

September 9, 2011

VIA HAND DELIVERY

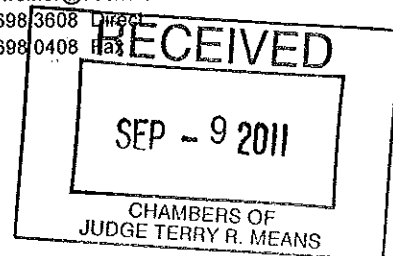
The Honorable Terry R. Means  
United States District Court for the Northern District of Texas  
501 W. 10th Street, Room 201  
Fort Worth, TX 76102

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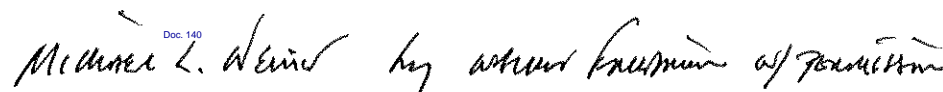
Re: *American Airlines, Inc. v. Sabre, Inc.*, et al., Civil Action No. 4:11-cv-00244-Y

Dear Judge Means:

I write to alert the Court to a decision yesterday by Judge Cedarbaum of the United States District Court for the Southern District of New York that directly relates to Travelport's Rule 12(b)(6) Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 85), which is currently pending before this Court.

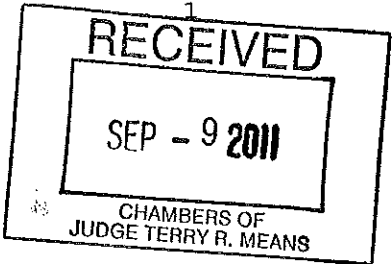
The decision was issued from the bench following extensive argument regarding a motion to dismiss brought by Sabre in the matter of *US Airways, Inc. v. Sabre Holdings Corp., et al.*, No. 11 CV 2725 (S.D.N.Y)(MGC), a case very similar to the action before this Court. During oral argument, US Airways' counsel attempted to defend its alleged single-brand, Sabre-only market on the basis of many of the same arguments raised by American Airlines in opposition to Travelport's motion in this case. See Sept. 8, 2011 Transcript (attached to this letter) at 19-35. Judge Cedarbaum rejected those arguments and dismissed US Airways' single-brand market monopolization claims without leave to replead. *Id.* at 33.

Respectfully,

  
Michael L. Weiner

cc: All Counsel (via email and United States mail)

1 198eusac  
1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x  
2  
3 US AIRWAYS, INC.,  
3  
4 Plaintiff,  
4  
5 v.  
5  
6 SABRE HOLDINGS CORPORATION,  
6 et al.,  
7  
7 Defendants.  
8  
8 -----x  
9



11 CV 2725 (MGC)

September 8, 2011

*pp. 19-35*

10  
11  
11  
12 Before:

12 HON. MIRIAM GOLDMAN CEDARBAUM,

13 District Judge

14  
15 APPEARANCES

16 CADWALADER WICKERSHAM & TAFT, LLP  
16 Attorneys for Plaintiff  
17 BY: CHARLES F. RULE  
17 PETER MOLL

18 CLEARY GOTTLIEB STEEN & HAMILTON  
18 Attorneys for Defendants  
19 BY: GEORGE S. CARY  
20 LEV DASSIN  
20 STEVEN KAISER

21 BARTLIT BECK  
21 Attorneys for Defendants  
22 BY: DONALD E. SCOTT

23  
24  
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1 (In open court)  
2 THE DEPUTY CLERK: US Air ways against Sabre holdings.  
3 THE COURT: I have admitted several lawyers pro hac  
4 vice in this case. One is Andrew Polovin. Another is Chris  
5 Lind. A third is Katherine Swift, who is not here, I take it?  
6 MR. CARY: That's correct, your Honor.  
7 THE COURT: And a fourth is Kenneth Reinker.  
8 I don't know if any of these people are present in the  
9 courtroom.  
10 MR. CARY: Mr. Reinker is here, your Honor.  
11 THE COURT: Very well. All right.  
12 Now, this is a motion to dismiss the complaint. And I  
13 will hear first from the proponent of the motion.  
14 MR. CARY: Good morning, your Honor. George Cary for  
15 Cleary Gottlieb Steen & Hamilton for Sabre.  
16 Arguing with me also will be Mr. Donald Scott from  
17 Bartlit Beck, who will address Count Four of the complaint.  
18 I'll address Count One, Two and Three, if it pleases the Court.  
19 THE COURT: Very well.  
20 MR. CARY: Your Honor, we brought the exhibit just to  
21 put the entire dispute here into context. As with most  
22 antitrust cases, it's very important to understand exactly who  
23 is dealing with whom, how the product is sold to the consumer  
24 in order to put into context the allegations that various  
25 provisions or activities hurt the consumer. Our position --

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1 THE COURT: Right. Well, we're all consumers of air  
2 travel.

3 MR. CARY: Exactly. And our position is that the  
4 provisions that are challenged here help the consumer, that  
5 they make the market more competitive and that they do not  
6 restrict competition; rather, they are the embodiment of  
7 competition.

8 THE COURT: Well, do I understand that it is really  
9 business travelers that we're talking about? Ordinary citizens  
10 like the rest of us don't use any of these big platforms.

11 MR. CARY: That's not correct, your Honor. The way  
12 that the complaint is styled, it has to do with travelers.  
13 They try to limit the travelers to those that use travel  
14 agents. A large portion of people that use travel agents  
15 happen to be business travelers, but business travelers also  
16 book directly. They also book on websites. And nonbusiness  
17 travelers use travel agents. So it is not correct to say that  
18 this is limited to business travelers. The allegation in the  
19 complaint --

20 THE COURT: Well, do I understand we're talking -- the  
21 main customers of these -- of Sabre and Travelport and Amadeus  
22 are large travel agencies?

23 MR. CARY: No. They're all travel agencies, your  
24 Honor, large and small.

25 THE COURT: What percentage of the travel agencies

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1 that work through Sabre are small travel agencies, travel  
2 agencies that primarily cater to individuals travelling for  
3 pleasure?

4 MR. CARY: Well, numerically, I would expect that it's  
5 a very large percentage. In terms of dollars --

6 THE COURT: When you say you would expect, do you have  
7 a basis for your expectations?

8 MR. CARY: The basis for my expectation is that there  
9 are lots and lots of travel agents. Travel agents used --

10 THE COURT: That is correct. There are many travel  
11 agents who, I'm sure, do not use this kind of arrangement if it  
12 costs them money.

13 MR. CARY: Very few, your Honor, very few. Travel  
14 agents use these arrangements, small and large. And the reason  
15 is because travel agents -- when you call up the travel agent,  
16 the travel agent wants to know what are the options, what are  
17 the possibilities for the itinerary you're proposing and what  
18 are the prices. And they want to look across all their lines  
19 and they want to find the itinerary. And they want to know  
20 what the prices are --

21 THE COURT: All travelers want that.

22 MR. CARY: And all travel agents are in the business  
23 of providing that, and that's why they use the GDSes. That's  
24 what the GDS is --

25 THE COURT: Surely there are other entities that

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1 can -- we are living in an age of computer expertise. Surely  
2 there are other people with the technological know-how to find  
3 out all of the flights available at any particular time on any  
4 particular day, isn't that right?

5 MR. CARY: Yes, it is right, your Honor. That's why  
6 we have up there, for example, the Internet metasearch Kayak  
7 box, the Brown box at the top. There are absolutely other ways  
8 to do it, yes, your Honor. But for the travel agents, I mean,  
9 the travel agents can use other ways as well. As you can see,  
10 they can go to the airline web page. They can go --

11 THE COURT: Is there any study really, a statistical  
12 study of how many individuals or small travel agents use these  
13 mega intermediaries?

14 MR. CARY: Yes, your Honor. I can't tell you that  
15 there are not travel agents that don't, but the vast  
16 preponderance, large and small, of travel agents subscribe to  
17 these services in order to be able to compare flights.

18 THE COURT: All right. Well, is it accurate that no  
19 other entity has entered the same field for 25 years?

20 MR. CARY: If we define --

21 THE COURT: Because that's what the complaint alleges.

22 MR. CARY: If we define it the way you've defined it  
23 in terms of sites like the Internet search site Kayak and the  
24 like, it's not correct. As you point out, there are lots of  
25 ways that one can do this. If you're talking --

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1 THE COURT: Right. But if you're not adept at the  
2 computer and you want to use an agent who will fill in your  
3 inadequacy through the computer, what are the entities that are  
4 middle people?

5 MR. CARY: The travel agents, as illustrated in the  
6 chart, can use the global distribution systems, the GDSes.  
7 They can go directly to a direct connect to an airline, such as  
8 Southwest; if the airline has a direct connection, they can go  
9 to --

10 THE COURT: Well, no. I'm talking about those who  
11 want to know all of the flights on a particular day of any  
12 airline to a particular destination. Isn't that really what  
13 we're talking about?

14 MR. CARY: It is, your Honor. And the most efficient  
15 way to do that is the global distribution systems, the GDSes.

16 THE COURT: Why is it, then -- isn't it unusual that  
17 no one has entered the field for 25 years?

18 MR. CARY: I don't think it is, your Honor. The  
19 reason no one has entered the field for 25 years is because the  
20 players in this field have provided excellent service and have  
21 competed aggressively with each other and have competed to win  
22 the business of the travel agents. Mr. Rule calls that  
23 kickbacks, but that is a sharing commissions, which is a  
24 discount to the traveler ultimately and because they --

25 THE COURT: I understand, but presumably other  
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1 entities could offer the same blandishments, isn't that right?

2 MR. CARY: They could, yes.

3 THE COURT: But for 25 years nobody has entered the  
4 field?

5 MR. CARY: In terms of the GDSes, yes, that's  
6 accurate.

7 THE COURT: That's an allegation that gives pause.

8 MR. CARY: Well, I don't think it should give too much  
9 pause, your Honor. It doesn't demonstrate -- it is equally as  
10 consistent with a very competitive market as it is with  
11 anything else.

12 THE COURT: I wouldn't say equally consistent. It may  
13 not show that it's not a competitive market, but I don't think  
14 it's equally consistent with a highly competitive market.

15 MR. CARY: The point here, your Honor, is that these  
16 plaintiffs have alleged in terms of their --

17 THE COURT: I'm looking only at the complaint. I  
18 don't know anything about the field.

19 MR. CARY: Right. In terms of the monopolization  
20 claim here, these plaintiffs have alleged --

21 THE COURT: That's a different issue. That's a  
22 different issue. Clearly everybody is a monopolist of his own  
23 clients.

24 MR. CARY: Exactly.

25 THE COURT: So to use a market of Sabre clients is not  
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1 realistic. But I'm talking about the bigger market, not the  
2 market of Sabre clients.

3 MR. CARY: So in the market for the bigger clients,  
4 we'd like to address what the allegations are with respect to  
5 that market. So that market is not part of their  
6 monopolization claim. It's part of their Sherman Act claim.

7 THE COURT: Yes.

8 MR. CARY: Agreements in restraint of trade claim. So  
9 we would like to address that.

10 Again, I mean, the travelling public can use all of  
11 these options. And ultimately what we're talking about here is  
12 a way for the airlines to reach the travelling public. And so  
13 what do they say are the anticompetitive agreements that are at  
14 issue here?

15 They highlighted in their complaint two sets of  
16 agreements. One set of agreement is the agreements between the  
17 GDSes on the one hand and the travel agents on the other. The  
18 other sets of agreements are the agreements between the GDSes  
19 on the one hand and the airlines on the other. And they say  
20 these are the two agreements that violate the Sherman Act. So  
21 let's talk about the agreements first between the GDSes and the  
22 airlines that they complain about.

23 THE COURT: Yes. No, there's no question. The  
24 plaintiff is complaining about the contract that it signed.

25 MR. CARY: Right. So what do they say is wrong with

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1 that contract? If you read the complaint in its totality, it  
2 is very clear what they're complaining about is the so-called  
3 full content requirement in the contract. What is that?  
4 That's a requirement that the airline provide to Sabre its full  
5 array of prices so that when it displays US Air's prices and  
6 American's and Southwest's and Delta, etc., that it's an  
7 apple-to-apple comparison.

8 What Sabre is selling is exactly that comparison.  
9 That's the basis for the entire product. Without that, Sabre  
10 really doesn't have that much to offer the travel agent. It's  
11 that ability to instantaneously shop so the travel agent, the  
12 agent for the traveler, can pick the best flight. There is  
13 nothing anticompetitive --

14 THE COURT: Yes, but the best flight may not entirely  
15 depend on price.

16 MR. CARY: That's right. And the travel agent, if it  
17 has that full picture of what the flights are, what the prices  
18 are, what the ancillary fees are, which is part of price, how  
19 much you'll be charged for the extra bag, how much you'll be  
20 charged to get the aisle seat in the exit row, if Sabre cannot  
21 provide all that information to the travel agent, its product  
22 is worse. Its product is not as good. An agreement that makes  
23 Sabre's product better is procompetitive because it serves  
24 consumer interest.

25 US Air is arguing, well, but because your product is

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1 better because of full content, it makes it harder for other  
2 people to compete. That's not what antitrust is about.  
3 Antitrust law does not require that a competitor hobble itself,  
4 put forward an inferior product just so that others can look  
5 better in comparison. That's what they're asking. There is  
6 nothing anticonsumer about the full fare requirement in these  
7 agreements.

8 And that's the heart of what we're talking about here.  
9 They're saying we require full fare. They're saying we require  
10 nondiscrimination. Those things help consumers. They're not  
11 anticonsumer.

12 So turning from the agreement with the airlines then  
13 to the agreement with the travel agents, what's the thrust of  
14 their complaint there? The thrust of their complaint there is  
15 that the GDSes who get paid by the airlines to find bookings is  
16 passing on some of that commission to the travel agents. How  
17 is that anticompetitive? The travel agents are intensely  
18 competitive, and they earn income by selling airplane tickets.  
19 And they're either going to charge the traveler for that  
20 service or they're going to charge the airline for that  
21 service. The GDS sits in between.

22 THE COURT: I know, but don't they, in effect, give a  
23 big discount on the air prices to the travel agents in order  
24 for them to sell cheaper tickets to their clients?

25 MR. CARY: Yes, exactly. That's procompetitive. That  
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1 is competition at its best. And Sabre and Travelport and  
2 Amadeus are out there competing for these travel agents by  
3 offering what US Air calls kickbacks, incentives. That's a  
4 commission for a booking. And as long as that commission for a  
5 booking is competitively set as between those airlines, it's  
6 not predatory. It's not designed to be so high that they're  
7 actually paying those travel agents more than they're getting  
8 in a commission in order to run the others out of business.

9 The Warehouse case in the Supreme Court is very clear  
10 that that's procompetitive. It lowers prices to consumers.  
11 It's good for consumers. And it's the artifact, it's the  
12 manifestation of competition among the GDSes that cannot be a  
13 Sherman Act violation.

14 So what do we have? We have contracts with the  
15 airlines that enable the product, make it better because it's  
16 fully inclusive, make it harder for the airlines to -- pardon  
17 the euphemism -- rip off the consumer by having a victim show  
18 up at the gate and say, by the way, it's 50 bucks for that bag.

19 THE COURT: Why has no other entity entered the field  
20 for 25 years? I still go back to that. That's really a  
21 somewhat -- obviously it's not proof of anticompetition, but it  
22 is surprising, if this is an open market.

23 MR. CARY: Your Honor, there are lots of markets with  
24 three players.

25 THE COURT: Which, for example? Why don't you cite me  
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a few.

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MR. CARY: Airplanes, to name one.

THE COURT: There are more than three airlines.

MR. CARY: No, three -- airplanes, I'm talking about Boeing and Airbus, intensely competitive. Aircraft engines. There are lots of markets with three players. In this market the department -- the Federal Trade Commission reviewed the merger of Galileo and --

THE COURT: Airbus and Boeing are the only manufacturers of airplanes in the world? I don't think so.

MR. CARY: They are predominant manufacturers -- there's a Chinese manufacturer that doesn't sell to the US, but the airlines basically, in terms of the jet fleet, they're Airbus or Boeing. There used to be --

THE COURT: That's true for the military as well?

MR. CARY: I think Lockheed also makes jets.

THE COURT: I think that's right. So immediately we're increasing the number.

MR. CARY: Well, but that's not for commercial aviation. But, I mean, one can think of lots of markets where there are three players, four players. In this case the FTC reviewed the merger of Galileo and Worldspan and said a three-player market here is competitive, we're going to allow the deal.

THE COURT: It depends on the market, of course, but  
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1 when you say there are lots, if so, we're not doing a very good  
2 job.

3 MR. CARY: But, your Honor, the main point is that the  
4 things that have been cited here, these contracts, those  
5 contracts make the Sabre product a better product. And if  
6 that's the reason that others can't compete, that's not  
7 violative of the --

8 THE COURT: What does that mean? Translate that for  
9 me.

10 MR. CARY: Full content, we've already talked about.

11 THE COURT: We've been through full content.

12 MR. CARY: The incentives that Sabre offers the travel  
13 agents, they are induced to offer a high incentive because  
14 they're competing with Travelport and Amadeus, who are offering  
15 incentives. They are able to secure the business because they  
16 are aggressively competing for that business.

17 THE COURT: Why isn't it anticompetitive to ordinary  
18 consumers --

19 MR. CARY: Because, as your Honor pointed out --

20 THE COURT: -- who have to pay more as a result.

21 MR. CARY: They don't pay more, they pay less. Those  
22 incentives are passed on to the traveler because the travel  
23 agents in turn are competing. And as this Court said on the  
24 verge --

25 THE COURT: Is there any evidence that the travel

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1 agents pass on their fees to the customer?

2 MR. CARY: Absolutely there is, your Honor.

3 Absolutely there is.

4 THE COURT: What evidence?

5 MR. CARY: The evidence is that travelers are  
6 basically -- some travelers are able to get their travel agent  
7 services at no cost at all because of these incentives. Others  
8 are able to get them at a lower cost because the travel agents  
9 are competing with each other and they're lowering their prices  
10 in light of the incentives that they get from the GDSes, who in  
11 turn get a commission from the airlines.

12 As this Court found in the Virgin Atlantic/British  
13 Airways case, those kinds of discounts are the result of  
14 competition. They're procompetitive.

15 THE COURT: But it depends on what we're talking  
16 about. These are not identical cases.

17 MR. CARY: They're pretty close. The case in Virgin  
18 Atlantic dealt with travel incentives paid to the travel agents  
19 by the airlines. Those went through the GDSes. It's very  
20 analogous. Once the travel agent gets it, the travel agent  
21 market is very competitive. The airlines stopped paying  
22 commissions to the travel agents directly. They started to  
23 have to charge fees. Those fees are lower than they otherwise  
24 would have to be because the GDSes pass on incentives to the  
25 travel agents, who in turn, in a competitive market, share

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1 those with their travelers. It's all procompetitive. It's  
2 output expanding and it's good for the consumer.

3 THE COURT: Well, it's the consumer that I'm not clear  
4 it's so good for, but that's a separate problem. We have a  
5 plaintiff here who's an airline.

6 All right. Let me hear from your adversary.

7 MR. RULE: Thank you, your Honor.

8 First point I guess I would make is just to remind  
9 Mr. Cary and everyone else that we're here on the motion to  
10 dismiss.

11 THE COURT: Yes.

12 MR. RULE: I heard a lot of --

13 THE COURT: We're here on the face of the complaint.  
14 I don't really consider matters outside the complaint.

15 MR. RULE: So I think pretty much 90 percent of what  
16 Mr. Cary said is outside the complaint. Obviously they are  
17 going to want to try to defend what has gone on. We understand  
18 that. But, again, that's for later in the process, for summary  
19 judgment and that sort of thing.

20 I think it's helpful, your Honor, to give you a little  
21 bit of background as to why there are only three of these guys.  
22 You know --

23 THE COURT: Yes. Why is travel logic not more widely  
24 used?

25 MR. RULE: Farelogix.

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1 THE COURT: Farelogix.

2 MR. RULE: Our allegations are it's because of the  
3 conduct and agreements that the GDSes have imposed on travel  
4 agents and on airlines. But there have -- if you go back, this  
5 all started in 1962 when the first systems came up based on big  
6 IBM mainframes. I think they had five IBM mainframes. It used  
7 to be that that travel agents -- this may be what you recall  
8 and what I recall -- had this ticket system. And they'd sit  
9 there, look things up in the OAG and write up a ticket. In the  
10 '60s they came up with a computer way to do it. Back in the  
11 days before computers were familiar to all of us, they had dumb  
12 terminals, and that didn't have the graphic interface we're all  
13 used to. And that was great back in the '60s.

14 Turned out these guys were owned by the airlines.  
15 They ended up getting sufficient market power that I think, you  
16 know, after all the industries that were being deregulated in  
17 the '70s and '80s, this happened to be the one industry that  
18 got regulated in the '80s. CAB and DOT imposed regulations  
19 after a DOJ investigation, and part of that was based on a  
20 conclusion that the CRSes, collectively but also individually,  
21 had market power with respect to not only travel agents but  
22 also airlines.

23 That regulation stayed in place. During the course of  
24 that regulation there was no new entry. Then in 2004 the  
25 Department of Transportation, along with DOJ, basically said,

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1 well, they still have market power but there's this thing  
2 called the Internet, and there's all this great opportunity out  
3 there for new competition. And one of the folks they pointed  
4 to were the online travel agencies like Orbitz and others. And  
5 they said, let's deregulate, because one thing that the  
6 airlines can do is they can come up with special fares to try  
7 to help foster these new competitors. They can work with these  
8 new competitors to try to pass on the efficiencies that they  
9 have. And there's going to be the antitrust laws.

10 Well, you know, it's now seven years later. Hardly  
11 any of the travel agents, as we allege, have switched. There  
12 have been no new entrants. The OTAs, online travel agents, in  
13 the meantime have been acquired or coopted, as we allege in our  
14 complaint. So today they are all dependent on the GDSes.

15 THE COURT: Why are you suing only Sabre?

16 MR. RULE: We're suing only Sabre because that was the  
17 one -- A, they're the largest, and that gave them the most  
18 power over us; B, they forced us into an agreement with these  
19 provisions that basically make it impossible for us to work  
20 with Farelogix.

21 THE COURT: The other travel agents -- GDSes do not  
22 have such agreements?

23 MR. RULE: There are existing agreements that are in  
24 place, but those agreements have not changed since 2006. They  
25 have been extended, but they have not been changed.

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1 THE COURT: But do they have the same provisions?

2 MR. RULE: Yes.

3 THE COURT: Well, then what difference does it make?

4 MR. RULE: Well, your Honor, again, as the plaintiff  
5 we do, I think, have the right to decide who we actually want  
6 to --

7 THE COURT: I understand. I was just curious, since  
8 you describe all three of them as doing the same thing.

9 MR. RULE: Well, again, we have decided to sue Sabre  
10 in part because we believe that there's very clear Section 2  
11 case. And I'll come to the market definition. Also, because  
12 of the recent experience that we went through in trying to  
13 negotiate the agreement and trying to get these provisions out  
14 of the --

15 THE COURT: But at one point you were willing to put  
16 them in.

17 MR. RULE: Your Honor, yes. And I think that, you  
18 know, that goes back to the last time we were here, we talked  
19 about PermaLife. They have not discussed PermaLife in their  
20 reply. I don't know whether that means they've conceded it or  
21 not. But as your Honor, I hope, will know now, having read the  
22 briefs and looked at the cases, it's very clear that unless we  
23 were equally responsible for the offending provisions, we have  
24 a right to challenge them.

25 THE COURT: I'm not questioning your right. I'm

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1 asking you why, if all three have agreements with you of the  
2 same kind, why are you choosing Sabre rather than suing all  
3 three?

4 MR. RULE: We could do that, your Honor. Not saying  
5 we will never do that.

6 I am saying that this is an important case because we  
7 believe that the provisions -- that if they're illegal with  
8 respect to Sabre, we believe that that will in effect mean that  
9 they're illegal with respect to the other GDSes. Now, it's  
10 worth noting that, of course, American Airlines has filed a  
11 lawsuit --

12 THE COURT: I saw.

13 MR. RULE: They actually had gotten -- they filed an  
14 amended complaint yesterday. And I haven't seen it but I've  
15 seen reports on it.

16 THE COURT: Because this is a part of an effort to  
17 multidistrict, I see what happens.

18 MR. RULE: But they apparently have gotten some  
19 interesting things in discovery. We haven't gotten to that  
20 point in discovery in terms of relationships between the GDSes  
21 and the travel agents. But whatever happens here will apply.

22 Now, if I might, your Honor, go for a minute to the  
23 market definition.

24 THE COURT: Right. Let me stop you for a minute.  
25 Every business has a monopoly, more or less, on its

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1 own customers. So to make a market of the customers of any  
2 particular business doesn't make sense.

3 MR. RULE: Your Honor can --

4 THE COURT: A market has to be bigger than the  
5 business of just one entity.

6 MR. RULE: And, your Honor, as a general matter -- and  
7 if you look at the Todd v. Exxon case in this circuit, the  
8 Court basically noted that our obligation as a plaintiff is to  
9 allege a market that has a rational relationship to the methods  
10 of market definition. And I can take you through the complaint  
11 as to how we do that, both with respect to the broader,  
12 broadest GDS market and with respect to the Sabre travel agent  
13 market.

14 After that, in the Todd v. Exxon case, there is a  
15 statement that says that, but that's not just a single brand  
16 or -- if plaintiffs don't explain why the market is limited as  
17 they explain it is. But that doesn't say that you can never  
18 have a single entity.

19 THE COURT: I understand, but that's the most  
20 vulnerable part of your complaint.

21 MR. RULE: And if I might, your Honor, just explain  
22 how we get to the point that Sabre is its own market. First,  
23 the fact is that you have to look at the market from the  
24 perspective of us. And we basically -- one of the problems  
25 with what Sabre has argued is they kind of confound what the

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1 airlines are and what they are. I mean, they're in effect The  
2 Post Office. They're Fed Ex. They're a logistics company that  
3 essentially facilitate transactions between airlines and travel  
4 agents.

5 THE COURT: It's true, but they're not the only one.  
6 MR. RULE: Absolutely. But let me just -- so they  
7 facilitate those transactions, your Honor. And they're saying  
8 that they can go -- it's like The Post Office. When their  
9 monopoly ends, they go to everybody and say, look, you know, if  
10 you receive mail, we're going to give you a little bit of extra  
11 money, if you agree not to receive any packages from Fed Ex.  
12 And then they go to the people who want to send overnight  
13 packages and they say, look, if you want to send an overnight  
14 package, guess what, you can't do it if you want to have the  
15 rest of your mail picked up and delivered. And in that way  
16 they essentially ensure that they preserve their monopoly.

17 And the fact that it's The Post Office and there's  
18 Fed Ex, who are doing something similar, because The Post  
19 Office has essentially gathered all of those parties and we  
20 can't reach them any other way than through them, it becomes --

21 THE COURT: Well, analogies are never perfect.

22 MR. RULE: They're never perfect, but that one's a  
23 pretty close one, because it's the same sort of deregulated  
24 entity. And it really is -- in order to get to what amounts to  
25 35 percent, as we've alleged in the complaint of US Airways'

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1 business, we have to go through Sabre. And in our contracts --  
2 THE COURT: Well, you have to go through the other two  
3 also, presumably.

4 MR. RULE: Not for that 35 percent.

5 THE COURT: For a different 35 percent.

6 MR. RULE: But, your Honor, that 35 percent is  
7 critical. In the absence of that 35 percent of business there  
8 is no US Airways. And there's no other way to get to those  
9 travel agents. There's no other way to get to -- that's what  
10 we've alleged. And that's what we think we can prove.

11 And so they can raise --

12 THE COURT: I understand, but that's the weakest part  
13 of your complaint.

14 MR. RULE: It may be, your Honor, you may -- it may  
15 appear that way. I think, though, if you look at the  
16 precedents, considering that we're at a motion to dismiss  
17 stage, we have alleged enough to get to be able to get  
18 discovery. And we can deal with this on summary judgment at  
19 trial.

20 The points that I would make --

21 THE COURT: I think that may well be true of a lot of  
22 the other things here, but this one, charging monopoly as  
23 distinguished from a contracted restraint of trade based on the  
24 market of a particular one of several GDSes is very hard even  
25 on the face of the complaint.

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1 MR. RULE: Well, your Honor, again, the question is  
2 plausibility.

3 THE COURT: That's correct.

4 MR. RULE: And if you look at the fact that both the  
5 Department of Justice and the Department of Transportation in  
6 that proceeding in 2004 that's cited in our complaint, and  
7 quoted, I think, even, basically found that each GDS has market  
8 power and monopoly power. We have the fact that DOJ is  
9 currently investigating horizontal agreements among the GDSes  
10 as well as Section 2 claims --

11 THE COURT: But you're not suing on the horizontal  
12 agreements. You're only suing one GDS.

13 MR. RULE: I'm only suing -- we are only naming one  
14 defendant. We are suing horizontally all three.

15 THE COURT: I understand, but you're not suing all  
16 three. You're suing Sabre for many things. But the one thing  
17 that's most difficult in your complaint is that Sabre is a  
18 monopoly in its own market.

19 MR. RULE: Your Honor, I understand. I hear what you  
20 say. But I'm saying that if the Department of Justice and the  
21 DOT are on record in proceedings finding that, in fact, Sabre  
22 is its own market, it's hard to say that's not plausible.  
23 Moreover, and the only case --

24 THE COURT: What kind of a proceeding are we talking  
25 about?

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1 MR. RULE: This was the deregulation proceeding.

2 THE COURT: Well, I understand. You know, comments  
3 made in the course of various proceedings are not like holdings  
4 of cases.

5 MR. RULE: But, your Honor, then let's go to a holding  
6 of a case.

7 The only case that's reported that involves a similar  
8 allegation against Sabre is a case in California in the late  
9 '80s where the Court at the summary judgment stage, in similar  
10 arguments that Sabre was its only market, found that there was  
11 a genuine issue of material fact and let it go to trial. Now,  
12 we quoted actually that provision.

13 THE COURT: Well, what happened after trial?

14 MR. RULE: Well, we quoted -- so it's clear, we quoted  
15 that provision in our complaint. It wasn't even addressed in  
16 their motion to dismiss. We pointed it out --

17 THE COURT: Well, because you're going here and there.  
18 The question is: What authority do you have for the  
19 proposition --

20 MR. RULE: That authority.

21 THE COURT: -- that an entity which is not the only  
22 entity in the field or in the general market can be treated as  
23 a separate market, as a monopoly in a separate -- in order to  
24 make it a monopoly, treat it as a separate market?

25 MR. RULE: Okay. Let me give you several. One, the  
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1 Kodak case, which is the leading Supreme Court case. Now, they  
2 argue why this is a different factual situation from the  
3 Kodak --

4 THE COURT: Facts are what make it law. I have a late  
5 colleague who said, you give me the facts and I'll give you the  
6 law.

7 MR. RULE: Absolutely, your Honor. And that's why,  
8 we've alleged, why as airlines they cannot avoid Sabre; why  
9 they have to go to Sabre; why Sabre has the power to raise  
10 price and restrict output. They have monopoly power. So  
11 there's the Kodak case. And the Kodak case says that one  
12 brand, one product can be a market.

13 The other two cases that I would mention from this  
14 circuit, one is Geneva Pharmaceutical.

15 THE COURT: Just a moment. When you say one brand,  
16 you're not -- when you're talking about trademark and brands,  
17 that's an entirely different kind of a brand. Sabre, the name  
18 Sabre doesn't make you have to go to Sabre to get a particular  
19 product. You can go to either one of the other two.

20 MR. RULE: But, your Honor, they can't. The reason  
21 you can't is because for 25 -- you know, for many years --

22 THE COURT: It's not because you can't. It's because  
23 you're saying that that would ruin your business.

24 MR. RULE: You can't because there's no way to get to  
25 those travel agents. They have exclusive deals with a series

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1 of travel agents, including online travel agents, that they've  
2 either bought or they've coopted. So the only way to get to  
3 them today is through Sabre. It's just like The Post Office.  
4 There's no other way to get to it. That's the only way I can  
5 get to them as an airline. And that's the only way --

6 THE COURT: You can get to 65 percent of the market.

7 MR. RULE: But, your Honor, as the Court said in the  
8 Dentsply case, basically the whole point of antitrust is, you  
9 know, those 35 percent of consumers, those 35 percent who  
10 basically deal with those travel agencies, either because they  
11 have corporate contracts or whatever else, have a right to sort  
12 of have competition.

13 THE COURT: Let me understand: Is it your position  
14 that each of the other GDSes has its own -- is a monopolist in  
15 its own market?

16 MR. RULE: Your Honor, we don't address that question.

17 THE COURT: No, but that's an important issue, isn't  
18 it, if you're arguing that it applies to Sabre but it doesn't  
19 apply to the other two, who you say are doing exactly what  
20 Sabre does, and you have contracts with them just like your  
21 contract with Sabre?

22 MR. RULE: Your Honor, again, if and when we get to  
23 the point of ever suing them, we will make a determination as  
24 to whether or not we have the same kind of evidence and  
25 arguments for them.

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1 THE COURT: The real point is if there are three of  
2 them, it's hard to call one of the three a monopolist.

3 MR. RULE: Absolutely. And it is true that if you  
4 look at what DOJ and DOT said, they have found that the other  
5 GDSes have market power.

6 Now, the interesting thing is that Sabre is the only  
7 one that has a court case where the court found on summary  
8 judgment that the plaintiff got past it and could go to trial  
9 on whether Sabre was its --

10 THE COURT: Well, I understand, but that's not  
11 authority for me on the antitrust law.

12 MR. RULE: Your Honor, could I mention two other cases  
13 in this circuit? One is the Geneva Pharmaceutical case,  
14 where --

15 THE COURT: Why don't you tell me the facts of that  
16 case.

17 MR. RULE: In that case there's something called  
18 Coumadin, I think --

19 THE COURT: Coumadin, yes. It's a blood thinner.

20 MR. RULE: Yes, your Honor. It's been around for a  
21 long time. It's made out of something called -- and you can  
22 maybe correct my pronunciation here, but Warfarin sodium.

23 THE COURT: Yes.

24 MR. RULE: Did I get that one right? And Warfarin  
25 sodium, essentially that case was a case of a new generic brand

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1 coming into the market on top of -- I forgotten who had the  
2 Coumadin branded product. And the court was faced with the  
3 question, was that new product, generic brand in the same  
4 market as the existing brand, the Coumadin? And the court  
5 found that it wasn't, that there was --

6 THE COURT: I understand. And I have had several  
7 similar cases, and I can understand the difference between the  
8 generic market and the brand market. They're not particular  
9 entities. They're --

10 MR. RULE: Absolutely -- well, but in that case they  
11 said Coumadin, one product, one manufacturer was different from  
12 this provider of a generic.

13 THE COURT: Usually it's the same manufacturer who  
14 makes both.

15 MR. RULE: In this case there were both, and they said  
16 it was two separate markets.

17 THE COURT: Right, because people -- doctors either  
18 prescribe the brand or the generic.

19 MR. RULE: Absolutely. But, your Honor, those are  
20 questions of fact. And, again, I think if you look at the  
21 allegations --

22 THE COURT: Well, I'm not sure that's accurate here  
23 because you're not alleging differences in these brands.

24 MR. RULE: I am, your Honor. We are, and we're doing  
25 it on the basis of --

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1 THE COURT: You're only saying that you have a  
2 bigger -- a bigger piece of your business comes through Sabre.  
3 MR. RULE: Your Honor, we're looking at whether you  
4 apply cross elasticity of demand tests, which is what the  
5 courts talk about, or the so-called sniff test. We've alleged  
6 that under both of those tests that you would conclude that  
7 they are -- that is, Sabre is its own market.  
8 We've also alleged that looking at the Brown Shoe  
9 factors, industry recognition and that sort of thing, that  
10 there's evidence that it is its own market.  
11 THE COURT: Well, you're now tell me things your  
12 complaint doesn't allege.  
13 MR. RULE: My complaint does allege it, your Honor.  
14 It does.  
15 THE COURT: It's a very long complaint before you even  
16 get to the claim.  
17 MR. RULE: Well, that's right, because it's important  
18 to give a background.  
19 THE COURT: But you do not explain why you can sue one  
20 of three as a monopoly by making the market limited to that  
21 entity.  
22 MR. RULE: But, your Honor, we do say that, because  
23 the --  
24 THE COURT: We've exhausted this.  
25 MR. RULE: Can I just mention one other case, your  
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1 Honor? Because it's an important precedent. It's Judge  
2 Buchwald in this court within the last six months or so, it's a  
3 case called Meredith v. SESAC. SESAC is one of three licensing  
4 rights agencies, similar to the GDSes.

5 THE COURT: What do you mean "licensing rights  
6 agencies"? What is the product we're talking about?

7 MR. RULE: ASCAP, BMI and SESAC are all copyright  
8 licensing --

9 THE COURT: They are holders of the right to license  
10 copyrights, yes.

11 MR. RULE: And the television stations in that case  
12 have sued SESAC and argued that SESAC has a monopoly and has  
13 violated Section 2 by virtue of the copyright holders that it  
14 signed up, even though it's the smallest of those rights  
15 organizations, because they are critical. And the only way to  
16 get to those copyright holders is through SESAC. And because  
17 of arrangements that SESAC has entered into, basically has  
18 made -- has forced television stations to deal with it.

19 And the Court, Judge Buchwald, found that those  
20 allegations, even though it was a single entity, even though  
21 there were competitors in the marketplace, essentially had --

22 THE COURT: Because copyright is itself a monopoly.

23 MR. RULE: Well, your Honor, I'm not sure that --  
24 that's a factual question, I think, in terms of whether --

25 THE COURT: No, that's a legal point.

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1 MR. RULE: But whether -- the relevance of whether  
2 it -- that point is different from the lockin of travel agents,  
3 and the fact that travelers, as we allege essentially, will  
4 only buy tickets from travel agents. And if the GDS that  
5 travel agent uses, Sabre, doesn't provide US Airways fares or  
6 provides them only discriminatory terms by its terms, what we  
7 allege what the user will do is go buy airfare somewhere else.

8 There's also these -- there are the various provisions  
9 that these folks do that, like, for example, we can't  
10 surcharge. Now, Mr. Carey says that's efficient. That's an  
11 issue, I think, for litigation, because what it means is even  
12 though Farelogix, for example, allows us to do the same thing  
13 at basically a fraction of the cost --

14 THE COURT: This has nothing to do with monopoly.  
15 This has to do with your antitrust claim.

16 MR. RULE: Your Honor, it has to do with both the  
17 Section 2 and the Section 1.

18 THE COURT: I understand, but --

19 MR. RULE: And just to make it clear, if you accepted  
20 the arguments of Mr. Cary and you applied them to the Court of  
21 Appeals decision in Microsoft, frankly, the US government  
22 should have never gotten past the motion to dismiss; because  
23 what the Court of Appeals did there was they rejected the fact  
24 that Apple was in the same market. Even though Apple, you  
25 know, computers do the same thing and that sort of thing, they

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1 rejected Apple being in the market. They rejected sort of dumb  
2 devices, network computing devices were in the market. They  
3 found that now it's true, they defined it by X86 Chumby  
4 machines. But basically Microsoft was the only one who sold  
5 those, and its market share was 90 percent or so.

6 THE COURT: Well, your problem really is that Sabre is  
7 not the only one who sells them.

8 MR. RULE: But, your Honor, it is the only one that  
9 you can access these travel agents, because --

10 THE COURT: These particular ones?

11 MR. RULE: Absolutely. Just like in, for example --  
12 that's the only way you --

13 THE COURT: No. No, I've heard you on this, and I've  
14 read everybody's position.

15 MR. RULE: And --

16 THE COURT: And I am satisfied that you squeak past a  
17 motion to dismiss your contract claim and the other claims you  
18 make, but not the claim that Sabre has a monopoly on its own  
19 market.

20 MR. RULE: Your Honor --

21 MR. CARY: Your Honor, can I address the contract  
22 claims?

23 MR. RULE: Before he does --

24 THE COURT: I've really given everybody a lot of time,  
25 and I've read a lot of -- you've given me a lot of material.

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1 Everybody here writes at great length.

2 MR. RULE: I hope you would say well as well.

3 THE COURT: Well, in truth, if you really want to  
4 write very well, it's less space. But that's neither here  
5 nor -- I'm not here as a critic of your writing style. That's  
6 not what's important.

7 What's important is that I have considered all of  
8 this. And I am going to grant the motion to dismiss the  
9 monopoly claim; that is, the claim that Sabre is a monopoly in  
10 its own market, has a monopoly of its own customers  
11 essentially, because I don't think that that is what the  
12 antitrust statute means by monopoly.

13 But I will deny the motion to dismiss the other  
14 allegations of the complaint. And we will find out what we  
15 have here.

16 MR. RULE: Your Honor, can I just make one other  
17 point? I realize I'm belaboring this, but one other thing we  
18 did not discuss is one can prove monopoly power by direct  
19 evidence. For example, the ability --

20 THE COURT: Look, if you can prove monopoly power, I  
21 will not preclude you at trial from showing they're -- or at  
22 some point along the way of showing me that they are, in fact,  
23 a monopoly and that it's appropriate to treat their own limited  
24 market of customers as a separate market.

25 MR. RULE: So, then, your Honor, we can --

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1 THE COURT: You have not -- the face of this complaint  
2 does not persuade that it is plausible, as the Supreme Court  
3 does require, especially in antitrust complaints, after  
4 Twombly, that the customers of a particular entity constitute a  
5 market, even though what is being sold is not limited like  
6 copyright by a monopoly.

7 MR. RULE: And, your Honor, I take it we have leave to  
8 replead?

9 THE COURT: Look, nobody ever prevents people from  
10 seeking to prove what they wish they could allege. But I  
11 really think that you have enough here without the claim the  
12 market is a monopoly.

13 MR. RULE: Well, your Honor, would we have leave to  
14 replead if we think that there is a way that perhaps there are  
15 things that we can put in the --

16 THE COURT: Why don't you tell me? You haven't yet  
17 told me anything that would make a difference. I normally  
18 grant leave to replead if there's something that can be repled,  
19 but this does not seem to me like something that can be repled.

20 Now, at some point if you discover something that  
21 shows that this should be a separate market, nobody ever gives  
22 up. But at the moment I see no reason for repleading on that  
23 one claim that there is a separate market in which Sabre is a  
24 monopoly.

25 MR. RULE: Well, your Honor, again -- and we don't

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1 have to replead, but we have alleged also the GDS market, and  
2 we have alleged that within that market -- and there's  
3 precedent for this -- that we have direct evidence that they  
4 have monopoly power even if you look at that market, because of  
5 their ability to keep prices up, their ability to exclude  
6 competitors, which is the definition of monopoly power if you  
7 look at the Dupont case, if you look at, you know, the Kodak  
8 case, Geneva case. We have the right to prove by direct  
9 power --

10 THE COURT: Look, I have considered all of this, and I  
11 am going to dismiss your claim of monopoly in a market defined  
12 by Sabre's customers.

13 MR. CARY: Your Honor, can I --

14 THE COURT: I will deny the motion in other respects,  
15 and we will see what it is you really can prove here, because  
16 we don't go beyond the face of the pleadings.

17 MR. CARY: Your Honor, may I just address some of the  
18 points that Mr. Rule raised on the contracts? Because, again,  
19 I completely --

20 THE COURT: You have addressed it. I have heard you.  
21 I have seen it. You will have a full opportunity at some point  
22 to move for summary judgment. And at that point, if you are  
23 correct, it should be even easier.

24 MR. CARY: Thank you, your Honor.

25 THE COURT: Very well. Good luck to everybody.

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1 Well, no, off the record.

2 (Discussion held off the record)

3 MR. SCOTT: Thank you, your Honor. I'm from Denver,  
4 and I was not on the list that you read of pro hac admissions.  
5 I've been informed that I was admitted pro hac some time ago  
6 for this case.

7 THE COURT: Very well.

8 MR. SCOTT: May I be heard this morning? And I'll be  
9 very brief.

10 On the horizontal conspiracy allegation, Count Four,  
11 Twombly does directly control that. It's a broader holding  
12 than that, we now know, but it directly controls the allegation  
13 of the horizontal conspiracy.

14 And the first principle of Twombly is that the Court  
15 must unpack these allegations and look at them at this time  
16 under 12(b)(6). You know, it needs to deconstruct the  
17 complaint and see what is there. Now, it's a long pleading. I  
18 had the excerpt here, but I'm going to be very brief and not  
19 take it out.

20 We also know that under Twombly allegations that are  
21 legal conclusions don't count for meeting the requirement.

22 THE COURT: It's not just Twombly. That was always  
23 the case.

24 MR. SCOTT: Yes. Yes, and it's been elaborated. In  
25 fact, the deconstruction, paragraph by paragraph, is not only

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1 what Twombly says but what Twombly does and what the Second  
2 Circuit does in the Star case, paragraph by paragraph, and the  
3 Second Circuit in In Re Elevator, in that case paragraph by  
4 paragraph; the first step being take out the conclusory  
5 allegations because they do not count as factual allegations.

6 In this complaint, in Count Four, the first factual  
7 allegation is one in which, in paragraph 95, US Air -- and I  
8 have the excerpt, if it would be convenient, your Honor. I  
9 have this --

10 THE COURT: I have the complaint right in front of me.

11 MR. SCOTT: Excellent. Thank you. I'm looking at  
12 page 29.

13 The factual allegations that ostensibly support  
14 Count Four are contained in paragraphs 95 through 132,  
15 beginning at page 29. I would just like to address the first  
16 page, because that will make the points I wish to make, and  
17 I'll take no more time from the Court than that.

18 Paragraph 95 has an example, is talking about each GDS  
19 agreed or ensured or avoided -- these are legal conclusions  
20 that don't count for the factual showing required by Twombly.  
21 The first facts that we encounter are in paragraph 96, where  
22 US Air, in what is its first factual allegation -- I would  
23 think its best, but its first one -- that the GDSes agreed  
24 because, and then they quote a document. And this is a generic  
25 point I wish to make to the Court. It's in our briefs.

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1           But they quote documents without citations, and very  
2 often with ellipses. And what we have done in our briefing is  
3 to show where this comes from, because they may not have  
4 anticipated that we're able to look up those quotes and find  
5 what documents they are. And this one, for example, is what's  
6 attached to our brief as Exhibit C. The exhibits identified by  
7 letters are the ones that are under seal, and the ones that are  
8 identified by numbers are the ones that are public domain.

9           But what they quote here in paragraph 96 as an  
10 example, for the GDSes be better off if we will not have to  
11 compete for the airlines' attention. The document they cite,  
12 document they quote without citing is an e-mail from a Sabre  
13 fellow named Moore to a US Airways fellow named Gustoffson in  
14 which, on its face, Mr. Moore is asking Mr. Gustoffson of  
15 US Air, we're trying to develop a technical solution for you,  
16 all right, if we meet with other GDSes and you to work together  
17 to develop a technical solution. That's what it is on its  
18 face.

19           And we know from the Second Circuit's precedents, from  
20 the Kramer case and the Chambers case, this becomes integral to  
21 their complaint, even though they don't cite it. They quote  
22 it. And the Court is supposed to look at what the document  
23 actually says, according to the Kramer holding. And what this  
24 document says is, US Air, could we meet with you and the GDSes  
25 to develop a technical solution --

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1 THE COURT: Why don't we look at 97 instead of 96.  
2 MR. SCOTT: Yes. 97 is their only allegation of an  
3 express agreement. And this is one, this is one where they  
4 quote a document without citing it. It's our Exhibit 4, where  
5 they say, oh, we agreed with Amadeus to eliminate competition.  
6 And what they cite is a press release, Exhibit 4, in which we  
7 publicly disclose over five years ago, outside the statute of  
8 limitations, no allegation of any complaint by US Air, because  
9 what's actually disclosed there is that Sabre agreed with  
10 Amadeus that if one of them couldn't book for their customers  
11 for a particular airline, the other one would back them up. It  
12 has nothing to do with how they deal with the airlines.

13 It's like two manufacturers who have factories, and  
14 they agree that if one of them can't get critical spare parts,  
15 the other one will back them up to keep both factories running.  
16 It has nothing to do with their dealings with the airlines and  
17 does not support the first sentence of paragraph 97. It is not  
18 anticompetitive to keep the two factories running or to provide  
19 the travel agents with the ability to book if one of them  
20 happens to be shut down or cut off by one of the airlines. It  
21 has nothing to do with anything else in the complaint, your  
22 Honor. They cite that only so they can claim there is some  
23 express agreement.

24 Just like in paragraph 96, they quote it out of  
25 context, no citation, because it uses the word will not have to

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1 compete. They're quoting these things for snippets. And under  
2 Twombly and under Kramer of this circuit, the Court needs to  
3 look at those to see if they really say what they claim they  
4 say.

5           These are all lead-ins to paragraph 98, which begins  
6 the allegation of parallel conduct, nearly all about full  
7 content, which you've already discussed with Mr. Cary. So you  
8 have documents quoted here and in later paragraphs which do not  
9 say what US Air claims they say. They cite documents and later  
10 paragraphs claiming they are communications between the GDSes  
11 and between Sabre and other GDSes, when on their face, which we  
12 attach, they are communications by Sabre talking to its  
13 customers to the travel agents and the Business Travel  
14 Coalition or Business Travel Coalition talking about what the  
15 customers want. They're not us. They are the trade  
16 associations of the corporate travel departments.

17           So they quote documents. They cut and paste them  
18 together and represent in their complaint that these documents  
19 are things where Sabre is signaling to other GDSes what, in  
20 fact, its business travel coalition, a customer saying  
21 something, or Sabre communicating with its customers that it has  
22 full content, which they want.

23           And so you have after this page 28, they go on and on  
24 in quantity but the quality never improves. They've given you  
25 the best they have on page 28, and it goes downhill from there.

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1 But it's --

2 THE COURT: Well, they're hoping they have even better  
3 after discovery.

4 MR. SCOTT: Yes. But, your Honor, these documents do  
5 not support what they say. The documents are incorporated by  
6 reference.

7 THE COURT: What you're really pointing out, which is  
8 always a problem, is information and belief without identifying  
9 the source of the information or the basis of a belief.

10 MR. SCOTT: But information and belief without the  
11 factual support does not meet Twombly.

12 THE COURT: Well, it doesn't meet anything.

13 MR. SCOTT: That's correct.

14 THE COURT: Information and belief always requires a  
15 statement of the source of the information and the basis of the  
16 belief.

17 MR. SCOTT: One last thing, your Honor. I understand,  
18 this is detailed or many pages there. There is quantity. I am  
19 suggesting that under the controlling law today, under Twombly,  
20 the Court needs to take a look at these paragraphs and the  
21 quoted materials which we tried to supply. I'm not going to --

22 THE COURT: As a general matter, forgetting Twombly, I  
23 do not like information and belief unless the information is  
24 provided and the source of the belief. So you make a good  
25 point, and I will direct the plaintiff to allege with respect

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1 to information and belief allegations, to replead to that  
2 extent to allege the source of the information and the basis of  
3 the belief with respect to every allegation on information and  
4 belief. Because that really is the way in which pleadings  
5 should run.

6 MR. SCOTT: Thank you for hearing me, your Honor. I  
7 know we're running into the lunch hour. Thank you.

8 THE COURT: That's fine.

9 MR. RULE: Your Honor, we'll be happy to do that, but  
10 may I just say that the e-mail that they have cited we would  
11 contend, if you look at it on its face, it is --

12 THE COURT: That's fine. So you're going to set out  
13 the source of the information and the basis of the belief with  
14 respect to allegations on information and belief, because  
15 that's what the law has always required, before Twombly.  
16 Allegations on information and belief are not favored by courts  
17 generally.

18 MR. RULE: And, your Honor, we will go back and  
19 replead for that purpose, although --

20 THE COURT: Very well. Very well. That's a good  
21 idea.

22 MR. SCOTT: Thank you so much, your Honor.

23 THE COURT: Very well. You're all excused. Good  
24 luck.

25 (Adjourned)

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