customers a discount or benefit for use of a General Purpose Card brand that costs less to the merchant;

–asking customers at the point of sale if they would consider using another General Purpose Card brand in their wallets;

–posting a sign encouraging use of, or expressing preference for, a General Purpose Card brand that is less expensive for the merchant;

–posting the signs or logos of General Purpose Card brands that cost less to the merchant more prominently than signs or logos of more costly General Purpose Card brands; or

–posting truthful information comparing the relative costs of different General Purpose Card brands.

32. Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, the new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, now forbids networks from prohibiting merchants from offering a discount for an entire payment method category, such as a discount for use of any debit card. All General Purpose Card networks operate under these laws. This Complaint does not seek relief relating to these two types of discounting.

VII. RELEVANT MARKETS

A. Product Markets

33. Defendants participate in two distinct product markets in the United States relevant to this Complaint: the General Purpose Card network services market, and the General Purpose Card network services market for merchants in travel and entertainment ("T&E") businesses.

1. General Purpose Card Network Services

34. General Purpose Card network services involve the processing of General Purpose Card transactions across a network. General Purpose Card networks provide infrastructure and mechanisms enabling merchants to obtain authorization for, settle, and clear transactions for their customers who pay with General Purpose Cards. Merchant acceptance of General Purpose Cards is defined and controlled at the network level, and prices to merchants are established directly or indirectly by the networks. A relevant product market for this case is the provision of General Purpose Card network services to merchants.

35. American Express, Discover, MasterCard, and Visa compete as sellers of these network services to merchants in the United States.

36. Visa and MasterCard provide network services indirectly to merchants through the merchants' acquiring banks. American Express generally sells its network services directly to merchants.

37. Merchants accept General Purpose Cards because many consumers strongly prefer to use General Purpose Cards over other means of payment. Millions of consumers prefer General Purpose Cards because they provide a combination of convenience, widespread acceptance, security, and deferred payment options that are not effectively replicated by other payment methods.

38. Each Defendant provides network services only for the use of its own General Purpose Cards, not for any other network's General Purpose Cards. Merchants that accept General Purpose Cards must purchase network services. Merchants cannot reasonably replace General Purpose Card network services with other services or reduce usage of these network services, even if such network services are substantially more expensive for merchants relative to services that enable other payment methods. Even a large increase in network fees would not provide a meaningful financial incentive for merchants to abandon acceptance of General Purpose Cards. Although other services that enable payment exist outside this relevant market, none of these services is a reasonable substitute for General Purpose Card network services from the perspective of merchants.

39. Competition from other payment methods in the geographic market identified below would not be sufficient to prevent a hypothetical monopolist of General Purpose Card network

services from profitably maintaining supracompetitive prices and terms for network services provided to merchants over a sustained period of time. Nor would competition from other payment methods prevent a hypothetical monopolist in the General Purpose Card network services market from imposing anticompetitive conditions on merchants in that market.

40. In addition to selling General Purpose Card network services to merchants, Defendants provide separate network services to a different group of customers: issuers, which provide General Purpose Cards to cardholders. Questions of market power and harm are distinct for the two separate customer groups. Sellers of General Purpose Card network services to merchants could exercise market power over merchants even in circumstances in which they could not exercise market power over issuers. Any benefits received by issuers are not necessarily shared with merchants, and would not offset anticompetitive harm imposed by networks on merchants.

2. Travel and Entertainment Market

41. Within the relevant market of General Purpose Card network services, there is another relevant market – a price discrimination market – consisting of General Purpose Card network services provided to merchants in travel and entertainment businesses. Specifically, merchants selling goods and services to customers primarily for travel and entertainment (for example, air travel, lodging, and rental cars) are exposed to price discrimination.

42. Price discrimination occurs when a seller charges different customers (or groups of customers) different prices for the same services, when those different prices are not based on different costs of serving those customers. General Purpose Card networks set fees for network services to some merchants separately from fees to other merchants. Setting a lower fee for one group has little to no effect on a network's ability to set a higher fee for other groups.

43. Competition from other payment methods in the geographic market identified below would not be sufficient to prevent a hypothetical monopolist in the market for General Purpose Card network services for T&E merchants from either profitably maintaining supracompetitive prices and terms for network services to T&E merchants over a sustained period of time or imposing anticompetitive conditions on T&E merchants in that market. A hypothetical monopolist could price discriminate profitably against T&E merchants even if other merchants were paying lower prices for network services.

44. Each Defendant can identify whether a merchant participates in the T&E sector, and establishes merchant pricing by segment or category. Each Defendant, for example, has one set of prices for airline merchants and a different set of prices for supermarket merchants. American Express has separate price schedules for Airlines, Lodging, Car Rentals, and Travel Agents. American Express has an agreement with each merchant customer, and each agreement contains the price American Express charges that merchant. Visa and MasterCard can and do identify T&E merchants through their relationships with the merchants' acquiring banks.

45. Defendants charge merchants in the T&E sector higher fees than they charge most other merchants. Moreover, American Express charges T&E merchants higher fees than competing networks charge T&E merchants. The high fees to T&E merchants are not based on Defendants' higher costs of serving their T&E merchants. Each Defendant can charge T&E merchants high fees because those merchants are even less able to substitute away to other networks than other merchants. For example, American Express imposed a substantial fee increase on major airline merchants in 2008 without losing any major airline merchant customers, even though its fees already were higher than those of other General Purpose Card networks. A

substantial differential in card acceptance fees exists between General Purpose Card network services for merchants in T&E businesses and merchants in other businesses.

46. Each Defendant's price discrimination against T&E merchants is persistent and systematic. American Express, for example, has successfully maintained higher profit margins for T&E customers than for other merchant categories.

47. Arbitrage, or indirect purchasing by T&E merchants of Defendants' network services from other merchants to avoid price discrimination, is impossible. For example, merchants can buy network services for transactions using American Express General Purpose Cards only from American Express, and one merchant cannot resell American Express network services to another merchant. T&E merchants have no realistic ability to avoid Defendants' high fees.

48. T&E merchants constitute a distinct customer group that cannot easily substitute away from the card network their customers want to use for travel and entertainment purchases. T&E merchants (such as airline, hotel, and rental car merchants) depend on business travelers as a significant source of revenues. Business travelers often are required or encouraged by their employers to use corporate cards of a particular network to qualify for reimbursement from their employers. Customers typically make larger purchases from T&E merchants than from merchants in many other industries. They also often purchase from T&E merchants through the Internet. T&E merchants thus rely more on General Purpose Cards than many other merchants and are even less willing and able than other merchants to substitute from General Purpose Cards to alternative payment methods in response to high network prices. In short, T&E merchants have particularly high inelasticity of demand for General Purpose Card network services.

49. Network industry participants recognize T&E merchants as a distinct market for network services. For many years, for example, American Express has had a T&E Industries Business Unit. Indeed, the principal operating subsidiary of American Express Company is the American Express Travel Related Services Company, Inc.

50. Accordingly, a distinct, additional relevant market exists for General Purpose Card network services to T&E merchants.

B. Geographic Market

51. The United States is the relevant geographic market for both the sale of General Purpose Card network services to all merchants and the sale of such services to T&E merchants.

52. Each Defendant treats the United States as a separate geographic market, as demonstrated in part by each Defendant's separate rules governing merchant acceptance in the United States and its separate pricing of network services to merchants in the United States. Defendants can easily identify the location of a merchant outlet. Arbitrage, or indirect purchasing by U.S. merchants of Defendants' network services from merchants located outside of the United States, is impossible.

53. The vast majority of General Purpose Card transactions with merchants located in the United States are made using General Purpose Cards issued in the United States. Almost all General Purpose Cards issued in the United States are issued under the American Express, Discover, MasterCard, and Visa networks. Other networks have limited competitive significance for U.S. merchants, as reflected in their negligible share of sales to U.S. merchants.

54. A hypothetical monopolist of General Purpose Card network services or General Purpose Card network services to T&E merchants could profitably maintain supracompetitive prices for network services provided to merchants in the United States over a sustained period of time and could impose anticompetitive conditions on merchants in the United States even if merchants located outside the United States paid competitive prices for network services.

VIII. MARKET POWER

55. Visa, MasterCard, and American Express each possess market power in the General Purpose Card network services market. The Second Circuit previously held that MasterCard and Visa each has market power in a General Purpose Card network services market. *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-39 (2d Cir. 2003). American Express also possesses market power in the General Purpose Card network services market.

56. Merchant acceptance of Defendants' General Purpose Cards is widespread. Merchants accounting for a substantial amount of General Purpose Card purchase volume in the United States accept all three Defendants' General Purpose Cards.

57. Merchants choose payment networks to accommodate the preferred payment brands of their customers. Some customers strongly prefer a particular brand and in some cases carry only one General Purpose Card brand. For example, in August 2009, 16% of American Express cardholders used only American Express and no other major General Purpose Cards. Such high cardholder insistence on using American Express gives American Express market power over merchants.

58. Merchants also consider whether their competitors accept a network's General Purpose Card and, if so, feel additional pressure to accept that network's card. Indeed, many merchants must accept all Defendants' General Purpose Cards to remain competitive with other merchants.

59. Despite technological advances that have decreased costs associated with General Purpose Card transactions over recent decades, Visa and MasterCard have increased the fees they charge merchants without losing sufficient merchants to make the price increases unprofitable.

60. American Express has for many years maintained the highest card acceptance fees among networks, including Visa and MasterCard. In recent years, American Express has increasingly been able to resist merchant pressure to reduce its card acceptance fees. American Express CEO Ken Chenault explained in 2009:

> At a time when many companies have had to cut or discount their prices and fees, we've been able to hold our own . . . . We're not lowering prices to get or keep customers or merchants. We continue to sign new merchants at existing discount rate levels . . . . This is significantly different from the position we were in during the downturn of the early 1990's. At that time our card and merchant pricing was under enormous pressure, and we did have to reduce fees.

American Express has increased the fees it charges many merchants without losing sufficient merchants to make the price increases unprofitable.

61. Notwithstanding these high fees, merchants continue to accept Defendants' General Purpose Cards because they would face serious economic consequences if they ceased to accept any one of the three Defendants' General Purpose Cards. Unlike customers in most markets for goods and services, merchants cannot buy fewer services from one Defendant's network and buy

more services from a competing network at the point of sale, even in the face of higher fees imposed by that network or lower fees offered by competing networks. A merchant's efforts to reduce its purchases of one network's services by encouraging its customers to choose another network's General Purpose Card would violate Defendants' Merchant Restraints. Thus, a merchant may resist a Defendant's high card acceptance fees only by no longer accepting that Defendant's cards. This all-or-nothing choice severely constrains merchants, because dropping any one of the Defendants' General Purpose Cards could alienate customers and lead to significant lost sales. The Merchant Restraints leave merchants less able to avoid Defendants' supracompetitive prices than they otherwise would be.

62. Defendants' ability to discriminate in the prices they charge different types of merchants, unexplained by cost differences, also reflects their market power. For example, American Express targets specific merchant segments for differential pricing based on those merchants' ability to pay and their inability to refuse to accept American Express, a practice American Express calls "value recapture." American Express generally charges higher fees to merchants that rely more on General Purpose Cards for their business, such as T&E merchants, than it charges merchants that traditionally rely less on American Express.

63. This direct evidence of Defendants' market power is consistent with their market share of General Purpose Card transaction volume. American Express, MasterCard, and Visa each has significant market shares in the highly concentrated General Purpose Card network services market. In 2009, the three Defendants together had approximately 94% of the dollar volume of U.S. issued General Purpose Cards. According to Nilson data, Visa's share was approximately 43%, while MasterCard had a 27% share, and American Express had a 24% share. Each of these

market shares is consistent with market power in a market with high concentration and other particular characteristics of the General Purpose Cards network services market. For example, the Second Circuit held that MasterCard had market power with a market share of 26%. *U.S. v. Visa U.S.A., Inc.*, 344 F.3d at 239-40. In subsequent litigation, American Express itself alleged that MasterCard "exercised market power in the network services market" when MasterCard's "share was approximately 26%," quite similar to American Express' share in the market for General Purpose Card network services to merchants today.

64. Defendants' acceptance among merchants is widespread. Visa and MasterCard are accepted at over 8.2 million merchant locations in the U.S. In 2009, American Express was accepted at 4.9 million merchant locations in the U.S., or about 60% as many as accept Visa and MasterCard. In recent years, American Express has expanded its acceptance at many "everyday spend" merchants, adding, for example, McDonalds (2004), Safeway (2004), Food Lion (2007) and Dollar Tree (2010). Today, many of the merchants that do not accept American Express are small and do not account for significant transaction volume. Indeed, American Express has stated that "as of the end of 2009, our merchant network in the United States accommodated more than 90% of our Cardmembers' general-purpose charge and credit card spending."

65. Among large U.S. retailers that account for a substantial amount of U.S. transaction volume, acceptance of all three Defendants' General Purpose Cards is widespread. For example, 95 of the largest 100 U.S. retailers accept all Defendants' General Purpose Cards. And in many major merchant segments, Defendants' acceptance is nearly universal. All major airlines, for instance, accept all three Defendants' General Purpose Cards.

66. Significant barriers to entry and expansion protect Defendants' market power, and have contributed to Defendants' ability to maintain high prices for years without threat of price competition by new entry or expansion in the market. These barriers to entry and expansion include the prohibitive cost of establishing a physical network over which General Purpose Card transactions can run, developing a widely recognized brand, and establishing a base of merchants and a base of cardholders. Defendants, who achieved these necessities early in the history of the industry, obtained substantial early mover advantages over prospective subsequent entrants. Successful subsequent entry would be difficult and expensive. In the presence of these barriers, the only successful market entrant since the 1960s has been Discover. Even so, Discover's market share historically has been, and remains, very small. In 2009, Discover's market share based on dollar volume of purchases placed on General Purpose Cards was approximately 6%.

67. Defendants' Merchant Restraints heighten these barriers to competitors' expansion and entry. Merchants' inability to encourage their customers to use less costly General Purpose Card networks makes it even harder for existing or potential competitors to threaten Defendants' market power.

68. Each Defendant also has market power in the T&E market for General Purpose Card network services. Among Defendants, American Express' market power in the T&E market is the most substantial. American Express' share of transaction volume in this market is approximately 37%, while Visa's share is approximately 36% and MasterCard's share is approximately 24%. American Express is the market leader among networks in airline, lodging, and rental car merchant segments, capturing nearly $100 billion in transaction volume. American Express' average card acceptance fee for these three merchant segments was 12% higher than its

average fee for all other merchant segments in 2009. American Express' costs in those segments are not proportionally higher than costs in most other segments; in many instances, they are lower. T&E merchant acceptance of American Express is extensive. American Express is the designated card for more business travelers than any other network's card. In fact, American Express accounts for 70% of all expenditures made with corporate cards, which consist largely of T&E merchant purchases. Most merchants in the T&E market have not declined to accept American Express' cards or its Merchant Restraints even when American Express has imposed card acceptance fees that are substantially higher than those set by other General Purpose Card brands, despite these merchants' strong desire not to accept those prices and restraints. Visa and MasterCard also price discriminate successfully against T&E merchants. For all of these reasons, each Defendant has market power in the T&E market.

IX. HARM TO COMPETITION

69. Each Defendants' vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition. Each Defendant's Merchant Restraints harm competition by:

(1) harming the competitive process and disrupting the proper functioning of the price-setting mechanism of a free market;

(2) restraining merchants from encouraging or pressing each Defendant to compete over card acceptance fees;

(3) insulating each Defendant from competition from rival networks that would otherwise encourage merchants to favor use of those networks' cards;

(4) inhibiting other networks from competing on price at merchants that accept each Defendant's General Purpose Cards;

(5) restraining merchants from promoting payment methods other than each Defendant's General Purpose Cards;

(6) restraining merchants from competing for customers with discounts, promotions, or other forms of lower prices and other benefits enabled by customers' use of a lower cost General Purpose Card or other payment method;

(7) causing increased prices in the form of higher merchant card acceptance fees;

(8) causing increased retail prices for goods and services paid generally by customers;

(9) reducing output of lower-cost payment methods;

(10) stifling innovation in network services and card offerings that would emerge if competitors were forced to compete for merchant business at the point of sale; and

(11) denying consumers information about the relative costs of each Defendant's General Purpose Card usage compared to other card usage that would cause more consumers to choose lower-cost payment methods.

70. Defendants' Merchant Restraints substantially reduce price and non-price competition for merchant use of network services and interfere with price setting at the merchant point of sale. Without the Merchant Restraints, and faced with Defendants' high card acceptance fees, many merchants would encourage customers to use cards offered by the lowest-cost network. Without the Merchant Restraints, each Defendant would compete more vigorously. By imposing the Merchant Restraints, Defendants have insulated themselves from competition with each other and with any other network competitor at the merchant point of sale. The Merchant Restraints reduce incentives for Defendants to offer merchants lower-priced network services that would benefit consumers, because merchants cannot encourage customers to use the less expensive

options without violating Defendants' Merchant Restraints. Each Defendant thus can maintain high prices for its network services with confidence that no competitor will take away significant transaction volume through competition in the form of merchant discounts or benefits to consumers to use lower cost payment options. Each Defendant's price for network services to merchants is higher than it would be without the Merchant Restraints.

71. Although other payment methods are not in the product markets relevant to this action, there is some, more attenuated competition between General Purpose Cards and other payment methods. Defendants' Merchant Restraints also restrict the competition that exists and otherwise would emerge from these other payment methods.

72. Because Defendants' Merchant Restraints obstruct merchants from encouraging customers to use less costly payment methods, merchants bear higher costs and their customers face higher retail prices. If a merchant cannot reduce its costs by encouraging cheaper payment methods or by encouraging competition among networks, the merchant will charge higher prices generally to its customers. A customer who pays with lower-cost methods of payment pays more than he or she would if Defendants did not prevent merchants from encouraging network competition at the point of sale. For example, because American Express General Purpose Cards typically are held by more affluent buyers, less affluent purchasers using non-premium General Purpose Cards, debit cards, cash, and checks effectively subsidize part of the cost of expensive American Express card benefits and rewards.

73. The fees Defendants impose on General Purpose Card transactions are largely not visible to consumers. The Merchant Restraints forbid merchants even from telling consumers simple factual information about what merchants have to pay when consumers use General

Purpose Cards. This information could help merchants to encourage customers to choose more cost-effective payment methods. For example, those customers who prefer American Express services and value them at a competitive price could continue to choose them, but others would not be forced to subsidize this choice by paying higher prices.

74. Authorities in other countries have taken actions to reduce or eliminate similar Merchant Restraints. In foreign jurisdictions where Defendants' Merchant Restraints have been relaxed, merchants have taken advantage of their ability to encourage customers to use less expensive General Purpose Cards or other payment methods.

75. In short, Defendants' Merchant Restraints remove tools that merchants in a competitive marketplace would use to negotiate lower card acceptance fees, to reduce their costs of doing business, to empower their customers with information to make choices about payment methods, to encourage customers to choose a low-cost payment method, and to keep retail prices lower for their customers. As a result, merchants, consumers, and competition itself are harmed.

X. VIOLATION ALLEGED

76. Each Defendant's Merchant Restraints constitute agreements that unreasonably restrain competition in the market for General Purpose Card network services to merchants, and in the market for General Purpose Card network services to T&E merchants, in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

77. These agreements have had and will continue to have anticompetitive effects by protecting Defendants from competition over the cost of card acceptance to merchants, and restraining merchants from encouraging customers to use lower-cost payment methods.

Defendants' restraints unlawfully insulate Defendants' card acceptance fees from competition, increase costs of payment acceptance to merchants, increase prices, reduce output, harm the competitive process, raise barriers to entry and expansion, and retard innovation.

78. These agreements are not reasonably necessary to accomplish any of Defendants' allegedly procompetitive goals. Any procompetitive benefits are outweighed by anticompetitive harm, and there are less restrictive alternatives by which Defendants would be able reasonably to achieve any procompetitive goals.

XI. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray that final judgment be entered against each Defendant declaring, ordering, and adjudging that:

a. The aforesaid agreements unreasonably restrain trade and are illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. Each Defendant be permanently enjoined from engaging in, enforcing, carrying out, renewing, or attempting to engage in, enforce, carry out, or renew the agreements in which it is alleged to have engaged, or any other agreement having a similar purpose or effect in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. Each Defendant eliminate and cease enforcing all Merchant Restraints and be prohibited from otherwise acting to restrain trade unreasonably;

d. Each Defendant fund and undertake programs to inform merchants of merchants' rights to encourage customers to use any payment method they choose; and

e. The United States be awarded its costs of this action and such other relief as may be appropriate and as the Court may deem just and proper, and the States be awarded their costs in this action, reasonable attorneys' fees, and such other relief as may be appropriate and as the Court may deem proper.

Dated: December 21, 2010

FOR PLAINTIFF
THE UNITED STATES OF AMERICA

s/Christine A. Varney
CHRISTINE A. VARNEY
Assistant Attorney General

s/Patricia A. Brink
PATRICIA A. BRINK
Director of Operations

s/John Read
JOHN READ
Chief, Litigation III Section
DAVID KULLY
Assistant Chief, Litigation III Section

s/Craig W. Conrath
CRAIG W. CONRATH
Attorney for the United States of America
U.S. Department of Justice
Antitrust Division, Litigation III Section
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530
Telephone: (202) 307-0468

STATE OF ARIZONA
Terry Goddard
Attorney General

s/Nancy M. Bonnell
Nancy M. Bonnell (AZ Bar# 016382)
Antitrust Unit Chief
Consumer Protection and Advocacy Section
Office of the Arizona Attorney General
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602) 542-7728
Fax: (602) 542-9088
nancy.bonnell@azag.gov

STATE OF CONNECTICUT

Richard Blumenthal
Attorney General

s/Michael E. Cole
Michael E. Cole
Chief, Antitrust Department
Rachel O. Davis
Assistant Attorneys General
Antitrust Department
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5040
Fax: (860) 808-5033

ATTORNEY GENERAL OF THE STATE OF HAWAII

Russell A. Suzuki
Acting Attorney General of Hawaii

s/Rodney I. Kimura
Deborah Day Emerson
Rodney I. Kimura
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1180
(808) 586-1205 (fax)

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

s/Brett T. DeLange
Brett T. DeLange (ISB No. 3628)
Deputy Attorney General
Consumer Protection Division
Office of the Attorney General
954 W. Jefferson St., 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-4114
FAX: (208) 334-4151
brett.delange@ag.idaho.gov

ATTORNEY GENERAL OF THE STATE OF ILLINOIS

Lisa Madigan
Attorney General of Illinois

s/Robert W. Pratt
Robert W. Pratt
Chief, Antitrust Bureau
Office of the Illinois Attorney General
100 W. Randolph Street
Chicago, Illinois 60601
(312) 814-3722
(312) 814-4209 (fax)

STATE OF IOWA

Thomas J. Miller
Attorney General of Iowa

s/Layne M. Lindebak
Layne M. Lindebak
Assistant Attorney General
Special Litigation Division
Iowa Department of Justice
Hoover Office Building-Second Floor
1305 East Walnut Street
Des Moines, Iowa 50319
Phone: 515 281-7054
Fax: 515 281-4902
Email: Layne.Lindebak@iowa.gov

DOUGLAS F. GANSLER
MARYLAND ATTORNEY GENERAL

s/Gary Honick
Ellen S. Cooper
Assistant Attorney General
Chief, Antitrust Division
Gary Honick
Assistant Attorney General
Office of the Attorney General
Antitrust Division
200 St. Paul Place, 19th Floor
Baltimore, Maryland 21202
Tel. # (410) 576-6470
Fax # (410) 576-7830

STATE OF MICHIGAN
MICHAEL A. COX
Attorney General

s/D.J. Pascoe
D.J. Pascoe (P54041)
Assistant Attorney General
Michigan Department of Attorney General
Corporate Oversight Division
Securities, Antitrust, and Business Section
G. Mennen Williams Building, 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933
Telephone: (517) 373-1160
Fax: (517) 335-6755
pascoedl@michigan.gov

STATE OF MISSOURI
CHRIS KOSTER
Attorney General

s/Anne E. Schneider
ANNE E. SCHNEIDER
Assistant Attorney General/Antitrust Counsel
ANDREW M. HARTNETT
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
Tel: (573) 751-7445
Tel: (573) 751-2041 (facsimile)
E-Mail: Anne.Schneider@ago.mo.gov

ATTORNEY GENERAL
OF THE STATE OF MONTANA

Steve Bullock
Attorney General of Montana

s/Chuck Munson
Chuck Munson
Assistant Attorney General
Office of the Montana Attorney General
215 N. Sanders
Helena, MT 59601
(406) 444-2026
(406) 444-3549

ATTORNEY GENERAL OF THE STATE OF NEBRASKA

Jon Bruning
Attorney General of Nebraska

s/Leslie C. Levy
Leslie C. Levy (NE Bar# 20673)
Chief, Consumer Protection/Antitrust Division
Office of the Nebraska Attorney General
2115 State Capitol Building
Lincoln NE 68509
(402) 471-2811
(402) 471-2957 (fax)

ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE

Michael A. Delaney
Attorney General of New Hampshire

s/David A. Rienzo

David A. Rienzo (NH Bar# 13860)
Assistant Attorney General, Consumer Protection and Antitrust Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-7987
(603) 223-6239 (fax)

ATTORNEY GENERAL OF THE STATE OF OHIO

Richard Cordray
Attorney General of Ohio

Jennifer L. Pratt
Section Chief, Antitrust Section

s/Mitchell L. Gentile
Mitchell L. Gentile
Principal Attorney, Antitrust Section
Patrick E. O'Shaughnessy
Senior Assistant Attorney General, Antitrust Section
Office of the Ohio Attorney General
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215
(614) 466-4328
(614) 995-0266 (fax)

ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND

Patrick C. Lynch
Attorney General
By His Attorney

s/Edmund F. Murray, Jr.
Edmund F. Murray, Jr. (RI Bar #3096)
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, Rhode Island 02906
(401) 274-4400
(401) 222-2995 (fax)

STATE OF TENNESSEE
ROBERT E. COOPER, JR.
Attorney General and Reporter

s/Victor J. Domen, Jr.
Victor J. Domen, Jr. (BPR# 015803)
Senior Counsel
Office of the Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37202
(615) 532-5732
(615) 532-2910 (fax)
Vic.Domen@ag.tn.gov

GREG ABBOTT
ATTORNEY GENERAL OF TEXAS

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

JOHN T. PRUD'HOMME
Assistant Attorney General
Chief, Antitrust Division

s/Kim Van Winkle
KIM VAN WINKLE
Assistant Attorney General
State Bar No. 24003104

BRET FULKERSON
State Bar No. 24032209

Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
512/463-1266 (Telephone)
512/320-0975 (Facsimile)

ATTORNEY GENERAL OF THE STATE OF UTAH

Mark L. Shurtleff
Attorney General of Utah

s/Ronald J. Ockey
Ronald J. Ockey (Utah State Bar #2441)
David N. Sonnenreich (Utah State Bar #4917)
Assistant Attorney General
Office of the Attorney General of Utah
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84111
(801) 366-0359
(801) 366-0315 (fax)
rockey@utah.gov (email)

STATE OF VERMONT

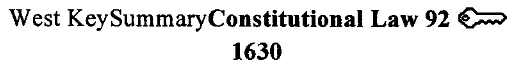
WILLIAM H. SORRELL
ATTORNEY GENERAL

s/William H. Sorrell
Sarah E.B. London
Assistant Attorney General
Public Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
ph. (802) 828-5479
fax. (802) 828-2154
slondon@atg.state.vt.us

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Texas,
Beaumont Division.
Anthony A. WHITEHURST, Plaintiff,
v.
SHOWTIME NETWORKS, INC., Defendant.

Civil Action No. 1:08-CV-47.
Sept. 22, 2009.


West KeySummary**Constitutional Law 92 1630**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(D) False Statements in General
92k1630 k. Right of publicity; misappropriation of likeness, name, or celebrity status. Most Cited Cases

Torts 379 391

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k391 k. Defenses in general. Most Cited Cases

An alleged minority owner of rights to a murder victim's likeness had no claim for misappropriation of his likeness on the cover of a DVD film about his life story. The film was protected by the First Amendment guarantee of free speech and free press and not subject to suit. Promotion of the film was also protected free speech and free press. Thus, using the likeness on the DVD cover was not subject to suit. U.S. Const. Amend. 1.

Anthony A. Whitehurst, Baytown, TX, pro se.

Michael Lawrence Raiff, Vinson & Elkins, Dallas, TX, for Defendant.

MEMORANDUM ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING MOTION TO DISMISS

THAD HEARTFIELD, District Judge.

***1** Pursuant to 28 U.S.C. § 636(b) and the Local Rules for the Eastern District of Texas, the Court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for determination of pre-trial matters and entry of findings of fact and recommended disposition on dispositive matters. The defendant's motion to dismiss is pending before the Court.

Judge Giblin entered a *Report and Recommendation* on the motion to dismiss on August 28, 2009. He entered findings and recommended that the Court grant the defendant's motion to dismiss and dismiss the plaintiff's claims for failure to state a claim.

The parties have not filed objections to the magistrate judge's report. In accordance with 28 U.S.C. § 636(b)(1), the Court reviewed the magistrate judge's findings and the applicable law in this proceeding. After review, the Court finds that Judge Giblin's findings and recommendations should be accepted.

Accordingly, the *Report and Recommendation on Motion to Dismiss* [Clerk's doc. # 26] is **ADOPTED** by the Court. The factual findings and legal conclusions of the magistrate judge are therefore fully incorporated by the undersigned in support of this order.

The Court **ORDERS** that defendant Showtime Networks, Inc.'s motion to dismiss [Clerk's doc. # 15] is **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(6). It is further **ORDERED** that the plaintiff Anthony A. Whitehurst's claims against defendant, Showtime Networks, Inc. are **DISMISSED** with prejudice.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

The Court finally directs the Clerk of Court to **CLOSE** this civil action as plaintiff's claim are dismissed in their entirety. All motions not addressed herein are **DENIED** as **MOOT.**

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

KEITH F. GIBLIN, United States Magistrate Judge.

Pursuant to 28 U.S.C. § 636(b) and the Local Rules for the United States District Court, Eastern District of Texas, the District Court referred this proceeding the undersigned United States Magistrate Judge for consideration of pretrial matters and proceedings and/or entry of a report and recommendation on case-dispositive issues. Pending before the Court is the *Defendant Showtime Network Inc.'s Motion to Dismiss Under Fed.R.Civ.P. 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B) and Brief in Support Thereof* [Clerk's doc. # 15].

Background

The Plaintiff, Anthony Whitehurst, proceeding *pro se* and *in forma pauperis,* filed suit against the Defendant Showtime Networks, Inc., seeking damages for Defendant Showtime's allegedly unauthorized use of the "likeness" of Mr. James Byrd, Jr., in Showtime's motion picture, *Jasper, Texas,* and its related marketing. The film (according to Plaintiff's complaint) aired on the network in June 2003 and was released for DVD distribution. In his pleading, the Plaintiff claims that he is "a 17% Registered Owner of the Property Rights, for the use of the name, voice, signature, photograph, or likeness of the deceased individual James Byrd, Jr., as proscribed under Chapter 26 of the Texas Property Code." *See Complaint,* at p. 3. The Plaintiff contends that he shares ownership of the above-described property rights with Ross Payne Byrd, the son of James Byrd, Jr. (also the administrator of the Byrd estate), James Byrd, Jr.'s other two children, and an individual named Eligah Ricky Jason. [FN1] The complaint alleges that Defendant Showtime "refused" to deal with the Plaintiff as owner of the property rights at issue when it made, advertised and marketed the film about James Byrd, Jr., and that Defendant's "coordinated efforts to 'control' the T.V., Radio, Print & Billboard commercial advertisements" for the film "deriving from" Plaintiff's property rights has resulted in a "virtual monopoly" for the Defendant related to the film. *See Complaint,* at p. 15. Plaintiff states that the Defendant was not given consent by the owners of the property rights at issue before they used James Byrd, Jr.'s likeness "in commerce." *Id.* at p. 24.

> FN1. There are also issues regarding whether Whitehurst actually owns any percentage of the property rights in contention, as Mr. Jason filed a motion to intervene arguing that Mr. Whitehurst is in fact not entitled to relief that he seeks because Mr. Jason and the children of James Byrd, Jr., are the only owners of the property rights to Byrd's estate. The Court reserves ruling on this issue as this time, finding it expeditious to rule on the pending motion to dismiss first, which would dispose of Mr. Whitehurst's claims in their entirety without having to consider the issues presented by Mr. Jason's motion. Additionally, Rule 12(b)(6) and case law require the Court to assume the Plaintiff's factual allegations-including his alleged 17% ownership-as true. As discussed herein, the Court concludes that even if Mr. Whitehurst owns the property rights at issue as he claims, his causes of action should still be dismissed.

***2** Although the Plaintiff's complaint is detailed on the alleged facts, the pleading is rather vague as the legal basis for his causes of action. [FN2] It appears that he is asserting some form of a discrimination/civil rights claim under 42 U.S.C. § 1981, general violations of his property rights by the Defendant in the form of conversion and unauthorized appropriation of James Byrd Jr.'s likeness or name (misappropriation), and a claim based on the alleged violation of federal antitrust laws under Title 15 of the United States Code. *See Complaint,*

at pp. 21, 23. Regarding the federal antitrust claims, he argues that the Defendant attempted to monopolize and stifle commerce by commercializing on Plaintiff's property rights, and that the Defendant's alleged "monopoly" was designed to lock out minorities and victims' families. *Id.* at p. 23. He relatedly argues that the Defendant wrongfully "refused to deal" with him as an owner of the property rights at issue.

FN2. "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed such a garrolous style is not an uncommon mask for an absence of detail." *Williams v. WMX Technologies, Inc.,* 112 F.3d 175, 178 (5th Cir.1997), *cert. denied* 522 U.S. 966, 118 S.Ct. 412, 139 L.Ed.2d 315 (1997). A statement of facts that merely creates a suspicion that a pleader might have a right of action is insufficient. *Rios v. City of Del Rio,* 444 F.3d 417, 421 (5th Cir.2006) (citing *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir.1995)). The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save a complaint. *Id.* Although the Plaintiff is proceeding *pro se,* he is not entitled to the lenient filing requirements afforded *pro se* prisoner litigants because he is not in the unique situation of a prisoner seeking relief without control over the mailing and filing of his pleadings. *See Cousin v. Lensing,* 310 F.3d 843, 848 (5th Cir.); *cert. denied* 539 U.S. 918, 123 S.Ct. 2277, 156 L.Ed.2d 136 (2003).

It is true that the Fifth Circuit has also held that on a 12(b) (6) motion, *pro se* complainants are held to a less stringent standard than formal pleadings drafted by lawyers. *Taylor v. Books A Million, Inc.,* 296 F.3d 376, 378 (5th Cir.2002) (internal quotations omitted). However, regardless of whether the plaintiff is *pro se* or represented by counsel, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Id.*

The Defendant responded to Mr. Whitehurst's claims with its motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B). In the motion to dismiss, Defendant Showtime contends that even assuming that Mr. Whitehurst has any rights relating to James Byrd, Jr., his misappropriation and antitrust claims are time-barred, he has no standing to bring suit, and his claims fail as a matter of law for several reasons, as discussed in more detail in the motion and this report. In support, the Defendant's motion cites the *in forma pauperis* statute, 28 U.S.C. § 1915(e)(2)(B), arguing that Plaintiff's claims are frivolous and should accordingly be dismissed. The Defendant also discusses various provisions of statutory and case law in support of its contention that Plaintiff's claims must also be dismissed as a substantive matter because he fails to state a claim upon which relief can be granted. Defendant's specific arguments are addressed in further detail in this Court's analysis, *infra.*

Mr. Whitehurst responded in opposition to the motion to dismiss. *See Response* [Clerk's doc. # 21]. The Plaintiff argues that his claims are not time-barred because they are tolled under the "Prison Mail Box [sic] Rule" and by the fact that earlier dismissal of his claims asserted herein [FN3] was without prejudice under the "Three Strike Rule" of 28 U.S.C. § 1915(g). He also argues that he does have standing to sue as a minority interest owner of the property rights at issue. Mr. Whitehurst further offers numerous arguments in support of his substantive claims. He concedes that Texas law does not recognize a claim for misappropriation of one's "life story," but argues that his pleading in fact properly states a claim for property rights under Sections 26.011 and 26.012(4) of the Texas

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

Property Code instead of "life story" rights. In his response, Plaintiff limits his misappropriation claim to the use of James Byrd, Jr.'s likeness in the advertising for the film and the cover jacket of the DVD for the film, therefore conceding that he cannot claim misappropriation of the likeness in the film itself because the events depicted in the film were already in the public record as newsworthy events. *See Response,* at pp. 9-10. He contends that "while defendant has the right to use such likeness in the film, they can't use the likeness in connection with the DVD (i.e. on the outside cover of the entertainment DVD) to solicit the purchase of the product, merchandise or good known as a DVD of the film, or for soliciting the services of renting out that entertainment DVD." *Id.* at p. 11. Plaintiff also reiterates his antitrust claims, citing the Texas Property Code, arguing that he can identify the relevant market for the single DVD product under law. He finally attempts to distinguish the federal case law cited by Defendant regarding its argument that Plaintiff cannot state a claim for refusal to deal.

FN3. Mr. Whitehurst brought suit against Showtime in 2005 asserting the same claims pled herein. *See Whitehurst v. Showtime Networks, Inc.,* No. 1:05-CV-407, in the United States District Court for the Eastern District of Texas. This Court recommended dismissal because, at the time, Mr. Whitehurst was incarcerated and he had filed at least three prior lawsuits or appeals which were dismissed as frivolous, malicious, or failed to state a claim. Therefore the undersigned found that his application to proceed *in forma pauperis* should be denied and the claims against Showtime should be dismissed without prejudice under the "three strikes" provision of 28 U.S.C. § 1915(g). The District Court agreed, adopting this Court's recommendation and dismissing Plaintiff's claims. The District Court also denied Mr. Whitehurst's later request for relief from judgment in that case.

*3 The Defendant filed its reply to the Plaintiff's response in opposition. *See Reply* [Clerk's doc. # 24]. The Defendant argues that even if Plaintiffs claim for misappropriation is limited to the DVD cover for the film, and not the film itself, his claim still fails. Defendant further contends that Whitehurst's claims are in fact not entitled to equitable tolling to save them from being time-barred, and even if they were tolled for purposes of the statute of limitations, they are still time-barred under the relevant dates and they also fail as a matter of law. Finally, in its reply, Defendant again discusses federal law on the antitrust, monopolization, conspiracy, and refusal to deal allegations, arguing that Plaintiff's reliance on the Texas Property Code and attempt to distinguish federal precedent on the issues are without merit.

Discussion

(A) Relevant Legal Standard

Motion to Dismiss Under Federal Rule of Civil Procedure 12(b) (6)

Federal Rule of Civil Procedure 12 provides that a pleader may present, by motion, a defense alleging "failure to state a claim upon which relief can be granted." FED. R. CIV. P 12(b)(6) (full citation of rule omitted). The Fifth Circuit has stated that a claim should not be dismissed under Rule 12(b)(6) unless the plaintiff would not be entitled to relief under any set of facts or any possible theory he may prove consistent with the allegations in the complaint. *See, e.g., Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir.2004) (quoting *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir.1999)). This standard derived from *Conley v. Gibson,* which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). But recently in *Twombly,* the Supreme Court made clear that the *Conley* rule is not "the minimum standard

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

of adequate pleading to govern a complaint's survival." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544,550 U.S. 544, 127 S.Ct. 1955, 1968-69, 167 L.Ed.2d 929 (2007).

Dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove *no set of facts* in support of claim that would entitle him to relief, although once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *See Twombly.,* 550 U.S. at 563 (abrogating *Conley*). A cause of action can fail to state a "claim upon which relief can be granted" if, inter alia, it fails to comply with the requirements of Rule 8(a)(2). *See, e.g., Buerger v. Southwestern Bell Tel. Co.,* 982 F.Supp. 1247, 1249-50 (E.D.Tex.1997); *Bank of Abbeville & Trust Co. v. Commonwealth Land Title Ins. Co.,* 201 F. App'x. 988, *2 (5th Cir. Oct.9, 2006) ("a Rule 12(b)(6) motion to dismiss for failure to state a claim may be a proper vehicle to challenge the sufficiency of a pleading under Rule 8").

***4** Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief FED. R. CIV. P. 8(a)(2). The United States Supreme Court has made clear, however, that a plaintiff is obligated to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citing *Papasan v. Attain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* "Rule 8(a)(2) still requires a showing, rather than a blanket assertion, of entitlement to relief without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests." *Id.* at 556 n. 3 (internal quotation marks omitted). Dismissal for failure to state a claim is appropriate when the plaintiff has failed to plead "enough facts to state a claim for relief that is plausible on its fact." *Id.* Plaintiffs must state enough facts to "nudge their claims across the line from conceivable to plausible." *Id.*

When the complaint contains inadequate factual allegations, "this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558. "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (Quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 528 n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)).

(B) Application

Failure to State a Claim

i. Misappropriation

In the complaint and Defendant's motion to dismiss, Mr. Whitehurst's claims is described as a claim for "misappropriation." The Court notes that, in this case, this claim is better described under Texas law [FN4] as a tort of invasion of privacy by appropriation of a name or likeness, as discussed in the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977). This distinction is necessary so as not to confuse Mr. Whitehurst's claim for misappropriation with a claim for misappropriation of trade secrets under Texas law, which is clearly distinguishable from the cause of action asserted herein. However, for the sake of brevity and clarity, because both parties refer to the privacy tort alleged herein as "misappropriation," the Court will refer to Mr. Whitehurst's claims based upon Showtime's allegedly wrongful appropriation of Mr. Byrd's name or likeness as his "misappropriation" claim.

FN4. Federal law directs this Court to look

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

> to the final decisions of the highest court of the state in determining state law, as well as applying state substantive law to any issue or claim which has its source in state law. *See Camacho v. Texas Workforce Comm'n,* 445 F.3d 407, 409 (5th Cir.2006) (citing C. Wright, A. Miller & E. Cooper, 19 Federal Practice and Procedure (2d ed.2002) § 4520); *Transcontinental Gas Pipeline v. Transportation Ins. Co.,* 953 F.2d 985, 988 (5th Cir.1992). Accordingly, at the outset the Court notes that it is required to look to Texas law in considering the Plaintiff's claims for misappropriation over which the Court has supplemental jurisdiction. However, because the case is before the Court on federal question jurisdiction because it also involves federal antitrust and civil rights claims, the Court will of course apply federal substantive law in considering those issues, *infra. See, e.g., Summers v. Tex. Dep't of Crim. Justice,* No. 06-70046, 206 F. App'x 317, 319-320 (5th Cir. Oct.25, 2006).

a. Statute of Limitations

No statute of limitations expressly governs actions for invasion of privacy. Although the Texas Supreme Court has not specifically addressed this issue regarding privacy torts, several courts have applied the two-year limitations period in Texas Civil Practice & Remedies Code Section 16.003(a).[FN5] Section 16.003(a) states:

> FN5. *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION, CHAP. 15-A, § 4.1 (2009) (citing *Stevenson v. Koutzarov,* 795 S.W.2d 313, 319 (Tex.App.-Houston [1st Dist.] 1990, writ denied); *Covington v. Houston Post,* 743 S.W.2d 345, 347-48 (Tex.App.-Houston [14th Dist.] 1987, no writ); *Wood v. Hustler Mag., Inc.,* 736 F.2d 1084, 1088-89 (5th Cir.1984); *Collins v. Collins,* 904 S.W.2d 792, 804 (Tex.App.-Houston [1st Dist.] 1995, writ denied)).

***5** "(a) Except as provided by Sections 16.010, 16.0031, and 16.0045, a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues."

TEX. CIV. PRAC. & REM.CODE § 16.003(a). *See also Computer Assocs. Int'l v. Altai, Inc.,* 918 S.W.2d 453, 458 (Tex.1996) (stating that Section 16.003(a) establishes a two-year statue of limitations for injury to the property of another or conversion of the property of another); *Wood v. Hustler Magazine,* Inc., 736 F.2d 1084, 1089 (5th Cir.), *cert. denied* 469 U.S. 1107, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985) (concluding that the Texas Supreme Court would apply a two-year limitations period to privacy torts involving actions for injury to the person). Following this precedent, the Court also applies a two year limitations period to Mr. Whitehurst's claim for misappropriation of James Byrd, Jr.'s likeness.

In this case, the Defendant argues that Mr. Whitehurst's claim should dismissed because it is time-barred under the applicable two year limitations period. The facts, as pled, do show that Mr. Whitehurst's claim would be time-barred under the two year period because this suit was filed on January 23, 2008, approximately two and a half years after the two year limitations period expired, based on the fact that it began to run in June 2003, when the film was aired. Mr. Whitehurst concedes these dates, but argues that the applicable limitations periods were tolled under the circumstances of his case because he filed an earlier suit in 2005 based on the same allegations, which this Court ultimately dismissed as frivolous pursuant to 28 U.S.C. § 1915(g). Mr. Whitehurst and the Defendant dispute whether that lawsuit and dismissal actually tolled the limitations period, and the date that Mr. White-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

hurst is considered to have filed that earlier suit for purposes of his cited "Prison Mail Box Rule." However, the Court finds it unnecessary at this point to determine whether that earlier filing actually tolled the limitations period, because, as discussed below, the Court concludes that even if his claims were not time-barred, he still fails to state a claim for misappropriation on the merits. The Court therefore need not delve into the factual specifics about the filing of the earlier lawsuit and the limitations issue because Mr. Whitehurst fails to state a claim upon which relief may be granted, even assuming it was timely filed based upon some tolling of the limitations period.

b. Whether Plaintiff Can State a Claim for the Cause of Action for Misappropriation

It is well established that "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Restatement (Second) of Torts, § 652C (1977). This type of privacy right, protecting against appropriation of a name or likeness, is also well established in the jurisprudence of many states. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 n. 2 (Tex.1994) (citing James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 Tex. L.Rev. 637, 638-39 (1973); *Pavesich v. New England Life Ins.*, 122 Ga. 190, 50 S.E. 68, 75-81 (Ga.1905) (discussing Michigan and New York cases and predicting future widespread acceptance of this tort)).

***6** *Kimbrough v. Coca-Cola/USA*[FN6] first recognized a cause of action for misappropriation as a violation of privacy rights under Texas law. To prove a cause of action for misappropriation, a plaintiff must show that his or her personal identity has been appropriated by the defendant for some advantage, usually of a commercial nature, to the defendant. *Benavidez v. Anheuser Busch, Inc.*, 873 F.2d 102, 104 (5th Cir.Tex.1989) (citing *Moore v. Big Picture Co.*, 828 F.2d 270, 275 (5th Cir.1987)); *see also Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 900 (Tex.App.-Dallas 2001, no pet.), *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir.1994). There are three elements to a misappropriation claim under Texas law: (i) that the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (ii) that the plaintiff can be identified from the publication; and (iii) that there was some advantage or benefit to the defendant. *Matthews*, at 437 (5th Cir.1994) (citations omitted).

FN6. 521 S.W.2d 719, 721-22 (Tex.Civ.App.-Eastland 1975, writ ref'd n.r.e.).

As conceded by Mr. Whitehurst, a plaintiff cannot claim for misappropriation of a "life story." *See Matthews*, at 438 ("the term 'likeness' does not include general incidents from a person's life"). In *Matthews*, the Fifth Circuit Court of Appeals held that the plaintiff could not recover for a misappropriation claim under Texas law. The *Matthews* Court reached this decision because the subject matter of the book and film at issue was a matter of public concern and because the protection of "a name or likeness" under Texas law does not include one's life story. *Id.* at 437. The *Matthews* opinion also pointed out that most of the material facts at issue in that film were a matter of public record because of a highly publicized trial, "as a name cannot be appropriated by reference to it in connection with the legitimate mention of public activities." *Id* . at 439 (citations omitted).

All of these elements of the *Matthews* decision apply directly to the case at hand. It is undisputed that the factual issues presented in *Jasper, Texas* were a matter of public concern and newsworthy in nature, as the real life account of James Byrd, Jr.'s death was highly publicized in the news media as a newsworthy event open to public observation. Any fictionalized depiction of the events of James Byrd's, Jr.'s life and/or tragic death is unactionable under Texas law on misappropriation because it involves his "life story" and biographical information. In his response, the Plaintiff ultimately con-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

cedes all of these points, thus removing the film itself from the basis of his claim for misappropriation.

In his response, Mr. Whitehurst turns his focus to the DVD cover for the *Jasper, Texas* film released by Showtime. He seems to contend that the portrayal of what is supposed to be Byrd's likeness on the cover the DVD for "the purpose of soliciting the purchase of the entertainment product" by the Defendant constitutes unlawful appropriation of Byrd's likeness. *See Response,* at p. 11. This argument does not salvage his misappropriation claim.

*7 Courts have held that misappropriation claims stemming from the privacy rights discussed in Section 652C of the Restatement of Torts should not apply to motion pictures or similar works when considering whether there is a "commercial purpose" because the motion picture would be entitled to First Amendment protection and thus excepted from liability. *See Tyne v. Time Warner Entertainment Co.,* 901 So.2d 902, 806 (Fla.2005). In other words, expression by means of motion pictures is included within the free speech and free press guarantees of the Constitution, and thus does not necessarily constitute a "commercial purpose" necessary to support a claim for misappropriation. *Id.* Citing *Joseph Burstyn, Inc., v. Wilson,* 343 U.S. 495, 501-02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); *see also Seale v. Gramercy Pictures,* 949 F.Supp. 331 (E.D.Pa.1996) (court considered a commercial misappropriation claim based on a motion picture dramatizing a historical event and held that motion pictures were distinguishable from pure commercial speech). Texas law requires that the plaintiff demonstrate that the defendant received an advantage or benefit for the unlawful appropriation. *See Matthews,* at 437. Although the Restatement suggests that the benefit to the defendant does not have to be commercial or pecuniary, most courts applying Texas law have held that an appropriation becomes actionable when the name or likeness is used for a commercial purpose. *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION, CHAP. 15-C, § 2.3 (2009) (citing RESTATEMENT (SECOND) OF TORTS,, § 652C cmt. B (1977); *Express One,* 53 S.W.3d at 900, *Benavidez,* 873 F.2d at 104; *National Bank of Commerce v. Shaklee Corp.* FN7, 503 F.Supp. 533, 540 (W.D.Tex.1980)); *see also Johnstone v. One America Productions,* Inc ., No. 2:07CV042, 2007 U.S. Dist. LEXIS 73450 (N.D.Miss. Oct. 2, 2007) (discussing Texas law on misappropriation claims and distinguishing Texas law from Mississippi law based on the elements of a misappropriation claim under *Matthews* and the commercial purpose issue).

FN7. In his response, the Plaintiff relies upon the *Shaklee* case to support his argument that the Defendant should be liable for misappropriation because it was "illegally cashing in on goodwill associated with the plaintiffs likeness, by providing onlookers and potential buyers of the DVD with the described visual picture." *See Response,* at p. 12. However, the Court agrees with Defendant that *Shaklee* is distinguishable from this case and that it actually supports this Court's holding that the Plaintiff cannot state a claim for misappropriation based upon the DVD cover. *Shaklee* involved Heloise Bowles of "Hints From Heloise" fame and the Shaklee Corporation, a manufacturer of household cleaners, food supplements and cosmetics, which purchased a number of Heloise's books in exchange for adapting the book as a special Shaklee edition. *Shaklee,* 503 F.Supp. at 537. In *Shaklee,* the court pointed out that there was no dispute that the publications at issue were used as a promotional scheme for a commercial purpose, and the advertisements for Shaklee's own products which identified the plaintiff unlawfully misappropriated her identity because they identified her in an attempt to link her to the defendant's products as an endorsement, without her permission. *Id.* at 541.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

> In Mr. Whitehurst's case, the Defendant was not using Byrd's likeness on the DVD cover as an endorsement for commercial purposes. Advertising its protected film is distinguishable from if it had solely used the likeness in the promotional or endorsement context. This is further supported by the *Shaklee* Court's focus on the fact that the defendant used the plaintiff's name not only to promote her book, but also to promote the defendant's household products, which constituted the unlawful use of her name. *Id.*

In the *Seale* case, the court held that the defendants' use of the plaintiff's name and likeness in the content of the book and the film at issue in that case, *Panther*[FN8], was protected from suit for (mis)appropriation of his identity under the First Amendment and because the defendants' use of his name and likeness in the film was not for the purposes of trade or for a commercial purpose. *Seale,* 949 F.Supp. at 337. Rather, the use of his name and likeness was for the purpose of First Amendment expression: the creation, production, and promotion of a motion picture and history book which integrated fictitious people and events with historical events. *Id.* The court further concluded that the defendants' use of the plaintiff's name and likeness on the cover of the pictorial history book and the cover for the home video (both produced for the film *Panther*) were clearly related to the content of the book and the film. *Id.* Because the covers dealt with the same subject matter as the film, the Court held that the defendants were also entitled to judgment on plaintiff's claims for misappropriation of his likeness on the cover for the home video and the pictorial book insofar as his claim related to the defendants' use of his name and likeness. *Id.*

> FN8. The plaintiff in that case, Bobby Seale, was a well-known public and historical figure due to his role as the co-founder and chairmen of the Black Pan ther Party in 1966. *Seale,* 949 F.Supp. at 334.

***8** Mr. Whitehurst's misappropriation claim falls squarely within the Court's decision in *Seale.* He has already conceded that the use of James Byrd, Jr.'s likeness in the film itself is protected and not subject to liability because the film involves his life story, thus exempting it from the parameters of a misappropriation claim under Texas law. Because the film itself is protected and not subject to suit, it follows that the promotion of the film is protected under *Seale.* This promotion includes using Byrd's likeness on the DVD cover. Accordingly, the Defendant cannot be held liable for using the likeness in the DVD cover, just as the cover of the home video in *Seale* was protected and did not give rise to liability.

The Plaintiff has offered no persuasive legal authority to the contrary which supports his contention that although the film itself is not subject to liability, he can still state a claim for misappropriation against the Defendant based on the use of Byrd's likeness on the DVD cover for the film. He cannot state a claim for relief for misappropriation under Texas law based on the film *Jasper, Texas,* under the elements for that cause of action set forth in *Matthews,* as addressed above. He concedes that the film is not subject to liability. It follows that the promotion of the film, including the DVD cover, is also not subject to liability for a misappropriation claim. Accordingly, Mr. Whitehurst cannot state a claim for misappropriation based upon the cover of the DVD alone, which he intends to do by distinguishing his claim in his response to the motion to dismiss. Mr. Whitehurst accordingly fails to state a claim for misappropriation of Byrd's likeness under Texas law.

c. Standing to Bring a Claim for Misappropriation

Furthermore, even if a claim could be made for misappropriation of James Byrd, Jr.'s likeness in this case, there are significant issues related to whether Mr. Whitehurst even has standing to bring such a claim. All of the above-cited case law involved the actual person whose likeness was al-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

legedly misappropriated acting as the plaintiff bringing suit in his or her own name. Here, Mr. Whitehurst contends that he has standing as a minority owner in the property rights of James Byrd, Jr.'s likeness pursuant to a contract he entered into with Byrd's children and Eligah Ricky Jason. Defendant argues that Mr. Whitehurst cannot state a claim upon which relief can be granted because he does not have standing to bring such a claim in the name of the decedent, James Byrd, Jr., and the Court agrees.

Chapter 26 of the Texas Property Code regulates the use of a deceased person's name, voice, signature, photograph, or likeness, and creates a cause of action for unauthorized use. MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION, CHAP. 15-C, § 7.5 (2009) (citing TEX. PROP.CODE §§ 26.001-26.015). Section 26.005 of the Texas Property Code provides that if the ownership of the property right(s) of a deceased individual are split among more than one person, those persons who own more than a one-half interest in the aggregate may exercise the right on behalf of all persons who own the right. TEX. PROP.CODE § 26.005(a) and (c). In this case, Mr. Whitehurst's pleading indicates that, pursuant to his agreement with Mr. Byrd's children and Mr. Jason, he is a seventeen percent (17%) owner of the Byrd property rights at issue. Taking this fact as true, Mr. Whitehurst does not have the authority to exercise the Byrd property rights under Section 26.005(c) because he does not own more than one-half interest in the rights to Byrd's likeness. Accordingly, he does not have standing to bring suit to exercise the Byrd rights at issue.

***9** Mr. Whitehurst attempts to argue around this statutory limitation in his ability to sue for the property rights at issue by claiming that he somehow owns the right to prosecute the misappropriation claim pursuant to an agreement with the other holders of the property rights. He contends that his contractual relationship with the majority rights holders gives him standing to sue. *See Response,* at pp. 36. However, even assuming that the contract between Whitehurst and the Byrd children is valid, the language of that agreement does not support Mr. Whitehurst's contention that it somehow vests in him the right to sue on behalf of the Byrd estate and property rights. The cited portions of agreement provide that "in consideration of the sum of one ($1) dollar and other good and valuable consideration, to include but not limited to, defending the authorized marketing, prosecuting the unauthorized marketing and marketing the commercial value in the property rights use of James Byrd, Jr.'s name, voice, signature, picture and likeness." *See Response,* at p. 5.; *see also Agreement for Partial Property Right Transfer, Exhibit B to Response.* The terms of the contract then go on to state that "in the event the use is integrally and directly connected with commercial sponsorship or paid advertising and or if the desired use is strictly for commercial purposes or to promote any person or entity." *See Agreement.* Thus, it would appear from the terms of the contract that any transfer of rights to the Plaintiff by Mr. Byrd's children was limited to instances involving commercial sponsorship or paid advertising. The Court has already found that the film and DVD cover in this case did not constitute a "commercial purpose" within the meaning of a misappropriation cause of action. Furthermore, the facts surrounding the Showtime film and the situation giving rise to Mr. Whitehurst's lawsuit do not fall within the plain language of the agreement between him and the children. The Court accordingly finds that his reliance upon this agreement, even assuming that the terms of that agreement are valid (which is apparently disputed, based on Mr. Jason's pending motion to intervene), does not support his claim that he has standing to sue on behalf of the property rights owned by the Byrd Estate.

Finally, Mr. Whitehurst offers no legal authority in support of his claim that this agreement somehow overrides the clear statutory provision of the Texas Property Code which only grants the right to exercise and prosecute property rights to majority holders of the decedent's property rights.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

He cites Section 26.004 of the Texas Property Code , which provides that "the property right is freely transferable, in whole or in part, by contract or by means of trust or testamentary documents." TEX. PROP.CODE § 26.004(a). Even if this provision applied and the property right was validly transferred to Mr. Whitehurst, his own pleadings still show that he is only a 17% owner of the Byrd property rights at issue under that contractual transfer. Thus this section of the Property Code does not remedy the limitation of Section 26.005(c) in this case because it is undisputed that Mr. Whitehurst is not a majority owner of the transferred property rights, a requirement to bring suit to enforce or protect those rights under TEX. PROP.CODE § 26.005 (c). Accordingly, his arguments are without merit as he attempts to claim his standing to sue. The Defendant has established that Mr. Whitehurst does not have the requisite standing as a majority owner of the rights to the decedent Byrd's name, voice, signature, photograph or likeness under Chapter 26 of the Texas Property Code. Mr. Whitehurst therefore cannot state a claim for misappropriation of that likeness on behalf of the decedent, Mr. Byrd, because he lacks standing to do so. The motion to dismiss should also be granted in this regard.

ii. Antitrust Claims

a. Limitations Issue

***10** 15 U.S.C. § 15b and the Clayton Act provide for a federally created four year limitations period for federal antitrust claims. The Defendant contends that Mr. Whitehurst's antitrust claims are also time-barred because the failed to bring suit within the requisite four years after his claims accrued. Mr. Whitehurst also argues that this four year limitations period was tolled by the filing of the 2005 suit against Showtime. Again, rather than analyzing whether the claims were tolled, the Court finds it expeditious to address the antitrust claims on the merits under the Rule 12(b)(6) dismissal standard because, even if the claims are not time-barred as a result of any tolling of the limitations period, Mr. Whitehurst still fails to state a claim upon which relief can be granted under federal law governing antitrust suits.

b. Whether Plaintiff Can State a Claim for Antitrust Violations

Mr. Whitehurst's antitrust claims seem to derive from a combination of allegations that Showtime monopolized or excluded others from the relevant market; that Showtime conspired to restrain trade; and that Showtime wrongfully refused to deal with Whitehurst when producing the *Jasper, Texas* movie. Defendant contends that all should be dismissed because Mr. Whitehurst has failed to state a claim for any of these causes of action. The Plaintiff cites the Texas Property Code in support of his argument that the Defendant has in fact committed antitrust violations, and he further argues that he has stated a claim for each element of the monopolization, conspiracy, and failure to deal causes of action.

Monopolization

It is well settled that to establish an antitrust violation of the Sherman Act based upon monopolization, the Plaintiff must prove two elements: (1) possession of monopoly power in the relevant market, and (2) that the monopolist achieved or is maintaining monopoly power through anticompetitive conduct. *Research in Motion Ltd. v. Motorola,* Inc., No. 3:08-CV-284, 2008 U.S. Dist. LEXIS 10124 (N.D.Tex. Dec. 11, 2008) (citing *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004)). The motion and responses in this case focus on the first element: whether Mr. Whitehurst can establish a relevant market.

A relevant market, for antitrust purposes, "can be broadly characterized in terms of the 'cross-elasticity of demand' for or 'reasonable interchangeability' of a given set of products or services." *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.,* 567 F.3d 1084, 1094 (9th Cir.2009) (quoting *M.A.P. Oil Co. ., Inc. v. Texaco Inc.,* 691 F.2d 1303, 1306 (9th Cir.1982) and *United States v. E.I. duPont de Nemours & Co.,* 351 U.S. 377, 395,

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

76 S.Ct. 994, 100 L.Ed. 1264 (1956)). The Court is to consider whether "the product and its substitutes are reasonably interchangeable by consumers for the same purpose," as well as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

***11** The Plaintiff's reading of what constitutes a "relevant market" is misplaced. His claims do not fall within the definition of a relevant market necessary to support an antitrust monopolization claim. Mr. Whitehurst argues that the Defendant should be held liable for monopolization because Showtime contends that it has the right to control the advertising for the *Jasper, Texas* film to the exclusion of others. Plaintiff argues that Showtime wrongfully controlled the advertising power for the film by excluding the Plaintiff "from producing and displaying advertisements and commercial announcements of their property rights being used in the defendant's film." *See Response,* at p. 18. He relies upon his repeated allegation that Showtime deceived the Plaintiff(s) by excluding them from entering the market for that particular film. He also contends that his claim satisfies the relevant market requirement because the Texas Property Code clearly defines a "relevant market" in this case.

However, these arguments are off-base. Plaintiff has cited no case law supporting the contention that the Texas Property Code's definition of the property rights alleged herein somehow trumps the relevant market requirement of a federal antitrust cause of action for monopolization. The case law is clear in requiring that for a plaintiff to state a claim for monopolization, he must show that the defendant engaged in the monopolizing conduct in a "relevant market," and the plaintiff must also show a relevant market as defined by federal law interpreting the federal antitrust statutes. The provisions of the Texas Property Code cited by Plaintiff do not change these legal requirements for a monopolization claim.

Furthermore, a relevant market cannot be limited to a single product. Here, Mr. Whitehurst's entire monopolization claim rests upon the market for a single product-the *Jasper, Texas* film and Showtime's marketing of that single film. The power that companies have over their product itself is not the measure by which courts determine illegal monopolies. *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 393, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Rather, an illegal monopoly must be appraised in terms of the competitive market for the product. *Id.* Mr. Whitehurst's pleading and response do not specify a relevant market for determining whether Showtime engaged in an illegal monopoly. His entire claim focuses on one single film and its related advertising and promotion. The cases construing monopolization claims look instead to the relevant market as a whole as it relates to a single product at issue rather than focusing on the market for the one product at issue. *See, e.g., Apani Southwest Inc., v. Coca-Cola Enters. Inc.,* 300 F.3d 620, 626 (5th Cir.2002) (in a case involving a contract to sell a particular brand of bottled water exclusively, the court determined that the relevant product market was bottled water.)

The Plaintiff has cited no authority supporting his proposition that the single film at issue creates a relevant market sufficient to state a claim for monopolization. Even if his pleading did identify some type of relevant market, for example "films about James Byrd, Jr." or "films about Jasper, Texas," (which it does not), the Plaintiff still cannot state a claim because even within one of these markets, *Jasper, Texas,* is still a single product upon which his entire claim focuses. He cannot show that Showtime has any control over either of these example markets with its one film, as the Plaintiff himself and others still are free to develop and market their own films within the same market(s) based upon the same subject matter. This removes the pled facts from the spirit of an illegal monopoly as prohibited by the antitrust statutes at issue, as the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

focus is on the demand within the market for interchangeable products, not the single product itself within the market. *See Apani Southwest Inc.*, at 626 (citing *CE. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir.1985) and *Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)). Mr. Whitehurst's pleading has not established a relevant market for products which are interchangeable with the single film at issue here. He has failed to define a relevant market with reference to "the rule of reasonable interchangeability and cross-elasticity of demand" and his pled claim clearly does not "encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *See Apani Southwest, Inc.*, at 628; *see also Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1,* 309 F.3d 836, 841 (5th Cir.2002) (establishing a relevant market requires "demonstrating not just where consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product ... [t]he possibilities for substitution must be considered.") (quoting *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance,* 123 F.3d 301, 311 (5th Cir.1997)). The Plaintiff's monopolization claim is accordingly legally insufficient. *See Apani Southwest,* at 628. Mr. Whitehurst cannot satisfy the first required element of an antitrust monopolization claim. Therefore, his monopolization claim should be dismissed because he has failed to state a claim upon which relief can be granted for antitrust monopolization against Showtime.

Antitrust Conspiracy

***12** The Plaintiff's conspiracy claim generally rests upon the argument that Showtime conspired with others and the executive producers of *Jasper, Texas* to exclude him from utilizing the property rights at issue when it made the film. Section 1 of the Sherman Antitrust Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. As the Defendant points out in its motion, as a matter of law, a corporation and its agent or employee are incapable of conspiring with one another to violate the antitrust laws. *See Surgical Care Ctr. of Hammond,* 309 F.3d at 841. Also, to establish an antitrust conspiracy claim, the Plaintiff's claims must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market. *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc.,* 200 F.3d 307, 312 (5th Cir.2000) (quoting *Johnson v. Hospital Corp. of America,* 95 F.3d 383 (5th Cir.1996)).

As the Court has already discussed, Mr. Whitehurst's pleading does not satisfy the third element of his antitrust conspiracy claim because he does not define a relevant market sufficient to support a claim for antitrust violations. *See Apani Southwest,* at 629 (discussing definition of "relevant market" for antitrust claims generally, as addressed above). Further, his pleading is insufficient in setting forth the first element, as he cannot show that the Defendant engaged in a conspiracy in the first place because a corporation such as Showtime cannot conspire with its own agents or employees. Mr. Whitehurst's pleading vaguely references a conspiracy on Showtime's part insofar as it alleges that Showtime and "its agents and employees" conspired in restraint of trade. *See Complaint.* He alleges that the conspirators included Showtime's agents, employees, and the film's producers. The pleading does not specify an independent third party with whom Showtime conspired. Whitehurst attempts to save this element of his claim by contending that to the extent the unidentified conspirators are unknown as named in his complaint, their addresses or employers can be found through discovery to show that they were independent third parties. *See Response,* at p. 26. He somehow attempts to shift the burden of establishing that third parties were not involved in the alleged conspiracy by stating the "the defendant has not verified that the independent producers are not independent, but are instead defendant Showtime's employees, servants, or agents." *Id.* at p. 27.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

However, when determining legal sufficiency under Rule 12(b)(6) the Court looks not to the Defendant's statements in its motion regarding the Plaintiff's claims, but to the Plaintiff's pleading on its face. The burden of pleading a cognizable claim is on the Plaintiff, not the Defendant. Mr. Whitehurst has not identified any third party necessary to sustain a conspiracy claim. He must do so to state a claim for conspiracy because Showtime cannot conspire to restrain trade with itself or its own agents and employees. Relying on the naming of "unknown" conspirators is insufficient because the plaintiff must identify specific times, places, or persons involved in the alleged conspiracy to properly put the Defendant on notice of the alleged conspiracy for pleading purposes. *See, e.g., Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 565 n. 10, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). To satisfy the pleading requirements for conspiracy, the Plaintiff cannot make a naked assertion of conspiracy, but must also provide some further factual enhancement in support which shows that he is entitled to relief. *See id.* at 558.

***13** Accordingly, the Plaintiff has failed to plead sufficient allegations to support at least two of the three required elements for a conspiracy claim. Mr. Whitehurst's vaguely pled claim for antitrust conspiracy against Showtime should therefore be dismissed.

Refusal to Deal

A refusal to deal does not, in itself, constitute an antitrust violation. *See American Cent. Eastern Tex. Gas Co. v. Union Pac. Res. Group, Inc.,* 93 F. App'x 1, 9 (5th Cir. Jan.27, 2004) (citing *United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct. 465, 1919, 63 L.Ed. 992 Dec. Comm'r Pat. 460 (1919)). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* the Supreme Court held that even monopolists are free to choose with whom they do business, but that businesses may not refuse to deal with the purpose of creating or maintaining a monopoly. *Aspen Skiing,* 472 U.S. 585, 602, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

In the more recent case of *Verizon Communications., Inc. v. Law Offices of Curtis V. Trinko, LLP,* the Supreme Court warned that courts must be careful in determining that a business's refusal to deal is based on anticompetitive motives versus a valid business strategy. 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). In *Trinko,* the Court determined that Verizon's refusal to offer certain communications services was not anticompetitive. However, in coming to this conclusion, the Court observed that Verizon's challenged conduct did little to support a suspicion of anticompetitiveness. For example, unlike the defendant in *Aspen Skiing,* Verizon had no prior course of dealing with its rival that it unilaterally terminated. *Id.* 540 U.S. at 409. *See American Central,* at 9 (discussing same).

In his response, Plaintiff attempts to distinguish *Trinko* and relies instead on *Aspen Skiing.* However, *Aspen Skiing* is inapplicable to the facts at hand. In that in that case, the plaintiff and defendant had engaged in significant dealings before the circumstances giving rise to the alleged failure to deal. *See Aspen Skiing,* 472 U.S. at 591-594. Specifically, the parties had jointly participated in an all-resort ski ticket for the ski resorts separately operated by both plaintiff and defendant in the area, until the defendant unilaterally refused to accept the ticket, thus locking the plaintiff out of revenue despite the earlier agreement. *Id.* at 594. According to the pled facts, prior contractual dealings are not at issue in this case. In *Trinko,* the Supreme Court even stated that " *Aspen* is at or near the outer boundary of § 2 [Sherman Act Antitrust] liability." *Trinko,* 540 U.S. at 409. The *Trinko* opinion further held that the Sherman Act generally does not restrict a private entity's refusal to deal, except in certain egregious circumstances, such as the exceptions noted in *Aspen Skiing. See id.* This 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 anti competitive end" in the context of a prior voluntary course of dealing, and there is no pled indication of anti-competitive malice as there

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

was in *Aspen Skiing. See id. See also ASAP Paging, Inc. v. Centurytel of San Marcos, Inc.,* 137 F. App'x 694, 698 (5th Cir. June 24, 2005) (discussing *Trinko* and *Aspen*).

***14** Plaintiff also again relies upon the Texas Property Code in support of his refusal to deal claim. For the same reasons as mentioned above, the Court finds this argument without merit as there is no cited authority suggesting that the Texas Property Code's definition of the alleged property rights overrides the clearly established requirements for stating a federal antitrust refusal to deal claim. The Plaintiff's claim does not establish that Showtime refused to deal with him in producing the film at issue for the purpose of monopolizing the market. Mr. Whitehurst also has not sufficiently pled any facts that Showtime acted in any way abrogating its lawful right to refuse to do business with whomever it chooses under the federal antitrust laws. As pled, his refusal to deal claim fails to comport with the Supreme Court's holding in *Trinko* in setting forth a claim upon which relief can be granted. It should therefore be dismissed for failure.

iii. Civil Rights Claims?

Although neither the Plaintiff nor the Defendant discuss any civil rights cause of action in the motion to dismiss or response, the Plaintiff does vaguely reference 42 U.S.C. § 1981 in his complaint. Accordingly, for the sake of completeness under Rule 12(b)(6), the Court considers whether Mr. Whitehurst can state a claim for relief under this statute.

Section 1981 entitles all persons within the jurisdiction of the United States with the same rights to enter in and enforce contracts as those "enjoyed by white citizens." 42 U.S.C. § 1981. The statute protects the equal rights of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. 42 U.S.C. § 1981. *Id.* Section 1981 offers relief from racial discrimination that "blocks the creation of a contractual relationship" or "impairs an existing contractual relationship" but only where "the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 476, 126 S.Ct. 1246, 163 L.Ed.2d 1069 (2006).

Mr. Whitehurst's complaint wholly fails to state the basic elements of a section 1981 claim. First, the Plaintiff's complaint neither lays out the elements to state a cause of action under the cited Civil Rights Act statute nor specifies which particular allegations he believes are actionable under Section 1981. *See, e.g., Grambling Univ. Nat'l Alumni Ass'n v. Board of Supervisors for the La. Sys.,* 286 Fed. App'x 864, 866 (5th Cir. July 10, 2008) (finding plaintiffs' civil rights claims to be insufficiently pled.) He does not specify which allegations are attributable to the Defendant under 42 U.S.C. § 1981.

The facts of Mr. Whitehurst's case also clearly do not fit within the elements of a Section 1981 discrimination claim because his pleading does not establish he had any contractual relationship with Showtime or that any contractual relationship was contemplated between himself and Showtime to satisfy Section 1981. His complaint also does not establish that he had standing to bring a discrimination claim under 42 U.S.C. § 1981, because he cannot show that he had rights or would have rights under any existing or proposed contract. The Court has already concluded that he does not have the standing to enforce the Byrd property rights at issue under the Texas Property Code. Finally, even if the Plaintiff were able to satisfy all of these elements of a Section 1981 contractual discrimination claim, his pleading does not show racial animus on the part of Showtime regarding any contractual decisions. *See, e.g., Grambling Univ.Nat'l Alumni Assn.,* 286 F. App'x at 870 (considering no showing of racial animus as a motivating factor in holding that Section 1981 claim was "implausible" under pleading requirements of *Twombly*); *see also Coleman v. Houston Indep. Sch. Dist.,* 113 F.3d 528, 534 (5th Cir.1997) ("a cause of action for racial discrimination in the making and enforcement of contracts,

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

under § 1981, requires the plaintiff to demonstrate intentional discrimination."). The Plaintiffs claims should accordingly be dismissed insofar as he is attempting to state a cause of action for discrimination under Section 1981.

Recommendation and Conclusion

***15** Based upon the findings and legal reasons stated herein, the undersigned United States Magistrate Judge concludes that the Plaintiff has failed to plead a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Accordingly, based upon these specific findings and the discussion of the Plaintiff's claims herein, the Court recommends that Defendant Showtime Network, Inc.'s *Motion to Dismiss Under Fed.R.Civ.P. 12(b)(6)* [Clerk's doc. # 15] be **granted.** The Court further recommends that the District Court dismiss Plaintiff's complaint with prejudice and dismiss all of his claims against the Defendant, Showtime Networks, Inc.

Objections

Within ten (10) days after receipt of this report, any party may serve and file written objections to the report and recommendation of the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(C). Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within ten (10) days after service shall bar an aggrieved party from *de novo* review by the District Judge of the proposed findings, conclusions and recommendations, and from appellate review of factual findings and legal conclusions accepted by the District Court except on grounds of plain error. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72; *Douglass v. United Serv. Auto. Ass'n.,* 79 F.3d 1415 (5th Cir.1996) (*en banc*).

SIGNED this the 28th day of August, 2009.

E.D.Tex.,2009.
Whitehurst v. Showtime Networks, Inc.
Not Reported in F.Supp.2d, 2009 WL 3052663 (E.D.Tex.)

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.