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

AMERICAN AIRLINES, INC.	§	
	§	
VS.	§	CIVIL ACTION NO. 4:11-CV-244-Y
	§	
TRAVELPORT LIMITED, et al.	§	

ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR RECONSIDERATION

Before the Court is the Motion for Reconsideration (doc. 162) filed by plaintiff American Airlines, Inc. ("American"). By the motion, American asks the Court to reconsider its November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave to Amend (doc. 156). After review, the Court will grant the motion in part and deny it in part.

I. Legal Standard

Because the November 21 order is interlocutory, the instant motion is governed by Federal Rule of Civil Procedure 54(b). *See Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009). Under Rule 54(b), the Court may revise an interlocutory order "at any time before the entry of a judgment adjudicating all the claims" in the case. Fed. R. Civ. P. 54(b). "Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is unclear, whether to grant such a motion rests within the discretion of the court." *Brown v. Wichita Cnty., Tex.*, No. 7:05–CV–108–O, 2011 WL 1562567, at *2 (N.D. Tex.

Apr. 26, 2011) (O'Connor, J.) (citation omitted) (internal quotation marks omitted). Moreover, while the standard for reconsideration under Rule 54(b) is less exacting than the standards imposed by Rules 59(e) and 60(b), these latter standards inform the Court's analysis under Rule 54(b). *See id.*

II. Analysis

A. The Court's Dismissal of Count Four

The first aspect of the November 21 order that American challenges is its dismissal of count four of American's first amended complaint.[1] Count four included claims against all defendants for alleged violations of section 1 of the Sherman Antitrust Act.[2] The Court dismissed those claims with prejudice after determining that American had failed to sufficiently plead a contract, combination, or conspiracy that foreclosed a sufficient share of the market to constitute an unreasonable restraint on trade.

American initially contends that the Court's dismissal of

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[1] In the November 21 order, the Court set out in detail the case's factual background and the parties' claims and defenses. The Court will not repeat them here.

[2] The defendants in this case are (1) Travelport Limited and Travelport, LP (collectively, "Travelport"); (2) Sabre Inc., Sabre Holdings Corporation, and Sabre Travel International Limited (collectively, "Sabre"); and Orbitz Worldwide, LLC ("Orbitz"). For the sake of brevity and clarity, in the text of this order, the Court will use the shorthand names of the defendants without first setting out their full names.

count four should not have been with prejudice. In the November 21 order, the Court decided to dismiss count four with prejudice after evaluating American's proposed second amended complaint and determining that it did not remedy the deficiencies in the first amended complaint. American complains that this was in error because American did not have the benefit of the Court's analysis when it filed its proposed second amended complaint. American insists that, if allowed, it can remedy the deficiencies described in the November 21 order.

The Court declines to grant reconsideration on this point. American is ably represented in this case by thirteen attorneys, all of whom work for sophisticated law firms in major cities. With such competent representation, American had all the knowledge it needed to meet Rule 8's requirements for stating a claim under section 1 of the Sherman Act. Moreover, Travelport's motion to dismiss American's original complaint provided American with sufficient notice of the potential grounds upon which the Court might find American's claims deficient. Given the large number of claims and parties involved in this case, in the November 21 order, the Court determined that the interests of efficiency and judicial economy made it necessary to dispose of all claims that had not been remedied by the first two rounds of amendments. The Court stands by this decision.

American also challenges two subsidiary legal positions taken

by the Court in reaching its conclusion that American had not stated a section 1 claim. First, American contends that the Court was incorrect in determining that it could not aggregate the effects of Sabre's and Travelport's discrete vertical agreements with travel agents in evaluating whether either of those defendants had participated in a contract, combination, or conspiracy that foreclosed a substantial share of the market. Second, American challenges the Court's conclusion that American could not rely on its own contracts with Sabre and Travelport to establish a section 1 claim against those defendants.

With regard to American's first argument, the Court maintains its position. To plead a section 1 violation, American must allege a contract, combination, or conspiracy that forecloses a substantial share of the market such that it unreasonably restrains trade. *See* 15 U.S.C.A. § 1 (West 2012); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008). In the Court's view, American cannot achieve this by pointing to several discrete vertical contracts, combinations, or conspiracies that only foreclose a substantial share of the market when viewed in the aggregate. Rather, it would seem that American must point to a single contract, combination, or conspiracy that **itself** forecloses a substantial share of the relevant market. *See Spectators' Commc'ns Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001) (noting that "the reason for looking at market

power is to determine whether **the combination or conspiracy**, not each individual conspirator, has the power to hurt competition in the relevant market." (emphasis added)).

Admittedly, courts have had trouble analyzing situations in which a common defendant is involved in numerous discrete vertical agreements that do not restrain trade individually, but do when viewed in the aggregate. *See* William C. Holmes, *Antitrust Law Handbook* § 2:4 (West 2011) (collecting cases). American disagrees with the position taken by this Court, but has not demonstrated that the Court is manifestly wrong on this point. *Compare Dickson v. Microsoft Corp.*, 309 F.3d 193, 210 (4th Cir. 2002) (concluding that aggregation is improper), *with Applied Med. Res. Corp. v. Johnson & Johnson*, No. SACV 03-1329-JVS(MLGx), 2004 U.S. Dist. LEXIS 29209, at *12 (C.D. Cal. May 23, 2005) (concluding that aggregation is permitted). In any event, even assuming the Court was incorrect on the aggregation issue, it nevertheless remains that American failed to adequately plead a contract, combination, or conspiracy in the first instance (aside from the Orbitz-Travelport compensation agreement). Thus, the Court will not reverse its position on the aggregation issue.

The Court, however, is inclined to agree with American concerning American's second argument. In footnote 15 of the November 21 order, the Court stated that "American cannot rely on its own contracts with Sabre to establish a section 1 violation

because Sabre cannot be unilaterally liable under section 1." (Nov. 21 Order 30 n.15.) Because American had pointed to its contracts with Sabre and Travelport as indicative of anticompetitive behavior and at the same time maintained its innocence, the Court viewed American's allegations as complaining about Sabre's and Travelport's unilateral activities. And because unilateral conduct does not violate section 1, the Court found these allegations deficient. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 325 (5th Cir. 1998).

But because "every contract" that unreasonably restrains trade or commerce is illegal under section 1, and given that a party can be an involuntary co-conspirator for purposes of section 1, the Court is persuaded that it must allow American the opportunity to show that its own contracts with Sabre and Travelport restrain trade or commerce in violation of section 1. *See* 15 U.S.C.A. § 1 ("Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); *Spectators' Commc'ns*, 253 F.3d at 220 ("[E]ven reluctant participants have been held liable for conspiracy."); *see also Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968) ("Petitioner's original complaint broadly asserted an illegal combination under § 1 of the Sherman Act. . . . [P]etitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price."),

overruled on other grounds by State Oil Co. v. Khan, 522 U.S. 3 (1997). The Court, therefore, will reconsider its position on this point.

B. The Court's Dismissal of Counts Five and Six

American also challenges the Court's dismissal of counts five and six of American's amended complaint. Counts five and six included state-law tortious-interference claims against Sabre and Travelport. The Court dismissed those claims with prejudice based on its conclusion that the Airline Deregulation Act ("ADA") preempted them.

First, American contends that the Court's dismissal of counts four and five should have been without prejudice. "Because American was dropping the state claims," argues American, "the Court was entitled to consider the motions to dismiss the state claims as moot." (Pl.'s Mot. 2.) According to American, the Court's dismissal of its state-law claims with prejudice amounted to an "erroneous advisory ruling." (*Id.* at 16.)

The Court rejects American's characterization of its ruling as "advisory." The Court's ruling on the preemption issue adjudicated an actual dispute between adverse parties. Travelport and Sabre properly moved for a decision on the dispute and the parties fully briefed the matter. In response, the Court ruled on it.

Rule 41(a)(2) authorizes the Court to allow a party to voluntarily dismiss its claims without prejudice, even after the defendant has filed an answer, "on terms that the court considers

proper." Fed. R. Civ. P. 41(a)(2). By the time American filed its motion for leave to file a second amended complaint, the Court had already worked to reach the merits of American's state-law claims and had expended significant judicial resources in the process. In light of this and other considerations, the Court did not view the terms of American's proposed dismissal as "proper." Fed. R. Civ. P. 41(a)(2). And having determined that American's state-law claims were preempted by the ADA, in the interest of finality and judicial economy, the Court dismissed American's state-law claims with prejudice. In the Court's view, there was nothing improper about that.

Second, American challenges the Court's legal position on the preemption issue. In the November 21 order, the Court concluded that the ADA preempted American's state-law claims because those claims (1) related to the defendants' rates and services and had a significant relationship to the economic aspects of the airline industry and (2) sought to enforce state-created standards, not self-assumed contractual obligations. The Court determined that American's claims fell within the purview of *Lyn-Lea Travel Corporation v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), in which the United States Court of Appeals for the Fifth Circuit determined that the state-law claims before it were preempted by the ADA because they involved the defendant's prices and services to customers.

American contends that the ADA's preemptive umbrella only

covers claims against airlines--not global distribution systems ("GDSes") like Sabre and Travelport. American acknowledges that the Fifth Circuit has previously stated that "ADA preemption is not limited to claims brought directly against air carriers." *Lyn-Lea*, 283 F.3d at 287 n.8. (citations omitted). But American makes a distinction between GDSes owned by airlines, such as Sabre at the time of *Lyn-Lea*, and independent GDSes, such as Sabre today. The Court does not find this distinction meaningful. In the Court's view, the November 21 order was correct on the preemption issue, and its dismissal of American's claims with prejudice was proper.

III. Conclusion

Based on the foregoing, American's motion for reconsideration is GRANTED in part and DENIED in part. The Court's dismissal with prejudice of counts five and six of American's first amended complaint and all subsidiary legal conclusions remain undisturbed. The Court's dismissal with prejudice of count four likewise remains undisturbed insofar as it concerns American's failure to plead a section 1 violation involving (a) Sabre and its travel-agent subscribers, (b) Travelport and its travel-agent subscribers (including Orbitz), and (c) Travelport or Sabre and any unnamed airlines. In this regard, the Court stands by its conclusion that it should not aggregate the effects of Travelport's and Sabre's discrete vertical conspiracies to determine whether either defendant's conduct, as alleged by American, had foreclosed a

substantial share of any of the relevant markets.

At the same time, however, the Court concludes that it erred in holding that American could not rely on its own contracts with Travelport and Sabre to support a section 1 claim against those defendants. Thus, the November 21 order is VACATED to the extent that it holds otherwise. In light of this, American is GRANTED leave to file **no later than March 19, 2012**, a supplement to its second amended complaint (not a third amended complaint) that includes a section 1 claim based on American's own contracts with Sabre and Travelport.[3] Given that the defendants have already submitted three rounds of dispositive-motions briefing, the Court declines to grant American leave to file an entirely new complaint, which would moot the defendants' most recently filed motions to dismiss. Instead, upon the filing of American's supplement, the defendants shall be permitted to file supplemental or amended motions to dismiss within the time limitations imposed by the Federal Rules of Civil Procedure.

SIGNED February 28, 2012.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[3] To be clear, in all other respects, the Court's dismissal of count four with prejudice remains undisturbed.