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September 26, 2011

Via ECF

The Honorable Terry R. Means
District Judge, U.S. District Court for the Northern District of Texas
501 W. 10th Street, Room 201
Fort Worth, Texas 76102-3673

Re: *American Airlines, Inc. v. Travelport Limited et al.*,
No. 4:11-cv-00244-Y (N.D. Tex.)

Dear Judge Means:

Sabre submits this letter in response to AA's Response to Travelport's September 9, 2011 Letter regarding the dismissal of monopolization claims brought by US Airways against Sabre in the Southern District of New York.

The Southern District of New York dismissed US Air's monopolization and conspiracy-to-monopolize claims with prejudice because there was no cognizable antitrust theory that Sabre could monopolize a market limited to travel agents who subscribe to Sabre, as opposed to other GDSs. Contrary to AA's assertion, the court dismissed US Air's claims after considering the same arguments—including arguments of retaliation and alleged power over pricing—that AA makes here. (Ex. A, 4/21/11 US Air S.D.N.Y. Complaint ¶¶ 51, 55, 128-131, 172 (retaliation allegations); *id.* ¶¶ 55, 137, 141, 147, 148, 151, 157, 162 (pricing allegations).)

The Southern District of New York ruled that a Sabre-only market was not plausible on its face: "Clearly everybody is a monopolist of his own clients . . . . So to use a market of Sabre clients is not realistic." (Ex. B, 9/8/11 Hr'g Tr. 7:22-8:1.) The Court also denied US Airways' request for leave to replead the claims, finding that such a repleading would be futile as there were no plausible facts that would make Sabre a monopolist over its own customers. (*Id.* 34:16-24) ("I normally grant leave to replead if there's something that can be repled, but this does not seem to me like something that can be repled.").)

In an attempt to avoid the implications of the New York court's ruling on this case, AA now relies on a handful of Sabre documents. AA's new reliance on documents does not escape its pleading shortfall for at least two reasons. First, a motion to dismiss must be decided on the pleadings. AA's reliance on documents outside the pleadings is improper.

Second, even if the documents on which AA relies supported its allegations (they do not), the documents add nothing to those allegations. As did US Airways, AA already alleges on the face of the complaint the "facts" that it now claims these documents support. (Doc. 70, AA Amended Complaint ¶¶ 10, 11, 13, 14, 50, 88-95, 102-11, 115, 135, 155 (allegations on retaliation); *id.* ¶ 48, 114, 118, 130, 133, 136, 142 (allegations of price increases).) AA's new reliance on documents, therefore, adds nothing to the allegations on the face of AA's complaint, which are taken as true for purposes of Sabre's motion to dismiss.

Assuming the truth of AA's allegations regarding price increases and retaliation does not save AA's claims. The alleged fact that Sabre has increased AA's booking fees does not support AA's proposed Sabre-only market. That AA may have elected to continue distributing through Sabre under a booking fee that is higher than the very low fee AA negotiated in 2006 does not mean that AA's alleged Sabre-subscribers-only market is a relevant antitrust market. If this were the standard, then any company that raises the prices of its goods to one customer would be found to be a monopolist over its own product as to that customer. That is not the law. A market based on sales of a single product to one customer is not plausible. *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 833 (5th Cir. 2002), (affirming dismissal for failure to plead plausible market when plaintiff defined market around sales to a single customer). This is the case even if the single product is distinctive or unique: "a single brand—no matter how distinctive or unique—cannot be its own market." *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 2:03-cv-107-TJW, 2009 WL 938561, at *2-4 (E.D. Tex. Apr. 6, 2009), *aff'd* 615 F.3d 412, 417-18 (5th Cir. 2010); *see also Whitehurst v. Showtime Networks, Inc.*, No. 1:08-cv-47, 2009 WL 3052663, at *11 (E.D. Tex. Sep. 22, 2009) ("[A] relevant market cannot be limited to a single product.").

Nor can a market be limited, as AA suggests here, by a company's contracts with its customers. The only basis that AA provides for ignoring the other GDSs—which is the basis that US Airways provided and the Southern District of New York rejected—is the allegation that Sabre has contracts with certain travel agents that encourage or incentivize the use of Sabre. (Doc. 70, AA Amended Complaint ¶¶ 39, 42, 63-68, 118.) But that is not how antitrust markets are defined. "Economic power derived from contractual arrangements affecting a distinct class of consumers *cannot serve as a basis for a monopolization claim*." *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 85 (2d Cir. 2000) (emphasis added) (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 345 (N.D. Ill. 1997)). Otherwise any alleged exclusive contractual arrangement would create its own market susceptible to a monopolization claim.

In sum, AA asks this Court to ignore the dispositive fact—plain on the face of AA's complaint (Doc. 70, AA Amended Complaint ¶ 3)—that Sabre competes with at least two other GDSs. The relevant market must, at a minimum, include all GDSs, not just Sabre. *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (relevant market includes all products that are "reasonably interchangeable by consumers for the same purposes"). No documents or allegations regarding increases in AA's booking fees change the fact that the Sabre-only "submarket" is but a subset of travel agents and excludes not only competing GDSs, but other prominent booking channels such as AA's own website and reservation call centers. AA's Sabre only market is therefore implausible.

The cases AA cites in its response do not support a single product market. In *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), the relevant market consisted of *all* operating systems for Intel-based personal computers. *Id.* at 51-52. Although Microsoft was found to have monopoly power in that market, with a 95% share of such operating systems, the market was not a single product, "Microsoft operating system"-only market. *Id.*

Similarly, in *United States v. Visa U.S.A. Inc.*, 344 F.3d 229 (2d Cir. 2003), the Second Circuit upheld the conclusion that several general purpose cards (Visa, Mastercard, Amex, and Discovery) were included in the relevant market because consumers—the end users—viewed the cards (but not other forms of payment) as substitutable for one another. *Id.* at 238-39. Although the court found that the arrangements within the broad, multi-supplier market violated the antitrust laws, it did *not* find that the relevant market was "Visa," or "Mastercard."

Accordingly, Sabre respectfully requests that the Court follow the reasoning of the Southern District of New York and dismiss American's monopolization claims with prejudice.

Sincerely,

Donald E. Scott
Counsel for Sabre

Cc: All counsel of record (via ECF)