American Airlines Inc v. Travelport Limited et al Doc. 87

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

AMERICAN AIRLINES, INC., Plaintiff, vs. SABRE, INC., a Delaware corporation; SABRE HOLDINGS CORPORATION, a Delaware corporation and SABRE TRAVEL INTERNATIONAL LTD., a foreign corporation, d/b/a SABRE TRAVEL NETWORK; 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

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

Travelport Appendix Exhibit (TP APX __)	Description	Page(s)
1	Northwest Airlines Complaint, Excerpt from *Sabre Inc. v. Northwest Airlines*, Civil Action No. 4:04-CV-612-Y (N.D. Tex. Jan. 13, 2005) (Dkt. No. 66, at APP. 009-39) (Appendix to Sabre's Motion to Dismiss)	4 to 34

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2	Relevant Excerpts from Preferred Fares Amendment, Galileo International Global Airline Distribution Agreement, signed by American Airlines, Inc. and Galileo International, L.L.C. on July 05, 2006	35 to 36
3	*Rx.com v. Medco Health Solutions, Inc.*, 2009 U.S. App. LEXIS 8469 (5th Cir. 2009).	37 to 40
4	*Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 1997 U.S. Dist. LEXIS 21119 (N.D. Tex. 1997), *aff'd*, 139 F.3d 899 (5th Cir. 1998), *vacated on other grounds*, 283 F.3d 282 (5th Cir. 2002).	41 to 51
5	*Manassas Travel, Inc. v. Worldspan, L.P.*, 2008 U.S. Dist. LEXIS 35217 (D. Utah 2008).	52 to 55
6	*Globespanvirata v. Texas Instruments*, 2006 U.S. Dist. LEXIS 8860 (D. N.J. 2006).	56 to 64
7	*Insignia Sys., Inc. v. News Corp.*, 2005 U.S. Dist. LEXIS 42851 (D. Minn. 2005).	65 to 70
8	*Galileo Int'l v. Ryanair*, 2002 U.S. Dist. LEXIS 3317 (N.D. Ill. 2002).	71 to 76

Dated: June 27, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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.

/s/ Walker C. Friedman
Walker C. Friedman

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Northwest Airlines Incorporated, a Minnesota Corporation,

Plaintiff,

v.

Sabre, Inc.; Sabre Holdings Corporation; and Sabre Travel International Ltd., d/b/a Sabre Travel Network,

Defendants.

Civil File No. 04-CV-03889 (PAM/RLE)

FIRST AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

1. For its Complaint against Sabre, Inc., Sabre Holdings Corporation, and Sabre Travel International Ltd., d/b/a Sabre Travel Network (collectively, "Sabre"), Northwest Airlines, Inc. ("Northwest") states and alleges as follows:

INTRODUCTION

2. Northwest brings this suit under the federal antitrust laws to obtain relief from Sabre's abuse of its monopoly power in the provision of computerized reservation services to the many travel agents who subscribe to Sabre's system. Like most major airlines, Northwest has no choice but to pay Sabre so that information about its flights and fares will be accessible to those travel agents, enabling them to issue tickets on Northwest flights. Because of its monopoly power, Sabre has charged Northwest and other airline participants in the Sabre system exorbitant fees every time a travel agent uses its system to book a flight, and those fees have increased the cost of airline travel, to

the detriment of consumers. Recently, Northwest announced policies designed to reduce Sabre's stranglehold on the industry and bring a measure of relief from the financial burden Sabre has imposed on airlines and consumers. In response, Sabre used its monopoly power to bludgeon Northwest, manipulating the information it provides to travel agents in ways plainly calculated to reduce sales of Northwest tickets in order to force Northwest to withdraw the new policies. In doing so, Sabre also sent a very strong public message to the rest of the airline industry designed to deter other carriers from matching Northwest's policies or pursuing similar initiatives. Sabre's strategy succeeded, and Northwest was forced to retreat. Unless the Court acts to enforce the antitrust laws, Sabre will not hesitate to react similarly to future initiatives designed to introduce competition into the distribution of travel services, and both Northwest and consumers will continue to pay the price. Northwest also brings this action to redress Sabre's breach of the parties' contractual agreements and for its violation of the Lanham Act and of Minnesota law through deceptive trade practices and defamation.

PARTIES

3. Northwest is the world's fifth largest airline, offering domestic and international travel by providing approximately 1,500 daily departures. Northwest is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business located at 2700 Lone Oak Parkway, Eagan, Minnesota.

4. Defendant Sabre, Inc., is a Delaware Corporation with its principal place of business located at 3150 Sabre Drive, Southlake, Texas. Sabre, Inc. owns and operates the Sabre GDS used by travel agencies and others for the sale and distribution of air

transportation services and information.

5. Defendant Sabre Holdings Corporation ("Sabre Holdings") is a Delaware Corporation with its principal place of business located at 3150 Sabre Drive, Southlake, Texas. Defendants Sabre, Inc., and Sabre Travel International Ltd. are subsidiaries of Sabre Holdings Corporation. Sabre Holdings directed and/or participated in the actions of these subsidiaries described in this complaint and is jointly and severally liable for their conduct.

6. Defendant Sabre Travel International Ltd. ("Sabre Travel") is an Irish corporation, with its principal place of business located at 3150 Sabre Drive, Southlake, Texas. Sabre, Inc. and Sabre Holdings have used Sabre Travel simply as a corporate vehicle for holding contracts with airline participants in the Sabre GDS, including Northwest. Sabre Travel neither owns nor operates the Sabre GDS, and Sabre, Inc. in reality performs the services that Sabre Travel is obligated to perform under those contracts.

JURISDICTION AND VENUE

7. This Court has jurisdiction over all claims asserted against defendants pursuant to 28 U.S.C. § 1332(a) because complete diversity exists between Northwest and the defendants and the amount in controversy exceeds $75,000.00. In addition, the Court has jurisdiction over Northwest's antitrust and Lanham Act claims pursuant to 28 U.S.C. § 1331.

8. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391(b) and (c). For venue purposes, defendants

reside and transact business in this District and a substantial portion of the events giving rise to the claims occurred in this District.

FACTUAL BACKGROUND

9. For decades, major airlines in the United States, including Northwest, have relied heavily on travel agents to provide consumers with information about airline services and to sell their tickets. In turn, individual travel agents have overwhelmingly relied on one of four major computerized reservation systems provided by third-party vendors, now called global distribution systems ("GDSs"), to obtain flight and fare information, make bookings, and issue tickets to their customers.[1] However, travel agents do not pay GDSs for the use of those services. Instead, every time a travel agent books a flight using a GDS, the GDS charges participating airlines a booking fee – which airlines must pay if they want their flights and fares displayed over the GDS to the travel agent – and then uses a portion of that booking fee revenue to pay travel agents for using the system. With each passing year, GDS booking fees have become an increasingly large part of airline operating expense. In 2003 alone, Northwest paid approximately $180,000,000 in booking fees to GDSs.

10. As of 1985, bookings by travel agents accounted for approximately 60% of all airline revenues, and about 90% of those sales were made by travel agents using a GDS. By 1989, travel agents accounted for about 75% of airline ticket revenues, and over 95% of agents relied on a GDS.

[1] Until recently, GDSs were known as Computer Reservation Systems ("CRSs"). In this complaint, Northwest follows the current nomenclature.

11. In the years since 1989, airlines have begun to change the ways in which they distribute their services, particularly by using the Internet as a means by which customers may book their flights directly with carriers, bypassing GDSs (travel agents also have access to airline web-sites which allow direct booking with airlines) and allowing airlines to avoid GDS booking fees. Nevertheless, major airlines have continued, by necessity, to rely substantially on travel agency sales booked through GDSs for a substantial portion of their ticket sales. Sabre has estimated that as of 2003, 70% of all airline revenue continued to be generated through sales by "brick and mortar" travel agencies. Moreover, online travel agencies (which also use GDSs, and in some cases are owned by them) account for an additional 13% of airline revenues. In recent years, approximately 65% of Northwest's revenue has been generated by "brick and mortar" travel agencies, and another 10-15% has been generated by online agencies that use GDSs.

12. An even larger percentage of business passengers continues to use travel agencies despite the availability of Internet sales channels. The National Business Travel Association recently reported that less than 10% of corporate travel is booked through the Internet and that many corporations forbid their employees to book travel on the Internet, even if the employees find a lower fare through that channel. Among travel agencies that manage high-yielding corporate travel accounts, Sabre is the dominant GDS. As is true for most network carriers, Northwest's business travelers account for a disproportionately high share of Northwest's total passenger revenue.

13. In short, travel agents continue to be a critical distribution outlet for major

airline sales of air passenger service. Travel agents, in turn, continue to rely almost exclusively on GDSs, resulting in steadily increasing booking fee expenses for major airlines, despite the fact that almost all travel agencies now have Internet access.

14. Significantly, most travel agents rely primarily on only one GDS, rather than subscribing to multiple systems. In 2003, the American Society of Travel Agents reported, based on a survey of its membership, that 94% of travel agents use only one GDS system.

15. The vast majority of travel agencies use only one GDS because it is costly and inefficient for travel agent locations to use multiple GDSs. Multiple GDS usage currently requires agencies to incur additional time, effort, and expense in searching more than a single GDS, as well as additional training costs, and requires them to implement duplicative accounting, billing, and recordkeeping systems necessary for tracking multiple GDS transactions.

16. Travel agents cannot readily switch from one GDS to another. There are currently four major GDSs that, in theory, are available to travel agents: Sabre, Galileo, Worldspan, and Amadeus. The reality is that switching among them is rare. Standard GDS contracts require multi-year commitments from travel agents. Even if travel agents could readily switch GDS systems at the end of their multi-year contract terms, however, there are significant practical, economic, and contractual impediments to a travel agent's ability to readily and rapidly switch systems during the contract term. Those impediments help maintain each GDS system's monopoly power over airlines. As a practical matter, each GDS, including Sabre, controls access by major airlines to a

discrete, but critical, group of travel agents whose distribution services remain essential to every major airline's competitive and financial viability.

17. A variety of factors account for the monopoly power that GDSs exert over major airlines.

18. First, nearly half of travel agencies have contracts with GDS systems with durations of five years. Most of the remainder have contracts of at least three years duration. As a deterrent to switching prior to the expiration of the contract term, GDS contracts with travel agents typically include liquidated damage clauses that attach an onerous financial penalty to termination of the agent's contract before the expiration of its term. Even without these contractual penalties, travel agents would incur significant operational costs in switching GDS systems midstream. Moreover, GDSs have perpetuated substantial inefficiencies and cost-based impediments to any travel agency location subscribing to more than a single GDS. As a result, nearly every travel agent is irrevocably tied to a single GDS for a multi-year period.

19. Further, although most travel agents now have the ability to access airline web sites tailored for their use to book flights, the GDSs, including Sabre, have imposed substantial penalties and disincentives on travel agents' use of alternative, and less costly, airline booking alternatives. Most GDSs – including Sabre – pay travel agents to use their services, rather than the other way around. Those payments are tied to productivity commitments by travel agencies, *i.e.*, commitments to use the GDS service for a specified volume of bookings, coupled with financial penalties or disincentives if those commitments are not reached. Thus, any booking a travel agent makes through a GDS

alternative is one less booking through a GDS that counts toward the travel agent's eligibility for productivity payments. Therefore, while travel agents have the technical ability to by-pass GDS systems when making airline bookings, there are significant financial disincentives to doing so. Travel agents have behaved consistently with the financial disincentives imposed by the GDS systems.

20. In theory, an airline could exert countervailing leverage against GDSs, like defendants, by withholding its participation in a particular GDS since, over time, the GDS's service would become less valuable to consumers and thus to travel agents. However, any such action would impose an immediate, and unacceptably harsh, penalty on the airline in reduced bookings by travel agent subscribers to the GDS, while imposing only a future, and uncertain, cost to the GDS, which is protected from immediate harm by long term contracts with travel agents. As the Department of Transportation recently found:

> "An airline's greatest leverage for obtaining lower fees or better terms for participation will be a threat to withdraw from the system. If an airline withdraws, however, it will immediately begin losing bookings from that system .... It is true that an airline's withdrawal from a system will make that system less attractive to travel agencies, and over time the system will lose subscribers. Because the average travel agency contract has a term of three years, however, only a relatively small portion of the system's subscribers will have the ability to switch to another system in the short term. Thus the airline's revenue losses from withdrawal will be substantial and begin occurring immediately, while the system's losses in subscribers will be gradual and occur over a period of some months. In these circumstances, the system [GDS] should have the upper hand in bargaining."

21. Despite the growth of the Internet as a means by which passengers (and travel agents) can book their travel directly with airlines, each GDS – including Sabre -

continues to enjoy monopoly power over major airlines such as Northwest. Travel agents continue to be the dominant channel for distribution of air transportation services, and travel agents continue to rely almost entirely on a single GDS. Therefore, from the standpoint of airlines, different GDSs are not substitutes for each other.

22. In sum, in order to reach essential groups of travel agents, major airlines are compelled to deal with the GDS that serves those agents. They must have their flights and fares displayed in all four of the major GDSs; to ignore any one of them would be to sacrifice sales by the group of travel agents who exclusively use that GDS. And because of the importance of marginal revenues in the airline business, that is a sacrifice that neither Northwest, nor any other major airline, can afford to make.

23. As a consequence, each GDS – including Sabre – constitutes a separate market for air carriers, and each is a monopolist with market power over carriers that want to sell airline tickets through its travel agency subscribers. As the United States Department of Justice has concluded:

> "Each CRS 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 CRS. Thus, from an airline's perspective, each CRS constitutes a separate market and each system possesses market power over any carrier that wants travel agents subscribing to that CRS to sell its airline tickets."

24. Sabre has taken a variety of steps to enhance and protect its monopoly position, including insisting on long-term contracts with travel agents and building contractual incentives and disincentives to make it difficult for travel agents to leave, or to use multiple GDSs.

25. The major GDSs have exercised their monopoly power in a variety of ways. The practical and legal impediments to travel agents' ability to switch from one GDS to another or to use more than one system give GDSs, including Sabre, the ability to charge booking fees greatly in excess of levels that a competitive market would produce, with little or no need to compete for airline participants.

26. In Northwest's case, GDS booking fees have increased steadily over the last decade, even though the Internet has offered a low-cost alternative to GDS systems. Northwest now pays an average booking fee of approximately $12.50 per domestic ticket issued through a GDS. GDS booking fees constitute a significant component of Northwest's costs, totaling approximately $180,000,000 in 2003. Sabre's own charges to Northwest per net flight segment booked increased from 1994 through 2003 by almost 62%. Significantly, the dramatic increase in booking fees over the last decade has occurred at a time when other analogous electronic and data input expenses have declined or remained flat, as one would expect. This is consistent with recent Department of Transportation findings that "the systems' [GDS] fees exceed competitive levels for the reasons set forth in the notice of proposed rulemaking.... We have not seen evidence that the systems' fees generally respond to market forces ...."

27. The excessive booking fees charged by GDSs have clearly harmed consumers of airline transportation. Each year, major airlines incur hundreds of millions of dollars in monopolistically inflated booking fees, and to varying degrees, those costs have been passed on to consumers in the form of higher ticket prices.

28. The current market structure reinforces the ability of GDSs to impose

excessive costs on the traveling public through supracompetitive booking fees. GDS purchasing decisions are made by travel agencies, but the responsibility for payment for GDS service falls on the major airlines, which have no choice but to participate in every GDS. Indeed, the airlines must pay fees to GDSs even when a passenger does not use the ticket and a refund is issued. On the other hand, travel agencies typically pay nothing to use a GDS. To the contrary, they are paid by GDSs to use their systems. As the Department of Transportation has found, "[t]ravel agencies often obtain CRS services at no cost or receive bonus payments in exchange for agreeing to use a system.... [I]n 2002 fewer than half of all travel agencies paid monthly fees for system services and ... 60 percent of them received a signing bonus of some kind from the system they were using."

29. GDSs similarly feel no pressure to reduce booking fees since they do not compete for the patronage of those who pay them – the airlines – given that major airlines have no practical choice but to list their flights and fares in all of the four principal GDSs. Rather, GDSs have the opposite incentive, since they use booking fees to cement their relationships with travel agents by paying them for use of the GDS service.

30. This disconnection between the purchase decision and payment responsibility creates perversely misaligned incentives. Travel agents have no incentive to shop for the GDS with the lowest booking fees since they do not pay them. Indeed, because incentive payments that GDSs make to travel agencies are funded by booking fees, travel agencies actually have an incentive to choose a GDS with the highest booking fees. This harms consumers because supracompetitive booking fees increase the cost of air transportation. Consumers will therefore benefit from actions designed to increase

competition and reduce GDS fees.

31. For these reasons, the Antitrust Division of the Department of Justice has in the past stated its view that GDS systems should be prevented from charging booking fees to airlines, causing GDSs to charge travel agents for providing flight information and booking services, thus realigning incentives so that the parties paying for GDS services, unlike the airlines, are those in a position to choose among GDS suppliers ("zero booking fee concept"). Such a structure would introduce competition among GDSs on booking fee levels and ultimately drive booking fees down to competitive levels, to the benefit of airlines and their customers.

32. The market power of GDSs over airlines has been threatened by advances in Internet distribution of air passenger service. All of the major airlines, and most of the others, offer fares and booking services over their own web sites. And several airlines offer travel agents access to such fares to book travel for their customers through a dedicated web site. Northwest, for example, provides a dedicated web site, called WorldAgent Direct, that travel agents may use to obtain flight and fare information and to book travel on Northwest and its code share partners. Other major airlines have developed similar Internet sites. In addition, Orbitz offers a service by which travel agents may make bookings for their customers using non-GDS technology.

33. As the Department of Transportation has found, however, despite the "development of sources of airline information and booking capabilities on the Internet [that] has created additional resources that travel agents can use .... [travel agents] continue to make most of their bookings through a [GDS] system ... [because] using

alternative booking channels is less efficient for travel agents."

34. Moreover, even though customers have the ability to search for and book travel through "online" agencies, all of the major online travel agencies use a GDS for all or most of their bookings. For example, Travelocity (itself a subsidiary of defendant Sabre Holdings) uses the Sabre GDS, while Orbitz, Expedia, and Priceline all use the Worldspan GDS. Like Travelocity, other major online travel agencies, such as OneTravel.com and CheapTickets.com, are owned by or under common ownership with GDSs. Thus, even when a passenger uses one of these online agencies to book travel on Northwest, Northwest must still pay the GDS a booking fee, just as it would if the booking had been made through a "brick and mortar" travel agency.

35. Each GDS's market power over airlines such as Northwest will persist as long as travel agents continue to be locked into use of a GDS for airline bookings. Each of the alternatives to GDS distribution of information and booking capability to travel agents is in its infancy, and none has succeeded, or likely will succeed in the foreseeable future, in materially undermining GDS market power.

36. Consistent with, though more modest than, the Justice Department's "zero booking fee" concept discussed above, Northwest publicly announced a new policy on August 24, 2004, intended to reduce the burden of GDS monopoly fees on itself and its passengers by providing incentives for travel agents to use non-GDS alternatives in booking Northwest flights. Under that policy, which became effective on September 1, 2004, Northwest announced that it would bill back travel agents who booked Northwest flights through a GDS a "Shared GDS Fee" of $3.75 per one-way tickets and $7.50 per

roundtrip tickets. Northwest made clear that no such charge would be assessed for travel agent bookings made through booking services such as Northwest's WorldAgent Direct site or other third-party technologies that by-pass GDSs. Even under the new policy, Northwest would continue to absorb approximately $5.00 of the average GDS fee per round trip ticket.

37. Sabre saw Northwest's initiative as a serious threat to its monopoly power over airlines, particularly if other airlines followed suit with similar strategies of their own. It reacted swiftly and brutally. First, on the day of Northwest's announcement, Sabre publicly announced that it would bias the display of flight information in the Sabre GDS by giving the flights of other airlines more prominent visibility than Northwest's flights, even when Northwest's flights would better meet a customer's needs.

38. Second, Sabre announced that it would cut off Northwest's access to certain system data and tools enjoyed by other airline participants in the Sabre GDS.

39. Third, Sabre announced that it would withhold from Northwest a portion of certain discounts otherwise payable under Sabre's full content discount program.

40. Sabre made clear in its announcement that it would follow the same coercive course of action against any other airline participant in the Sabre direct-connect program that charged a fee for tickets issued through Sabre.

41. As it had threatened, Sabre immediately began biasing the display of flight information over the Sabre GDS in ways that disadvantaged Northwest and immediately cut off Northwest's access to system data and tools. For example, Northwest is the only airline to offer non-stop service between Minneapolis and Rapid City, South Dakota. On

the flight display, Sabre placed the non-stop Northwest flight at the end of the third display screen, behind fourteen connecting flights on other carriers. Between Minneapolis and Winnipeg, where Northwest again is the only airline to offer non-stop service, Sabre placed the non-stop Northwest flight at the end of the third display screen, behind sixteen connecting flights on other carriers. Sabre also introduced bias on all Northwest available international flights in markets where Northwest was not the only non-stop provider between two given markets. For example, between Los Angeles and Tokyo, Sabre placed Northwest's flight on the third display screen, behind fifteen flights on other carriers.

42. Display bias is a powerful tool that GDSs can use to disadvantage disfavored airlines. For example, a 1981 study by Sabre found that more than half of all Sabre sales came from the first line on the computer screen display, and almost 92% came from the first screen of displayed information. By placing Northwest flights at the end of the display list (well beyond the first screen of information), Sabre was attempting to ensure that few, if any, of its travel agent subscribers would book flights on Northwest.

43. Display bias has been condemned in harsh terms by the federal courts. In *In re Air Passenger Computer Reservations Systems Antitrust Litigation*, 694 F. Supp. 1443 (C.D. Cal. 1988), the court declared:

> "Display biasing is unreasonably restrictive of competition in that it restricts competition on the merits in the air transportation business. When consumers attempt to purchase a ticket on the best available flight their final decision is not solely based upon the merits of the particular flight (flight time, price, service, etc.). Rather, biasing artificially inflates the value of the host airline's flights by listing their flights above better flights. 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. This type of competitive advantage depends upon the perpetration of a fraud upon the consumer. It is unreasonable and therefore an unwarranted competitive advantage because it inhibits competition on the merits."

44. Display bias is not only a practice that works a fraud on consumers, it is a practice that Sabre Travel International Ltd. itself agreed not to use. On July 1, 2003, Northwest and Sabre Travel International Ltd. entered into an amendment to an agreement entitled Sabre Participating Carrier Distribution and Services Agreement ("Agreement"). As amended, the Agreement provided that Sabre would not introduce any "bias" based on carrier identity into its flight display – a promise that Sabre broke on August 24.

45. When Northwest did not withdraw its Shared GDS Fee initiative in the face of Sabre's GDS screen display bias, Sabre escalated its assault, announcing on August 26 that, effective September 1, 2004, it would begin adding the Northwest "Shared GDS Fees" into the displayed price of Northwest's fares in the shopping and pricing displays of the Sabre GDS. In other words, although those fees were charges that Northwest intended to assess against *travel agents* who booked through a GDS, Sabre decided to treat them as an across-the-board *fare* increase to Northwest's *passengers*. The consequence of this plan, which Sabre put into effect on September 1, was to bias Northwest's fares in comparison to the fares of its competitors, so that when travel agents searched for the lowest fares, Northwest's appeared to be either $3.75 or $7.50 higher than they really were.

46. Put simply, Sabre lied about Northwest's fares, in a manner calculated to

place Northwest at an even more serious competitive disadvantage. To Sabre, the fact that its travel agent subscribers might not have to pay the Shared GDS Fee at all (if they used a non-GDS technology for booking) or might not attempt to pass all of the fees on to their customers, was immaterial. It chose to treat the fee as an actual fare increase, precisely for the purpose of creating bias against Northwest's service throughout the Sabre GDS. Sabre falsely and fraudulently represented Northwest's fares to travel agents and to the public.

47. Sabre knew that Northwest's Shared GDS Fee was not a fare increase, and knew that it would not necessarily be incurred by its subscribers or passed on to consumers even if incurred. Indeed, Sabre manipulated its system so that if a travel agent actually succeeded in booking a Northwest ticket despite the roadblocks Sabre set up, the actual issued ticket would not include the fictitions fare increase.

48. Sabre did not stop with biasing its systems against Northwest flights and fares. On August 31, Sabre notified Northwest that if it did not withdraw the Shared GDS Fee initiative by midnight, Sabre would begin closing out Northwest's inventory of high-value seats on Northwest's international flights, as displayed in the Sabre GDS. When Northwest did not comply, Sabre followed through on its threat beginning on September 1, 2004. It began manipulating the data in its GDS in order to close out the availability of high-yielding business and first class travel on all of Northwest's international flights displayed in the Sabre GDS. When travel agents searched Sabre for flight information on international routes served by Northwest, the Sabre GDS showed that Northwest's business and first class cabins were full – despite the fact that ample

seats were available. Once again, Sabre simply lied to its travel agent subscribers and, through them, to the public, all in a blatant effort to pressure Northwest into abandoning its "Shared GDS Fee policy." In fact, the Shared GDS Fee policy did not even apply to international bookings. Sabre's actions were simply a bald-faced attempt to economically coerce Northwest into dropping that policy.

49. Sabre has engaged in other retaliatory and punitive actions against Northwest beyond those described in detail above, including turning off journey logic controls and refusing to pay Northwest discounts to which it was entitled under Sabre's full-content discount program.

50. In implementing its retaliatory campaign against Northwest, Sabre intended to do more than merely punish and coerce Northwest. It also sent a message to other airlines that Sabre will not tolerate actions designed to erode its monopoly power, and that any efforts by airlines to introduce more competition into the relevant market, and to wean travel agents from their single GDS dependency, will be met with a swift and harsh response. It intended to stop other carriers from matching Northwest's announcement, and thereby kill off Northwest's new policy in its infancy. Through these and other actions, Sabre succeeded, as no other airline matched Northwest's Shared GDS Fee initiative.

51. There is no doubt that the true purpose behind Sabre's actions beginning August 24 was to protect its ability to charge and recover supracompetitive booking fees and to restrain competition among GDSs and with alternative forms of distribution. It also painted a very clear picture to the entire industry about what the consequences would

be of any future efforts by carriers to liberate themselves from the burden of monopolistic booking.

52. On September 2, 2004, at 5:00 p.m., Northwest announced that it was rescinding its "Shared GDS Fee." Having accomplished its objective of bringing about Northwest's withdrawal of its initiative and deterring other airlines from matching it, Sabre advised Northwest that it was going to restore its display of Northwest's flight and fare information to the status they enjoyed prior to announcement of the Shared GDS Fee policy, *i.e.*, an unbiased display. However, Sabre continues to withhold discount payments to which Northwest was entitled for the time period during which the Shared GDS Fee policy was in effect.

53. As a result of defendants' anticompetitive conduct, absent relief from this Court, Northwest and other airlines will be forced to continue paying monopoly prices for access to GDSs, and GDSs will continue to block price competition among themselves as well as competition from on-line alternatives to GDS services provided to travel agents. And consumers will continue to foot much of the bill in the form of higher air fares.

54. Northwest has been damaged by Sabre's conduct in numerous ways, including the following: Sabre's conduct effectively prevented Northwest from successfully implementing the Shared GDS Fee policy. That policy would have enabled Northwest to reduce its booking fee charges, not only from Sabre but also from other GDSs, as travel agents moved toward non-GDS alternatives for booking Northwest flights. In addition, with respect to travel agents who continued to use GDSs, the policy would have enabled Northwest to defray at least some part of the resulting booking fees

through collection of the Shared GDS Fee from those agents. With each passing day, these elements of damages grow larger. In addition, Sabre's conduct has enabled it and the other GDSs to maintain their per segment booking fees at monopolistic levels, and Northwest is entitled to recover the resulting overcharges. Further, Sabre's manipulation of information displayed over the Sabre GDS has cost Northwest sales that it otherwise would have made through Sabre-automated travel agents. Northwest is entitled to recover these damages from Sabre, and all other losses caused by Sabre's conduct.

MARKET DEFINITION

55. The conduct described above constitutes a violation of the federal antitrust laws, specifically, Section 2 of the Sherman Act, 15 U.S.C. §2.

56. For purposes of antitrust analysis in this case, the relevant product market consists of the provision of computerized air passenger transportation flight and fare information and booking capability (hereafter referred to as "GDS services") to travel agent subscribers of the Sabre GDS. In that market, Sabre is a seller of the relevant service and Northwest is a buyer. Northwest pays for that service primarily in the booking fees that it pays to Sabre. In this market, the services provided by other GDSs are not substitutes. Sabre provides the only practical access to Sabre-automated travel agents, since the vast majority of such travel agents only use the Sabre GDS. Because they are not effective substitutes, other GDSs do not constrain the pricing power of Sabre in setting the booking fees that airlines such as Northwest must pay. The geographic scope of this market is national.

57. In the product market described above, Northwest is a competitor of Sabre,

as well as a customer. That is because Sabre provides services not only to airlines such as Northwest (providing them a vehicle for displaying their information to travel agents and permitting flight bookings), but also to its travel agency subscribers (who use the system to access that information and to make bookings). From the standpoint of travel agents, Northwest provides an alternative to the Sabre GDS. Through Northwest's own dedicated web site for travel agents, Sabre subscribers can access Northwest flight and fare information and book travel for their customers on Northwest flights. In that sense, Northwest is a competitor of Sabre.

BARRIERS TO ENTRY

58. The relevant market defined above is characterized by durable barriers to entry that protect Sabre's monopoly power. No new GDS has appeared on the scene in more than a decade; to the contrary, fewer GDSs are now available to travel agents than were available 10 years ago. More importantly, several economic barriers prevent travel agents from using more than a single GDS and prevent them from rapidly and efficiently switching GDS providers prior to the termination of multi-year contract terms. The GDSs have also erected powerful economic barriers to competition from on-line alternatives to the services GDSs provide to travel agents. In short, to obtain access to Sabre-automated agents, Northwest must, and for the foreseeable future will need to, participate in the Sabre GDS system, and pay Sabre's monopolistic booking fees.

59. Although some travel agents have indeed switched among GDSs over the years, the rate of switching has not been significant. Moreover, switching GDSs at the end of a contract term does nothing to alleviate the monopoly power of any GDS. As

long as a GDS retains a significant base of travel agent subscribers, airlines such as Northwest have no practical choice but to continue participating in that GDS's system and to continue paying the GDS's monopolistic booking fee charges. Any travel agents who switch simply become the clients of some other GDS, merely transferring some of the monopoly power of one GDS to another.

60. For reasons discussed above, at all times relevant to this complaint, and for the foreseeable future, non-GDS alternatives are not likely to induce travel agents to switch from a GDS to a non-GDS vehicle for accessing information and booking travel. Only the practical ability to switch immediately from one GDS to another, to use more than a single GDS, or to efficiently substitute on-line alternative services – none of which is possible in the current industry structure – might ultimately undermine the monopoly power of the defendant GDSs.

MONOPOLY POWER

61. For the reasons previously explained, Sabre possesses monopoly power in the market for provision of GDS services to Sabre travel agency subscribers. Sabre's share of that market approaches 100%.

ANTICOMPETITIVE CONDUCT

62. Sabre has engaged in a scheme to maintain its monopoly power through anticompetitive and exclusionary conduct. Northwest's August 24 initiative was a procompetitive policy, consistent with the Antitrust Division of the Justice Department's recommendations, designed to provide travel agents with incentives to create price competition among GDSs and to make use of non-GDS alternatives for booking travel –

whether on Northwest's own dedicated web site or through some other non-GDS mechanism. By retaliating against Northwest in the manner described in this complaint, and by publicly sending the message to all other participating carriers that they could expect to be punished in the same way, Sabre has engaged in anticompetitive and exclusionary conduct without any lawful business justification.

63. The success of Sabre's actions in fact depended on their tendency to discipline and undermine Northwest. By biasing the display of Northwest information, Sabre in fact de-valued the service it provides to its travel agent subscribers. Those subscribers could no longer rely on the accuracy of flight and fare displays in the Sabre GDS and had to engage in extra time-consuming effort to search out the best flights for their customers. Similarly, when Sabre artificially closed out the availability of high-value seats on Northwest's international flights – an action that had no conceivable connection to Northwest's Shared GDS Fee, which did not even apply to international bookings – Sabre deprived its travel agent subscribers of the opportunity to sell tickets that they might otherwise have sold, thus depriving them of commission revenues (and itself of booking fees). Absent an anticompetitive motive, a company in Sabre's position would have no legitimate reason to sacrifice short term profits and to undermine the value of its own service in these ways. The fact that it did so is itself a clear indicator of the degree of Sabre's monopoly power, and a sign of the hold it maintains over its subscriber base.

FIRST CAUSE OF ACTION

64. Northwest incorporates paragraphs 1 through 63 of this complaint by

reference.

65. Sabre has engaged in monopoly maintenance in violation of Section 2 of the Sherman Act. Sabre has willfully and wrongfully maintained and abused its monopoly power in the relevant market through the anticompetitive and exclusionary conducted described herein. Sabre's conduct has harmed competition and consumers, and it has directly and proximately caused injury to Northwest's business and property. Northwest's injury is of the type the antitrust laws are intended to prohibit and thus constitutes antitrust injury.

SECOND CAUSE OF ACTION

66. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

67. Sabre's conduct described above breached the Sabre Participating Carrier Distribution and Services Agreement between Northwest and Sabre Travel International, Ltd., as amended (the "Agreement").

68. Northwest has fully performed its obligations under the Agreement and has satisfied all conditions precedents to enforcement of the Agreement.

69. Sabre's breach of contract has caused damage to Northwest in an amount in excess of $75,000.

THIRD CAUSE OF ACTION

70. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

71. Northwest possessed prospective contractual relations with air travel customers who, but for Sabre's conduct, would have purchased tickets for air travel on Northwest flights.

72. Sabre's conduct described above interfered with the air travel customers' prospective contractual relations with Northwest, by inducing or otherwise causing air travel customers not to enter into contractual relations with Northwest for air travel, and/or by preventing Northwest from acquiring or continuing the prospective contractual relations.

73. Sabre's conduct described above was intentional and improper, and employed wrongful means in order to cause the interference.

74. Sabre's conduct described above creates and continues an unlawful restraint of trade, and/or has as its purpose eliminating competition.

75. Sabre's interference with Northwest's prospective contractual relations has caused damage to Northwest in an amount in excess of $75,000.

FOURTH CAUSE OF ACTION

76. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

77. Sabre's conduct described above was undertaken in the course of Sabre's business.

78. Sabre's conduct described above constitutes a deceptive trade practice within the meaning of Minn. Stat. § 325D.44 in that, without limitation, Sabre disparaged the services and business of Northwest by false or misleading representations of fact.

79. Sabre's conduct described above has caused damage to Northwest in an amount in excess of $75,000, including without limitation costs of investigation and reasonable attorney's fees.

FIFTH CAUSE OF ACTION

80. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

81. Sabre's conduct described above constituted the use of fraud, false pretense, misrepresentation, misleading statements and/or deceptive practices within the meaning of Minn. Stat. § 325F.69.

82. Sabre's conduct described above was undertaken with the intent that Sabre's subscribers and air travel customers rely upon such conduct and information in connection with the sale of merchandise -- to wit, airline travel. Upon information and belief, Sabre's conduct had the intended effect, in that Sabre's subscribers and air travel customers relied upon the false information provided by Sabre to their and Northwest's detriment.

83. Sabre's conduct described above constitutes a violation of Minn. Stat. § 325F.69.

84. Sabre's conduct described above has caused damage to Northwest in an amount in excess of $75,000, including without limitation costs of investigation and reasonable attorney's fees.

SIXTH CAUSE OF ACTION

85. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

86. Sabre's conduct described above constituted false advertising and/or promotion within the meaning of 15 U.S.C. § 1125(a).

87. Sabre's conduct described above was undertaken in the course of Sabre's business in a manner affecting interstate commerce. By using its Global Distribution System to reach all Sabre GDS subscribing travel agents, Sabre undertook an organized campaign to make misrepresentations and false representations and descriptions of fact regarding Northwest and its products and services. Through its GDS, Sabre misrepresented the availability of international First and Business class seats on Northwest flights, misrepresented the fare for Northwest's flights by adding a $3.75 or $7.50 surcharge to its GDS display, and misrepresented the nature and availability of Northwest flights that would best suit a consumer's travel needs by biasing Northwest flights as described herein.

88. Sabre's false and misleading representations were made willfully and intentionally.

89. Sabre's conduct described above constitutes a violation of 15 U.S.C. § 1125(a).

90. Sabre's conduct described above has caused damage and is likely to cause damage to Northwest in an amount in excess of $75,000, which Northwest is entitled to recover, together with enhanced damages and attorneys fees under the Lanham Act.

SEVENTH CAUSE OF ACTION

91. Northwest incorporates paragraphs 1 through 63 of this complaint by reference.

92. In its August 24, 2004 press release, Sabre accused Northwest of breaching the Agreement with Sabre by imposing new and hidden fares on all domestic tickets issued through travel agencies using a GDS. Sabre's claim of breach is false.

93. Northwest is entitled to a declaratory judgment that by the acts and omissions alleged herein, Sabre breached the Agreement and that Northwest has not breached the Agreement.

JURY DEMAND

94. Northwest demands a trial by jury of all issues triable of right by a jury.

RELIEF REQUESTED

95. Northwest requests that the Court declare that the conduct of Sabre specified in this complaint violates Section 2 of the Sherman Act, the Lanham Act, and the Minnesota statutes pursuant to which Northwest has brought its claims.

96. Northwest further requests that the Court issue a permanent injunction forbidding Sabre from threatening or implementing the biasing of any airline's flight or fare information, and from engaging in any other punitive or retaliatory conduct against Northwest.

97. Northwest further requests that the Court issue such other permanent injunctive relief, as the Court deems appropriate, designed to create market conditions

capable of dissipating Sabre's unlawfully maintained monopoly power.

98. Northwest requests that, pursuant to its antitrust causes of action, the Court award it damages against Sabre in an amount to be proven at trial, trebled as permitted under the antitrust laws, as well as interest on the award at the highest lawful rate, together with Northwest's attorneys fees and costs.

99. Northwest further requests that the Court award it damages against Sabre pursuant to its additional causes of action, in an amount not less than $75,000.00, together with enhanced damages where permitted by law and amounts for Northwest's costs of investigation, reasonable attorneys fees, and costs of suit, and all other such amounts and relief as the Court finds equitable and just.

100. Northwest further requests that the Court declare that Sabre has breached the Agreement and that Northwest has not breached it.

101. Northwest also requests such other relief as the Court may deem just and proper.

September 27, 2004

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Attorneys for Plaintiff Northwest Airlines Incorporated, a Minnesota Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2004, I caused the following documents:

- First Amended Complaint

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

- **Craig S Coleman**
  ccoleman@faegre.com kdraves@faegre.com
- **Richard A Duncan**
  rduncan@faegre.com lhonse@faegre.com;rcox@faegre.com
- **Thomas B Mayhew**
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- **Frank J Riebli**
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- **Roderick M Thompson**
  rthompson@fbm.com

I further certify that I caused a copy of the foregoing documents and the notice of electronic filing to be mailed by first class mail, postage paid, to the following non-ECF participants:

None

Dated: September 27, 2004

s/Renee P. Christensen
Renee P. Christensen

PREFERRED FARES AMENDMENT

This Preferred Fares Amendment, dated as of July 05, 2006 (the "Amendment"), is made by and between American Airlines, Inc., a Delaware company ("American"), and Galileo International, L.L.C., a Delaware limited liability company, and Galileo Nederland, B.V., a company organized under the laws of the Netherlands (collectively, with Galileo International, L.L.C., "Galileo").

IN WITNESS WHEREOF, each of the Parties has caused this Amendment to be executed by its duly authorized representative as of the Agreement Date.

GALILEO INTERNATIONAL BY:

Galileo International, L.L.C.

Signed: ______________________

Name: Kurt J. Ekert

Title: SVP Supplier Services

Galileo Nederland, B.V.

Signed: ______________________

Name: M. van IJeperen

Title: Director

AMERICAN AIRLINES, INC. BY:

Signed: ______________________

Name: David Cush

Title: SVP Global Sales

Analysis
As of: May 24, 2011

RX.COM, Plaintiff - Appellant v. MEDCO HEALTH SOLUTIONS, INC.; CAREMARK RX INC.; EXPRESS SCRIPTS, INC., Defendants - Appellees

No. 08-40388

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

322 Fed. Appx. 394; 2009 U.S. App. LEXIS 8469

April 22, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Rx, 2009 U.S. LEXIS 7774 (U.S., Nov. 2, 2009)

PRIOR HISTORY: **[**1]**

Appeal from the United States District Court for the Eastern District of Texas. USDC No. 5:04-CV-227.

COUNSEL: For RX.COM, Plaintiff - Appellant: Patrick Lamont Hughes, Alene Ross Levy, Lynne Liberato, Haynes & Boone, Houston, TX; William Shawn Staples, The O'Quinn Law Firm, Houston, TX.

For MEDCO HEALTH SOLUTIONS INC, Defendant - Appellee: Robert K. Stanley, Ryan Michael Hurley, Baker & Daniels, Indianapolis, IN; John David Crisp, Crips, Boyd, Poff & Burgess, Texarkana, TX.

For CAREMARK RX INC, Defendant - Appellee: Michael Sennett, Paula W. Render, Jones Day, Chicago, IL.

For EXPRESS SCRIPTS INC, Defendant - Appellee: Joseph Franklin Wayland, Jayma Marie Meyer, Simpson Thacher & Bartlett LLP, New York, NY.

JUDGES: Before GARWOOD, OWEN, and HAYNES, Circuit Judges.

OPINION BY: HAYNES

OPINION

[*395] HAYNES, Circuit Judge: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff Rx.com brought this lawsuit alleging that the pharmacy benefit managers, **[*396]** Caremark RX, Inc. ("Caremark"), Medco Health Solutions, Inc. ("Medco"), and Express Scripts, Inc. ("Express Scripts") (collectively "Defendants") **[**2]** suppressed

competition by "refusal to deal" and "denying them access to their networks unless upside was shared, and otherwise acting in concert with one another" to frustrate competition. Rx.com asserted claims for: (1) agreement in restraint of trade in violation of section 1 of the Sherman Act; (2) conspiracy to monopolize in violation of section 2 of the Sherman Act; and (3) attempted monopolization in violation of section 2 of the Sherman Act. The district court granted summary judgment to Defendants. Because we find that the statute of limitations bars these claims, we AFFIRM.

I. Background

Defendants are pharmacy benefit managers ("PBMs"), which are third party administrators of prescription drug programs for health insurance plans, employers, unions, governmental entities, and others. From December 1998 to June 1999, Defendants discussed among themselves the threat to their business of internet pharmacies. There is some evidence that Defendants collectively decided to exclude all internet pharmacies from access to their networks to prevent the internet pharmacies from competing with Defendants' direct mail businesses.

Rx.com applied for admission into each of the Defendants' networks. **[**3]** Those requests were denied as follows: (1) by Caremark, on February 14, 2000; (2) by Medco, first on October 26, 1999 and then on February 15, 2000; and (3) by Express Scripts in February of 2000. This lawsuit was filed on October 8, 2004. Thus, unless some ground exists for tolling the statute of limitation or beginning accrual of the causes of action later than February 2000, these claims are time-barred. 15 U.S.C. § 15b (2006). Rx.com contends that limitations does not bar its claims for the following reasons: (1) the claims did not accrue until some time after October 2000, when the injury was discoverable; (2) Defendants committed "continuing violations" through 2001; (3) Defendants' fraudulent concealment tolls limitations; and (4) the limitations period should be equitably tolled for the period of time when Rx.com lacked officers and directors.

II. Standard of Review

This court reviews a district court's grant of summary judgment de novo, applying the same standard as the district court. *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 354 (5th Cir. 2008). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that **[**4]** there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. Discussion

A. Accrual

The United States Code provides that "[a]ny action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). "[I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date . . ." *Id.* at 339.

The district court held that Rx.com's antitrust claims accrued in February 2000, **[*397]** by which time its internet pharmacy had been refused admission by each Defendant. Rx.com insists, however, that its claims did not accrue until it became aware of circumstances which, in the exercise of reasonable diligence, would lead to the discovery of facts that would allow it to file suit; Defendants **[**5]** argue that the limitations clock began to run when Rx.com had knowledge of its injury.

The United States Supreme Court answered this question in *Rotella v. Wood,* 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000), stating, "in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." Applying *Rotella* to the present case, the injury of which Rx.com complains is exclusion from the market by Defendants, a fact known to it in February 2000 when its application to enter into the Defendants' networks had been denied. On February 29, 2000, Rx.com complained in writing to the FTC that "2/3 of the requests from our prospective customers have to be turned away because certain PBM's refuse to allow Rx.com into their networks." Joseph Rosson, co-founder and CEO of Rx.com, testified in an unrelated case that he always believed that what the Defendants were doing was illegal. Even though Rx.com may not have known all the details of the Defendants'

concerted conduct, it knew it was injured, suspected illegality, and had sufficient knowledge to complain to the FTC. Under *Rotella,* then, the clock began to run in **[**6]** February of 2000.

B. Continuing Violations

Rx.com asserts that even if some of its claims accrued in February of 2000, Defendants' continuing violations of the antitrust laws tolled limitations. Defendants assert that there was no continuing violation, and that in any event, they only reiterated their final decisions to exclude Rx.com from their networks.

Under the continuing conspiracy theory, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . the statute of limitations runs from the commission of the act." *Zenith,* 401 U.S. at 338; *see also Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1051 (5th Cir. 1982); *Poster Exch. v. Nat'l Screen Serv. Corp.,* 517 F.2d 117, 125 (5th Cir. 1975). Rx.com failed to offer evidence of "a specific act or word of refusal during the limitations period." *Poster Exch.,* 517 F.2d at 129. In other words, Rx.com failed to offer evidence that Defendants reiterated their refusals to admit Rx.com to their networks during the limitations period. Thus, Rx.com failed to raise a fact issue on its "continuing violations" claim sufficient to **[**7]** defeat the limitations defense.

C. Fraudulent Concealment

Rx.com contends that Defendants fraudulently concealed its causes of action. In order to avoid summary judgment, Rx.com was required to raise a fact issue as to two elements: "first, that the defendants concealed the conduct complained of, and second, that the plaintiff failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim." *Texas v. Allan Constr. Co.,* 851 F.2d 1526, 1528 (5th Cir. 1988) (internal quotation and citation omitted). To satisfy the first element, the defendants must have engaged in "affirmative acts of concealment." *Id.* at 1531. In the present case, Rx.com argues that the secret communications between the Defendants while they each claimed they were making unilateral decisions and publicly stated they **[*398]** were horizontal competitors constitute fraudulent concealment.

However, "[c]oncealment by defendant only by silence is not enough. [The defendant] must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry." *Allan Constr.,* 851 F.2d at 1532 (quoting *Crummer Co. v. Du Pont,* 255 F.2d 425, 432 (5th Cir. 1958) (alteration in original)). **[**8]** Similarly, "denial of wrongdoing is no more an act of concealment than is silence" unless "the parties are in a fiduciary relationship, or where the circumstances indicate that it was reasonable for the plaintiff to rely on defendant's denial." *Id.* at 1532-33. Here, there is no such affirmative act of concealment on the part of the Defendants.

D. Equitable Tolling

The issue of equitable tolling is subject to differing standards of review depending on the basis of the district court's decision. If the district court denied equitable tolling as a matter of law, this court's review is de novo. *FDIC v. Dawson,* 4 F.3d 1303, 1308 (5th Cir. 1993). Alternatively, a denial that stems from the district court's weighing of the equities is reviewed for abuse of discretion. *Teemac v. Henderson,* 298 F.3d 452, 456 (5th Cir. 2002) (reviewing district court's refusal to toll Title VII limitations period on motion to dismiss for abuse of discretion); *United States v. Patterson,* 211 F.3d 927, 931 (5th Cir. 2000) (reviewing district court's refusal to toll Anti-Terrorism and Effective Death Penalty Act limitations period on motion to dismiss for abuse of discretion); *Fisher v. Johnson,* 174 F.3d 710, 713 (5th Cir. 1999) **[**9]** (explaining that district court's discretionary refusal to toll limitations should be reviewed for abuse of discretion, even where made on the pleadings). "A district court abuses its discretion when it bases its decision on an erroneous legal conclusion or on a clearly erroneous finding of fact." *James v. Cain,* 56 F.3d 662, 665 (5th Cir. 1995) (citing *McGary v. Scott,* 27 F.3d 181, 183 (5th Cir. 1994)).

In the case before us, the district court exercised discretion in not equitably tolling Rx.com's claims. The district court stated in its order: "[T]he Court finds that Plaintiff should be charged with the duty to pursue its claims. Since a derivative cause of action was always available to Mr. Rosson or other shareholders, the Court concludes that this does not constitute the 'rare and exceptional circumstances' that would equitably toll the statute of limitations."

We have stated that "'[t]he doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be

inequitable.'" *Patterson,* 211 F.3d at 930 (quoting *Davis v. Johnson,* 158 F.3d 806, 810 (5th Cir. 1998)). "'Equitable tolling applies principally where the plaintiff is actively **[**10]** misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.'" *Id.* at 930-31 (quoting *Coleman v. Johnson,* 184 F.3d 398, 402 (5th Cir. 1999)).

All of the officers and directors of Rx.com resigned in May 2001, and Rx.com did not regain officers and directors until April 2004. Rx.com asserts that the resignation of its officers and directors was an exceptional circumstance warranting equitable tolling, but fails to cite any authority on point. Rather, Rx.com relies on cases discussing the adverse domination rule, which tolls limitations when the board is controlled by those culpably involved in the wrongful conduct on which the action is based. *See FDIC v. Henderson,* 61 F.3d 421, 425-26 (5th Cir. 1995). In this case, by contrast, there was no obstacle preventing a shareholder from protecting Rx.com's rights. Rosson, former CEO and co-founder of Rx.com, or any other shareholder, could have called a special meeting **[*399]** to appoint a new board of directors after the resignations of May 2001. *See* DEL. CODE ANN. tit. 8, § 223(a) (2002) (providing that when a corporation does not have any directors because of death, resignation, or any other **[**11]** cause, any shareholder may call a special meeting for the purposes of electing new directors). Alternatively, Rosson or another shareholder could have brought a derivative suit on Rx.com's behalf. *See Elf Atochem N. Am., Inc. v. Jaffari,* 727 A.2d 286, 293-94 (Del. 1999). [1] In fact, Rosson, who by early 2000 already thought Defendants were acting unlawfully in denying Rx.com access to their networks, did bring a shareholder's derivative lawsuit claim alleging a third party caused Rx.com's demise. Accordingly, we find that the district court did not abuse its discretion when it refused to equitably toll the statute of limitations.

1 Rx.com also contends that, during a period of time, it was under a court-appointed receivership. Rx.com suggests that the pendency of the receivership is another reason supporting equitable tolling. It argues that the court order appointing the receiver did not specifically authorize the bringing of this type of litigation. However, the receiver in question was specifically appointed "pursuant to the applicable provisions of the . . . Texas Civil Practice and Remedies Code." The "applicable provision" allows a receiver to pursue litigation without court approval. **[**12]** TEX. CIV. PRAC. & REM. CODE § 64.033 (Vernon 2008). Also, Rx.com has not brought forth any facts suggesting that, even if court approval to pursue litigation were required, the receiver could not have sought and obtained such approval.

IV. Conclusion

For the foregoing reasons, we AFFIRM the summary judgment of the district court.

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.

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

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: plaintiffs 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

Analysis
As of: May 24, 2011

GLOBESPANVIRATA, INC., Plaintiff, v. TEXAS INSTRUMENT, INC., THE LELAND STANFORD JUNIOR UNIVERSITY and its BOARD OF TRUSTEES, and STANFORD UNIVERSITY OTL, LLC, Defendants.

Civ. No. 03-2854 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 8860; 2006-1 Trade Cas. (CCH) P75,229

March 3, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

PRIOR HISTORY: Globespanvirata, Inc. v. Tex. Instrument, Inc., 2006 U.S. Dist. LEXIS 242 (D.N.J., Jan. 3, 2006)

COUNSEL: For GLOBESPANVIRATA, INC, Plaintiff: WILLIAM B. MCGUIRE, MICHAEL SCOTT MILLER, BRIAN M. ENGLISH, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

For TEXAS INSTRUMENTS, INC., LELAND STANFORD JUNIOR UNIVERSITY, BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, STANFORD UNIVERSITY OTL, LLC, Defendants: LIZA M. WALSH, AGNIESZKA ANTONIAN, CONNELL FOLEY LLP, ROSELAND, NJ; ROBERT A. ROSENFELD, DAVID M. GOLDSTEIN, DAVID E. JONES, RIMA J. ALAILY, BRENDAN T. MANGAN, JOHN A. JURATA, JR., APPEARING PRO HAC VICE, HELLER EHRMAN, LLP, MENLO PARK, CA.

For TEXAS INSTRUMENTS, INC., LELAND STANFORD JUNIOR UNIVERSITY, THE, BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, STANFORD UNIVERSITY OTL, LLC, Counter Claimants: LIZA M. WALSH, AGNIESZKA ANTONIAN, CONNELL FOLEY LLP, ROSELAND, NJ.

For GLOBESPANVIRATA, INC, Counter Defendant: BRIAN M. ENGLISH, MICHAEL SCOTT MILLER, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

For CONEXANT SYSTEMS, INC., Counter Defendant: BRIAN M. ENGLISH, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

JUDGES: GARRETT E. BROWN, JR., U.S.D.J.

OPINION BY: GARRETT E. BROWN, JR.

OPINION

BROWN, District Judge

This matter comes before the Court upon Defendants

Texas Instruments, Inc., The Leland Stanford Junior University and its Board of Trustees, and Stanford [*2] University OTL, LLC's (collectively "Defendants") motion to dismiss, with prejudice, Counts in, V, VI and VII, and the *per se* tying claims in Counts I and II, in plaintiff Globespanvirata, Inc.'s ("Plaintiff") Second Amended Complaint ("SAC"). The Court, having considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rules of Civil Procedure Rule 78, and for the reasons set forth below, will grant Defendants' motion in its entirety.

I. BACKGROUND

Plaintiff is a corporation in the business of providing integrated circuits, software and system designs for Digital Subscriber Line ("DSL") applications. (SAC P9.) Plaintiff alleges that Defendants own numerous patents related to Asymmetric Digital Subscriber Line ("ADSL") technology, which technology enables high-speed telecommunication services to be provided over ordinary telephone lines. (*Id.* P2.) Included among those patents are ones that are necessary for manufacturing products that comply with certain national and international ADSL standards. (*Id.*) According to Plaintiff, only standards-compliant ADSL products are commercially [*3] viable. (*Id.*)

On June 12, 2003, Plaintiff brought suit against Defendants for their alleged antitrust violations in various ADSL-related markets. Plaintiff filed its First Amended Complaint ("FAC") on July 6, 2004. On July 30, 2004, Defendants filed their Answer to the FAC and asserted counterclaims against Plaintiff for its alleged patent infringement.

On June 24, 2005, Defendants moved to dismiss Counts III, V, VI and VII of the FAC. On September 12, 2005, the Court granted Defendants' motion and allowed Plaintiff to amend the FAC with respect to the dismissed counts. On September 26, 2005, Plaintiff filed the SAC.

On October 11, 2005, Defendants moved to dismiss Counts III, V, VI and VII, as well as the *per se* tying claims in Counts I and II, of the SAC. In Counts I and II, Plaintiff alleges that Defendants violated Section 1 of the Sherman Act through conduct that was unlawful both *per se* and under the "rule of reason." (SAC PP101, 105, 115, 122.) With respect to the *per se* tying claims in Counts I and II, Plaintiff alleges that Defendants unlawfully agreed to pool and/or tie patents for ADSL Standards Technology with those for ADSL Non-Standards Technology. [*4] (*Id.* PP101-16, 122-28.)

In addition, Plaintiff alleges in Counts III, V, VI and VII that Defendants violated Section 2 of the Sherman Act based on their alleged monopolization, conspiracy to monopolize and/or attempts to monopolize various ADSL-related markets. Specifically: (1) Count III alleges that Defendants monopolized or conspired to monopolize the market for ADSL Non-Standards Technology; (2) Count V alleges that Defendants monopolized or conspired to monopolize the market for ADSL Technology; (3) Count VI alleges that Defendants attempted to monopolize the market for ADSL Technology; and (4) Count VII alleges that Defendants attempted to or conspired to monopolize the market for ADSL Systems. Each of these counts are based on allegations that Defendants used their alleged monopoly power with respect to ADSL Standards Technology to establish monopoly power in the relevant markets. (SAC PP131-33, 146-48, 153-55, 160-62.)

In managing this case, the Court bifurcated Plaintiff's antitrust claims and Defendants' patent infringement counterclaims, staying the antitrust phase of the litigation until the infringement claims were resolved. Trial of the patent infringement counterclaims [*5] began on January 4, 2006. On February 6, 2006, the jury returned a verdict in favor of Defendants with respect to their counterclaims. Having resolved the patent infringement portion of this case, the Court will now address Defendants' motion to dismiss.

II. DISCUSSION

A. Standard of Review for Motions to Dismiss

In considering a Rule 12(b)(6) motion to dismiss, this Court "must accept all well pleaded allegations in the complaint as true and view them in the light most favorable to plaintiff." *Angelastro v. Prudential-Bache Sec., Inc.,* 764 F.2d 939, 944 (3d Cir.), *cert. denied,* 474 U.S. 935, 106 S. Ct. 267, 88 L. Ed. 2d 274 (1985). *See also Langford v. City of Atl. City,* 235 F.3d 845, 847 (3d Cir. 2000); *Oran v. Stafford,* 226 F.3d 275, 279 (3d Cir. 2000); *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir. 1996). The Court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (3d Cir. 1998);

Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998); **[*6]** *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994); *Markowitz v. Ne. Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

With respect to antitrust claims, "facts must be pleaded with reasonable particularity . . . in order to permit an inference that a Federal antitrust claim is cognizable." *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999). "It is not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). The trial court has "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 528 n.17.

B. Plaintiff's Allegations of Monopoly Power for Counts III, V, VI and VII

Defendants argue that Counts III, V, VI and VII of the SAC should be dismissed because Plaintiff has failed to allege specific facts showing that Defendants had monopoly **[*7]** power, or a dangerous probability of achieving it, in the relevant markets. In particular, they point to Plaintiff's failure to allege Defendants' share of those markets. For purposes of this motion, the relevant markets are the markets for: (1) ADSL Non-Standards Technology (Count III); (2) ADSL Technology (Counts V and VI); and (3) ADSL Systems (Count VII).

In response, Plaintiff argues that market share is only one method by which it may prove that Defendants possess monopoly power, and that its allegations support a claim that Defendants possessed such power. Specifically, Plaintiff has alleged that for each of the disputed counts, Defendants had monopoly power, or a dangerous probability of achieving it, as a result of their alleged control of ADSL Standards Technology. (Pl.'s Opp. Br. at 5 ("the starting point for Defendants' monopoly power in all of the relevant markets is their ownership of patents alleged to be essential for compliance with the ADSL Standards and their resulting monopoly power in the ADSL Standards-Compliant Technology market").) The Court will consider whether the facts alleged in the SAC are sufficient to state a claim with respect to each of the disputed **[*8]** counts.

1. Requirements for Section 2 Claims

Plaintiff claims that Defendants violated Section 2 of the Sherman Act by monopolizing, conspiring to monopolize and/or attempting to monopolize various markets for ADSL technology and products. To state a claim pursuant to Section 2, a plaintiff must allege that the defendant enjoys monopoly power in the relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). For a claim of either attempted monopolization or conspiracy to monopolize, a plaintiff must allege that the defendant has a dangerous probability of achieving monopoly power. *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 141 (3d Cir. 1998) (citing *Schuylkill Energy Res. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 413 (3d Cir. 1997)); *Urdinaran v. Aarons*, 115 F. Supp. 2d 484, 491 (D.N.J. 2000). To adequately state its claims, then, Plaintiff must allege facts showing that Defendants either have monopoly power or a dangerous probability of achieving it with respect to the relevant markets.

a. Proof of a Defendant's Monopoly Power

The Supreme **[*9]** Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). "The size of market share is a primary determinant of whether monopoly power exists . . . ." *Pennsylvania Dental Ass'n v. Med. Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 260 (3d Cir. 1984). *See also Gordon v. Lewistown Hosp.*, 423 F.3d 184, 211-12 (3d Cir. 2005) ("Once the markets are defined, we must determine whether [the defendant]'s market share is sufficient to infer the existence of market power"). Other factors are also relevant in considering whether a defendant has monopoly power. "A predominant share of the market, or a lesser market share combined with other relevant factors, may suffice to demonstrate monopoly power." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992). *See also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("[a] less than predominant share of the market combined with other relevant factors may suffice to demonstrate monopoly power"). Such factors include: the **[*10]** size and strength of competing firms; freedom of entry into the field; pricing trends and practices in the industry; the ability of consumers to substitute comparable goods or

services from outside the market; and consumer demand. *Fineman,* 980 F.2d at 202. *See also Allen-Myland, Inc. v. Int'l Bus. Machines Corp.,* 33 F.3d 194, 209 (3d Cir. 1994).

b. Proof of a Dangerous Probability of Achieving Monopoly Power

As with proving a defendant's monopoly power, a defendant's market share is the "most significant" factor in proving a dangerous probability of achieving monopoly power. *Pastore v. Bell Tel. Co. of Pennsylvania,* 24 F.3d 508, 513 (3d Cir. 1994). But similarly, "although the size of a defendant's market share is a significant determinant of whether a defendant has a dangerous probability of successfully monopolizing the relevant market, it is not exclusive." *Barr Laboratories, Inc. v. Abbott Laboratories,* 978 F.2d 98, 112 (3d Cir. 1992). "Factors to be reviewed 'include the strength of the competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity **[*11]** of consumer demand.'" *Pastore,* 24 F.3d at 513 (quoting *Barr Labs.,* 978 F.2d at 112).

2. Plaintiff Has Failed to State a Claim With Respect to Counts III, V, VI and VII

The Court finds that Plaintiff has failed to state a claim with respect to Counts III, V, VI and VII. Allegations concerning a defendant's share of the relevant market are highly significant, and Plaintiff has failed to make such allegations for each of the disputed counts. While other factors are also relevant, they are typically considered alongside facts concerning market share, not in lieu of such facts. Although Plaintiff cites a number of cases acknowledging the relevance of factors other than market share, in none of those cases did the court find that the plaintiff sufficiently stated a claim in the absence of allegations concerning market share. *See Allen-Myland,* 33 F.3d at 201-09 (discussing the defendant's market share in determining whether it had monopoly power); *Barr Labs.,* 978 F.2d at 112-13 (discussing the defendant's market share in determining whether it had a dangerous probability of achieving monopoly power); *Brunson Commc'ns, Inc. v. Arbitron, Inc.,* 239 F. Supp. 2d 550, 569-73 (E.D. Pa. 2002) **[*12]** (dismissing plaintiff's Section 2 claim for failure to allege sufficient facts showing defendant's monopoly power); *World Arrow Tourism Enters., Ltd. v. Trans World Airlines,* 582 F. Supp. 808, 811-12 (S.D.N.Y. 1984) (same).

Plaintiff argues that allegations concerning market share are inappropriate in this case because "technology markets . . . are not readily susceptible to market share calculations in the same manner applicable to markets for traditional goods . . . ." (Pl.'s Opp. Br. at 15.) Plaintiff, however, has not even attempted to make such calculations, difficult or qualified though such calculations may be. Nor has Plaintiff provided support for its assertion that the technology market is not susceptible to such calculations.

Moreover, to the extent that a plaintiff could in theory prove monopoly power without alleging market share, Plaintiff fails to state a claim in the disputed counts because it fails to adequately allege facts even with respect to the other relevant factors. *See Fineman,* 980 F.2d at 202. The Court will discuss Plaintiff's failure with respect to each of the relevant markets.

a. Market for ADSL Non-Standards Technology [*13] (Count III)

Plaintiff defines the ADSL Non-Standards Technology market as the market for "features of ADSL Systems that are not essential for compliance with the ADSL Standards but provide functions and capabilities that enhance the efficiency, value, attractiveness or operability of such systems." (SAC P90.) According to the SAC, "Defendants' requirement that licensees of their ADSL Standards-compliant Technology also purchase a license to Defendants' ADSL non-Standards Technology forecloses the majority, if not all, of the potential competition for the licensing of ADSL non-Standards Technology . . . ." (SAC P133.)

Plaintiff fails to allege facts showing Defendants have monopoly power in the ADSL Non-Standards Technology market. Instead, it focuses on Defendants' alleged conduct. According to the SAC, Defendants have monopoly power in the market for ADSL Standards Technology and required licensees of that technology to also license ADSL Non-Standards Technology. (SAC PP131-33.) There are no factual allegations, however, concerning the degree of control enjoyed by Defendants in the ADSL Non-Standards Technology market as a result of their alleged conduct.

In particular, Plaintiff **[*14]** has not alleged Defendants' market share, a significant factor in

establishing monopoly power. Nor has Plaintiff adequately alleged facts concerning other relevant factors, including: the size and strength of firms competing in the ADSL Non-Standards Technology market; the pricing trends and practices in that market; the ability of licensees to substitute Defendants' ADSL Non-Standards Technology with other technology; and the nature of licensees' demand for such technology. *See Fineman,* 980 F.2d at 202. Although Plaintiff has alleged that Defendants' ownership of ADSL Standards Technology serves as a barrier to entry for competitors in the ADSL Non-Standards Technology market, it does so in a conclusory manner -- the allegations do not indicate the extent to which Defendants' alleged conduct may have impeded competition. (*See* SAC P132-33.) Thus, even assuming the truth of Plaintiff's allegations concerning Defendants' conduct, Plaintiff has not alleged facts showing that Defendants had monopoly power, or a dangerous probability of achieving it, with respect to the ADSL Non-Standards Technology market.

b. Market for ADSL Technology (Counts V and VI)

Counts **[*15]** V and VI concern the market for ADSL Technology as a whole, which technology consists of both ADSL Standards Technology and ADSL Non-Standards Technology. (*See* SAC P91 ("[a] broader relevant market for ADSL Technology as a whole also exists, which includes both the market for ADSL Standards-compliant Technology and the market for ADSL non-Standards Technology").) Again, Plaintiff's claim here rests on its allegations that Defendants exclusively owned the patents for ADSL Standards Technology. Specifically, Plaintiff alleges that "Defendants were able to obtain monopoly power in the ADSL Technology market because any actual or potential licensee of ADSL Technology invariably will require a license to Defendants' ADSL Standards-compliant Technology." (SAC P148.)

Plaintiff has failed to allege sufficient facts concerning Defendants' monopoly power in the ADSL Technology market. As with Count III, Plaintiff's claims in Counts V and VI are based on allegations concerning Defendants' conduct. Plaintiff fails to allege any facts showing Defendants' market share in the ADSL Technology market. It has also failed to allege facts describing the characteristics of the competitors, customers **[*16]** and pricing practices of that market. Although Plaintiff alleges that Defendants' conduct resulted in barriers to entry for potential competitors, it has done so in a conclusory manner. (*See* SAC PP147-48, 154-55.) Plaintiff has therefore failed to allege sufficient facts showing that Defendants had monopoly power, or a dangerous probability of achieving it, in the ADSL Technology market.

c. Market for ADSL Systems (Count VII)

Count VII concerns the market for ADSL Systems. Plaintiff alleges that "access to Defendants' technology is a prerequisite to entering the market for ADSL Systems," and that by controlling "an essential input for the production of ADSL Systems[,]" Defendants have "the power to exclude new entrants and/or raise the costs of competing producers . . . ." (SAC P162.)

Plaintiff fails to allege sufficient facts to state its claim. As with the previous counts, Plaintiff's claim is based on Defendants' alleged monopoly power in the ADSL Standards Technology market. (*See* SAC PP161-62.) Plaintiff does not, however, allege specific facts concerning Defendants' monopoly power in the ADSL Systems market. For example, it has not alleged facts showing the **[*17]** extent to which Defendants control the market for ADSL Systems relative to other competitors, whether by market share or otherwise. Nor has it, for example, alleged the degree to which Defendants' conduct has excluded competitors or raised the prices for ADSL Systems for consumers of such systems. Its allegations that Defendants' conduct created barriers to entry for competitors are, again, conclusory. (*See* SAC P161-62.)

Taken as true, Plaintiff's allegations show that Defendants had an advantage in the ADSL Systems market as a result of their ownership of patents for ADSL Standards Technology. They do not show, however, that Defendants have monopoly power, or a dangerous probability of achieving it, in the ADSL Systems market. Plaintiff has therefore failed to state a claim with respect to Count VII.

C. Plaintiff's *Per Se* Tying Claim in Counts I and II

Defendants also seek dismissal of the Plaintiff's *per se* tying claims in Counts I and II of the SAC. Both counts are based on Section 1 of the Sherman Act. Count I alleges unlawful conspiracy in restraint of trade, and

Count II alleges unlawful tying. For both counts, Plaintiff claims that Defendants' alleged conduct [*18] was unlawful both *per se* and under the "rule of reason." (SAC PP101, 105, 115, 122.) For the reasons below, the Court finds that the *per se* tying claims in Counts I and II should be dismissed.

1. Certain Tying Arrangements Constitute *Per Se* Violations of the Sherman Act

Certain tying arrangements are *per se* unlawful. "Where (1) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected, then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). The Supreme Court has stated that "application of the *per se* rule focuses on the probability of anticompetitive consequences." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). "The character of the restraint produced by [a prohibited *per se* tying arrangement] is considered a sufficient basis for presuming unreasonableness [*19] without the necessity of any analysis of the market context in which the arrangement may be found." *Id.* at 9. *See also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7-8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) ("certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases") (citations omitted).

2. The *Per Se* Rule Does Not Apply Where a License for a Patent Necessary to Comply with a Standard Is Tied with Related Non-Essential Licenses

In *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179 (Fed. Cir. 2005), the Federal Circuit Court of Appeals considered whether the *per se* rule applied in cases where a seller ties a license for technology necessary for practicing a standard with licenses for related nonessential technology. In that case, Philips appealed a decision by the United States International Trade Commission ("Commission") that a number of Philips's patents were unenforceable because of patent misuse. *Philips*, 424 F.3d at 1182. [*20] Philips owned the patents for manufacturing recordable compact discs and rewritable compact discs in accordance with certain technical standards. *Id.* It offered them through package licenses that also included patents that were nonessential for complying with the standards. *Id.* Philips charged a royalty for each disc made using the package license, and the royalty was the same regardless of how many of the licensed patents were used. *Id.*

After a number of licensees failed to pay royalty fees, Philips filed a complaint against them with the Commission for patent infringement, and the respondents raised patent misuse as an affirmative defense. *Id.* at 1182-83. According to the licensees, "Philips had improperly forced them, as a condition of licensing patents that were necessary to manufacture CD-Rs or CD-RWs, to take licenses to other patents that were not necessary to manufacture those products." *Id.* at 1183. The administrative law judge found that Philips's patents were unenforceable as a result of patent misuse. *Id.* The Commission upheld that decision, finding that "Philips's patent package licensing arrangement constituted *per* [*21] *se* patent misuse because Philips did not give prospective licensees the option of licensing individual patents (presumably for a lower fee) rather than licensing one or more of the patent packages as a whole." *Id.* at 1184.

The Federal Circuit Court of Appeals held that a patent-to-patent tying arrangement is not *per se* unlawful. The court based its reasoning on antitrust law for tying arrangements. It noted that "the [Supreme] Court has made clear that tying arrangements are deemed to be *per se* unlawful only if they constitute 'a naked restraint of trade with no purpose except stifling of competition' and 'always or almost always tend to restrict competition and decrease output' in some substantial portion of a market." *Id.* at 1185 (quoting *Broad. Music*, 441 U.S. at 19-20). "The Supreme Court has applied the *per se* rule only when 'experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it . . . .'" *Id.* (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)). "Conduct is not considered *per se* anticompetitive [*22] if it has 'redeeming competitive virtues and . . . the search for those values is not almost sure to be in vain.'" *Id.* (quoting *Broad. Music*, 441 U.S. at 13).

In explaining the inapplicability of the *per se* rule, the court identified a number of pro-competitive effects resulting from the practice of packaging licenses. License packaging "'may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation . . . [thereby] promoting the dissemination of technology, cross-licensing and pooling arrangements . . . .'" *Id.* at 1192 (quoting U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5 (1995)). It also "reduces transaction costs by eliminating the need for multiple contracts and reducing licensors' administrative and monitoring costs." *Id.* License packaging also "allows the parties to price the package based on their estimate of what it is worth to practice a particular technology, which is typically much easier to calculate than determining the marginal benefit **[*23]** provided by a license to each individual patent." *Id.*

The Court of Appeals distinguished Supreme Court cases in which tying arrangements were deemed to be unlawful *per se.* Specifically, the court found it significant that Philips's tying arrangement concerned licenses rather than products. According to the court:

> Philips gives its licensees the option of using any of the patents in the package, at the licensee's option. Philips charges a uniform licensing fee to manufacture discs covered by its patented technology, regardless of which, or how many, of the patents in the package the licensee chooses to use in its manufacturing process. In particular, Philips's package licenses do not require that licensees actually use the technology covered by any of the patents that the Commission characterized as nonessential. In that respect, Philips's licensing agreements are different from the agreements at issue in [*United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)], which imposed an obligation on the purchasers of package licenses to exhibit films they did not wish to license.

Id. at 1188. *See also id.* at 1187-89 (distinguishing **[*24]** *United States v. Loew's, Inc.,* 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962)). The court reasoned that "[a] nonexclusive patent license is simply a promise not to sue for infringement" and "does not obligate the licensee to do anything . . . ." *Id.* at 1189. For this reason, the *Philips* case differed from patent-to-product tying cases where "the patent owner uses the market power conferred by the patent to compel customers to purchase a product in a separate market that the customer might otherwise purchase from a competitor." *Id.* at 1189-90.

> [A] package licensing agreement that includes both essential and nonessential patents does not impose any requirement on the licensee. It does not bar the licensee from using any alternative technology that may be offered by a competitor of the licensor. Nor does it foreclose the competitor from licensing his alternative technology; it merely puts the competitor in the same position he would be in if he were competing with unpatented technology.

Id. at H90. "The package license is thus not anticompetitive in the way that a compelled purchase of a tied product would be." *Id.*

3. Defendants' Alleged Tying Arrangement Does [*25] Not Constitute *Per Se* Violation of the Sherman Act

For the reasons provided in *Philips,* the Court finds that Defendants' alleged tying arrangement does not constitute a *per se* violation of the Sherman Act. Tying a patent that is necessary for complying with a standard with related but nonessential patents does not constitute "a naked restraint of trade with no purpose except stifling of competition" that "always or almost always tend to restrict competition and decrease output . . . ." *Broad. Music,* 441 U.S. at 19-20. The *per se* rule does not apply where a tying arrangement has "redeeming competitive virtues and . . . the search for those values is not almost sure to be in vain." *Id.* at 13. The *Philips* court identified a number of potential benefits that may result from such tying arrangements. *See Philips,* 424 F.3d at 1192-93.

Plaintiff argues that *Philips* does not control this case for a number of reasons. The Court finds these arguments to be unpersuasive.

First, Plaintiff argues that this case is controlled by Supreme Court and Third Circuit Court of Appeals cases

that have explicitly recognized tying **[*26]** arrangements as *per se* unlawful. The Supreme Court and Third Circuit cases to which Plaintiff cites are consistent with *Philips* because they involved the tying of products. *See Jefferson Parish,* 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2; *Town Sound,* 959 F.2d 468; *Independent Ink v. Illinois Tool Works, Inc.,* 396 F.3d 1342 (Fed. Cir. 2005), *rev'd on other grounds,* U.S. , 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26, 2006 U.S. LEXIS 2024 (March 2006). While certain types of tying arrangements may remain *per se* unlawful, patent-to-patent tying cases do not fall into that category. The Court is persuaded by the reasoning in *Philips* that the *per se* rule against certain tying arrangements should not extend to patent-to-patent tying cases in light of the pro-competitive aspects of such arrangements. As the Supreme Court recently stated, "many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market." *Illinois Tool Works,* 2006 U.S. LEXIS 2024 at *31 (holding that in cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product). Thus, to the extent that *Philips* **[*27]** is consistent with the *per se* rule against certain types of tying arrangements, and because it directly addresses the issue before this Court, that decision should be followed.

Second, Plaintiff seeks to distinguish *Philips* as a case about patent misuse rather than antitrust violations. Although *Philips* concerned patent misuse, its reasoning applies to antitrust cases also. The *Philips* court itself observed that "because of the importance of anticompetitive effects in shaping the defense of patent misuse, the analysis of tying arrangements in the context of patent misuse is closely related to the analysis of tying arrangements in antitrust law." *Philips,* 424 F.3d at 1185 (citing *Virginia Panel Corp. v. MAC Panel Co.,* 133 F.3d 860, 868-69 (Fed. Cir. 1997)). *See also USM Corp. v. SPS Techs., Inc.,* 694 F.2d 505, 512 (7th Cir. 1982) (Posner, J.) ("If misuse claims are not tested by conventional antitrust principles, by what principles shall they be tested? Our law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the day to try to develop one without in the process subjecting the rights **[*28]** of patent holders to debilitating uncertainty.").

Finally, Plaintiff argues that *Philips* should be distinguished because the decision was based on a developed fact record, and Plaintiff has not yet had an opportunity to develop facts to prove its claims. However, the *Philips* court's discussion of the facts in that case merely provided further support to its more general finding -- that "a package licensing agreement that includes both essential and nonessential patents does not . . . bar the licensee from using any alternative technology that may be offered by a competitor of the licensor . . . ." *Philips,* 424 F.3d at 1190. Moreover, to the extent that *Philips* was based on facts showing that the licensor had not charged a royalty for the nonessential patents, Plaintiff has not specifically alleged contrary facts in the SAC, *i.e.* that the price for the license package was greater than what Defendants could have charged for licenses of the ADSL-Standards Technology only. *See id.* at 1191-92 ("because a license to the essential patent is, by definition, a prerequisite to practice the technology in question, the patentee can charge whatever **[*29]** maximum amount a willing licensee is able to pay to practice the technology in question.").

III. CONCLUSION

For the above reasons, Defendants' motion to dismiss is granted. Specifically, the Court dismisses Counts III, V, VI and VII, as well as the *per se* tying claims in Counts I and II, of the Second Amended Complaint. An appropriate form of order is filed herewith.

Dated: March 3, 2006

GARRETT E. BROWN, JR., U.S.D.J.

ORDER

This matter comes before the Court upon Defendants Texas Instruments, Inc., The Leland Stanford Junior University and its Board of Trustees, and Stanford University OTL, LLC's (collectively "Defendants") motion to dismiss, with prejudice, Counts III, V, VI and VII, and the *per se* tying claims in Counts I and II, in plaintiff Globespanvirata, Inc.'s ("Plaintiff") Second Amended Complaint. The Court, having considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rules of Civil Procedure Rule 78, and for the reasons discussed in the Memorandum Opinion accompanying this Order;

IT IS THIS 3rd day of March, 2006, hereby

ORDERED that Defendants' motion **[*30]** is GRANTED. Specifically, Counts III and V-VII, and the

per se tying claims of Counts I and II, of the Second Amended Complaint [216] are DISMISSED.

GARRETT E. BROWN, JR., U.S.D.J.

Positive
As of: May 24, 2011

INSIGNIA SYSTEMS, INC., Plaintiff, v. NEWS CORPORATION, LTD., NEWS AMERICA MARKETING IN-STORE, INC., and ALBERTSON'S INC., Defendants.

Civil No. 04-4213 (JRT/FLN)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2005 U.S. Dist. LEXIS 42851

August 25, 2005, Decided
August 25, 2005, Filed

SUBSEQUENT HISTORY: Motion to strike denied by, Motion denied by Insignia Sys. v. News Am. Mktg. In-Store, Inc., 2006 U.S. Dist. LEXIS 47015 (D. Minn., June 30, 2006)

COUNSEL: **[*1]** Willie L. Hudgins, COLLIER SHANNON SCOTT, PLLC, Washington, D.C., and Robert L. Meller, Jr. and Cynthia L. Hegarty, BEST & FLANAGAN LLP, Minneapolis, MN, for plaintiff.

Stacey Anne Mahoney, CONSTANTINE CANNON, New York, NY, and Todd Wind, FREDRIKSON & BYRON, Minneapolis, MN, for defendants News Corporation, Ltd. and News America Marketing In-Store, Inc.

Michael A. Lindsay, DORSEY & WHITNEY LLP, Minneapolis, MN, and Phillip A. Proger, JONES DAY, Washington, D.C., for defendant Albertson's Inc.

JUDGES: JOHN R. TUNHEIM, United States District Judge.

OPINION BY: JOHN R. TUNHEIM

OPINION

MEMORANDUM OPINION AND ORDER

BACKGROUND

Plaintiff Insignia, Inc. ("Insignia") and defendant News America Marketing In-Store, Inc. ("NAMI") are direct competitors in the in-store advertising market. Each buys shelf space and other advertising space from retailers, like defendant Albertson's, and sells advertising services, including in-store placement in retailers, to consumer packaged goods companies ("CPGs"), i.e. manufacturers of packaged products. Insignia contends that NAMI has engaged in activity that excludes Insignia and other competing in-store advertisers from access to retailers' advertising **[*2]** space by (1) signing exclusive agreements with retailers; (2) orchestrating a boycott of other in-store advertisers by retailers; (3) engaging in exclusionary and anticompetitive conduct designed to harm Insignia and consumers; and, (4) making false and disparaging representations about Insignia. Insignia alleges state and federal antitrust violations against

TP APX
Exhibit 7

NAMI and Albertson's and false advertising violations against NAMI. NAMI and Albertson's move to dismiss under Rule 12(b)(6) for failure to state a claim. For the following reasons, the Court grants the motions to dismiss.

ANALYSIS

I. STANDARD OF REVIEW

In a motion to dismiss, the Court construes the complaint in the light most favorable to the plaintiff and presumes all facts alleged in the complaint to be true. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984); *Schmedding v. Tnemec Co. Inc.,* 187 F.3d 862, 864 (8th Cir. 1999). The Court may dismiss a claim only where the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Schmedding,* 187 F.3d at 864. **[*3]**

II. CLAIMS 3,4,5,7,8, AND 9 - UNLAWFUL BOYCOTT AND EXCLUSIVE DEALING (Sherman Act § 1, Clayton Act § 3, Minn. Stat. §§ 325d.51 and .53)

To establish a claim under section 1 of the Sherman Act, section 3 of the Clayton Act, or Minnesota Statute sections 325D.51 and 325D.53, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; and (2) that the agreement unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis. *Minn. Ass'n of Nurse Anesthetists v. Unity Hospital,* 5 F. Supp. 2d 694, 704 (D. Minn. 1998) (section 1 of the Sherman Act); *see 3M Appleton Papers Inc.,* 35 F. Supp. 2d 1138, 1142-43 (D. Minn. 1999) (analyzing claims under section 3 of the Clayton Act and section 1 of the Sherman Act together); *Howard v. Minn. Timberwolves Basketball Ltd.,* 636 N.W.2d 551, 557 (Minn. Ct. App. 2001) (stating that Section 1 of the Sherman Act is analogous to Minnesota Statutes sections 325D.51 and 325D.53).

A. Contract, Combination, Or Conspiracy

"In order to withstand a motion to dismiss, a plaintiff must go further than merely alleging **[*4]** a conspiracy existed, for a bare bones accusation of conspiracy without any supporting facts is insufficient to state an antitrust claim." *Northwest Title & Escrow Corp. v. Edina Realty,* 1993 U.S. Dist. LEXIS 20734, 1993 WL 593995, *1 (D. Minn. Dec. 11, 1993) (internal quotation omitted); *see also Five Smiths, Inc. v. Nat'l Football League Players Ass'n,* 788 F. Supp. 1042, 1048 (D. Minn. 1992) ("general allegations of conspiracy, without a statement of the facts constituting the conspiracy, its objects and accomplishment are inadequate to state a cause of action"). A plaintiff must demonstrate that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Minn. Nurse Anesthetists,* 5 F. Supp. 2d at 704 *(quoting Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). "[C]oncerted action forms the essence of a section 1 claim; unilateral actions do not give rise to antitrust liability under section 1." *Id. (citing Willman v. Heartland Hosp. E.,* 34 F.3d 605, 610 (8th Cir. 1994). Furthermore, "conduct as consistent with permissible competition as with **[*5]** illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Insignia has asserted that Albertson's and, possibly, other unnamed retailers have entered into long-term exclusive relationships with NAMI in exchange for unusually high up-front and guaranteed payments. According to Insignia, these induced relationships were intended to eliminate Insignia from the market. On their face, Insignia's allegations indicate only that NAMI unilaterally initiated a series of relationships that had the effect of preventing Insignia from doing business with some mostly unspecified retailers for an uncertain period of time, and that Albertson's and unspecified other retailers each agreed to exclusive relationships with NAMI at favorable terms. Offering a better deal than does the competition is a time-tested competitive strategy, and accepting a good deal when offered is generally considered to be a sound business practice. Insignia's allegations, therefore, provide insufficient indication of a common scheme designed to achieve an unlawful objective.

[*6] B. Unreasonable Restraint Of Trade

Most agreements are evaluated under the "rule of reason," a standard that asks whether the alleged contract or agreement unreasonably restrains trade in a relevant product or geographic market. Certain kinds of agreements, however, are considered unlawful *per se*

because they are of a type that is so often harmful and so rarely justified that proof of anticompetitiveness is not required. *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.,* 208 F.3d 655, 659 (8th Cir. 2000) *(quoting NYNEX Corp. v. Discon, Inc.,* 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)); *see also Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1058 (8th Cir. 2000).

1. Per se violation

A "group boycott" is a narrow category of *per se* violation, "limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *Minn. Nurse Anesthetists,* 208 F.3d at 659 *(quoting FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)). "It is not an antitrust 'boycott' when one supplier enters **[*7]** into an exclusive supply agreement with one customer, even though the supplier's competitors are 'foreclosed' from that customer for the life of the contract." *Id.* A horizontal restraint of trade is another category of *per se* violation. *See Double D Spotting Service, Inc. v. Supervalu, Inc.,* 136 F.3d 554, 558 (8th Cir. 1998). Horizontal restraints of trade result when combinations of traders at one level of the market structure agree to exclude direct competitors from the same level of the market. *Id.*

According to Insignia, Albertson's and other retailers, at the instigation of NAMI, agreed to deal only with NAMI and to exclude Insignia from the in-store advertising market resulting in a group boycott of Insignia and a horizontal restraint of trade. As noted above, Insignia's evidence and allegations indicate only that NAMI arranged one exclusive agreement with Albertson's, and may have arranged other similar relationships. This is insufficient to support an allegation of a group boycott. Additionally, as NAMI and Albertson's are not participants in the market at the same level, any agreement between the two cannot constitute a horizontal restraint of **[*8]** trade. Although an agreement between retailers could constitute a horizontal restraint of trade, Insignia has not provided any indication that Albertson's has ever spoken to, let alone entered into an agreement with, another retailer regarding or resulting in the exclusion of Insignia from the market. The Court, therefore, finds that Insignia has not adequately alleged a *per se* violation of the antitrust laws, and Insignia's claims must therefore be analyzed under the Rule of Reason.

2. Rule Of Reason

Exclusive dealing contracts are usually analyzed under the Rule of Reason. *Minn. Nurse Anesthetists,* 208 F.3d at 660 *(citing Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 333-335, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)). In order to prevail, a plaintiff must produce evidence to show that the defendant's contractual arrangements were unreasonable, based on the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers. *Concord Boat,* 207 F.3d at 1059-60. "Where the degree of foreclosure caused by the exclusivity provisions **[*9]** is so great that it invariably indicates that the supplier imposing the provisions has substantial market power, we may rely on the foreclosure rate alone to establish the violation. However, where ... the foreclosure rate is neither substantial nor even apparent, the plaintiff must demonstrate that other factors in the market exacerbate the detrimental effect of the challenged restraints." *Ryko Mfg. Co. v. Eden Servs.,* 823 F.2d 1215, 1235 (8th Cir. 1987). Alternatively, a plaintiff may demonstrate that the challenged practice has actually produced significant anti-competitive effects, in which case formal market analysis is unnecessary. *Minn. Nurse Anesthetists,* 5 F. Supp. 2d at 707 *(citing Ind. Dentists,* 476 U. S. at 460-61)).

a. Market power/foreclosure

A plaintiff must demonstrate that the defendant has a dominant market share in a well-defined relevant market. *Flegel v. Christian Hosp.,* 4 F.3d 682, 689 (8th Cir. 1993). Assuming that there are, as Insignia asserts, local, regional, and national markets for in-store advertising services, Insignia's complaint provides insufficient indication of NAMI's market **[*10]** share or ability to foreclose competitors' participation in the relevant markets. Insignia asserts that NAMI dominates the relevant markets, that Insignia and Floorgraphics, Inc. pose the only significant competition to NAMI, and that NAMI has foreclosed Insignia from doing business with retailers in local, regional, and national markets by entering into exclusive contracts with 35,000 retail stores including the 2,500 Albertson's outlets throughout the nation. Based on this information, NAMI could, conceivably, dominate (in the colloquial sense) any given market with a 50% share as compared to Insignia's and

Floorgraphics' hypothetical 25% shares, but fail to be dominant in the legal sense. *See Tops Mkts., Inc. v. Quality Mkts., Inc.,* 142 F.3d 90, 97 (2d Cir. 1998) (finding 72% market share insufficient to support a section 1 claim); *Minn. Nurse Anesthetists,* 5 F. Supp. 2d at 708 (stating that a market share of 30% is insufficient as a matter of law to constitute sufficient market power to achieve significant foreclosure). Furthermore, absent some indication of the percentage of the local, regional, or national markets that the 35,000 retail outlets **[*11]** allegedly under exclusive contract constitute, it is impossible to evaluate the percentage of the market with which Insignia and other competitors are prevented from doing business, let alone determine that Insignia and other competitors are prevented from dealing with a significant number of retailers. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 45-46, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (O'Connor, J., concurring) (quoted in *Minn. Nurse Anesthetists,* 208 F.3d 655 at 661) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers and sellers are frozen out of a market by the exclusive deal"). These same deficiencies prevent the Court from determining whether significant barriers to entering this market or other factors exacerbating the detrimental effect of the challenged restraints exist. Insignia provides no indication of any barriers other than NAMI's exclusive contracts with the 35,000 retail outlets. Because it is unclear how large the markets are, or what the terms of the NAMI's alleged contracts are, it is impossible to determine how high a barrier is created by NAMI's exclusive contracts.

b. [*12] Actual detrimental effects

Actual detrimental effects may include an actual increase in the price of the good or service, a decrease in output, or a decline in quality. *Minn. Nurse Anesthetists,* 5 F. Supp. 2d at 707. Insignia broadly alleges that in-store information and advertising has been reduced and that higher prices have resulted. The Court finds that, as when demonstrating the existence of a contract, combination or conspiracy, such broad, unsupported allegations are inadequate to withstand a motion to dismiss.

Insignia's allegations indicate that NAMI is large and successful - but do not indicate that NAMI wields any particular degree of market power or ability to foreclose competitors from the market, or has entered into any sort of agreement in an attempt to do so. "Size in itself does not create an unlawful monopoly within the meaning of the Sherman Anti-Trust Act." *Kansas City Star Co. v. United States,* 240 F.2d 643, 658 (8th Cir. 1957). As Insignia's complaint insufficiently alleges either a contract, combination, or conspiracy or an unreasonable restraint of trade, the Court will grant NAMI's and Albertson's motions to dismiss with **[*13]** respect to claims 3, 4, 5, 7, 8, and 9.

III. CLAIMS 1 AND 10 - UNLAWFUL MONOPOLIZATION (Sherman Act § 2 and Minn. Stat. § 325d.52)

In order to make out a claim under either section 2 of the Sherman Act or its Minnesota corollary, Minnesota Statute section 325D.52, a plaintiff is required to plead and, ultimately, prove that the defendant "(1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power as opposed to gaining it as a result 'of a superior product, business acumen, or historical accident.'" *Double D,* 136 F.3d at 560; *Howard,* 636 N.W.2d at 556 (stating that Minnesota antitrust law should be interpreted consistently with federal court interpretations of federal antitrust law unless Minnesota law clearly conflicts.); *Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Co.,* 498 N.W.2d 274, 276 (Minn. Ct. App. 1993) (noting that section 2 of the Sherman Act provided the model for Minn. Stat. § 325D.52).

Monopoly power under § 2 of the Sherman Act requires something greater than market power under § 1. *See Fortner Enterprises v. US. Steel,* 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969). **[*14]** Thus, assuming *arguendo* that Insignia has adequately defined the relevant market and has alleged anticompetitive conduct sufficient to withstand a motion to dismiss, based on the Court's analysis in section II(B)(2)(a), *supra,* Insignia has not adequately established NAMI's monopoly power. Accordingly, the Court will grant NAMI's motion to dismiss claims 1 and 10.

IV. CLAIMS 2 AND 11- ATTEMPTED MONOPOLIZATION (Sherman Act § 2 and Minn. Stat. § 325d.52)

To prevail on an unlawful attempt claim, Insignia must prove "(1) a specific intent by the defendant to control prices or destroy competition; (2) predatory or anticompetitive conduct undertaken by the defendant directed to accomplishing the unlawful purpose; and (3) a

dangerous probability of success." *General Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 803 (8th Cir. 1987).

"To determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). "Proof **[*15]** of market power in a monopolization claim and proof of dangerous probability of success in an attempt claim are of the same character." *3M v. Appleton Papers,* 35 F. Supp. 2d at 1146. Thus, under the Court's analysis in section II(B)(2)(a), *supra,* Insignia has not adequately established NAMI's dangerous probability of success and the motion to dismiss these claims will be granted.

V. CLAIMS 6 AND 12 - FALSE ADVERTISING (Lanham Act and Minnesota Deceptive Trade Practices Act)

In order to establish its false advertising claims, Insignia must establish (1) a false statement of fact made in a commercial advertisement, (2) which actually deceived or had a tendency to deceive a substantial segment of the intended audience, (3) which was material in that it was likely to influence purchasing decisions, (4) which has or is likely to injure Insignia, in the form of lost sales or lost goodwill. *3M Innovative Props. Co. v. Dupont Dow Elastomers LLC,* 361 F. Supp. 2d 958, 968 (D. Minn. 2005).

Insignia alleges that "NAMI has made repeated false and misleading ... statements of fact regarding Insignia and the nature, qualities and character of [NAMI's] **[*16]** Price Pop Guaranteed program and Insignia's Price POPSign program," including its quality and efficacy, causing "CPGs and retailers to be confused, misled, and deceived about the nature, qualities and character of Insignia's in-store marketing vehicles" and influencing the decisions of "(a) CPGs to purchase Insignia's in-store advertising and promotion products and services; and (b) retailers to grant or honor the right to allow Insignia to sell its in-store advertising and promotion products and services for use in their respective retail stores." (Compl. PP101 and 102.) As a result, "Insignia has suffered economic injury, loss of good will, and other injuries in an amount to be determined at trial." (Compl. P103.)

The Court finds that Insignia fails to adequately allege a false statement of fact made in a commercial advertisement. Insignia's complaint does nothing to indicate what allegedly false statements were made to which party in what context. The allegations seem to indicate that NAMI made objectionable statements to CPGs and retailers in connection with sales of its own product, but not that NAMI engaged in something akin to a widespread advertising campaign to discredit **[*17]** Insignia's product and, thereby, boost its own product's success. Such an allegation is insufficient to satisfy the first prong. *See Med. Graphics Corp. v. SensorMedics Corp.,* 872 F. Supp. 643, 650 (D. Minn. 1994) (infrequent statements by a sales representative to potential customers, as opposed to a traditional advertising campaign, are unlikely to constitute commercial advertising). Accordingly, the Court will grant NAMI's motion to dismiss counts 6 and 12.

VI. CONCLUSION

The Court is mindful that a party is required only to make a short and plain statement of its claims, and that this bar is not high. Nevertheless, the Court finds that Insignia's complaint, as it stands, simply provides insufficient information with which to determine whether any set of facts exists under which Insignia might be able to support its claims. As such, it is appropriate to grant defendants' motions to dismiss. However, the Court will permit Insignia to amend its complaint within 30 days from the date of this Order.

ORDER

Based on the foregoing, all the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant News America Marketing **[*18]** In-Store, Inc.'s motion to dismiss [Docket No. 28] is **GRANTED.**

2. Defendant Albertson's Inc.'s motion to dismiss [Docket No. 30] is **GRANTED.**

IT IS FURTHER ORDERED that plaintiff shall have 30 days from the date of this Order to file an amended complaint.

DATED: August 25, 2005

at Minneapolis, Minnesota.

JOHN R. TUNHEIM United States District Judge

Positive
As of: May 24, 2011

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

01 C 2210

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

2002 U.S. Dist. LEXIS 3317

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

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

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

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

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

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

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

OPINION BY: BLANCHE M. MANNING

OPINION

MEMORANDUM AND ORDER

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

TP APX
Exhibit 8

BACKGROUND

1

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

DISCUSSION

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

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

I. Claims Under the ICFA

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

Congress enacted the Airline Deregulation Act ("ADA") "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services." H.R.Conf.Rep. No. 95-1779, 95th Cong., 2d Sess. 53 (1978), reprinted in, 1978 U.S.C.C.A.N. 3737, 3773. The ADA largely deregulated the domestic airline industry. American Airlines, Inc. v. Wolens, 513 U.S. 219, 222-23, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995). To prevent states from undoing the ADA, Congress included a preemption clause, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992), which provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . ." 49 U.S.C. § 41713(b)(1).

The Supreme Court first visited the scope of the ADA's preemption clause in Morales, 504 U.S. at 378, where the court addressed the "Travel Industry Enforcement Guidelines ("the Guidelines")," which were promulgated by the National **[*9]** Association of Attorneys General to govern the content and format of airline fare advertising. Several states attempted to enforce the Guidelines through their consumer protection laws to stop allegedly deceptive advertising by airlines. Id. Noting that the plain language of the preemption clause "expresses a broad preemptive purpose," the court determined that the states' actions "related to [airline] rates, routes, or services," and therefore, held that the fare advertising provisions of the Guidelines were preempted by the ADA. Id. at 388-89. The court noted that the Guidelines set "binding requirements as to how airline tickets may be marketed," which "would have [had] a significant impact upon . . . the fares [airlines] charged." Id. at 390. The court further noted that the airlines would not have "*carte blanche* to lie and deceive customers" because the Department of Transportation retained the power to prohibit advertisements that did not further competitive pricing. Id. at 390-91.

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

The United States Supreme Court reversed the Illinois Supreme Court's decision to permit the plaintiffs' consumer fraud claims, but affirmed its holding that the plaintiffs' breach of contract claims were not preempted. The court held that the ICFA served as a means "to guide and police the marketing practices of the airlines," and therefore, was related to airline "rates and services" and

was preempted by the ADA. 513 U.S. at 228-29. However, the Court held that the ADA did not preempt the plaintiffs' contract claims, which sought "recovery solely for the airline's **[*11]** alleged breach of its own, self-imposed undertakings." Id.

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

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

1. Scope of "Services" Under the ADA

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

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

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

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

3 Although the instant issue has not been addressed in this circuit, the Court notes that in Mesa, the Seventh Circuit noted that "because Wolens held general consumer-fraud law preempted, [counter claimants] have big problems." 219 F.3d at 608.

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

Here, given the above decisions holding that a CRS is a "service" within the ADA and the Seventh Circuit's broad proposition that "general consumer fraud law [is] preempted" by the ADA, Mesa, 219 F.3d at 608, this Court finds that Ryanair's third amended counterclaim under the ICFA is preempted by the ADA. Ryanair contends that its ICFA claim stems from its purchase of Galieo's CRS services for Ryanair's "own use in making its flight information available to travel agents and enabling travel agents to book reservations on Ryanair's flights." (Ryanair's Countercl. at P 31) According to

Ryanair, [*15] Galieo used an "incentive scheme," whereby Galieo offered travel agents using its CRS services to earn commissions based on the number of fares they booked on Ryanair. (Id. at PP 33-34.) Ryanair contends Galieo violated the ICFA by directing these travel agents to book over 29,000 fictitious and speculative fares which were later cancelled but for which Galieo obtained payment from Ryanair. (Id. at P 41.) As a result of the "incentive scheme," Ryanair alleges that it was left with "an inordinate number of empty, unpaid seats on [its] flights"(id. at P 38) and "lost the opportunity to sell many tickets on its flights." (Id. at P 46.) Consequently, based on the above facts alleged by Ryanair, this Court finds that the allegations relating to Ryanair's ICFA claim relate to airline "services" within the scope of the ADA's preemption clause, and therefore, Count III is preempted by the ADA.

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

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

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

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

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

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

Galileo is correct in that Illinois law does not permit a party to seek an independent claim for breach of the implied obligation of good faith which Illinois law incorporates into all contracts. Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995). To bring a claim for breach of the obligation of good faith, a party must include such a claim within a breach of contract claim. Solon v. Kaplan, 2001 U.S. Dist. LEXIS 1384, 2001 WL 123769, at *5 (N.D. Ill. Feb. 13, 2001) (denying motion to dismiss breach of good faith claim that was included in breach contract of count). Where a party fails to properly plead a claim for good faith within a count for breach of contract, the court should properly dismiss the separate claim for [*19] good faith. Echo, Inc. v. Whitson Co., Inc., 121 F.3d 1099, 1105-06 (7th Cir. 1997); Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough, 1999 U.S. Dist. LEXIS 11229, 1999 WL 528499, at *9 (N.D. Ill. July 19, 1999).

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

CONCLUSION

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

ENTER:

BLANCHE M. MANNING

U.S. DISTRICT COURT JUDGE

DATE: 2-21-02