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

American Airlines, Inc., a Delaware corporation, Plaintiff, v. Travelport Limited, a foreign corporation and Travelport, LP, a Delaware limited partnership, d/b/a Travelport; and Orbitz Worldwide, LLC, a Delaware limited liability company, d/b/a Orbitz, Defendants.	)	Civil Action No. 4:11-cv-00244-Y

PLAINTIFF AMERICAN AIRLINES'S REQUEST FOR RULE 16(a) CONFERENCE

Plaintiff American Airlines, Inc. respectfully files this Request for Rule 16(a) Conference, pursuant to Case Management Procedure I(B). American requests that the Court convene a Rule 16(a) conference with the parties as soon as the Court's schedule permits after May 25, 2011, when responses are due from Defendants and so that American may apprise the Court of anticipated preliminary injunction proceedings this summer and the need for discovery to proceed expeditiously.

PROCEDURAL STATUS AND BACKGROUND

This is a major antitrust case as to which time is of the essence. As set forth in the Complaint, American has brought this case against Defendants alleging serious

violations of Sections 1 and 2 of the Sherman Act, as well as provisions of Texas law. American is concerned that Defendants will engage in further damaging and anticompetitive actions in the next few months, and Defendants have refused to provide any assurances to the contrary.

Defendant Travelport owns three of the five largest global distribution systems ("GDSs"), and one of the Travelport defendants and/or its affiliates has an ownership interest in Defendant Orbitz, the third largest online travel agency. (Compl. ¶¶ 1-2, 78, 80.)[1] A GDS distributes airline fare, flight, and availability information provided by American and other airlines to travel agents, and enables those travel agents to make reservations and issue tickets on the airlines' flights. (*Id.* ¶ 2.) Travel agents do not pay to use the services of the GDSs, nor do either travel agents or GDSs pay airlines a fee for each booking that a travel agent makes through a GDS. (*Id.*) Indeed, American annually pays tens of millions in "booking fees" to Travelport. (*Id.*)

As both the Antitrust Division of the U.S. Department of Justice ("DOJ") and the U.S. Department of Transportation ("DOT") have recognized, GDSs have market power over airlines. "Each [GDS] provides access to a large, discrete group of travel agents, and unless a carrier is willing to forego access to those travel agents, it must participate in every [GDS]." (*Id.* ¶¶ 27, 37.) The majority of tickets for flights on American and other major airlines are sold through travel agents. (*Id.* ¶ 23.) Thus, the GDSs are the

[1] Sabre is Travelport's largest supposed GDS competitor in the United States. American and Sabre are parties to an agreement staying litigation between them until June 1, 2011. (*Id.* ¶ 96). If American and Sabre are unable to come to an agreement before that date, American may join Sabre in the lawsuit. That joinder, however, will not delay this action or obviate the need for the case to move expeditiously—particularly as to American's need to seek preliminary injunctive relief against Travelport.

gatekeepers between their respective travel agent subscribers and the airlines. Indeed, the DOT has concluded that the GDSs' market power is evidenced by the fact that the GDSs' booking fees "exceed competitive levels" and do not "respond to market forces." (*Id.* ¶ 39.)

Moreover, in agreeing to deregulate GDSs in 2004, the DOT specifically recognized that GDSs could abuse their market power in anticompetitive ways, including by using display "bias"—a practice by which GDSs present in a misleading fashion the display of airline flight, fare, and availability information—to the detriment of *both* the airline being penalized by the bias and consumers who are attempting to purchase the most convenient flights at the best available price. (*Id.* ¶¶ 27, 88.) The DOT also expressed concern that, left unchecked, GDSs could continue to impose "clauses requiring participating airlines to provide all fares as a condition to participation ... because they unreasonably limit each airline's ability to choose how to market its services." (*Id.* ¶ 52.) The DOT thus proceeded with deregulation only after stressing that vigorous enforcement of the antitrust laws would serve to curb any anticompetitive abuse of the GDSs' market power. (*Id.* ¶ 27.)[2]

To reduce its dependency on the GDSs—and the supracompetitive fees to which they subjected American—and in order to offer more innovative and customized flight and fare offerings to customers, American has developed an alternative channel of

[2] Indeed, US Airways recently sued Sabre, another GDS, based on the *same* violations of antitrust laws at issue in American's Complaint after it was allegedly forced to accept an anticompetitive contract under threat of losing access to bookings from Sabre's travel agent subscribers and being forced to file for bankruptcy. *See US Airways, Inc. v. Sabre Holdings Corp.*, No. 11-cv-2725, Compl. ¶¶ 7-9, 23 (S.D.N.Y. April 21, 2011).

distribution—called AA Direct Connect—that is based on modern, efficient, flexible, and less costly technology than that used by the GDSs. As detailed in the Complaint, however, Defendants have abused their market power in the very ways that the DOJ and DOT warned of, by engaging in anti-competitive behavior intended to foreclose AA Direct Connect from the marketplace and to preserve the GDS monopolies. (*See, e.g., id.* ¶ 8.)[3] There is currently a federal investigation concerning whether conduct by the GDSs violates antitrust laws.

From the outset of this litigation, American has made clear to the Defendants that it is imperative that this case be litigated without delay. That is because two key contract amendments to the Travelport distribution contracts are set to expire this summer, and Travelport has refused to provide American with any assurances that it will cease from engaging in further damaging and anticompetitive conduct when those amendments expire. This likely will force American to seek injunctive relief as soon as this August, and the development of an adequate discovery record will be essential in order for American to prosecute, and for the Court to decide, that motion.

More specifically, amendments to American's contracts with two of the Travelport GDSs—Worldspan and Galileo—expire in August and September,

[3] For example, and as alleged in the Complaint, when American terminated its relationship with Orbitz for failing to honor its contractual commitment to book flights on AA Direct Connect, Travelport (and Sabre, its largest supposed competitor) promptly took draconian punitive action against American by *doubling* American's booking fees and *biasing* American's fares on certain American flights resulting in substantial lost ticket sales—and harming consumers as well. (*See id.* ¶¶ 85-96.)

respectively.[4] The Worldspan Content Agreement (the "PCA Amendment"), which amends the Worldspan Participating Carrier Agreement (the "Worldspan PCA"), is set to expire on August 1, 2011. The Preferred Fares Amendment (the "PFA Amendment") to the Galileo International Global Airline Distribution Agreement (the "GIGADA"), is set to expire on September 1, 2011. In light of the history of retaliatory conduct by Travelport and other GDSs, examples of which are detailed in the Complaint, *(see, e.g., id.* ¶¶ 77-98), American has a well-grounded fear that, absent preliminary injunctive relief, Travelport will take punitive action against American that will result in irreparable harm as soon as this August.

American has reached out to Defendants repeatedly in an effort to ensure that this litigation proceeds expeditiously—including by attempting to promptly schedule the parties' Rule 26(f) conference, giving Defendants advance notice of what documents American will seek in discovery, attempting to negotiate an appropriate protective order, and seeking to have discovery produced in ongoing litigation between the parties elsewhere deemed produced in this action. Defendants have either affirmatively rebuffed or simply ignored these requests and, to the contrary, have done nothing but seek more time to respond to the Complaint—a request that American accommodated as a matter of professional courtesy.

In that regard, American has made good faith efforts to avoid the need for the Court's early intervention. For example, on May 13, 2011, American requested that

[4] The three GDSs controlled by Travelport are Galileo, Apollo, and Worldspan. (*See id.* ¶ 3.) American only has relationships with the Galileo and Worldspan GDSs. The Apollo GDS is related to the Galileo GDS, but American has no relationship with the Apollo GDS.

Travelport provide assurance that it will not take punitive action against American upon the expiration of the PCA and PFA Amendments.[5] Given that over $2.7 billion of American's sales were booked through Travelport GDSs in the past year alone, (*see id.* ¶ 3), American requested assurance that Travelport will not terminate the underlying GIGADA and Worldspan PCA resulting in American's fares not being listed in the Travelport GDSs; charge American booking fees at rates much higher than the already supracompetitive rates provided for in the PCA and PFA Amendments; or introduce bias of American's fares in the principal GDS displays. Unfortunately, Travelport refused to provide the requested assurance.

As set forth below, a prompt Rule 16(a) conference with the Court is thus warranted to discuss American's anticipated preliminary injunction motion this summer and to ensure that discovery proceeds in this action without delay. There is no question that this action can proceed expeditiously and that absolutely no prejudice will befall Defendants for moving forward with the necessary discovery. Defendants have been on notice of the discovery American is seeking, and Travelport has already sued American in a contract case pending in Illinois state court.[6] That litigation was filed last November, and document requests have been issued, (*see id.* ¶¶ 78-90), which seek discovery that could also be relevant here. Moreover, we believe the DOJ has served a Civil Investigative Demand ("CID") upon Travelport, concerning the same

[5] For the Court's convenience, a true and correct copy of American's letter dated May 13, 2011, as well as the parties' other correspondence referenced herein, are attached hereto as Exhibit "A."

[6] The case is *Travelport, LP v. American Airlines, Inc.*, Case No. 10-CH-48028, pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division.

issues in dispute here and requiring it to produce information highly relevant to the claims in this case. Further information on the CID will be presented to the Court during the requested Rule 16(a) conference.

A PROMPT RULE 16(a) CONFERENCE IS WARRANTED UNDER THE CIRCUMSTANCES

This Court's Case Management Procedures provide that a party may request "a FRCP 16(a) scheduling conference." *See* Court Proc. I(B). In the usual case, the request typically comes after the defendant has responded, and the Court has ordered the parties to submit a joint status report. Here, however, there is good reason for the Court to exercise its discretion to ensure that the Court is apprised of American's anticipated need to seek preliminary injunctive relief as early as this summer and so that discovery can proceed promptly and expeditiously. And there can be no serious dispute that the Court has the authority to order a Rule 16(a) conference promptly at the outset of this important antitrust case to streamline and facilitate prompt discovery. *See, e.g., Pacific Indem. Co. v. Broward County*, 465 F.2d 99, 103 (5th Cir. 1972) ("Rule 16 F.R.Civ.P. gives the trial court broad discretion in conducting pre-trial procedures in order to narrow the issues, reduce the field of fact controversy for resolution, and to simplify the mechanics of the offer and receipt of evidence."); *Manual for Complex Litigation*, § 10.1 (4th ed. 2004) ("[T]he court's express and inherent powers enable the judge to exercise extensive supervision and control of litigation."). Further, it is well-settled that "control of discovery 'is committed to the sound discretion of the trial court,'" and Rule 26(d)(1) grants this Court explicit authority to issue an order

commencing discovery before a Rule 26(f) conference takes place. *See* Fed. R. Civ. P. 26(d)(1); *Smith v. Potter*, 400 Fed. Appx. 906, 813 (5th Cir. 2010).

As American will further explain at the requested Rule 16(a) conference, there is a serious risk that Travelport will take punitive action upon the expiration of the PCA and PFA Amendments on August 1 and September 1. And, in light of the history of retaliatory and punitive conduct engaged in by the GDSs seeking to maintain their market control, American has a well-grounded fear that any such action would cause American to suffer irreparable harm.[7] Accordingly—and especially in light of Travelport's refusal to provide *any* assurance that it will not engage in such punitive conduct—American expects to need to file a motion for preliminary injunctive relief in short order.

Early development of the factual record is appropriate here where the Court may be asked to rule on a preliminary injunction application this summer, and courts in similar circumstances have ordered expedited discovery. *See OMG Fidelity, Inc. v. Sirius Technologies, Inc.*, 239 F.R.D. 300, 305 (N.D.N.Y. 2006) (granting expedited discovery where "the potential prejudice which will be suffered by the defendant if discovery is permitted, [was outweighed by] that which will be experienced by the plaintiff if denied the opportunity for discovery at this stage"); 8A Charles Alan Wright

[7] Indeed, one major travel agency has recently noted that if American's flights are not displayed in the Travelport GDS, then "this would result in significant loss of agent productivity and decreased online adoption and efficiency, both of which impact travelers." Further, it is well-settled that display bias harms American and consumers. *See In re Air Passenger Computer Reservations Systems Antitrust Litig.*, 694 F. Supp. 1443, 1474 (C.D. Cal. 1988) ("Display biasing is unreasonably restrictive of competition in that it restricts competition on the merits in the air transportation business.... The consumer bears the brunt of this practice by getting a less than optimal flight, and the airline with the better flight has lost a sale it should have otherwise made.").

& Arthur R. Miller, *Federal Practice and Procedure* § 2046.1 (3d ed. 2010) (early discovery "would be appropriate in cases involving requests for a preliminary injunction or motions challenging personal jurisdiction"); *see also Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd.*, 204 F.R.D. 675, 676 (D. Colo. 2002) (granting motion for expedited discovery under Rule 26(d) where delay would make it more difficult for plaintiff to obtain evidence supporting its allegations); *cf. Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (the Federal Rules of Civil Procedure "authorize[] federal courts to control and expedite the discovery process ....").

CONCLUSION

Given the likelihood that a motion for a preliminary injunction will be necessary within the next few months, and the importance of developing an adequate record upon which that motion can be decided, American respectfully requests that the Court convene a Rule 16(a) conference as soon as its schedule permits after Defendants' May 25, 2011 responsive pleading deadline. American also requests any other and further relief to which it may be justly entitled.

Dated: May 20, 2011

Respectfully submitted,

/s/ Michelle Hartmann
Michelle Hartmann

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CERTIFICATE OF CONFERENCE

On May 20, 2011, counsel for American, Michelle Hartmann, conferred with counsel for Travelport, Walker Friedman, and counsel for Orbitz, John J. Little, regarding the relief requested herein and, based on those conferences, believe that the defendants oppose the relief requested herein.

/s/ Michelle Hartmann
Michelle Hartmann

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 20th day of May, 2011.

/s/ Michelle Hartmann
Michelle Hartmann