Warning
As of: May 24, 2011

LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant.

CA3:96-CV-2068-BC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

1997 U.S. Dist. LEXIS 21119

December 2, 1997, Decided
December 2, 1997, Filed; December 3, 1997, Entered

DISPOSITION: [*1] Defendant's and Intervenor's Motion for Summary Judgment GRANTED in part and DENIED in part.

COUNSEL: For LYN-LEA TRAVEL CORP, plaintiff: Stephen H Gardner, Attorney at Law, Law Office of Stephen Gardner, Dallas, TX USA.

For AMERICAN AIRLINES INC., defendant: William James Albright, Attorney at Law, Timothy Alan Daniels, Attorney at Law, Amy Elizabeth Gibson, Attorney at Law, Figari & Davenport, Dallas, TX USA.

For WORLDSPAN LP, movant: James Alexander McCorquodale, Attorney at Law, Vial Hamilton Koch & Knox, Dallas, TX USA.

For LYN-LEA TRAVEL CORP, counter-defendant: Stephen H Gardner, Attorney at Law, Law Office of Stephen Gardner, Dallas, TX USA.

For SABRE GROUP INC, intervenor-defendant: William James Albright, Attorney at Law, Timothy Alan Daniels, Attorney at Law, Amy Elizabeth Gibson, Attorney at Law, Figari & Davenport, Dallas, TX USA.

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JUDGES: Jane J. Boyle, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Jane J. Boyle

OPINION

MEMORANDUM OPINION AND ORDER

Before the court is **Defendant's and Intervenor's Motion for Summary [*2] Judgment,** filed October 2, 1997. Having reviewed the pertinent pleadings the undersigned **GRANTS** the motion in part, and **DENIES** the motion in part, for the reasons that follow.

I. Background [1]

1 These uncontested background facts are taken from the following: plaintiff's Second Am. Compl., filed June 3, 1997; Def.'s Mot. for Summ. J., filed October 2, 1997; and Pl.s' Resp. to Def's Mot. for Summ. J., filed October 27, 1997. Unless characterized as a contention, all background facts are undisputed.

In 1983, First Class Travel International Travel Management ("FCI") began operating a travel agency. FCI sells airfare for many different airlines, including American Airlines, Inc. ("American"). FCI is authorized to sell airline tickets for American pursuant to the terms of an addendum to the Airline Reporting Commission Reporting Agreement ("ARC Agreement"). The ARC Agreement requires American to pay commissions to FCI according to American's published commission structure. The agreement **[*3]** also permits American to modify its commission schedule at any time. In addition to commissions, from time to time, American also paid FCI "override" payments.

In late 1994, to expand its business, FCI decided to buy a travel agency known as "Air-O Travel." The negotiations surrounding this transaction were conducted by Steve Sedgewick, the President of FCI, and Mary Earhart ("Earhart"), the owner of Air-O Travel. During these negotiations, FCI discovered that Air-O Travel was contractually obligated to use the SABRE Computerized Reservation System ("SABRE CRS"), the reservation system affiliated with American. Conversely, FCI was contractually obligated to utilize WorldSpan, a reservation system affiliated with Delta. FCI intended to honor its agreement with WorldSpan and did not want to assume responsibility for Air-O Travel's SABRE agreement. Consequently, FCI began negotiating with the SABRE Travel Information Network ("STIN") [2] in an effort to reduce FCI's obligations under the SABRE agreement. On December 7, 1994, STIN and FCI ultimately signed a SABRE agreement whereby STIN agreed to supply FCI four terminals, rather than eight as required by the Air-O Travel SABRE agreement. **[*4]** Under the SABRE agreement, FCI was required to use the SABRE CRS for at least 1200 transactions per month (300 per terminal) to avoid paying damages under the agreement.

2 At the time of these negotiations, STIN was a division of American. However, currently STIN is operated as a division of SABRE, a separate subsidiary of AMR Corporation.

On February 10, 1995, American announced that it decided to modify its domestic commission schedule as of February 27, 1995. Under the new plan, American would cap commissions at $ 25 for one-way tickets and $ 50 for round-trip airfare. FCI contends that this modification of the commission structure had an adverse effect on FCI's earnings.

On March 1, 1996, STIN sent FCI an invoice requesting in excess of $ 20,000 for amounts owed pursuant to the SABRE agreement. FCI did not pay the March invoice. Consequently, in June 1996, STIN terminated the SABRE agreement and now seeks damages of $ 102,079.17 for breach of contract. FCI contends that this amount of damages was **[*5]** in excess of the agreed to terms.

In early 1997, FCI entered into an exclusive booking agreement with MAI Systems ("MAI"). Prior to entering into this contract with FCI, MAI had entered into an agreement with American that required MAI to book their flights on a SABRE CRS to obtain a discount on their American flights. FCI requested that American waive the SABRE restriction for MAI because FCI no longer had access to the SABRE CRS. However, American refused to waive this condition.

FCI contends that American utilized "waivers and favors" to "steal" FCI's client, Mendoza Dillon. FCI claims that by granting one of FCI's competitors, Nick Lugo Travel ("Nick Lugo"), favorable discounts, American enabled Nick Lugo to induce Mendoza Dillon to switch travel agencies in August 1997.

Earhart's agreement to sell Air-O Travel to FCI included Earhart's agreement to work for FCI after the purchase. Earhart's employment agreement included a covenant to not compete with FCI. In January of 1996, Earhart left FCI and did not return. On July 3, 1996, FCI and Earhart resolved their dispute and the parties executed a release which dissolved Earhart's covenant to not compete. After the release was signed, **[*6]** Earhart went to work for Sundance Travel. After she left FCI, one of FCI's clients, Sensormedics, decided to follow Earhart and book their future flights through Sundance. Sundance Travel uses the SABRE CRS. FCI contends that American encouraged Earhart to shift FCI's business to a travel agency using a SABRE system in violation of

Earhart's covenant to not compete and that its actions constitute tortious interference with a contract.

FCI also contends that in July 1997, defendants tortiously interfered with FCI's relationship with Hyundai Motors ("Hyundai") by offering Hyundai a corporate discount program contingent upon the use of a SABRE system to book the flights.

On July 24, 1996, FCI filed suit against American Airlines. On May 6, 1997, SABRE filed a motion to intervene. On June 3, 1997, FCI filed a Second Amended Complaint, seeking damages for tortious interference, breach of contract, fraud, violations of the Texas Deceptive Trade Practices Act ("DTPA") and requesting a declaratory judgment. [3] On July 7, 1997, SABRE filed a counterclaim against FCI seeking damages for breach of contract. On October 2, 1997, American and SABRE filed the instant motion requesting summary judgment [*7] on (1) all of FCI's claims and (2) SABRE's claim against FCI for breach of contract.

3 FCI also raises a claim for breach of good faith and fair dealing. This claim is not mentioned in FCI's Second Am. Compl., but was raised in FCI's Resp. to Def.'s Mot. for Summ. J. This claim is addressed later in this opinion.

II. Analysis

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. ***Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).** "The substantive law will identify which facts are material." ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).** Only disputes about those facts will preclude the granting of summary judgment. ***Id.*** In a motion for summary judgment, the burden is on the movant to prove that no [*8] genuine issue of material fact exists. ***Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990).** If the non-movant bears the burden of proof at trial, the movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. ***Id.; Little*, 37 F.3d at 1075.**

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. ***Little*, 37 F.3d at 1075** ***(citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986)).** "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." **Id.** ***(quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871-73, 110 S. Ct. 3177, 3180, 111 L. Ed. 2d 695 (1990); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, [*9] 1086 (5th Cir. 1994)).** Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" ***Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356** ***(quoting* FED. R. CIV. P. 56(e)).**

In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. ***Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).** If the moving party seeks to establish the absence of a material fact through the submission of affidavits, depositions, admissions, or responses to interrogatories, the non-movant may not rely solely on mere allegations or denials. Rather, the non-movant must demonstrate the existence of an issue of material fact necessitating resolution by trial through similar evidentiary materials setting forth specific facts. **FED.R.CIV.P. 56(e); *Lechuga v. Southern Pac. Transp. Co.*, 949 F.2d 790, 794 (5th Cir. 1981).**

It is with this standard in mind that the undersigned reviews the issues raised by defendants in their motion.

[*10] *B. Preemption*

In their motion for summary judgment, the defendants and intervenors ("defendants") argue that the plaintiff's state law claims for tortious interference, deceptive trade practices and common law fraud are preempted by the Airline Deregulation Act ("ADA"). [4] The ADA provides, in pertinent part, "[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.A. § 41713(b)(1) (1997).** [5] Thus, the first issue for this court is whether the plaintiff's state law claims for tortious interference, deceptive trade practices common law fraud, and breach of the duty of good faith and fair dealing are preempted under the ADA.

4 In their reply, defendants also contend that FCI's claims for breach of the duty of good faith and fair dealing are preempted.

5 The former citation to this cite, **49 U.S.C.A. § 1305(a)(1),** is referred to in many of the ADA preemption cases. The clause was revised by Congress in 1994, but Congress did not intend the revision to make a substantive change. **Pub.L. 103-272, § 1(a), 108 Stat. 745.**

[*11] In ruling on this issue, this court is guided by several recent decisions dealing with preemption under ADA. The United States Supreme Court first addressed the issue of ADA preemption in ***Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).** In Morales, the National Association of Attorneys General ("NAAG") promulgated guidelines which purported to govern the content and format of airline advertising. After seven of the attorneys general initiated attempts to enforce the guidelines under the States' general consumer protection laws, the airlines filed suit in Federal District Court contending that state regulation of fare advertisements is preempted by the ADA. By analogizing to ERISA, the Morales Court broadly construed the ADA words "relating to rates, routes, or services" to conclude that the ADA will preempt state enforcement actions "having a connection with or reference to airline 'rates, routes, or services.'" ***Morales,* 504 U.S. at 384, 112 S. Ct. at 2037.** The Court ultimately concluded that the NAAG guidelines on fare advertising related to rates and thus were preempted because they "establish binding requirements **[*12]** as to how tickets may be marketed" and imposed obligations that "would have a significant impact . . upon the fares [the airlines] charge. ***Id.* at 388-90, 112 S. Ct. at 2039, 2040.** However, the Supreme Court also explained that "some state actions may affect [airline rates or services] in too tenuous, remote, or peripheral a manner" to be preempted. ***Id.* at 388, 112 S. Ct. at 2040 *(quoting Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 100 n. 21, 103 S. Ct. 2890, 2901, n. 21, 77 L. Ed. 2d 490 (1983)).**

The Supreme Court revisited preemption under the ADA in ***American Airlines, Inc. v. Wolens,* 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995).** In Wolens, members of the airline's frequent flyer program filed suit challenging the airline's retroactive changes in the terms and conditions of the program. Specifically, the plaintiffs alleged that by imposing capacity controls and blackout dates to previously earned mileage credits, the airline breached its contract with the plaintiffs and violated the Illinois Consumer Fraud and Deceptive Business Practices Act. In its Opinion, the Court first observed that the plaintiffs claims clearly related to rates **[*13]** and services. Specifically, the Court noted that the mileage credits related to the airline's "rates" and the capacity controls and blackout dates related to access to flights and hence to the airline's "services." ***Id.* at 226, 115 S. Ct. at 823.** However, this determination did not end the Court's inquiry.

Once the Court determined that the plaintiffs' claims related to rates and services, the Court next had to interpret the ADA words "enact or enforce any law" as provided in the clause "No state shall enact or enforce any law . . . related to a price, route, or service . . . ." **49 U.S.C.A. § 41713(b)(1).** Specifically, the Court considered whether the plaintiff's claims for breach of contract and violations of the Illinois Consumer Fraud Act constituted the enactment or enforcement of a state law and were thus preempted by the ADA. The Court concluded that the claims under the Illinois Consumer Fraud Act were preempted because the act allowed the state to "police the marketing practices of the airlines." ***Wolens,* 513 U.S. at 227, 115 S. Ct. at 823.** In contrast, the Wolens Court determined that plaintiffs' breach of contract claims were not preempted because **[*14]** the ADA preemption clause was not designed to "shelter airlines from suits . . . seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." ***Id.* at 228-29, 115 S. Ct. at 824.** The Court later explained that a claim by a party seeking relief from an airline that "dishonored a term the airline itself stipulated" will not be preempted because the ADA will permit "state-law-based court adjudication of routine breach of contract claims." ***Id.* at 232-33, 115 S. Ct. at 826.** However, the Court further explained that contract actions seeking to enlarge or enhance the parties' agreement "based on state laws or policies external to the agreement" will not be permitted. ***Id.***

After the Supreme Court decided Wolens, the Fifth Circuit explored preemption under the ADA in ***Hodges v.***

***Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc).** In Hodges, a passenger of an airline was injured during his flight when another passenger opened an overhead compartment and caused a case of rum to fall and injure the passenger's arm and wrist. The passenger subsequently sued the airline under the state law theory of negligence. In response, **[*15]** the airline argued that the plaintiff's claim was preempted by the ADA. To resolve this issue, the Hodges Court first needed to determine whether the alleged negligence of the airline was related to "services" as that term is used in § 41713(b)(1) of the ADA.

The Fifth Circuit defined "services" to include "elements of the air carrier service bargain . . . such as ticketing, boarding procedures, [the] provision of food and drink, and baggage handling, in addition to the air transportation itself." ***Id.* at 336.** The Court explained that this definition of "services" was premised upon its belief that Congress, by enacting the ADA, intended to deregulate the contractual features of air transportation. ***Id.*** The Hodges Court's interpretation of Congressional intent was based in part on various statements made by the CAB following deregulation. Specifically, the CAB concluded that:

> preemption extends to all of the economic factors that go into the provision of the quid pro quo for [a] passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, [and] **[*16]** bonding and corporate financing.

***Id.* at 337 *(quoting* 44 Fed.Reg. 9948, 9951** (Feb. 15, 1979)).

However, the Hodges Court also determined that the ADA will not preempt "state tort actions for personal physical injuries or property damage caused by the operation and maintenance of an aircraft" because they do not relate to the economic and contractual features of air transportation. [6] ***Id.* at 336.** Accordingly, because the plaintiff's claim was one for a personal injury, the Court concluded that plaintiff's tort claim was not preempted by the ADA.

> 6 The Hodges Court based this determination on the fact that Congress requires air carriers to maintain insurance to cover passengers' claims for bodily injury and property damage resulting from the operation and maintenance of aircraft. ***Hodges*, 44 F.3d at 338 (citing 49 U.S.C.A. § 1371(q) (1994)).** By requiring airlines to maintain insurance for these claims, Congress has impliedly made clear that it does not intend § 41713(b)(1) to preempt all state claims for personal injury. **Id.**

[*17] In this case, defendants argue that plaintiff's state law claims for tortious interference, deceptive trade practices and common law fraud relate to rates and services and are therefore preempted. Conversely, plaintiff that its claims do not relate to rates and services or argues that any such relation is too tenuous, remote and peripheral to warrant preemption. Plaintiff's claims can be divided into two primary categories. The first category involves the claims related to defendants' alleged tortious interference with several of the plaintiff's business relationships. [7] The second category of claims are those that arise out of the SABRE Agreement and the negotiations that culminated in that agreement. [8]

> 7 The first category includes the plaintiff's civil conspiracy claims.
>
> 8 The second category includes the plaintiff's claims for deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing. FCI's claim for breach of contract is addressed later in this opinion.

[*18] *1. Tortious Interference Claims*

The first category of claims arise out of defendants' alleged interference with various business relationships that existed between the plaintiff and its clients. Specifically, plaintiff contends that defendants interfered with its business relationships through the following actions:

1) permitting Nick Lugo Travel to book customers on fares that are greatly lower than those available to plaintiff or the general public; **(Pl.'s Second Am. Compl., p. 5-6, Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 11)**

2) insisting that MAI use a SABRE agency to obtain corporate discounts with American Airlines; **(Second Am. Compl., p. 6, Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 9-10)**

3) offering Hyundai Motors a corporate discount program that required the use of SABRE; and **(Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 13)** [9]

9 Defendants have objected to this allegation because it is not included in Plaintiff's Second Amended Complaint. **See Joint Pretrial Order, p. 8.** However, since the Court finds that this claim is preempted, the Court need not address this objection.

[*19] 4) encouraging and assisting Mary Earhart's violation of her covenant to not compete with plaintiff which culminated in the plaintiff's loss of the Sensormedics account. **(Pl.'s Second Am. Compl., p. 5, Pl.'s Resp. to Def.'s Mot. for Summ. J., p. 12-13)**

In its motion for summary judgment, defendants argue that the state law claims arising out of actions 1-3 are preempted by ADA § 41713(b)(1) because such claims are "related to rates and services." **Def.s' Brief in Support of Mot. for Summ. J., p. 5, Def.s' Reply Brief, p. 3, n. 4.** In response, plaintiff argues that its tortious interference claims are related to the SABRE CRS business and not to the rates, routes, or services of American, or alternatively, that any connection between the CRS business and the rates, routes and services is too attenuated to require preemption. [10]

10 Plaintiff also argues that its claims against SABRE cannot be preempted because SABRE is not an air carrier. **Pl.'s Brief in Resp. to Def.s' Mot. for Summ. J., p. 11.** However, this argument is without merit because ADA preemption is not limited to claims against air carriers. ***Huntleigh Corp. v. Louisiana State Bd. of Private Security Examiners,* 906 F. Supp. 357, 362 (M.D. La. 1995); Marlow v. AMR Services Corp., 870 F. Supp. 295, 297-98 (D. Haw. 1994); *Continental Airlines, Inc., v. American Airlines, Inc.,* 824 F. Supp. 689, 696-97 (S.D. Tex. 1993).**

[*20] Here, it is clear that defendants' offers, i.e., discounts to Nick Lugo and corporate discount programs contingent upon the use of SABRE to MAI and Hyundai, have a "connection with or reference to" defendants' rates and services. Plaintiff's claim that defendants interfered with plaintiff's business relationship by permitting Nick Lugo to book customers on fares greatly lower than those available to plaintiff or the general public clearly has a connection with the "rates" that defendants charge for their airline tickets because such discounts reduce the price of the fare. ***See Wolens,* 513 U.S. at 226 (mileage credits from frequent flier program related to rates); *Continental Airlines, Inc.,* 824 F. Supp. at 697 (plaintiffs state-law claims arising out of defendant's Value Pricing Plan were preempted since they had a connection with airline rates).**

Similarly, plaintiff's claims based on the offering of corporate discount programs to MAI and Hyundai that were contingent upon the use of SABRE also have a connection with American's rates and services. As explained previously, to the extent that plaintiff's complaints are based on a reduction in airfare to those participating **[*21]** in the corporate discount program, those claims clearly have a connection with an airline's "rates" and are preempted. Similarly, plaintiff's claims arising out of American's requirement that MAI and Hyundai use the SABRE CRS system to obtain corporate discounts also have a connection with "rates" and "services." In Hodges, supra, the Fifth Circuit relied, in part, upon various statements by the CAB to define "services" of an airline for purposes of ADA preemption. Specifically, the Hodges Court quoted with approval the CAB's conclusion that ADA "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." **Hodges, 44 F.3d at 337 *(quoting* 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979)).** Here, plaintiff's complaints arising out of the SABRE CRS are clearly based on the defendants' reservation practices and therefore have a connection with defendants' "services." [11]

11 Computerized reservation systems ("CRS") consist of "computer terminals and printers in travel agents' offices plus telecommunications hook-ups to the airline's master computer." "The terminal in the agent's office displays information about flights, including fares, departure and arrival times, and seat availability. The travel agent can use the equipment to book a flight for the customer and print out the ticket." ***United Air Lines, Inc., v. Civil Aeronautics Bd.,* 766 F.2d 1107, 1109 (7th Cir. 1985).**

[*22] In addition, other courts confronted with similar cases have found plaintiffs' common law claims to be preempted by the ADA. ***See Virgin Atlantic***

***Airways, Ltd., v. British Airways, PLC,* 872 F. Supp. 52, 59, 66-67 (S.D. N.Y. 1994)** (plaintiff's common law claims based on airline's actions in granting rebates and incentives to corporate customers and travel agents only if they purchase a high percentage of their travel requirements from defendant were clearly related to defendant's rates, routes and services and thus preempted by the ADA); ***See also Frontier Airlines, Inc. v. United Air Lines, Inc.,* 758 F. Supp. 1399, 1407-1411 (D. Colo. 1989) (plaintiff's claims arising out of defendant's computer reservation system and its relations with travel agents were preempted by the ADA).** Finally, the condition that corporations use the SABRE CRS to obtain discounts has a connection with "rates" and "services" because it relates to access to flights. ***Wolen,* 513 U.S. at 226, 115 S. Ct. at 823 (frequent flier program had a connection with "services" because it related to access to flights).**

In this case, plaintiff's state-law claims arising out of the defendants' **[*23]** discount programs and requirements that customer use the SABRE CRS to obtain discounts have a connection with the airline's "rates" and "services." Thus, the undersigned must next consider whether FCI's tortious interference claims constitute the "enactment or enforcement" of a state law under the ADA. ***Wolens,* 513 U.S. at 226.** The Supreme Court has previously explained that laws of general applicability can be preempted under the ADA. ***Morales,* 504 U.S. at 386 (comparing preemption under the ADA to ERISA and citing *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47-48, 107 S. Ct. 1549, 1552-1553, 95 L. Ed. 2d 39 (1987) (common law tort and contract claims preempted)).** In Hodges, the Fifth Circuit concluded that although federal preemption under the ADA will apply to "certain common law actions 'related to services' of an air carrier, it will not "displace state tort actions for personal physical injuries or property damage caused by the operation or maintenance of an aircraft." ***Hodges,* 44 F.3d at 336.** [12]

12 See n. 6, *supra.*

[*24] Here, none of these state law tortious interference or conspiracy claims allege personal injury or damage to property resulting from the operation or maintenance of an aircraft. ***Hodges,* 44 F.3d at 338; *Trujillo v. American Airlines, Inc.,* 938 F. Supp. 392, 394 (N.D. Tex. 1995), *aff'd,* 98 F.3d 1338 (5th Cir. 1996).** Accordingly, FCI's common law claims for tortious interference are preempted by the ADA. [13] However, the tortious interference claim arising out of Mary Earhart's covenant to not compete does not relate to the "rates" and "services" of an airline. Consequently, this claim is not preempted and is addressed later in this opinion.

13 The conspiracy claims based on these actions by defendants are also preempted. However, the conspiracy claims based on Earhart's contract are not preempted.

2. Claims Based on the SABRE Agreement Negotiations (Contract Related Claims)

The second category of claims are those arising out of the SABRE agreement negotiations between plaintiff and **[*25]** American and American's subsequent decision to cap the commissions it pays to travel agents. These contract related claims include the plaintiff's claims for deceptive trade practices, common law fraud and breach of the duty of good faith and fair dealing. Specifically, FCI's claims are based on the following actions and omissions of the defendants:

(1) changing the commission practices by capping commission and changing the override program; **(Pl.'s Second Am. Compl., p. 3-4)**

(2) failing to disclose their plans to cap commissions paid to travel agents while they were negotiating the SABRE agreement with plaintiff; **(Pl.'s Resp. to Def.s' Mot. for Summ. J., p. 28)** [14]

14 Plaintiff contends that American's failure to disclose its plans to alter its domestic commission structure constitute breach of contract, fraud, misrepresentation and a violation of the DTPA.

(3) failing to offer an actual damages provision in the agreement; and **(Id.)**

(4) failing to negotiate fairly and in good faith. **[*26] (Id. at 29)**

In their motion for summary judgment, defendants argue that plaintiff's state law claims for deceptive trade practices, common law fraud, and breach of good faith [15] arising out of the SABRE agreement negotiations are preempted by the ADA. In response, plaintiff argues its claims are not preempted because they do not relate to defendants' "rates" "routes" and "services" and, in

Wolens, supra, the U.S. Supreme Court stated that contract claims will generally not be preempted by the ADA.

15 Defendants argue that the breach of good faith claims are preempted in their Reply Brief.

Initially, this Court must determine whether the defendants' alleged misconduct has a "connection with or reference to" American's "rates," "routes" or "services." In Hodges, the Fifth Circuit defined "services" to encompass all the "elements of the air carrier service bargain including . . . ticketing." **Hodges, 44 F.3d at 336 (citation omitted).** Travel agents are significant participants in an airline's ticketing **[*27]** practices because they receive commissions from the airlines in exchange for selling an airline's tickets. Consequently, defendants' commission practices have a "connection with" their ticketing practices, which are part of their "services."

Not only are defendants' commission practices related to their "services," as an economic matter, it is clear that the defendants' commission practices also have a significant effect on American's "rates." ***Morales,* 504 U.S. at 388, 112 S. Ct. at 2039.** Commissions paid to travel agents are operating costs for airlines. To the extent an airline is able to reduce its operating costs, the airline places itself in a position to pass these savings along to the consumers in the form of lower rates for airfare. Thus, any change in an airline's commission practices necessarily has a significant impact upon the fares they charge. Consequently, this Court must conclude that the plaintiff's causes of action related to the SABRE agreement negotiations have a connection with American's "rates" and "services."

Having determined that the plaintiff's claims relate to "rates" and "services," this Court must next consider whether the plaintiff's causes **[*28]** of action constitute the "enactment or enforcement" of a state law under the ADA. In Wolens, the Supreme Court determined that the Illinois Consumer Fraud Act was preempted by the ADA because it allowed the state to "police the marketing practices of the airlines." ***Wolens,* 513 U.S. at 227.** However, the Supreme Court explained that a party seeking relief from an airline that "dishonored a term the airline itself stipulated" will not generally be preempted since the ADA will permit "state-law based court adjudication of routine breach of contract claims." ***Id.* at 232-33.** Nevertheless, the Wolen Court later clarified its decision by noting that contract actions will be preempted where a party seeks to enlarge or enhance the parties' agreement "based on state laws or policies external to the agreement." **Id.**

Here, the plaintiff's causes of action do not seek relief from the defendants because of the breach of a self-imposed undertaking or because they "dishonored a term" in a contract that they themselves had stipulated. Instead, this is a case where the plaintiff seeks to enlarge or enhance the parties agreements by obtaining relief based on state laws and policies **[*29]** external to the agreement. It is undisputed that FCI is bound by the terms of the Airline Reporting Corporation Agreement ("ARC Agreement") between American and FCI. An addendum to that agreement provides in pertinent part, that "American, in its sole discretion, reserves the right to modify its commission schedule from time to time and at any time." **App. to Def.'s Mot. for Summ. J., Ex. B-1 at F 00918, par. 2(a).** Thus, the commission caps imposed by American do not breach a term that American imposed upon itself. Indeed, the language in the ARC Agreement expressly permits American to modify its commission schedule "at any time."

The fact that the defendants did not breach a self-imposed term in their SABRE agreement with FCI is further corroborated by FCI's own employees. For example, FCI's CEO, Sandra Sedgewick admitted that no one from American ever promised to keep its commission structure unchanged. **Sandra Sedgewick Dep. 20:1-5.** Further, Stephen Sedgewick, President of FCI, admitted in his deposition that there were no written agreements included in the SABRE agreement that were breached by the defendants. **Stephen Sedgewick Dep. 103:10-14.**

In this case, the **[*30]** plaintiff cannot point to any provision in the SABRE agreement or the ARC agreement that was breached by the defendants. Instead, the plaintiff seeks to invoke state laws and policies external to the agreement. **Wolens, 513 U.S. at 233.** Plaintiff relies on allegations that defendants breached the duty of good faith and fair dealing, and engaged in fraud, misrepresentations and violations of the DTPA by failing to advise FCI of its plans to change its commission structure. "State causes of action are available to enforce bargains for services into which an airline voluntarily entered, but may not be used to impose external requirements upon the airlines. . . ." ***Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 394 (N.D. Tex. 1995),**

aff'd, 98 F.3d 1338 (5th Cir. 1996); ***See Stone v. Continental Airlines, Inc.,*** **905 F. Supp. 823, 826 (D.Haw. 1995)** (plaintiff's implied breach of warranty claim was preempted by the ADA because it was not expressly agreed to by the airline).

In addition, it is abundantly clear that the plaintiff's DTPA claims are preempted under the ADA. Recently, the Fifth Circuit explained that "Wolens leaves no doubt that the Texas Deceptive Trade [*31] Practices-Consumer Protection Act is preempted by the ADA, especially as it relates to an airline's rates, routes, or services." ***Sam L. Majors Jewelers v. ABX, Inc.,*** **117 F.3d 922, 931 (5th Cir. 1997).**

In sum, plaintiff's state law claims for tortious interference, [16] deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing are related to American's "rates" and/or "services." The claims related to discounts on airfare, including those made contingent upon the use of the SABRE CRS, all related to "rates" because they reduce the cost of airfare. Further, any claims based upon the SABRE CRS system relate to American's reservation system, which is part of its "services." Plaintiff's claims arising out of America's modifications are related to American's ticketing "services" and have a significant effect upon American's "rates." Moreover, none of the plaintiff's claims are for physical injuries or damage to property that resulted from the operation or maintenance of an aircraft. ***Hodges,*** **44 F.3d at 338.** Finally, the plaintiff's contract related claims do not rely on terms the airline voluntarily agreed to, but instead seek to [*32] enlarge the parties agreement based upon principles of state law and public policy. Consequently, the plaintiff's state law claims for tortious interference, [17] deceptive trade practices, common law fraud, and breach of the duty of good faith and fair dealing are preempted by the ADA.

16 Except the tortious interference and conspiracy claims involving Mary Earhart's covenant to not compete.

17 Except the tortious interference and conspiracy claims involving Mary Earhart's covenant to not compete.

C. Tortious Interference With Earhart's Covenant To Not Compete

To prevail on a claim for tortious interference with contract, FCI must prove (1) a contract subject to interference exists, (2) that the alleged interference was intentional, (3) that the willful and intentional act proximately caused the plaintiff's damages, and (4) that FCI sustained actual damages or losses. ***ACS Investors, Inc. v. McLaughlin,*** **943 S.W.2d 426, 430 (Tex. 1997).**

In their motion for summary judgment, defendants [*33] argued that FCI cannot prove the requisite intent to interfere with Earhart's contract because there is no evidence that defendants were aware that Earhart had a covenant to not compete. Brief in Support of **Def.s' Mot. for Summ. J., p. 18-19; Def.s' Reply, p. 9.** As summary judgment movants, the defendants are initially responsible for informing the court of the basis of their motion and showing there is no genuine issue of material fact. ***Celotex Corp. v. Catrett,*** **477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).** This burden may he satisfied by showing that there is an absence of evidence to support any essential element of the nonmoving party's claims. ***Id.*** **at 325.** Here, by pointing out the absence of evidence to show that defendant's knew about Earhart's employment agreement, the defendants satisfied their burden and highlighted the absence of evidence to establish the second element in FCI's claim, i.e., that defendant's intentionally interfered with Earhart's agreement with FCI.

Once the movant meets this burden, the nonmovant must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. ***Lechuga v.*** [*34] ***Southern Pac. Transp. Co.,*** **949 F.2d 790, 794 (5" Cir. 1981); FED.R.CIV.P. 56(e).** The purpose of this requirement is not to "replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." ***Lujan,*** **497 U.S. at 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177.** Here, in an effort to establish the requisite intent on the part of the defendants, FCI relies on the affidavit of Steve Sedgewick. **Pl.'s Brief in Resp. to Mot. for Summ. J., p. 7.** In his affidavit, Sedgewick testified that "any person reasonably familiar with the travel industry would have known, or should have known, that Mary [Earhart] was under a non-compete clause. **Id., App., Ex. 1, p. 25.** This conclusory allegation is not sufficient for FCI to comply with its obligation under Rule 56(e) to set forth specific facts showing a genuine issue for trial. By relying solely on the Sedgewick affidavit to establish that defendants intentionally interfered with Earhart's covenant, FCI has merely replaced the conclusory allegations in their

complaint with conclusory allegation of an affidavit. ***Lujan,* 497 U.S. at 888.** This Court will not presume the missing specific facts to support FCI's claim because without **[*35]** them, the Sedgewick affidavit would not establish the injury that FCI generally alleges. ***Id.*** Accordingly, the undersigned grants the defendants' motion for summary judgement on this claim. [18]

18 Defendants are also entitled to summary judgment on FCI's conspiracy claims to the extent the conspiracy allegations arise out of Earhart's covenant to not compete.

D. FCI's Breach of Contract Claim

Defendants argue they are entitled to summary judgment on FCI's breach of contract claim because FCI has not pointed to any term in the parties' written contract that has been breached by the defendants. **Brief in Support of Mot. for Summ. J., p. 24.** In response, to defendants' motion, FCI has not come forward with any contractual provisions in the parties' written contract that were breached by the defendants. As explained above, under Rule 56(c), when a summary judgment movant points to the absence of evidence to support the nonmoving party's claims, it becomes incumbent upon the nonmoving party **[*36]** to set forth specific facts showing there is a genuine issue for trial. Here, the nonmoving party, FCI, has failed to point to a contractual provision that was breached by the defendants. Thus, the undersigned can find no basis to support FCI's allegation that the defendants breached their contract with FCI. **Thanksgiving Tower Partners v. Anros Thanksgiving Partners, 64 F.3d 227, 230-31 (5th Cir. 1995) (movant entitled to summary judgment on breach of contract claim where nonmovant could not point to language in the parties' contract to support its claim).** [19]

19 In addition, as explained previously, the language in the ARC Agreement expressly authorized the defendants to modify their commission schedule at any time. Thus, FCI's breach of contract claim is without to the extent it is based on the modification of the commission schedule.

In sum, the undersigned can find no basis to support FCI's allegation that the defendants breached their contract with FCI. Accordingly, the undersigned grants the defendants' **[*37]** motion for summary judgment on this claim.

E. SABRE's Counterclaim

Intervenor SABRE argues that it is entitled to summary judgment on its counterclaim. However, because this Court finds that there are genuine issues of material fact surrounding this claim, SABRE's motion is denied.

III. Conclusion

Defendant's and Intervenor's Motion for Summary Judgment is **GRANTED** as follows: (1) **GRANTED** as to FCI's claims for conspiracy and tortious interference with Earhart's covenant to not compete and those claims are dismissed with prejudice; (2) **GRANTED** as to FCI's claims for breach of contract and this claim is **dismissed with prejudice;** and (3) **GRANTED** as to FCI's claims for conspiracy, tortious interference (except those based on Earhart's covenant), deceptive trade practices, common law fraud and breach of good faith based on this court's finding that those claims are preempted by the ADA. [20] The Intervenor's Motion for Summary Judgment on its breach of contract claim is **DENIED.**

20 It is well-settled that the ADA does not provide a private right of action. ***Sam L. Majors Jewelers,* 117 F.3d at 924.** However, this does not mean that the plaintiff's claims are without merit. If the plaintiff wishes to pursue its claims further, it may complain to the appropriate administrative agency. *Statland v. American Airlines, Inc.* 998 F.2d 539, 542 (7th Cir.), *cert. denied,* 510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 2d 568 (1993) (plaintiff may complain to the Department of Transportation); *Anderson v. USAir, Inc.,* 260 U.S. App. D.C. 183, 818 F.2d 49, 55 (D.C. Cir. 1987) (plaintiff can pursue claims before the DOT or FAA); *Lawal, British Airways, PLC,* 812 F. Supp. 713, 721 (S.D. Tex. 1992)(same); *Howard v. Northwest Airlines, Inc.,* 793 F. Supp. 129, 132-33 (S.D. Tex. 1992)(same).

[*38] Having granted in part the Defendant's and Intervenor's Motion for Summary Judgment, the only remaining claim is SABRE's breach of contract claim. In the interests of judicial economy, the undersigned **VACATES** the trial setting and abates this cause of action pending a ruling by the appropriate administrative agency.

For the foregoing reasons, the undersigned

ORDERS that the **Defendant's and Intervenor's Motion for Summary Judgment,** filed October 2, 1997, be **GRANTED** in part.

Signed this 2nd day of December, 1997

Jane J. Boyle

UNITED STATES MAGISTRATE JUDGE

ORDER - December 3, 1997, Filed; December 4, 1997, Entered

Before the court is **Plaintiff's Motion for Partial Summary Judgment,** filed October 2, 1997 and the Response thereto. Having reviewed the pertinent pleadings the undersigned is of the opinion that the motion should be **DENIED.**

Accordingly, the undersigned **ORDERS** that the **Plaintiff's Motion for Partial Summary Judgment,** filed October 2, 1997, be **DENIED.**

Signed this 2nd day of December, 1997.

Jane J. Boyle

UNITED STATES MAGISTRATE JUDGE

Cited
As of: May 24, 2011

MANASSAS TRAVEL, INC., Plaintiff, vs. WORLDSPAN, L.P., ET AL, Defendants.

Case No. 2:07-CV-701-TC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2008 U.S. Dist. LEXIS 35217

April 30, 2008, Decided
April 30, 2008, Filed

COUNSEL: [*1] For Manassas Travel, Plaintiff, Counter Defendant: Brian W Steffensen, LEAD ATTORNEY, STEFFENSEN LAW OFFICE, SALT LAKE CITY, UT.

For Worldspan L.P., Defendant: James D Gilson, LEAD ATTORNEY, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT; Aron J. Frakes, Jeffrey J. Bushofsky, Megan E. Thibert-Ind, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL; Paul E. Chronis, PRO HAC VICE, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL.

For Worldspan L.P., Counter Claimant: Aron J. Frakes, LEAD ATTORNEY, Paul E. Chronis, MCDERMOTT WILL & EMERY (IL), CHICAGO, IL; James D Gilson, LEAD ATTORNEY, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT.

JUDGES: TENA CAMPBELL, Chief Judge.

OPINION BY: TENA CAMPBELL

OPINION

ORDER AND MEMORANDUM DECISION

In this diversity action, Manassas Travel, Inc. ("Manassas") has sued Worldspan, LP ("Worldspan") and Stewart Hall, an account representative of Worldspan, alleging breach of contract, breach of the covenant of good faith and fair dealing, intentional interference with contract, intentional and negligent interference with business relationships, and civil conspiracy. Manassas provides travel services to government agencies and private corporations. [1] Worldspan offers a computerized reservations service [*2] ("CRS"), also called a global distribution system ("GDS"). After the business relationship between Manassas and Worldwide soured, Manassas brought this action.

1 All factual statements in this order are taken from the complaint. Because the agreements between Manassas and Worldwide are at the center of this lawsuit and are referred to several times in the complaint, the court has also, when necessary, considered the agreements themselves. But the court has not considered other supplemental materials submitted by the parties and, therefore, does not treat this motion as one

for summary judgment.

Worldspan has filed a motion to dismiss [2], raising various arguments in support of their motion, chief among them that the Airline Deregulation Act ("ADA") preempts all Manassas claims. As discussed below, the court grants Worldspan's motion on all claims except the two contract claims (claims one and four).

2 In total, Worldspan filed three separate motions in support of dismissing Manassas's claims including an initial motion to dismiss (dkt. # 4), a supplemental motion to dismiss (dkt. # 30), and a post-hearing supplemental brief per the direction of the court. (Dkt. # 61.)

BACKGROUND

In 2001, a **[*3]** travel agency called N&N Travel and Tours ("N&N") won the bid to become the prime contractor on a large contract with the United States Air Force Education Training Command ("AETC Contract"). Manassas was one of six travel agencies acting as subcontractors on the AETC Contract. All six travel agencies contracted with Worldspan to use Worldspan's GDS in connection with the AETC Contract.

In 2004, N&N assigned its own contract with Worldspan ("The N&N Worldspan Agreement") to Manassas. Manassas claims that although Worldspan knew that Manassas was now to receive all the payments that were earlier due N&N under the N&N Worldspan Contract, Worldspan did not make the payments to Manassas. Manassas alleges that in failing to make the required payments, Worldspan breached the N&N Worldspan Agreement, violated the covenant of good faith and fair dealing and is liable for tortious interference with the Agreement (claims one, two and three of the complaint).

In October 2004, Manassas and Worldspan entered into a second contract ("the New Manassas / Worldspan Agreement"). Manassas alleges that when Manassas sought payment from Worldspan for the payments due under the N&N Worldspan Agreement, Worldspan **[*4]** wrongfully terminated, and thereby breached, the New Manassas / Worldspan Agreement. Manassas also claims violation of the covenant of good faith and fair dealing and tortious interference with the New Manassas / Worldspan Agreement (claims four, five and six of the complaint). Manassas further alleges that Defendant Stewart Hall, an account executive of Worldspan, disclosed confidential information about Manassas and its business to competitors of Manassas (claim seven). In claim eight, Manassas alleges that the actions of the Defendants were part of a conspiracy.

ANALYSIS

Standard of Review

When reviewing a motion to dismiss, the court assumes the truth of the well-pleaded factual allegations, viewing them in the light most favorable to the plaintiff. *Ridge at Red Rock v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007). The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007)).

Previously Dismissed Claims

In its opposition to Worldspan's motion to dismiss, Manassas acknowledged that its third and sixth claims for relief, alleging tortious interference with contract, should **[*5]** be dismissed for failure to state a claim. Then, at the hearing, Manassas's counsel acknowledged that Georgia law controlled the interpretation of the N&N Worldspan Agreement and the New Manassas / Worldspan Agreement. Counsel also acknowledged that the associated second and fifth claims (breach of the covenant of good faith and fair dealing) should be dismissed because Georgia law does not recognize breach of the covenant of good faith and fair dealing as a separate cause of action. (Hr'g Tr. 8-10, Mar. 11, 2008); *See also Alan's of Atlanta, Inc. v. Minolta Corp.,* 903 F.2d 1414, 1429 (11th Cir. 1990). Also at the hearing, the court, relying on *Leigh Furniture & Carpet Co. v. Isom,* 657 P.2d 293 (Utah 1982), held that the claim for negligent interference with business relationships (claim seven) must be dismissed, although it reserved ruling on the claim of intentional interference pled in that claim. (Hr'g Tr. 10.)

At the close of the hearing, the court directed the parties to submit additional briefing on the issues of preemption under the ADA and the "improper means" element of the claim for intentional interference with business relationships. The court has carefully reviewed the **[*6]** briefs and now rules as follows.

ADA Preemption

The ADA prohibits States from "enact[ing] or enforc[ing] 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). Worldspan agreed that the breach of contract claims (claims one and four) are not preempted so long as they "stay within the four corners of the parties' contract . . . ." (Worldspan Supplemental Br. Supp. Mot. Dismiss 10 n.5.) But Worldspan contends that to the extent Manassas is seeking extra-contract relief, such as attorneys' fees, exemplary damages and interest, the ADA preempts such relief. *American Airlines v. Wolens,* 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), supports Worldspan's argument. There the Court held that the ADA did not preempt a straightforward breach of contract claim: "A remedy confined to the contract's terms simply holds parties to their agreements . . . ." *Id.* at 229. But the Court made clear that any relief that went beyond "the parties' bargain" and was "based on state laws or policies external to the agreement" was preempted. *Id.* at 233.

Other courts have held that in cases alleging breach of contract, claims for punitive **[*7]** damages are preempted by the ADA. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (holding that although breach of contract claim itself was not preempted, under *Wolens,* punitive damages, because they are based on state laws or policies external to the contract, were preempted); *Power Standards Lab. Inc. v. Fed. Express Corp.,* 127 Cal. App. 4th 1039, 1046-47, 26 Cal. Rptr. 3d 202 (Cal. Dist. Ct. App. 2005) (same). Of course, if Manassas's request for attorneys' fees and interest is based on the agreements themselves, the request would not be preempted. But the parties have not addressed that issue. Accordingly, the court dismisses only the claim for punitive damages, does not dismiss the contract claims themselves, and reserves ruling on the claims for attorneys' fees and interest.

Worldspan also contends that the two remaining claims, intentional interference with business relationships (claim seven) and civil conspiracy (claim eight), are preempted. But the court has decided that those claims must be dismissed on other grounds and therefore will not reach the issue of preemption of counts seven and eight.

Intentional Interference With Economic Relations

In **[*8]** *Leigh Furniture & Carpet Co. v. Isom,* 657 P.2d 293 (Utah 1982), the Utah Supreme Court established the elements for the tort of intentional interference with economic relations: (1) the defendant intentionally interfered with the plaintiff's existing or potential economic relations; (2) for an improper purpose or by improper means; (3) causing injury to the plaintiff. *Id.* at 304. The *Leigh* court made it clear that "improper purpose" is established by a showing that the defendant's primary purpose was to injure the plaintiff. *Id.* at 307. Manassas has not alleged that Defendants acted for an improper purpose. The alternative for satisfying factor two of the test is to allege "improper means."

According to Manassas's allegations, Worldspan and Mr. Hall acted, not with the deliberate intent to injure Manassas, but to gain economic benefit. Under Utah law, this is not sufficient to establish the "improper means" element of the tort of intentional interference with business relationships.

Manassas, at the hearing, argued that Worldspan had acted by improper means. [3] Manassas argues that the "improper means" element was met because Defendants breached their fiduciary duty. Manassas contends **[*9]** that Defendants owed a fiduciary duty to Manassas, which they breached by disclosing confidential information. But the Agreement itself does not have an express agreement creating a fiduciary relationship between the parties. And Manassas did not, nor can it, argue that it alleged any facts indicating a fiduciary relationship between Worldspan and Manassas.

> 3 The court notes that breach of contract and breach of the implied covenant of good faith and fair dealing are not, under Utah Law, improper means. The *Leigh* court stated, "A deliberate breach of contract, even where employed to secure economic advantage, is not, by itself, an 'improper means.'" 657 P.2d at 309. Accordingly, Manassas may not rely on those acts to establish the tort.

"A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another . . . . A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary." *First Sec. Bank of Utah v. Banberry Dev. Corp.,* 786 P.2d 1326, 1333 (Utah 1989). **[*10]** "There is no invariable rule which determines the existence of a

fiduciary relationship, but . . . there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other." *Id.*

Manassas argues that Worldspan stands in a superior position to Manassas. Manassas also states that it entrusted its important and sensitive information to Worldspan. But Manassas does not explain how those statements indicate a fiduciary relationship.

From the allegations, it appears that Manassas provided confidential information to Worldspan as part of an arm's length business transaction. Manassas does not allege any facts supporting its conclusion that Worldspan was placed in a position of peculiar confidence by Manassas or that Worldspan had a duty to "act primarily for the benefit of" Manassas. Moreover, Manassas does not explain or allege how Worldspan stands in a position superior to Manassas.

Accordingly, because Manassas has not alleged either improper purpose or improper means, the court dismisses Manassas's claim for intentional interference with business relations.

Civil **[*11]** *Conspiracy*

Manassas conceded at the hearing that the unlawful act required for a civil conspiracy was the same unlawful act necessary to prove "improper means" in claim seven. (Hr'g Tr. 22.) Manassas conceded that if claim seven failed, then so would claim eight. (*Id.*) Accordingly, the court holds that because "improper means" was not alleged in claim seven, claim eight must also be dismissed.

ORDER

For the reasons set forth above and at the March 11, 2008 hearing, Worldspan's motion to dismiss (dkt. nos. 4, 30, 61) is GRANTED IN PART and DENIED IN PART as follows:

1) Manassas's claims two, three, five, six, seven and eight are DISMISSED.

2) Although claims one and four remain, the claim for punitive damages is DISMISSED.

The court reserves ruling on the claims for attorneys' fees and interest. [4]

4 At the hearing, Worldspan was given leave to file the amended counterclaim. (Hr'g Tr. 36) (granting Worldspan's Motion to Amend/Correct Counterclaim (dkt. no. 28)). Accordingly, Manassas's Motion to Dismiss Worldspan's Counterclaim (dkt. no. 22) is DISMISSED as moot because Worldspan has filed an amended counterclaim. Also, Manassas's Motion to Strike Worldspan's Supplemental Motion to Dismiss (dkt. **[*12]** no. 47) and Manassas's Motion to Strike Portions of Memo (dkt. no. 50) are DISMISSED as moot based on this order and the outcome of the hearing.

SO ORDERED this 30th day of April, 2008.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

Chief Judge