American Airlines Inc v. Travelport Limited et al Doc. 162

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

American Airlines, Inc., a Delaware corporation, Plaintiff, vs. Sabre, Inc., a Delaware corporation; Sabre Holdings Corporation, a Delaware corporation; Sabre Travel International Ltd., a foreign corporation, d/b/a Sabre Travel Network; Travelport Limited, a foreign corporation; Travelport, LP, a Delaware limited partnership, d/b/a Travelport; and Orbitz Worldwide, LLC, a Delaware limited liability company, d/b/a Orbitz, Defendants.	**Civil Action No.: 4:11-cv-00244-Y**

PLAINTIFF AMERICAN AIRLINES, INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 21, 2011 ORDER

Plaintiff American Airlines, Inc. respectfully requests that the Court reconsider portions of its Order Regarding Motions to Dismiss and Motion for Leave to Amend (Dkt. #__, Nov. 21, 2011) (the "Order"), which dismisses with prejudice counts 4-6 in the First Amended Complaint (the "Complaint"). While mindful that motions for reconsideration should be sought only rarely, American knows that this Court strives to ensure the accuracy of its rulings and, where warranted, is willing to consider corrections. American believes this is such an instance.

Specifically, American requests that the Court vacate its dismissal with prejudice of count four of the Complaint and enter an order dismissing that claim without prejudice.

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American filed its proposed Second Amended Complaint before it had the benefit of the Court's conclusions about what the Complaint needed to plead to state a claim under section 1 of the Sherman Act. The deficiencies that were identified in the Order can be remedied by further amendment. Similarly, the rulings in the Order rejecting aggregation of the foreclosure effects of defendants' travel agency contracts, and concluding that American's contract with Sabre does not establish the requisite agreement under section 1, arguments that neither GDS advanced in support of its motion, were made without the benefit of full briefing by the parties. If the Court dismisses the claim without prejudice, American will move for leave to file an amended Complaint that identifies in much greater detail: (1) specific travel agents and airlines with which Sabre and Travelport have agreements, (2) specific provisions contained in those agreements, and (3) the amount of commerce that is foreclosed by those agreements.

In addition, with respect to counts 5-6 in the Complaint, which are the state-law claims, American requests that the Court either vacate its dismissal with prejudice and deny defendants' motions to dismiss those claims or withdraw the portions of the Order discussing these claims. First, the Airline Deregulation Act does not protect defendant GDSs from state claims because its purpose was to deregulate the airline industry and its text explicitly protects air carriers from state state-law claims, but not ticket agents such as GDSs. Second, the Order conflicts with the decisions of other courts, which reject preemption of state-law tort claims brought by airlines, including against GDSs, on the ground that they would not impose state re-regulation on airlines. Third, the Order addresses claims that American sought to dismiss voluntarily through its motion for leave to amend, which was granted in part in the Order. Because American was dropping the state claims, the Court was entitled to consider the motions to dismiss the state claims as moot.

LEGAL STANDARD

Because the Order disposes of only some of the claims in the case, it is an interlocutory rather than a final order, and a motion to reconsider it is decided under Rule 54(b) of the Federal Rules of Civil Procedure. *Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009) (Means, J.). Rule 54(b) provides that "any order or decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time" before the entry of final judgment in the case. Fed. R. Civ. P. 54(b). The courts have broad discretion under Rule 54(b) to reconsider their decision on a motion to dismiss "as justice requires." *M3Girl Designs LLC v. Purple Mountain Sweaters*, No. 3:09-CV-2334, 2010 WL 304243, at *1 (N.D. Tex. Jan. 22, 2010) ("These considerations leave a great deal of room for the court's discretion and, accordingly, the 'as justice requires' standard amounts to determining whether reconsideration is necessary under the relevant circumstances.") (internal quotation marks omitted); *see also Dos Santos*, 651 F. Supp. 2d at 553 ("whether to grant such a motion rests within the discretion of the court."). ("These considerations leave a great deal of room for the court's discretion and, accordingly, the 'as justice requires' standard amounts to determining whether reconsideration is necessary under the relevant circumstances.") (internal quotation marks omitted); *see also Dos Santos*, 651 F. Supp. 2d at 553 ("whether to grant such a motion rests within the discretion of the court.").

Reconsideration is appropriate when necessary "to correct a clear or manifest error of law or fact or to prevent manifest injustice," *J & J Sports Productions, Inc. v. Tawil*, No. SA–09–CV–947–XR, 2009 WL 5195892, at *2 (W.D. Tex. Dec. 18, 2009), or when the court determines, after review of the relevant case law, that its initial decision was incorrect, *see*, *e.g.*,

Rana v. Spectra Energy Corp., No. H-10-0403, 2010 WL 3257523, at *4 (S.D. Tex. Aug. 17, 2010). Moreover, this Court has noted that the standard for reconsideration under Rule 54(b) is "less exacting than that imposed by Rules 59 and 60." *Dos Santos*, 651 F. Supp. 2d at 553. Indeed, the Court's broad discretion under Rule 54(b) means that "'the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.'" *Brown v. Wichita Cnty., Tex.*, No. 7:05–CV–108, 2011 WL 1562567, at *2 (N.D. Tex. Apr. 26, 2011).

DISCUSSION

A. The Deficiencies in Count IV Identified by the Order Can Be Remedied by Amendment.

The fourth count in the Complaint, which the Court dismissed with prejudice, alleges that each GDS's individual "contracts with its travel agent subscribers," Compl. ¶¶ 138-39, and each GDS's individual "contracts with participating airline carriers," *id.* ¶¶ 140-41, "constitute agreements in unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act," *id.* ¶¶ 138-141.

The Order dismisses American's section 1 claim on two grounds: First, it concludes that the Complaint does not adequately allege the individual vertical agreements between the GDSs and the airlines and travel agents. Second, the Order concludes that the Complaint does not plead facts sufficient to establish that the agreements foreclose a substantial share of commerce in the relevant markets. Having concluded that the fourth count is insufficient to state a cause of action under section 1, the Order dismisses that claim with prejudice.

The Order notes that the proposed Second Amended Complaint that American submitted with its Motion for Leave to Amend does not remedy the deficiencies identified in the Order.

That proposed complaint, however, was filed before American had the benefit of the Court's rulings and reasoning on the Motion to Dismiss. In light of the guidance provided by the Order, and with the benefit of the discovery that has already taken place, American can amend its Complaint to include the specific factual allegations to support its claim for relief that the Order finds missing. Accordingly, American respectfully requests that the Court reconsider its decision to dismiss the fourth count with prejudice, so that American may ask for leave to file an amended complaint that remedies the issues identified by the Court.

"A court should give the plaintiffs an opportunity to amend their complaint rather than dismiss if it appears that a more carefully drafted complaint might state a claim upon which relief may be granted." *Mills v. Injury Benefits Plan of Schepps-Foremost, Inc.*, 851 F. Supp. 804, 806 (N.D. Tex. 1993).

> Unless it appears beyond a doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief, the complaint should not be dismissed for failure to state a claim, and leave to amend should be liberally granted.

Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284-85 (5th Cir. 1993) (internal quotation marks omitted); *see also Berry v. Indianapolis Life Ins. Co.*, 600 F. Supp. 2d 805, 827 (N.D. Tex. 2009) ("a complaint should only be dismissed under Rule 12(b)(6) 'after affording every opportunity for the plaintiff to state a claim upon which relief can be granted.'"); *La Porte Constr. Co., Inc. v. Bayshore Nat'l Bank of La Porte, Tex.*, 805 F.2d 1254, 1256 (5th Cir. 1986) ("Generally, when a court dismisses a complaint under Rule 12, the court should allow the plaintiff leave to amend his complaint to correct the defect."). [1]

[1] The leading federal procedure treatise explains this policy in detail:

In light of this policy in favor of liberal amendment, courts in this Circuit regularly permit amendment before dismissal, or dismiss without prejudice, unless it is clear that such amendment would be futile. *See In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 618 (N.D. Tex. 2008) (Means, J.) ("'this and other courts typically give a plaintiff at least one opportunity to cure pleading defects that the court has identified before dismissing the case . . . .'"); *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d 552, 568 (N.D. Tex. 2005) ("Despite the fact that plaintiffs have already filed amended complaints, this is the first time the court has addressed whether their pleadings sufficiently state a claim on which relief can be granted. . . . It will therefore give them an additional opportunity to avoid dismissal.").

American requests the same opportunity this Court gave the plaintiff in *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 653 F. Supp. 2d 669, 677 (N.D. Tex. 2009) (Means, J.). In that case, this Court granted a motion to dismiss under Rule 12(b)(6) without prejudice and allowed the plaintiff to file a motion seeking leave to file an amended complaint. *Id.* The Court allowed the plaintiff to file a motion for leave to amend because it recognized that "[b]efore a district court dismisses claims with prejudice, the plaintiff must be given a 'fair opportunity to make his case.'" *Id.* Indeed, a complaint should only be dismissed with prejudice pursuant to Rule 12(b)(6) if "'it is clear that the defect is incurable or the plaintiff advises the court that he is

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> [D]ismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim.

Wright & Miller, *Federal Practice & Procedure* § 1357 (3rd ed. 2004) (footnotes omitted).

unwilling or unable to amend in a manner that will avoid dismissal.'" *In re RadioShack*, 547 F. Supp. 2d at 618; *cf. Brown v. Tex. A & M Univ.*, 804 F.2d 327, 334 (5th Cir. 1986) ("Unless we have searched every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability,' we must remand to permit plaintiff to amend his claim if he can do so.").

If permitted, American will promptly move for leave to further amend its fourth count and will identify with specificity travel agents and airlines that have entered into anticompetitive agreements with each of Sabre and Travelport. In addition, American will identify specific terms in those contracts that violate section 1 of the Sherman Act. Finally, American will seek to add allegations demonstrating the amount of commerce that is foreclosed by those agreements.

The Order holds that American cannot establish substantial foreclosure by aggregating the market shares of the travel agencies with which each GDS had anticompetitive agreements. Order 30 n.16. American requests that the Court reconsider its ruling on this point. Neither Sabre nor Travelport argued in its dismissal brief that aggregation was inappropriate, and indeed such an argument is contrary to established antitrust doctrine. *See* 3 Hovenkamp & Areeda, Antitrust Law ¶ 310c1 ("[I]n many vertical foreclosure cases the defendant contracts with more than one purchaser, and foreclosure is measured by looking at the aggregate foreclosure.").[2]

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[2] Hovenkamp and Areeda apply this principle to a hypothetical situation quite similar to that alleged in the Complaint:

> An aggregation of claims may produce sufficient proof of violation or injury where violation requires that a certain legal threshold be met and no claim standing alone is sufficient to meet the threshold. This is not the type of case with which *Continental Ore* was concerned, but it does illustrate a correct use of aggregation. For example, suppose that the defendant has entered into distinct tying or exclusive dealing contracts

In fact, courts regularly aggregate multiple vertical agreements to determine whether they foreclose a substantial amount of commerce. See, e.g. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 295 (1949) (finding liability under section 3 of the Clayton Act based on the combined anticompetitive effect of contracts with 5,937 independent service stations); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922) (holding that plaintiffs stated claim under section 3 of the Clayton Act by alleging thousands of vertical exclusive purchasing agreements that, taken together, foreclosed 40% of the market); *Chatham Condo. Associations v. Century Vill., Inc.*, 597 F.2d 1002, 1009 (5th Cir. 1979) (analyzing whether facilities leases challenged under section 1 of the Sherman Act foreclosed a substantial amount of competition by measuring the aggregate rental fee of all such leases); *William O. Gilley Enterprises, Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 665 (9th Cir. 2009) ("If the bilateral agreements in themselves have an illegal effect on competition (when aggregated), then the bilateral agreements constitute the `contract, combination or conspiracy' required for a claim under § 1 of the Sherman Act."); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (analysis of market foreclosure should "tak[e] account of other existing foreclosures" in the market).

> with four different purchasers. Each contract individually forecloses approximately 15 percent of the market in question and thus would ordinarily be insufficient to establish a violation. However, in the aggregate the contracts foreclose approximately 60 percent of the market, which is more than sufficient. In such a case it would clearly be improper for the court to examine each agreement with the same defendant separately, conclude that that agreement standing alone is insufficient to establish illegality, and dismiss the complaint without considering the impact of the aggregation.

3 Antitrust Law ¶ 310c1. In this case, the Complaint alleges that Sabre and Travelport each entered into anticompetitive contracts with a number of travel agents that, taken together, foreclose a substantial majority of the market. If permitted to propose a new amended complaint, American will add specific allegations to show that Sabre and Travelport's agreements with travel agents foreclose a substantial portion of the relevant markets.

The case on which the Order relies, *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), is out of step with the majority rule, has rarely been followed, and is distinguishable on its facts. *See Applied Med. Res. Corp. v. Johnson & Johnson*, SACV 03-1329-JVS(MLGx), 2004 U.S. Dist. LEXIS 29409, at *12 (C.D. Cal. Feb. 23, 2004) (reaffirming that aggregation is "the rule" and distinguishing *Dickson* on the ground that the *Dickson* plaintiff pleaded only "two separate vertical conspiracies" and did not plead that the agreements together foreclosed a substantial portion of the markets at issue).[3]

American respectfully submits that the Court should have the benefit of the parties' full briefing on this important issue – which can proceed if and when Sabre or Travelport moves to dismiss the amended complaint − before making a final ruling.

If allowed to seek leave to amend, American will also add allegations identifying each of the airlines with which Sabre and Travelport have anticompetitive and exclusionary "full content" agreements and other restrictive contract terms that preclude competition, and the amount of commerce foreclosed by these agreements, preventing new entry that would drive booking fees down to a competitive level.

With regard to American's own contract with Sabre, the Order holds that, under *Perma Life Mufflers, Inc. v. International Parts Corp.* 392 U.S. 134 (1968), American is not barred under the doctrine of *in pari delicto* from challenging that contract, because American "lacks any truly complete involvement or participation" in Sabre's monopolistic conduct. Order at 30 n.15

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[3] Orbitz did argue that aggregation was inappropriate as to whether *Orbitz* had violated the Sherman Act by entering into its agreement with Travelport, and cited the *Dickson* case for support. Whether or not it is appropriate to measure Orbitz's culpability under the Sherman Act by reference to agreements to which it is not a party, the case law establishes that firms with market power, *like Sabre and Travelport*, cannot lawfully foreclose competition by entering into a series of anticompetitive agreements that in the aggregate foreclose a substantial share of the market.

(internal quotation marks omitted). But the Court further read *Perma Life* to mean that, because American was not a participant in a "conspiracy" with Sabre, its contract with Sabre could not provide the requisite agreement needed to establish a violation of section 1 of the Sherman Act.

American asks the Court to reconsider its holding on this point, which is erroneous. Sherman Act section 1 provides that "[e]very contract . . . in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1. There is no question that a legally binding contract between two unrelated parties constitutes a "contract" within the meaning of the Sherman Act. *See State of N.Y. by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 869 (E.D.N.Y. 1993) ("It is axiomatic that such a contract will satisfy the first requirement of an antitrust action."). This is true even when one of the parties to the contract does not share the anticompetitive motives of the other party. *See* Areeda & Hovenkamp, Antitrust Law ¶ 357c ("Dealers injured by an illegal distribution restraint have standing to seek an injunction against the restraint or treble damages. That the dealer may be a party to the very agreement it attacks does not generally prevent such relief."). Indeed, Sabre and Travelport never argued that their participating carrier agreements with American are not "contracts" within the meaning of section 1 of the Sherman Act.

In fact, *Perma Life Mufflers* itself stands for the proposition that a legally binding agreement between two parties is a "contract" under the Sherman Act, even if the parties to the contract willingly entered into the contracts knowing that they contained the very restrictive terms that they are challenging as anticompetitive. 392 U.S. at 139-140. In that case, in response to defendants' argument that the plaintiffs had not alleged an illegal conspiracy under the Sherman Act, the Court held that each of the plaintiffs "can clearly charge a combination between [the defendant] and himself, as of the day he unwillingly complied with the restrictive franchise agreements." *Id.* at 139. The holding of *Perma Life Mufflers* is that a party to a

contract may challenge the contract under section 1 when it is not an active participant in a scheme, but instead has anticompetitive terms imposed upon it. *Id.* Because this argument was not raised in the defendants' briefs on their motions to dismiss, the Court has not had the benefit of a full briefing on this issue.

B. American's State-Law Claims Are Not Preempted by the ADA and, In Any Event, the Order's Dismissal of the Claims was Unnecessary.

American respectfully moves for reconsideration of the dismissal with prejudice of the state-law claims as preempted, Order on Mot. to Dismiss 33-36, for three reasons.

First, the Airline Deregulation Act (ADA) does not protect GDSs or other "ticket agents." The Act deregulated the airline industry, not the ticket agent industry, and it preempts only state claims that would impose state re-regulation on *air carriers*.

Under the ADA, it is not sufficient for preemption that the claim is merely "related to a price, route, or service of an air carrier." 49 U.S.C. §41713(b). The Supreme Court in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), held that some state claims are not preempted by the ADA even if they do "relate" to an airline's prices, routes, or services. *Id*. at 232. For example, one such set of non-preempted claims are those that allege "no violation of state-imposed obligations." *Id.* at 228. As the Court reasoned,

> the ban on enacting or enforcing any law relating to rates, routes, or services is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.

Id. at 229 n.5 (quote marks omitted). In other words, even if a claim is "related" to airline prices, routes, or services, the ADA only preempts the claim if it is based on a state-imposed obligation ***and*** it would impose regulations on the operations "of an air carrier." *Id*. Thus, the Court in

Wolens held that a contract claim does not satisfy the former requirement, because contracts are privately agreed, not *state*-imposed, obligations. *Id.* at 228-29.

Other courts have addressed the second requirement, recognizing that the ADA only preempts claims that would have "a regulatory effect upon the airlines." *United Air Lines, Inc. v. Gregory*, 716 F.Supp.2d 79, 90 (D. Mass. 2010), quoting *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 221-22 (Tex. App.--Fort Worth 2009, pet. denied), *cert. denied*, 130 S.Ct. 2061 (2010). In other words, "claims must adversely impact economic deregulation of the airlines and the forces of competition within the airline industry in order to be preempted by the ADA." *Ginsberg v. Northwest, Inc.*, 653 F.3d 1033, 1041 (9th Cir. 2011), quoting *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F.Supp.2d 1161, 1171 (C.D. Cal. 2003). *Accord Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 282 (Tex. 1996) (a contract claim is not preempted "because contract law does not effectuate purposes that could have a prohibited *regulatory effect on airlines*") (emph. added).

Consequently, even if a state claim "relates" to airline prices, routes, or services, and even if the claim is based on state-imposed obligations, the ADA does not preempt the claim if it would not impose state re-regulation *on airlines*. *See, e.g.*, *Trujillo v. Am. Airlines, Inc.*, 938 F. Supp. 392, 394 (N.D. Tex. 1995) (ADA does not preempt claim that does not seek "to impose external requirements *upon airlines* in the provision of services to the consumer") (emph. added), *aff'd*, 98 F.3d 1138 (5th Cir. 1996). American's tortious interference claims here do not seek to impose state re-regulation on any airline, so the claims are not preempted by the ADA.

Second, the Order conflicts with decisions of other federal courts whose rulings track the text of the ADA, which distinguishes airlines from travel intermediaries like ticket agents such as GDSs. The Act has a section barring unfair or deceptive practices, which covers both "air

carriers" and "ticket agents" by name. *See* 49 U.S.C. §41712. GDSs like Sabre and Travelport are subject to this *anti-deception* clause. *See Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1122 (D.C. Cir. 2005) (holding Sabre, over its opposition, to be subject to the ADA restrictions on "ticket agents"). In contrast, the *preemption* clause in the ADA, which is the very next section (§41713), does not name ticket agents. Congress included GDSs only in §41712, by including ticket agents within the deception prohibition. The anti-deception clause expressly extends beyond airlines to ticket agents, but the preemption clause does not:

- Section 41712(a): DOT "may investigate and decide whether an air carrier, foreign air carrier, or ***ticket agent*** has been or is engaged in an unfair or deceptive practice" (emph. added);

- Section 41713(b)(1): States "may not enact or enforce a law . . . related to a price, route, or service of ***an air carrier***" (emph. added).

In other words, the statutory language and purpose confirm that, while non-airline-owned GDSs, as ticket agents, are covered by the anti-deception provision in §41712, they are not covered by the preemption provision in §41713.

Due to this distinction, the case law rejects preemption of state-law tort claims by airlines, including against "ticket agents" such as GDSs, on the ground that they would not impose state re-regulation on airlines. *See, e.g.*, *Alaska Airlines, Inc. v. Carey*, 395 F. App'x 476, 478 (9th Cir. 2010) (rejecting ADA preemption of airline's fraud claim against ticket agent because the claim "would not frustrate the purpose of the Airline Deregulation Act"); *Gregory*, 716 F. Supp. 2d at 90 (rejecting ADA preemption of airline's tort claim because it would not have a "regulatory effect upon the airlines"); *accord Frequent Flyer Depot*, 281 S.W.3d at 221-22 (rejecting ADA preemption of airline's tort claims – including interference – against ticket agent, because the claims would not have a "regulatory effect upon the airlines").

Moreover, the Order conflicts with the preemption decisions of the state courts in the Sabre case pending in the 67th Judicial District of Tarrant County, which have ruled on the ADA preemption issue based on detailed briefing and arguments. Indeed, Sabre just asserted such a "conflict" in the Fort Worth Court of Appeals.[4]

As no GDS today is part of an airline, they have no standing to assert ADA preemption. So, while an airline's state-law claims against a GDS could tangentially affect the airline's fares, any effect is "too tenuous, remote, or peripheral" to trigger preemption, *Morales*, 504 U.S. at 391, and it will not impose state-mandated regulatory restrictions on airlines. A GDS is merely a "travel intermediary," *Sabre*, 429 F.3d at 1122; it is not an air carrier. It is the electronic plumbing that enables travel agents to book airline tickets within their authority from an airline. It also offers bookkeeping and back-office software services to travel agents, which have nothing to do with the prices or services of air carriers protected by the ADA. Courts consistently find that claims against travel/ticket agents are not preempted. *See, e.g.*, *Kneuss v. Ritenour*, 2002 WL 31518175, at *4 (Ohio App. 2002). Travel agencies are subject to the anti-deception provision of the ADA, but not the preemption clause. Claims against travel agents are not

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[4] The state trial judge has ruled on the preemption defense against American's state claims twice. *See* Denial of Sabre Special Exception (June 23, 2011); Hearing on Sabre Special Exception (Aug. 12, 2011). In the state courts, the parties have filed a total of 151 pages of preemption briefing and had two oral arguments. Sabre briefed ADA preemption in a 9-page motion (June 6, 2011); a 19-page reply (June 16, 2011); another 11-page brief (July 29, 2011); and a 7-page reply (Aug. 21, 2011). American filed a 12-page response (June 14, 2011) and another 12-page response (Aug. 8, 2011). Before ruling, the state judge heard lengthy arguments at two hearings. Over two months later, Sabre sought a writ of mandamus on the preemption rulings, filing a 26-page mandamus petition (Oct. 21, 2011); American made a 28-page response (Nov. 3, 2011); and Sabre filed a 19-page reply (Nov. 8, 2011). The Fort Worth Court of Appeals denied the petition. *See In re Sabre Inc.*, No. 02-11-00440-CV (Tex. App.--Fort Worth Nov. 18, 2011, orig. proc.). Sabre then filed an 8-page motion for rehearing of the denial of its petition, citing this Court's Order as "conflict[ing]" authority that supports Sabre's request. *See* Sabre's Motion for Rehearing on Pet. for Writ of Mandamus at 1 (Dec. 5, 2011).

preempted, just like claims against the GDSs they use – GDSs are simply technology vendors hired by airlines to distribute fares and other data to travel agencies.

These decisions are consistent with *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), where the claims were brought *against* an air carrier (American) and its GDS "subsidiary" (Sabre). *Id.* at 284; *see id.* at 285 (lawsuit was filed in 1996 when disputed acts occurred and when American owned Sabre). Claims against an airline affiliate can, in fact, impose state re-regulation upon airlines, even though the affiliate is not itself an airline. Thus, the ADA preempts claims against an airline subsidiary, such as the airline-owned GDS in *Lyn-Lea*, or the airline parent AMR Corp. in *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689, 696 (S.D. Tex. 1993). Claims against independent GDSs, which do not operate as an airline, do not impose state re-regulation upon air carriers, and the claims are not preempted.

Third, the preemption ruling addresses state-law claims that American sought to dismiss. Rather than disposing of the claims through the proposed amendment, the Order held that the preemption required dismissal with prejudice. Because American was dropping the state claims, the Court was entitled to consider the motions to dismiss the state claims as moot. Other courts have so held in similar circumstances. *See, e.g.*, *Bibbs v. Tukwila Police Dep't*, 2009 WL 1531797, at *2 (W.D. Wash. 2009) ("The issue is now moot as Plaintiff dropped his . . . claim in his Proposed Amended Complaint."). Courts decline to rule on moot claims to avoid issuing advisory rulings. The mootness doctrine "is derived from Article III's prohibition against federal courts issuing advisory opinions." *League of United Latin Am. Citizens v. City of Boerne*, 659 F.3d 421, 432 (5th Cir. 2011). *See also Toney v. Miller*, 358 F. App'x 583, 584 (5th Cir. 2009) (state dropped one charge after defendant pleaded guilty to another, so the appeal was "moot"

and "any decision rendered by this Court would be an impermissible advisory opinion"). Here, the ruling on preemption amounts to an advisory opinion on an issue not briefed in depth.[5]

In short, American respectfully submits that reconsideration is warranted of the Order's erroneous advisory ruling regarding preemption of the state-law claims, which creates needless conflicts with federal and state precedent on an important issue.

CONCLUSION

For these reasons, American respectfully requests that the Court reconsider its Order dismissing with prejudice American's fourth count, vacate that Order's dismissal with prejudice, and enter an order dismissing that claim without prejudice.

American also requests that the Court reconsider its Order dismissing with prejudice American's fifth and sixth counts, vacate the Order and deny defendants' motions to dismiss the counts, or withdraw the portions of the Order discussing the counts.

Dated: December 19, 2011

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[5] In contrast to the extensive briefing and arguments in the state litigation, this Court got just 8 pages of ADA briefing from all parties combined. Travelport's motion spent less than 3 pages on preemption. Dkt. #86 at 23-25. Sabre's motion addressed preemption in about 1 page, merely incorporating Travelport's arguments. Dkt. #98 at 23-24. Orbitz filed no preemption briefing. Due to space limitations, American's response on the issue was about 3 pages long. Dkt. #107 at 22-25. And Travelport's reply addressed this issue in about 1 page. Dkt. #125 at 9-10.

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 19th day of December, 2011.

/s/ Yolanda Garcia
Yolanda Garcia