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

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

SEALED ORDER DENYING MOTIONS TO DISMISS

Before the Court is the Partial Motion to Dismiss (doc. 163) filed by defendants Sabre Inc., Sabre Holdings Corporation, and Sabre Travel International Limited (collectively, "Sabre"), along with Sabre's Supplement to Its Motion to Dismiss (doc. 283). Also before the Court are the Motion to Dismiss (doc. 169) and Supplemental Motion to Dismiss (doc. 287) filed by defendants Travelport Limited and Travelport, LP (collectively, "Travelport"), and the Motion to Dismiss (doc. 165) filed by defendant Orbitz Worldwide, LLC ("Orbitz"). After review, the Court will deny the motions.

I. Background

This is an antitrust case that plaintiff American Airlines, Inc. ("American"), filed against Travelport, Orbitz, and Sabre. American is a large domestic and international airline. Orbitz operates an online travel agency. And Travelport and Sabre each

operate global distribution systems ("GDSes").[1]

In its first amended complaint (doc. 70), American asserted claims against the defendants under sections 1 and 2 of the Sherman Antitrust Act as well as under state law. In that complaint, American alleged in essence that Sabre and Travelport had each unlawfully wielded monopoly power in the market for the distribution of airline fare, flight, and availability information and the provision of booking services to travel agents ("the Market"), as well as in the submarkets consisting of Sabre and Travelport customers, respectively. In addition, American alleged that Sabre and Travelport, along with Orbitz and other unnamed industry participants, had engaged in an industry-wide conspiracy to preserve the GDSes' monopoly power.

All defendants responded by moving for dismissal of the first amended complaint under Federal Rule of Civil Procedure 12(b)(6). After reviewing the motions, the Court determined that American had stated claims against Sabre for monopolization of the Market and the Sabre submarket and a claim against Travelport for monopolization of the Travelport submarket. The Court, however, dismissed all other claims--some with prejudice--and granted American leave to file a second amended complaint. Pursuant to

[1] GDSes distribute airline fare, flight, and availability information to travel agents, enabling those travel agents to make reservations and issue tickets to travelers. (Pl.'s Second Am. Compl. 2, ¶ 2.) Airlines provide their information to GDSes and pay each GDS a booking fee for every reservation that is made through the GDS. (*Id.* at 3, ¶¶ 6-7.)

that order, American filed its second amended complaint (doc. 159).

American also filed a motion for reconsideration challenging certain aspects of the Court's dismissal order. The Court rejected the majority of the arguments made in that motion, but granted reconsideration on American's argument that it should be permitted to assert section 1 claims based on its own contracts with Sabre and Travelport. Rather than grant American leave to file an entirely new complaint, however, the Court granted American leave to file a supplement to its second amended complaint. American thereafter filed its supplement (doc. 265), and Sabre and Travelport filed supplemental motions to dismiss.

In the second amended complaint and supplement, American re-urges its position that Sabre, Travelport, and Orbitz have engaged in an industry-wide conspiracy to preserve the GDSes' market power. According to American, the defendants have conspired to preserve the GDS model[2] and to exclude American's "AA Direct Connect" from the Market and submarkets. AA Direct Connect is a method of providing airline information and booking services directly to travel agents without having to go through GDSes.

Based on these allegations, American asserts the following claims in its second amended complaint: (1) monopolization by Sabre of the Market and the Sabre submarket in violation of section 2 of

[2] The GDS model is explained in detail in the Court's November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave (doc. 244).

the Sherman Act; (2) monopolization by Travelport of the Travelport submarket in violation of section 2; (3) conspiracy by Sabre, Travelport, Orbitz, and "other unnamed co-conspirators" to monopolize the Market and submarkets in violation of section 2; (4) agreement between Sabre and Travelport to unreasonably restrain interstate commerce in violation of section 1 of the Sherman Act; (5) group boycott by Sabre, Travelport, and "numerous travel agencies" in violation of section 1; (6) agreement between Travelport and Orbitz to allocate customers in violation of section 1; and (7) unreasonable restraint of competition by Sabre and Travelport via their contracts with American in violation of section 1. The defendants now collectively seek dismissal under Rule 12(b)(6) of counts 3-7.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This rule must be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court. *See* Fed. R. Civ. P. 8(a). Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding that Rule 8(a)'s simplified

pleading standard applies to most civil actions). The Court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 555 (2007) (citations omitted). The Court need not credit bare conclusory allegations or "a formulaic recitation of the elements of a cause of action." *Id.* at 555. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

"Generally, a court ruling on a motion to dismiss may rely on only the complaint and its proper attachments. A court is permitted, however, to rely on documents incorporated into the complaint by reference, and matters of which a court may take

judicial notice." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (citations omitted) (internal quotation marks omitted). "A written document that is attached to a complaint as an exhibit is considered part of the complaint and may be considered in a 12(b)(6) dismissal proceeding." *Ferrer v. Chevron Corp.*, 484 F.3d 776, (5th Cir. 2007) (footnote omitted). In addition, a "court may consider documents attached to a motion to dismiss that 'are referred to in the plaintiff's complaint and are central to the plaintiff's claim.'" *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (quoting *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003)).

III. Analysis

A. Count Three: Conspiracy to Monopolize in Violation of Section 2

"Section 2 of the Sherman Antitrust Act provides a cause of action against 'single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.'" *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 315 (5th Cir. 2000) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993)).[3] To

[3] Section 2 of the Sherman Act reads, in relevant part, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

state a claim for conspiracy to monopolize, a plaintiff must plead facts showing "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Id.* at 316 (quoting *N. Miss. Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1335 (5th Cir. 1986)) (internal quotation marks omitted).

After reviewing the second amended complaint and drawing all reasonable inferences in favor of American, the Court concludes that American has stated a plausible section 2 conspiracy-to-monopolize claim.[4] First, American identifies the specific intent to monopolize allegedly shared by Sabre, Travelport, and Orbitz. American alleges that Sabre, Travelport, Orbitz, and certain unnamed industry participants conspired "to punish and retaliate against American for its direct connect initiative, with the specific intent of preserving Sabre's and Travelport's monopolies in the [Market] and submarkets." (Pl.'s Second Am. Compl. 52, ¶ 177.) American contends that AA Direct Connect poses a threat to the GDS model and that, consequently, the defendants and certain

---

15 U.S.C.A. § 2 (West 2012).

[4] It would take a treatise to respond to all of the arguments raised by the parties in their motion-to-dismiss briefing. Therefore, the Court will explicitly address only those arguments (a) that are germane to the disposition of the instant motions and (b) that are not indirectly addressed by the Court's analysis.

other industry participants share an interest in excluding AA Direct Connect from the Market and submarkets. According to American, the GDSes benefit directly from the GDS model because it allows them to enjoy monopoly power, while travel agencies such as Orbitz benefit indirectly from the model because they share in the booking fees that the GDSes charge to airlines. These allegations, taken as true, support a reasonable inference that GDSes and travel agencies alike share an interest in preserving the status quo of the GDS model and defeating efforts such as AA Direct Connect that challenge the long-term viability of the GDS model. The allegations further support an inference that Sabre, Travelport, and Orbitz have specifically intended to act in accordance with that shared interest.

Second, American has adequately pleaded the existence of a conspiracy. More precisely, American has alleged facts sufficient to support a reasonable inference that Sabre, Travelport, Orbitz, and other industry participants engaged in a combination or conspiracy to preserve the GDS model and exclude AA Direct Connect from the Market and submarkets. American alleges that the defendants, joined by various travel agencies, "agreed with one another not to implement American's direct connect technology, agreed to bias their displays to disfavor American's flights, agreed to boycott American flights for their own corporate sales, and agreed to encourage their corporate customers to 'book away' from American and shift sales to other airlines." (Second Am.

Compl. 6, ¶ 14.) American alleges further that this conspiracy was "orchestrated by Sabre and Travelport, with assistance from large travel agencies such as Orbitz and Expedia, and trade associations such as the Business Travel Coalition and the American Society of Travel Agents." (*Id.* 7, ¶ 15.)

Third, American has alleged facts from which it may reasonably be inferred that overt acts were taken in furtherance of the alleged conspiracy. For example, the defendants, American alleges, "coordinated their actions through telephone and email communications, and face-to-face meetings among their senior executives, board members, and employees." (*Id.*) American also alleges that in November 2010 "a senior executive at Sabre reported to colleagues on a conversation he had with a Travelport representative" and mentioned "a roadmap for AA plan." (*Id.* at 36, ¶ 115.). In addition, American alleges that "an Orbitz employee sent an email to employees at Sabre, Expedia, BTC, and ASTA asking them to 'stand together' with Orbitz against American." (*Id.* ¶ 116.) Further, as a final example, American alleges that "[i]n mid-2010, the GDSs were meeting with travel agencies to 'discuss AA' or to 'share views and action plan' on AA Direct Connect." (*Id.* at 39, ¶ 126.) These allegations are sufficient to support an inference that the defendants took actions in furtherance of the alleged conspiracy.

Fourth, American has alleged facts showing that the alleged conspiracy has had a substantial effect on commerce. The second

amended complaint alleges that Sabre controls the largest GDS in the Market, accounting for more than 60% of all airline ticket sales made by U.S.-based travel agencies, and that Travelport controls three GDSes--Galileo, Apollo, and Worldspan--which collectively account for over 30% of all airline ticket sales made by U.S.-based travel agencies. (*Id.* at 2, ¶ 3; 11, ¶ 26.) Furthermore, American alleges that the majority of airlines' passenger revenues are generated by ticket sales through travel agencies. (*Id.* at 12, ¶ 33.) According to American, approximately 51% of American's passenger revenue is generated by sales through brick-and-mortar travel agencies, and approximately 10-15% is generated by sales through online agencies. (*Id.*) Given these allegations, it is reasonable to infer that a substantial amount of commerce is affected by the alleged conspiracy.

In their motions to dismiss, the defendants collectively contend that American's conspiracy allegations are merely conclusory and are insufficiently pleaded. Admittedly, American's conspiracy allegations are rather sweeping. But anchoring American's broad conspiracy allegations are facts that, taken as true and construed in American's favor, support a reasonable inference of an industry-wide conspiracy between Sabre, Travelport, Orbitz, and other travel agencies and trade associations. Moreover, whereas American's first amended complaint lacked any allegations linking Sabre's and Travelport's activities, the second amended complaint contains several such allegations of horizontal

agreement. Thus, American, rather than alleging several discrete vertical conspiracies (as it did in its first amended complaint), has alleged facts that plausibly support a reasonable inference that a broad, industry-wide conspiracy to exclude American from the Market and submarkets exists.

To illustrate, consider American's allegation that "Sabre and Travelport have a policy and practice of using contractual and technical methods to prevent non-GDS distribution providers from interoperating with their platforms" while "they permit interoperation with each other." (*Id.* at 30, ¶ 93.) This allegation corroborates American's position that Sabre and Travelport have been working together to exclude non-GDS technologies from the Market and the submarkets.

Travelport argues that it is illogical to infer that Travelport and Sabre are engaged in a common conspiracy in the Market, particularly one that preserves Sabre's market position, because they are competitors. But in the economic landscape painted by American's complaint, Travelport has a concrete monopoly in the Travelport submarket and a tight grip on 30% of the Market, each of which is jeopardized if the GDS model crumbles. In view of this, it is not illogical to infer that Travelport is willing to work to maintain the GDS model simply because it benefits Sabre.

Consider also American's allegation that Sabre, Orbitz, and Amadeus, the fifth GDS in the Market, engaged in "regular communication with each other about the threat that American's

activities posed to the GDS model, how each of the GDSs would approach negotiations with American (and other airlines)[,] and how they would neutralize the threat that AA Direct Connect posed to the GDS model and its monopoly profits." (*Id.* at 32, ¶ 99.) Describing an example of such collaboration, American alleges that "in September 2010, a senior executive at Sabre and a member of Travelport's board of directors discussed their strategies for negotiating with American, including the Travelport director's belief that American's direct connect initiative would not get any traction." (*Id.*) These allegations help solidify American's assertion that Sabre and Travelport have aligned themselves in their respective negotiations with American.

Moreover, American alleges that the conspiracy to monopolize "between, Sabre, Travelport, and numerous travel agencies was conducted at the highest levels by some of the most senior executives at these firms and they recognized that their communications crossed the line of legitimate competition on the merits." (*Id.* at 34, ¶ 107.) To illustrate, American alleges that "one senior executive at a leading travel agency wrote to one of Sabre's most senior executives, 'the circle needs to be very small and very tight.'" (*Id.*) Furthermore, alleges American, "another travel agency expressed concerns about discussing American's direct connect initiative in writing, and suggested using a code name" while Sabre "ordered its employees not to use words such as 'bias' in their e-mails and to communicate verbally, rather than in

writing, with senior executives when possible." (*Id.*) While none of these allegations is, on its own, enough to support an inference of a conspiracy, when considered together and in context, and construed in favor of American, they are sufficient to support a conspiracy-to-monopolize claim under section 2.

B. Count Four: Unreasonable Restraint on Interstate Commerce by Sabre and Travelport in Violation of Section 1

"To establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy, (2) that restrained trade, (3) in the relevant market." *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008) (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002)).[5] In addition, "antitrust plaintiffs must prove they have suffered an injury stemming from the complained-of anti-competitive behavior." *Stewart*, 200 F.3d at 312 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)).

"Once a plaintiff establishes that a conspiracy occurred, whether it violates § 1 is determined by the application of either the per se rule or the rule of reason." *Golden Bridge*, 547 F.3d at 271 (citing *Spectators' Commc'n Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222-23 (5th Cir. 2001)). Should "the court determine[] that the defendant's conduct 'would always or almost

[5] Section 1 states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1.

always tend to restrict competition and decrease output,' the restraint is per se illegal and no further inquiry occurs." *Id.* (quoting *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)). But "if the conduct is not deemed per se unreasonable, the plaintiff will also have to prove that the conduct unreasonably restrains trade in light of actual market forces under the rule of reason." *Id.* (citing *Leegin*, 551 U.S. at 886). Most cases will require analysis under the rule of reason. *See N. Tex. Specialty Physicians v. F.T.C.*, 528 F.3d 346, 360 (5th Cir. 2008) (noting that the Supreme Court "has analyzed most restraints under the so-called rule of reason" (footnote omitted) (internal quotation marks omitted)).

American alleges that "Sabre and Travelport have conspired and agreed with one another not to compete with one another on certain terms on which they provide airline booking services to American." (Second Am. Compl. 53, ¶ 180.) In particular, alleges American, Sabre and Travelport have agreed that "they would not implement AA Direct Connect" and that they would "coordinate their negotiations with American." (*Id.*)

As discussed above, American has alleged facts sufficient to support a reasonable inference that Sabre and Travelport have been working together to exclude AA Direct Connect from the Market and submarkets. More to the point here, American has alleged facts from which it may be inferred that Sabre and Travelport have agreed not to compete for American's business, but instead to align

themselves together in their negotiations with American. For example, American alleges that a Sabre employee stated: "We don't want to take advantage of it with Travelport agencies. We want AA to LOSE the book/passenger. We need to support Tport in their tough actions." (*Id.* at 39, ¶ 125.) The defendants may dispute that this was ever said or that the speaker intended the comment to mean what American contends it means. But at the Rule 12(b)(6) stage, the Court must treat American's allegations as true and draw all reasonable inferences in American's favor--even if those inferences are not the **most** reasonable.[6] *See Kaiser Aluminum*, 677 F.2d at 1050.

Because a horizontal agreement between competitors not to compete "would always or almost always tend to restrict competition and decrease output," Sabre and Travelport's alleged agreement amounts to a restraint that is *per-se* unlawful. *Leegin*, 551 U.S. at 886; *see also Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 317 (5th Cir. 1985) ("Horizontal agreements affect inter

[6] Throughout its briefing, Travelport highlights purported discrepancies between American's allegations and the actual documents from which the allegations are derived. While the Court is permitted to consider certain documents described in American's second amended complaint, and even though the Court is not bound to treat as true any allegations that contradict such documents, the Court declines to engage in significant document review at the pleading stage. In other words, the Court will not undertake to check the accuracy of the allegations in American's fifty-five-page second amended complaint and four-page supplement by comparing each of those allegations to the document from which it is derived. Such an evidence-based process is more appropriately conducted at the summary-judgment stage. At the Rule 12(b)(6) stage, the Court will treat American's allegations as true and will only refuse to give them effect if they are directly contradicted by a document obviously central to American's second amended complaint. *See Kaiser Aluminum*, 677 F.2d at 1050; *Sullivan*, 600 F.3d at 546.

brand competition, and because interbrand competition is the primary concern of antitrust law, they are generally illegal per se." (citation omitted) (internal quotation marks omitted)); *Transource Int'l*, 725 F.2d at 280 ("[A]greements not to compete among potential competitors are also illegal per se." (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973))). But even if analyzed under the rule of reason, the alleged agreement between Travelport and Sabre to align themselves in their negotiations with American would, given the economic landscape alleged in the second amended complaint, unreasonably restrain trade in, and foreclose a substantial share of, the Market and submarkets in violation of section 1. *Golden Bridge*, 547 F.3d at 271.

C. Count Five: Group Boycott in Violation of Section 1

American contends that "Sabre, Travelport, and numerous travel agencies have combined and conspired with one another to retaliate against American for its efforts to implement direct connect." (Second Am. Compl. ¶ 183.) American alleges that Sabre and Travelport carried out the boycott by "obtain[ing] agreements from these travel agencies to bias their displays to disfavor American flights" and by "soliciting travel agents and major corporate customers' agreement[s] to reduce their sales of tickets on American flights." (*Id.*)

Technically, the allegations contained in the second amended complaint under the headings "Sabre and Travelport Orchestrate a

Group Boycott" and "Fifth Claim for Relief: Group Boycott in the Relevant Markets in Violation of Section 1 of the Sherman Act" do not establish the existence of a group boycott involving both Sabre and Travelport. Instead, the allegations under these headings show the existence of two boycotts--one orchestrated by Sabre and the other by Travelport. But reading the allegations in the context of the entire second amended complaint, and considering that elsewhere in the complaint allegations of collusion between Sabre and Travelport can be found, the Court is satisfied that American has alleged sufficient facts to support a reasonable inference that Sabre and Travelport orchestrated a group boycott of American.

Further, because American has alleged that Sabre and Travelport (1) possess dominant positions in the Market and their respective submarkets, (2) "control access to an element necessary to enable [American] to compete," and (3) have no pro-competitive justifications for their alleged boycott, the alleged horizontal boycott is *per se* unlawful. *Tunica Web Adver. v. Tunica Casino Operators*, 496 F.3d 403, 414-15 (5th Cir. 2007); *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985) ("This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act."); *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1017 (5th Cir. 1984) ("Horizontal agreements are ordinarily considered

illegal *per se* 'because of their pernicious effect on competition and lack of any redeeming virtue.'" (quoting *Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 279 (5th Cir. 1984))).

D. Count Six: Customer-Allocation Agreement in Violation of Section 1

A customer-allocation agreement is *per-se* unlawful under section 1. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 708 (1962). American alleges that "[b]eginning in November 2010, Travelport and Orbitz entered into secret customer allocation agreements with numerous other travel agencies." (Second Am. Compl. 54, ¶ 187.) According to American, "[p]ursuant to these agreements, these agencies agreed not to compete for the business of [the] corporate customers" of Orbitz for Business ("OFB"), Orbitz's corporate travel agency. (*Id.*)

What American is alleging here is not a horizontal customer-allocation agreement. A "classic" customer-allocation agreement is "one[] in which 'competitors at the same level agree to divide up the market for a given product.'" *Ca. ex ral. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011) (quoting *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1996)). Instead, what American is alleging is an agreement between Orbitz and other travel agencies, monitored and enforced by Travelport, not to compete for OFB customers. Such an agreement constitutes a *per-se* violation under section 1. *See Transource*, 725 F.2d at 280 ("[A]greements not to compete among potential competitors are also

illegal per se."). Thus, while the Court disagrees with American's characterization of this claim as one challenging a customer-allocation agreement, the Court nevertheless concludes that American has pleaded a section 1 claim based on Orbitz and other travel agents' alleged agreement not to compete for OFB customers.[7]

E. Count Seven: Section 1 Violation Based on Sabre's and Travelport's Contracts with American

Lastly, American alleges that "Sabre and Travelport have included terms in their subscriber agreements with American that have the purpose and effect of excluding [from] competition . . . direct connect, as well as restricting competition among GDSs." (Pl.'s Supp. to Second Am. Compl. 1, ¶ 2.) More specifically, alleges American, "both Sabre and Travelport require that American provide them with full content and content parity, and restrict American's ability to provide incentives to travel agents to shift

---

[7] This alleged agreement not to compete is horizontal because it is primarily between Orbitz and other travel agencies. *See Bus. Elec. Corp. v. Sharp Elec.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints."). That Travelport has joined in the agreement and policed it does not render the agreement a vertical restraint, even though Travelport has a vertical relationship with Orbitz. *See Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 (5th Cir. 1981) ("Conspiracies between a manufacturer and its distributors are . . . treated as horizontal when the source of the conspiracy is a combination of the distributors.").

Moreover, American's failure to identify the other travel-agency participants is not fatal to American's section 1 claim (as it was to many of American's claims in the first amended complaint) because American has alleged the identity of at least two members of the conspiracy--Travelport and Orbitz--and because American has alleged sufficient facts to apprise Travelport and Orbitz of the particular agreement that it is challenging. In any event, American explains that it knows the identities of the other travel-agency participants but that Orbitz refused to consent to American's filing of a proposed second amended complaint that included those names. If this is true, then Orbitz should not be permitted to now challenge the sufficiency of American's complaint on that basis.

bookings among GDSs." (*Id.*) In addition, American alleges that Sabre "has prohibited American from publicly marketing a Direct Connect program." (*Id.*) According to American, "[t]hese provisions effectively prevent American from promoting competition and supporting new entrants in the relevant markets, including competition from its own AA Direct Connect." (*Id.*)

"To prove conspiracy or 'concerted action' [for purposes of section 1], the plaintiff must prove that the conspirators had a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Spectators' Commc'n Network*, 253 F.3d at 220 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). That said, "[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy." (*Id.*) Indeed, section 1 itself states that "**[e]very contract**, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1 (emphasis added). Based on this language, if a contract unreasonably restrains trade, then it offends section 1--even if one of the parties to the contract assented to its terms merely because of financial necessity.[8] *See*

[8] Travelport posits that "[a] plaintiff that voluntarily enters into and enjoys the benefits of a contract cannot later complain that the contract violates the antitrust laws." (Travelport Supp. Mot. to Dismiss 6.) According to Travelport, American "will need to show that [it] had anticompetitive terms imposed upon it" and that it "unwillingly complied." (*Id.* (internal quotation marks omitted).) Travelport's position is difficult to reconcile with the

id.

Sabre and Travelport contend that their subscriber agreements with American cannot support a section 1 claim because the agreements are not exclusionary and do not foreclose a substantial share of the Market or submarkets. Concerning the latter, Sabre argues that American must allege facts indicating its percentage share of the airline-services market. But in the Court's view, this argument would more likely be correct if the aggrieved party were a passenger or a travel agent seeking to obtain flights. Instead, because American is the aggrieved party, the relevant

---

United States Supreme Court's comments in *Perma Life Mufflers, Inc. v. International Parts Corporation*, 392 U.S. 134, 140 (1968), *overruled on other grounds by Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 777 (1984). There, the Supreme Court, in holding that *in pari delicto* is not a defense to an antitrust action, stated that a "plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." *Id.* at 139. The Court noted further that "permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." *Id.* Thus, the Court is not persuaded that American must allege facts showing that it was completely innocent in its involvement in the scheme embodied by the subscriber agreements.

But at the same time, the Supreme Court explicitly declined to answer the question of whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiff's cause of action." *Id.* at 140. That is, "*Perma Life Mufflers* did not foreclose a defense to an antitrust claim based on a plaintiff's 'truly complete involvement.'" *Rogers v. McDorman*, 521 F.3d 381, 388-89 (5th Cir. 2008) (quoting *Perma Life Mufflers*, 392 U.S. at 140). In any event, American's allegations do not suggest that it had "truly complete involvement" in the drafting and selection of provisions in the subscriber agreements. To the contrary, American has alleged facts indicating that the economic realities were such that American had little choice but to accept the terms in the subscriber agreements. Thus, American should not be barred from asserting section 1 claims based on its subscriber agreements with Sabre and Travelport simply because American was a party to those agreements. *See Perma Life Mufflers*, 392 U.S. at 140 ("[E]ven if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business.").

market for purposes of American's section 1 claim is the Market (i.e., the distribution of airline fare, flight, and availability information and the provision of booking services to travel agents), along with the Sabre and Travelport submarkets (i.e., the provision of airline booking services to Sabre and Travelport subscribers, respectively). American has alleged facts showing that its subscriber agreements with Sabre and Travelport (or Travelport's predecessors) bear on its ability to access Sabre and Travelport's combined ninety-plus percentage share of the Market and their respective 100% shares of their submarkets. These allegations are sufficient to establish substantial foreclosure.

Regarding Sabre and Travelport's contentions that the subscriber agreements are not exclusionary, the Court maintains the position it took in its November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave (doc. 244): that while the factfinder may eventually find that the full-content and related provisions are not anticompetitive, at this stage of the litigation the Court is simply not able to say that the aforementioned allegations are, as a matter of law, insufficient to support a section 1 claim.

IV. Conclusion

Based on the foregoing, the Court concludes that American's second amended complaint and supplement contain sufficient

allegations to avoid dismissal under Rule 12(b)(6). Accordingly, the defendants' motions to dismiss are DENIED.

SIGNED August 7, 2012.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE