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

AMERICAN AIRLINES, INC., Plaintiff, 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

TRAVELPORT'S OPPOSITION TO REQUEST FOR RULE 16 CONFERENCE AND MEMORANDUM IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING A DECISION ON THE RULE 12(b)(6) AND 12(b)(3) MOTIONS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

FEDERAL RULES

INTRODUCTION

Defendants Travelport Limited and Travelport, LP ("Travelport") oppose the request for this Court to conduct a Rule 16(a) case management conference in order to establish expedited discovery proceedings. Travelport further moves under Rule 26(c) for an order to stay discovery pending a decision on the dispositive motions to dismiss.

This case is not a genuine antitrust action to protect consumers but an attempt by American Airlines, Inc. ("AA") to enhance its leverage in the stalled negotiations over contracts with Travelport that are set to expire this summer. AA now seeks to turn up the heat on Travelport by asking this Court to expedite the Rule 16(a) conference so that antitrust discovery can begin early and AA can start running up Travelport's expenses and further distract Travelport from running its business before the contracts expire – and before Travelport's motions to dismiss are even decided.

The request for a Rule 16(a) conference is premature. The parties have not submitted their Joint Status Report, which is not due until July. Furthermore, dispositive motions have been filed that, if granted, would obviate the need for any discovery. AA would nonetheless have this Court develop a scheduling order and begin managing expedited discovery proceedings for the sole reason that AA might choose to file a preliminary injunction motion on some subjects some time this summer.

It is hard to see how any court could manage expedited discovery proceedings on this bare record. AA's motion requesting the Rule 16(a) conference identifies some preliminary relief AA might seek down the road but leaves this Court and the defendants entirely guessing as to the grounds for any future preliminary injunction motion. AA contends that "[d]efendants have been on notice of the discovery American is seeking."

AA's Request for Rule 16(a) Conference at 6. But AA does not explain to the Court what discovery it "is seeking" for future preliminary injunction proceedings and has never told Travelport. What AA did provide was a sweeping "Non-Exhaustive List of Document Preservation Categories" for full-scale discovery of documents and data spanning time periods ranging from 4 to 8 years. *Id*. at Ex. A.

The Court need not intervene because of a possible preliminary injunction motion. The motions that have actually been filed in this case would knock out the entirety of AA's Complaint. The overwhelming weight of the relevant precedent, designed to promote judicial economy and avoid wasteful discovery proceedings, supports deferral of antitrust discovery until a decision on the dispositive motions that have already been filed.

PROCEDURAL BACKGROUND

Relief Requested. AA served its Complaint in April. Based on its single-brand product market, AA's Complaint seeks treble damages for alleged antitrust violations occurring in the United States and several European nations. The claimed antitrust violations are alleged to have started more than four years ago.

The Complaint does not seek a temporary restraining order or a preliminary injunction grounded in any factual allegations of imminent harm. Rather, the Complaint seeks a "permanent injunction" to bar "unlawful retaliatory conduct." Compl. at ¶ 138. It also requests "such other permanent injunctive relief, as the Court deems appropriate, designed to create market conditions capable of dissipating Travelport's unlawfully maintained monopoly power." *Id*. at ¶ 139.

Scheduling and Case Management. Under the Federal Rules, a Scheduling Order issued by the Court is due on July 26. Fed. R. Civ. P. 16(b). This is the earlier of 120 days after service or 90 days after a defendant in this case first appeared. *Id*. The parties

must hold a discovery conference at least three weeks before the Scheduling Order is due. *Id*. at 26(f). As such, AA, Travelport, and Orbitz must hold their Rule 26(f) discovery conference by July 5 and thereafter submit their Joint Status Report to the Court. The Federal Rules bar either side from conducting discovery at this time absent compelling circumstances justifying accelerated proceedings.

Motions Pending. On May 25, Travelport filed a Rule 12(b)(6) motion to dismiss the entire Complaint with prejudice. The primary focus of the motion is the implausibility of AA's alleged product market – Travelport services to travel agents that subscribe to Travelport. This is a market in which Travelport is a monopolist by definition. This single-brand market excludes travel agents who choose to use one of Travelport's competitors such as Sabre.

In addition to this Rule 12(b)(6) motion, Travelport filed a motion to dismiss for improper venue or, in the alternative, to transfer the case to federal court in Illinois. This motion is grounded upon the forum selection clause in the agreement that AA's Complaint challenges as anticompetitive and illegal. Travelport's Rule 12(b)(3) motion to transfer the case to Illinois could obviate the need for a scheduling conference and early intervention by this Court on discovery matters. The case management order would come from a different judge in a different court.

Defendant Orbitz also filed a Rule 12(b)(6) motion to dismiss the entire case against it. These dispositive motions will be fully briefed by early July.

On June 1, Sabre filed a motion for leave to intervene and a proposed complaint. In its motion, Sabre indicated that it intends to file a Rule 12(b)(6) motion to dismiss. Sabre Mem. in Supp. of Mot. for Leave to Intervene at 2.

ARGUMENT

Travelport's request for a discovery stay pending resolution of its dispositive motions is an unremarkable and sensible request. "[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted).

I. The Court Has Broad Authority to Stay Discovery

"A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). Although a stay of discovery is not automatic when a dispositive motion is pending, "[a] stay of discovery may be appropriate where the disposition of a motion to dismiss might preclude the need for discovery altogether thus saving time and expense." *Von Drake v. NBC*, No. 3-04-CV-0652-R, 2004 U.S. Dist. LEXIS 25090, *3 (N.D. Tex. May 20, 2004) (quoting in part *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990)).

Among the factors that inform the Court's discretion are: the strength of the dispositive motion, the scope of relevant discovery, the burden of responding to discovery of this magnitude, and the need for immediate discovery. *See Von Drake*, 2004 U.S. Dist. LEXIS 25090 at *3; *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, No. H-08-cv-0857, 2008 U.S. Dist. LEXIS 112721, *3-4 (S.D. Tex. Aug. 11, 2008). Courts have wide discretion in determining whether these factors weigh in favor of deferring discovery proceedings until the potentially dispositive motion is decided. *Id.*

II. The Strength of Travelport's Motion to Dismiss Favors a Stay

The strength of the Rule 12(b)(6) motion weighs heavily in favor of a stay. As demonstrated by the 12(b)(6) motions, AA's Complaint is not the type of antitrust complaint that can provide the court, upon a quick review, with a high degree of confidence that it will survive a motion to dismiss. *See In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 U.S. Dist. LEXIS 57982, at *23-24 (N.D. Cal. July 24, 2007) ("Nor is this a case where it is almost certain that the complaint is viable, such as is often true where guilty pleas have already been entered in parallel criminal cases.").

Motions that raise "substantial arguments for dismissal of many, it not all, of the claims asserted" carry weight. *See Von Drake*, 2004 U.S. Dist. LEXIS 25090 at *2 (granting motion to stay). In contrast, courts provide less weight to motions directed at only the relief sought for a subset of the claims. *Ford Motor Co. v. U.S. Auto Club*, No. 3-07-CV-2182-L, 2008 U.S. Dist. LEXIS 34240, at *3 (N.D. Tex. Apr. 24, 2008) ("it is significant to note that defendant does not seek dismissal of the entire case" but rather only "injunctive and declaratory relief" for a portion of the claims).

AA's entire Complaint skates on thin ice. The antitrust claims depend on a single-brand product market, a rare exception in antitrust law. Since the governing Supreme Court decision in this area, no antitrust actions against a GDS – neither private nor public – have survived a motion to dismiss on this single-brand product market theory. Such a product market definition conflicts with established, modern antitrust precedent.

In light of the potential for opportunistic litigation, courts will not allow plaintiffs to plead a single-brand product market except in the rarest of circumstances. A well

developed body of law, including Supreme Court and Fifth Circuit precedent, delineates the limited circumstances in which plaintiffs can open the door to expensive monopolization litigation using an alleged single-brand product market. The alleged product market consisting of Travelport services for travel agents using Travelport does not fit this exception. This market definition should be federal court-tested before AA should be authorized to open the doors to expansive and expensive antitrust discovery.

III. Stays Are Especially Appropriate for Antitrust Litigation

Motions to stay discovery pending a decision on a potentially dispositive Rule 12(b)(6) motion "are granted with substantial frequency" in antitrust litigation. *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 336 (N.D. Ill. 2005). The extreme costs associated with antitrust discovery – as recognized by the Supreme Court – provide a compelling justification for granting a stay, not to mention the management time and effort required. *Twombly*, 550 U.S. at 558-59.

Pointing to *Twombly*, a district court in this Circuit recently granted a motion to stay and stated that "[p]roving an antitrust conspiracy of unspecified timing and scope is precisely the type of 'sprawling, costly and hugely time-consuming undertaking'" that should not be rushed into. *Dowdy & Dowdy Partnership v. Arbitron, Inc*., CIVIL ACTION NO. 2:09cv253 KS-MTP, 2010 U.S. Dist. LEXIS 108798, *5 (S.D. Miss. Sept. 30, 2010) (quoting *Twombly*, 550 U.S. at 559). The district court concluded that the "equities and potential harm to the defendants . . . weigh[ed] heavily in favor of granting a stay of discovery" so as to avoid "very expensive" antitrust discovery. *Dowdy*, 2010 U.S. Dist. LEXIS 108798 at *6.

While *Twombly* did not "erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff's complaint survives a motion to dismiss, . . . to

allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly*, at least when the discovery would be burdensome." *In re Graphics Processing Units Antitrust Litig.*, 2007 U.S. Dist. LEXIS 57982, at *23. It is now the overwhelming practice, albeit not a categorical rule, for courts to defer discovery proceedings in complex antitrust cases until a decision on the dispositive motion. *Rio Grande Royalty Co.*, 2008 U.S. Dist. LEXIS 112721, at *2-4 (S.D. Tex. Aug. 11, 2008) ("staying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive"); *McLafferty v. Deutsche Lufthansa A.G.*, CIVIL ACTION NO. 08-1706, 2008 U.S. Dist. LEXIS 81627, at *6 (E.D. Pa. Oct. 14, 2008) ("[D]elaying discovery until the Court can determine whether or not Plaintiffs have pled the facts necessary to proceed" with antitrust litigation will "help to streamline the expensive discovery process, and, thereby, minimize the burden on counsel, parties and the Court").[1]

There is no doubting that this lawsuit can be expected to impose significant discovery burdens on the parties, third parties, and the Court. *See* AA's Request for Rule 16(a) Conference, Ex. A, Non-Exhaustive List of Document Preservation Categories. The time period of the business practices AA is challenging exceeds four years. The

[1] *See also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (complaint must show "a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery"); *Coss v. Playtex Prods. LLC*, No. 08 C 50222, 2009 WL 1455358, at *1 (N.D. Ill. May 21, 2009) ("Antitrust cases are typical of the types of cases where discovery is so burdensome and costly to parties that a stay pending decision on a motion to dismiss may be appropriate."); *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 U.S. Dist. LEXIS 87473, at *6 (N.D. Ill. Oct. 28, 2008); (granting stay of discovery pending resolution of motions to dismiss because "[a]s the Supreme Court, the Seventh Circuit, and this court have all recognized, discovery in any antitrust case can quickly become enormously expensive and burdensome on defendants."); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (staying discovery pending resolution of motions to dismiss and allowing very limited discovery during re-pleading because "the Supreme Court has recognized that staying discovery may be particularly appropriate in antitrust cases").

alleged antitrust violations occurred in geographic markets in Europe as well as the United States. AA is challenging the business practices of both a GDS (Travelport) and a leading online travel agency (Orbitz). AA has also threatened to add Sabre to this lawsuit (*Id*. at 2 n.1), and Sabre has now moved for leave to intervene. That would broaden the case and add to the discovery costs.

Discovery in the case will require the Court to expend significant resources. As in all major litigations there is no doubt that issues relating to coordination and scheduling will confront the Court. In addition, discovery in a case of this magnitude will almost certainly result in some disputes over the scope of responses, privilege designations, confidentiality, and a host of other issues. The number of potential disputes will be exacerbated by the number of third parties involved in discovery, many of whom may come to the Court in an attempt to limit their burden and costs.

In short, this case fits well within the long-line of antitrust cases where courts have used their discretion to stay discovery pending a ruling on a motion to dismiss because of the significant costs this discovery would impose.

IV. AA Lacks a Compelling Justification for Immediate Discovery

The filing of a well-grounded preliminary injunction motion may, under proper circumstances, justify tailored, expedited discovery. When the party seeking discovery has not filed a preliminary injunction motion specifying the need for early judicial intervention, courts deny expedited discovery as premature. *See Edgenet, Inc. v. Home Depot, U.S.A., Inc.*, 259 F.R.D. 385, 387 (E.D. Wis. 2009) ("Edgenet has not sought a preliminary injunction or a temporary restraining order against Home Depot and, as such, the claim to expedite discovery is premature"); *Dimension Data North America, Inc. v. NetStar-1*, 226 F.R.D. 528, 531-32 (E.D.N.C. 2005) (motion for expedited discovery is

"not reasonably timed [when] plaintiff has not yet filed a …motion for a preliminary injunction, setting out in detail the areas in which discovery is necessary in advance of a determination of preliminary injunctive relief."); *Carter v. Ozoeneh*, CIVIL CASE NO. 3:08cv614, 2009 U.S. Dist. LEXIS 45679, *8 (W.D.N.C. May 14, 2009) (denying motion because "plaintiffs have not even filed a motion seeking preliminary injunctive relief").

Moreover, the possibility of a future preliminary injunction motion is not enough to depart from standard federal practice. Time and time again, courts have refused to allow expedited discovery on the basis of conjecture about a future injunction motion. *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986, 991 (S.D. Tex. 2004) (rejecting claim that expedited discovery is justified by "the possibility that Plaintiff might seek injunctive relief in the future"); *Dimension Data*, 226 F.R.D. at 529, 532 (refusing expedited discovery needed to "adequately prepare" for an anticipated preliminary injunction); *Momenta Pharms., Inc. v. Teva Pharms. Indus.*, Civil Action No. 10-12079-NMG, 2011 U.S. Dist. LEXIS 18562, *6-7 (D. Mass. Feb. 18, 2011) (refusing expedited discovery to support future anticipated preliminary injunction motion).

Courts are even less likely to authorize departures from standard federal practice when the party seeking expedited discovery has failed to propose discovery requests that are narrowly tailored to a particular time-sensitive need. *See Dimension Data*, 26 F.R.D. at 532 (denying expedited discovery request that was not "narrowly tailored"); *Philadelphia Newspapers v. Gannett Satellite Info. Network, Inc.*, CIVIL ACTION NO. 98-CV-2782, 1998 U.S. Dist. LEXIS 10511, *6 (E.D. Pa. July 15, 1998) (same). Of course, the absence of any proposed written discovery requests tied to the preliminary relief makes it easy for courts to deny expedited discovery. *See Coram, Inc. v. Jesus*,

8:10cv37, 2010 U.S. Dist LEXIS 12079, *2 (D. Neb. Feb. 11, 2010) (denying expedited discovery motion when "no proposed discovery requests were proffered").

AA's sole justification for immediate antitrust discovery is that it "anticipate[s]" preparing and filing a preliminary injunction motion in the future. AA's Request for Rule 16(a) Conference at 4. When would this preliminary injunction motion come to light? It will "likely" be filed this summer if the parties are unsuccessful in commercial negotiations to renew their contracts and Travelport continues to "refuse[] to provide American with any assurances that it will cease engaging in further damaging and anticompetitive conduct when those [contract] amendments expire." *Id*.

Travelport first heard that AA might seek a preliminary injunction in a letter by AA's counsel over a month after filing the Complaint. Rothman Letter, May 13, 2011 (attached in Ex. A. to AA's brief); see *also* Weiner Letter, May 24, 2011 (attached hereto as TP APX 1 at 5) (Travelport response to Rothman Letter). At that time, AA indicated it "would anticipate" shifting this case into a preliminary injunction action, possibly in the summer. Rothman Letter, May 13, 2011. Now AA seeks an expedited Rule 16(a) conference "to discuss American's anticipated motion this summer" and to "apprise the Court of anticipated preliminary injunction proceedings." Request for Rule 16(a) Conference at 1, 4. The proper way to "apprise the Court" of these issues is to provide a well-founded preliminary injunction motion, but AA chose not to do that.

AA's grounds for a preliminary injunction remain a mystery. Presumably AA is not seeking a preliminary injunction on the grounds that Travelport has monopolized product markets in the United States and Europe over the past four years and has engaged in conspiracies to monopolize these markets with unnamed coconspirators. Maybe the

motion instead would deal with just one of the five counts of the Complaint. Maybe it would deal with a subset of factual allegations. The underlying wrongs supporting a future preliminary injunction motion might be grounded in antitrust, business torts, or contract – AA has not said.

All that AA has described is the ultimate relief it would seek in a preliminary injunction case. The relief AA anticipates requesting is strange to say the least. AA "would anticipate" seeking some form of an order by the Court providing "clear assurance" that Travelport will not (1) "introduce any biasing to American's flights in their GDS displays," (2) "terminate the underlying . . . agreements," (3) "increase American's booking fees," or (4) "otherwise change any other current practice or course of doing business." Rothman Letter, May 13, 2011; *see also* Request for Rule 16(a) Conference at 6.

None of these statements about anticipated preliminary injunction relief provide a coherent framework for the Court to manage expedited discovery proceedings. First, the display bias issue is hard to address because there are no underlying factual allegations relating to display bias. The Complaint does not allege that Travelport has biased displays in the United States or allege facts showing that Travelport has threatened to do so. The Complaint contains a factual allegation of display bias in Europe, not the United States. We can only speculate about what type of expedited discovery AA would seek to support a preliminary injunction on display bias. Nor does AA provide any explanation of what violation of law – antitrust, business tort, or contract – supports injunctive relief on display bias.

Second, any request for a preliminary injunction barring "terminat[ion] of the underlying . . . agreements" extends beyond anything said in AA's 37-page Complaint. Missing is any allegation that Travelport has threatened to terminate the agreement or that the exercise of contractual termination rights is a violation of antitrust law or some form of a business tort. As AA's brief recognizes, the agreements "expire" (AA's Request for Rule 16 Conference at 4) and thus there is no issue concerning termination. Moreover, Travelport and AA are already in contract litigation in Illinois state court. Any claims for preliminary injunctive relief focusing on the duration of the contract or contractual termination rights can be heard by the state court now handling the contract disputes.

Third, AA's request for a preliminary injunction to freeze booking fees would at least have some tangential connection to the antitrust Complaint (the Complaint appears to seek treble damages based on alleged overpayment of booking fees) but is not a permissible antitrust remedy in an injunctive relief application in court, much less in an expedited proceeding. A price freeze is not sought in the Complaint; nor could it be. Any price controls on travel distribution services would have to come from Congress, U.S. Department of Transportation regulations, or a European regulatory agency, not an order in a private lawsuit. There are myriad problems with court regulation of pricing. Is AA the sole beneficiary of price controls or is this industry wide pricing? What if Travelport's input costs rise? What if its products or services are enhanced? What is the time period for the price freeze? What countries?

For present purposes, the obvious problem is that any injunctive relief related to the level of booking fees would require substantial underlying fact discovery, evidentiary

briefing, and expert testimony. AA's Complaint alleges that Travelport charged high booking fees over the years and asks for treble damages, apparently measured as the difference between Travelport's supposed "exorbitant" or "monopolistic" booking fees and booking fees at the "competitive" level. Compl. at ¶ 13 ("American has suffered significant harm in the form of exorbitant booking fees"); *id*. at ¶ 100 ("Travelport has been able to maintain its per segment booking fees at monopolistic levels, and American is entitled to recover the resulting overcharges."). This kind of heavy lifting would be part of the damages phase of a proven case of illegal monopolization, not a rushed proceeding.[2]

Fourth, AA's open-ended request that Travelport indefinitely freeze its business practices – forbidding Travelport from changing "any other current practice or course of doing business" – can be quickly tossed aside. This type of all-encompassing mandatory injunction is not a tenable court remedy and does not provide any guidance for the Court to manage expedited, tailored discovery.

[2] It is at least ironic, and more likely disingenuous, that the booking fees that AA now refers to as "exorbitant" or "monopolistic" are precisely the same heavily discounted booking fees from the agreement that AA deemed "competitive" when it used its negotiating leverage to demand them in 2006. *See* Press Release, Travelport, Galileo International and American Airlines Sign New Five-Year, Full Content Distribution Agreements (May 7, 2006), http://travelport.mediaroom.com/index.php?s=43&item=208 (attached hereto as TP APX 2 at 6) ("'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.'").

CONCLUSION

For the foregoing reasons, the Court should deny AA's request for the Court to conduct a Rule 16(a) case management conference and grant Travelport's motion to stay antitrust discovery pending a decision on the dispositive motions.

Dated: June 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 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.

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