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

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

Sabre's Response in Opposition to American Airline's Motion for Reconsideration of the Court's November 21, 2011 Order

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The Court should deny American Airlines' ("AA") motion to reconsider the Court's dismissal of Counts 4, 5, and 6 of AA's First Amended Complaint. In Count 4, AA alleged that Sabre's contracts with airlines and travel agents unreasonably restrained trade in violation of Section 1of the Sherman Act, 15 U.S.C. § 1. This Court dismissed Count 4 for failing to allege substantial foreclosure. Prior to dismissal, AA had two opportunities to plead foreclosure but instead chose to argue foreclosure was not relevant. AA should not get a third try. The Court dismissed on preemption grounds Counts 5 and 6, which sought to assert state law tort causes of action. As to those counts, AA simply seeks to articulate new arguments against preemption, which is improper on a motion for reconsideration. In any event, AA is wrong on the merits: the Court's holding is correct and entirely consistent with precedent.

I. Reconsideration is Warranted Only for Compelling Reasons

To prevail on a motion for reconsideration, the moving party must provide compelling reasons. Otherwise, litigation goes on without end and the overriding interest in finality and avoiding imposing unwarranted costs and delay on the court and other parties is undermined. *See Official Committee v. Coopers & Lybrand*, 322 F.3d 148, 167 (2d Cir. 2003) ("We have limited district courts' reconsideration of earlier decisions under Rule 54(b) by treating those decisions as law of the case, which gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that 'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'"); *Singh v. George Washington University*, 383 F. Supp. 2d 99, 101-02 (D.D.C. 2005) (quoting *Coopers & Lybrand* and adding that "[t]he sure and speedy administration of justice requires no less"); *see also Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (stating that courts must "strike the proper balance" between "finality" and "render[ing] just decisions on the basis of all the facts."). Accordingly, district courts in this circuit have held that motions for

reconsideration should only be granted for strong reasons — not present here — such as to correct an obvious and plain legal error or the discovery of new evidence. *See, e.g., J&J Sports Productions, Inc. v. Tawil*, 2009 WL 5195892, *2 (W.D. Tex. 2009) (requiring the movant show "the need to correct a clear or manifest error of law or fact or to prevent a manifest injustice"); *Perforaciones Maritimas Mexicanas S.A. de C.V. v. Seacor Holdings, Inc.*, 2008 WL 7627805, *1 (S.D. Tex. 2008) (holding that a Rule 54(b) motion must '"clearly establish either a manifest error of law or fact or must present newly discovered evidence") (citing *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005)).

The standards under Rule 59(e) for motions to alter or amend a final judgment and under Rule 60(b) for motions for relief from judgment are also relevant. This Court has held that Rules 59 and 60 should "inform" the Rule 54 analysis, although the standard under Rule 54 may be somewhat "less exacting." *Dos Santos v. Bell Helicopter Textron, Inc.*, 651 F. Supp. 2d 550, 553 (N.D.Tex. 2009) (Means, J.). Others courts too have looked to these other rules in this context.[1] For Rule 59(e), the Fifth Circuit has explained that a motion to alter or amend a final judgment is an "extraordinary remedy that should be used sparingly" only to correct a "manifest error of law or mistake of fact" and has emphasized that "a judgment should not be set aside except for substantial reasons." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). For Rule 60(b), the moving party must establish "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence…; (3) fraud…; (4) the judgment is void; (5) the judgment has

[1] Limiting the list only to district courts in this circuit, some of the examples include *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471 (M.D. La. 2002) (looking to Rule 59(e)); *Shell Global Solutions (US), Inc. v. RMS Engineering, Inc.*, 782 F. Supp. 2d 317 (S.D. Tex. 2011) (applying Rule 59(e) standards); *Rotella v. Mid-Continent Cas. Co.*, 2010 WL 1330449 (N.D. Tex. 2010) (approvingly citing *Dos Santos* on this issue); *Mason v. T.K. Stanley, Inc.*, 2006 WL 1365411 (S.D. Miss. 2006) (looking to Rule 59(e)); and *In re Bank of Louisiana/Kenwin Shops Inc., Contract Litigation*, 1999 WL 518852 (E.D. La. 1999) (applying Rule 60 standards).

been satisfied, released or discharged; or (6) any other reason justifying relief for the operation of the judgment." *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991).

Whatever the precise formulation of the standard, none of AA's arguments come remotely close to satisfying it. As detailed below for each count, AA has not shown that the Court committed any error, much less clear error. Nor has AA shown that it will suffer a manifest injustice; indeed, whether AA will suffer at all is doubtful. AA also does not offer new law or facts, much less significant ones.

II. Count 4: AA Concedes It Did Not Plead Substantial Foreclosure and Simply Asks for Yet Another "Do Over"

This Court dismissed AA's Count 4 because AA failed to plead substantial foreclosure of the alleged market and failed to identify with sufficient particularity the agreements it seeks to challenge. (Order on Mot. to Dismiss, Dkt. 156, Nov. 21, 2011, at 31-32). AA does not dispute that pleading substantial foreclosure is required to state a claim.[2] AA's only argument for reconsideration is that the Court dismissed Count 4 with prejudice; it says that the Court should have dismissed without prejudice and given AA a third attempt to amend its pleadings to actually plead substantial foreclosure.

Courts often deny leave to amend in these circumstances. *See, e.g., Forman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that a court may deny leave for reasons including "undue delay, bad faith or dilatory motive … repeated failure to cure deficiencies … undue prejudice … [and] futility"); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1175 (5th Cir. 2006) (affirming denial of leave given prior failures to state a claim); *Smith v. EMC Corp.*, 393 F.3d 590, 595-96

[2] AA does argue that the Court erred on two subsidiary points, specifically that the Court erred in holding (1) "American cannot establish substantial foreclosure by aggregating the market shares of the travel agencies with which each GDS had anticompetitive agreements" (AA Mot. For Reconsideration, Dkt. 162, Dec. 19, 2911, at 7); and (2) AA's "contract with Sabre could not provide the requisite agreement needed to establish a violation of section 1of the

(5th Cir. 2004) (affirming denial of leave for undue delay and noting that the plaintiff could have pled claims earlier); *Mayeaux v. Louisiana Health Services & Indem. Co.*, 376 F. 3d 420, 427 (5th Cir. 2004) (affirming denial of leave when amendment was "'untimely' in light of the procedural history and posture of the case"); *Smith v. Ayres*, 845 F.2d 1360 (5th Cir. 1988) (affirming denial of leave given continued deficiencies); *Mitsubishi Aircraft Intern., Inc. v. Brady*, 780 F.2d 1199, 1203 (5th Cir. 1986) (affirming denial of leave when failure to plead the claim earlier "strongly suggests either a lack of diligence on [the plaintiff's] part or a lack of sincerity"); *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) ("[M]eaningful consideration should be accorded the proposition that all litigation must have a timely termination."); *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981) (affirming denial of leave as "untimely" after motions to dismiss, or in the alternative summary judgment, were taken under advisement); *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) ("Liberality in amendment is important to assure a party a fair opportunity to present his claims and defenses, but 'equal attention should be given to the proposition that there must be an end finally to a particular litigation.'").

Here, AA had ample opportunity to set forth sufficient foreclosure allegations. AA has already filed two amended complaints, neither of which adequately alleged foreclosure. (AA First Am. Compl., Dkt. 52, Jun. 1, 2011; AA Second Am. Compl., Dkt. 159, Dec. 5, 2011). The need to show substantial foreclosure to have a valid Sherman Act, Section 1 claim such as AA's Count 4 is well-established by Supreme Court and Fifth Circuit precedent, *see, e.g.*, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328-29 (1961); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1386 (5th Cir. 1994), and so AA must have known it needed to plead substantial foreclosure. The Court need not be solicitous toward AA on this point either: AA is

represented by experienced antitrust counsel who undoubtedly know that substantial foreclosure is required for this sort of claim.

Moreover, Sabre's motion to dismiss described in detail the legal requirement that AA must show substantial foreclosure and why AA's pleadings failed to meet that standard. (*See* Sabre Mem. ISO Mot. to Dismiss, Dkt. 97, Jul. 13, 2011, at 17-21). AA's most recent amended complaint post-dated Sabre's motion to dismiss by over three months, yet *still* failed to address these deficiencies. (Sabre filed its motion to dismiss on July 13, 2011 (Dkt. 97), and AA filed a motion for leave to file its second amended complaint, including a copy of that complaint, on Oct. 20, 2011 (Dkt. 148).)

Even worse, AA did not actually file its most recent inadequate complaint until two weeks *after* the Court's ruling on the motion to dismiss and therefore had ample opportunity to plead whatever additional facts it wanted. (*See* Order on Mot. to Dismiss, Dkt. 156, Nov. 21, 2011; AA Second Am. Compl., Dkt. 159, Dec. 5, 2011). This filing triggered a second set of motions to dismiss, which are pending. (*E.g.*, Sabre Partial Mot. to Dismiss, Dkt. 163, Dec. 22, 2011). Were the Court to grant AA's motion, there would likely be yet another round of motion to dismiss briefing, all to the prejudice of this Court and Sabre. In any event, any conceivable justification for AA's delay was lost when AA filed its second amended complaint without curing the deficiencies in its foreclosure allegations that the Court identified in dismissing Count 4.

AA also cannot plausibly argue that it was missing any facts it needed to plead substantial foreclosure at the time it filed either of its amended complaints. AA's motion does not point to any new facts AA has now but did not have previously. Nor could AA plausibly say it lacked the facts it needed: AA first sued Sabre in state court in January 2011, and by the time

AA filed its motion for leave to file a second amended complaint in this Court in October 2011, Sabre had produced hundreds of thousands of pages of material to AA. Indeed, the entire premise of AA's motion for leave was that AA should be allowed to add new claims based on the discovery it had received from Sabre. (AA Mot. for Leave to File Second Am. Compl., Dkt. 148, Oct. 20, 2011, at 2.) Moreover, AA plainly had sufficient facts to allege substantial foreclosure by the time it actually filed its second amended complaint on Dec. 5, 2011, as its motion for reconsideration was filed a mere two weeks later, on Dec. 19, 2011. (AA Second Am. Compl., Dkt. 159, Dec. 5, 2011; AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011.)

Finally, the Court should be mindful of the fact that AA's claims regarding the same conduct under Section 2 of the Sherman Act, 15 U.S.C. § 2, remain before this Court. AA has also brought monopolization claims against Sabre based on the same conduct in Texas state court under the guise of the Texas antitrust law. AA has successfully resisted Sabre's attempt to remove the state case to federal court so that it might be consolidated with the claims pending before this Court. Thus, the dismissal of Count 4 will not deprive AA of a chance to make its case; far from it — AA still has not just one, but two chances to attack Sabre in both federal and state court for the same conduct.

Given all of these circumstances, the Court plainly acted well within its discretion in dismissing Count 4 with prejudice. Sabre also incorporates by reference the reasons detailed in Travelport's briefing why further amendment by AA would be futile and prejudicial to the defendants. (Travelport Resp. to AA's Mot. for Reconsideration, Dkt. 182, Jan. 9, 2012, at 5-9.)

III. Count 5 and 6: The Court Properly Ruled that the ADA Preempts AA's State Law Claims

AA asks the Court to reverse or "withdraw" its ruling that the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b), preempts AA's state law tortious interference claims (Counts 5 and 6). (Order on Mot. to Dismiss, Dkt. 156, Nov. 21, 2011, at 34, 36). AA's request is nothing more than its latest attempt to forum-shop this dispute: AA is trying to avoid the impact of this Court's ruling on similar claims it has brought against Sabre that are pending in state court. Indeed, AA admits it no longer wants to pursue these claims in federal court. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 15-16.)

AA's motion for reconsideration of Courts 5 and 6 should be denied for three reasons. First, AA could have, but did not, raise its new preemption arguments in response to the motions to dismiss, and a motion for reconsideration "cannot be used to raise arguments which could, and should, have been made before." *Shell Global Solutions (US) Inc.*, 782 F. Supp. 2d at 358 (citing *Schiller v. Physicians Resource Group Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)). In response to the defendants' motions to dismiss, AA argued that ADA preemption does not apply to "state-law tort claims … brought to enforce legitimate contracts." (AA Resp. to Travelport Mot. to Dismiss, Dkt. 107, Jul. 18, 2011, at 23; AA Resp. to Sabre Mot. to Dismiss, Dkt. 124, Aug. 3, 2011, at 25 (incorporating AA's response to Travelport)). In its current motion, however, AA changes course and argues that ADA preemption applies only to claims against airlines. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 11-15). Because AA offers no reason for not raising this argument earlier, the Court should deny AA's motion. *E.g., Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 9-10 (D.D.C. 2011) ("[A]lthough styled as such, Defendants' motion is plainly not one for reconsideration. Defendants' entire motion either raises arguments that should have been, but were not, raised in their underlying Motion for

Summary Judgment, or merely recycles the same arguments already pressed and rejected. This approach is, frankly, a waste of the limited time and resources of the litigants and the judicial system."); *Dos Santos*, 651 F. Supp. at 553 ("[C]onsiderations such as whether the movant . . . is attempting to raise an argument for the first time without justification bear upon the Court's review of the motion for reconsideration.").

Second, AA's new preemption argument is unsupported by the statutory text or precedent. The text of the ADA does not preempt only claims against airlines. Instead, the ADA says that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b). The well-settled statutory test for determining whether ADA preemption applies tracks this language: it applies to all claims that (1) "derive from the enactment or enforcement of state law," and (2) "relate to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them." *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1168 (C.D. Cal. 2003).[3] Counts 5 and 6 meet this statutory test. First, AA sought in those counts to enforce the Texas common law of tortious interference. Second, these counts relate to AA's prices, routes, or services. AA alleged that Sabre's actions "misled and confused the Travel Agent and Corporate Subscribers regarding American's fares and have thwarted the ability of the Travel Agent and Corporate Subscribers to make

[3] *All World* held that the ADA did not preempt the claims at issue, but only because they did not "relate to" an airline's prices, routes, or services. No such concern exists here because, as described in the text, AA's claims plainly do relate to its prices, routes, and services. Many other courts have similarly applied a two-part test. *E.g., United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996); *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109, 111 (S.D.N.Y. 1996); *Chrissafis v. Continental Airlines*, 940 F. Supp. 1292, 1297 (N.D. Ill. 1996); *Delta Airlines v. Black*, 116 S.W.3d 745, 753 (Tex. 2003); *Continental Airlines v. Kiefer*, 920 S.W.2d 274, 281-82 (Tex. 1996).

reservations for and otherwise sell airline tickets for flights on American" (AA First Am. Compl., ¶ 155, Dkt. 52, June 1, 2011) and that it has suffered "actual damages" due to "a decrease in ticket sales" (*Id.* ¶ 156). AA also asked the Court to enjoin conduct that it alleges causes confusion about "American's fares" and misrepresents "American's fares to travel agents and to the public" (*Id.* ¶¶ 98, 155).

AA does not dispute any of this. Instead, it urges the Court to read an additional requirement into the statute — that ADA preemption should apply only to claims against airlines.[4] (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 11-15.) Yet AA points to nothing in the statutory text to support this view. Quite the contrary: the statute says that it preempts enforcement of any state law claim "related to" a "price, route, or service," without mention of the target of the enforcement. In *Morales v. TWA*, the Supreme Court interpreted "related to" to preempt any state law claim that has "a connection with or reference to" an airline's prices, routes, or services. 504 U.S. 374, 388 (1992). *Morales* expressly declined to hold that the ADA prevents states only from actually prescribing an airline's rates, routes, or services or that "only state laws specifically addressed to the airline industry are pre-empted." *Id*. at 383-86. The Court instead emphasized the preemption clause's "broad scope" and "expansive sweep." *Id.* at 384 (citations and internal quotations omitted); *see also Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002) (quoting *Morales* and noting "the Court held that the phrase 'relating to rates, routes, or services' in the ADA was 'deliberately expansive'"); Order on Mot. to Dismiss, Dkt. 156, Nov. 11, 2011, at 33-34,

[4] Notably, AA took the opposite position in *Continental Airlines, Inc. v. Am. Airlines, Inc.*,824 F. Supp. 689 (S.D. Tex. 1993), a suit against AA's parent company. There, AA argued that ADA preemption "applies to non-carriers as well" and the court agreed, holding that "[n]othing in the ADA suggests that [preemption] applies only to suits against an air carrier." *Id.* at 969.

(quoting *Morales* and *Lyn-Lea* and holding that the phrase "related to" is "deliberately expansive and preempt[s] any state enforcement action having a connection with or reference to airline rates, routes, or services") (internal quotation marks omitted).

Recognizing that the text of the preemption clause undermines its claim, AA argues that a different section of the ADA, the anti-deception clause, 49 U.S.C. § 41712(a), supports its position. The anti-deception clause specifies that the U.S. Department of Transportation has authority to "investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." 49 U.S.C. § 41712(a). AA says that because the *anti-deception* clause expressly lists "ticket agents" — a phrase that includes GDSs — the *preemption* clause cannot apply to claims against GDSs because the preemption clause does not also expressly identify "ticket agents."

But AA's argument has it backward. While the anti-deception clause expressly enumerates the entities over which the DOT has regulatory authority — "air carriers," "foreign air carriers," and "ticket agents" — the preemption clause does not enumerate specific entities, but rather broadly proscribes all state enforcement of laws "related to" a "price, route, or service of an air carrier." 49 U.S.C. § 41713(b). The distinction between these two clauses supports the Court's decision and Sabre's position: the preemption clause is nowhere limited only to claims against air carriers; instead, it applies to preempt any enforcement of state law related to prices, routes, or services, regardless of the target.[5]

[5] Another consequence of AA's argument is that the preemption clause would not apply to claims against "foreign air carriers," which like "ticket agents" are specifically enumerated in the anti-deception clause. This illogical outcome further emphasizes the fatal flaws in AA's argument.

Unsurprisingly given the central role GDSs play in the provision of air transportation services, courts often find ADA preemption applies to state law claims against GDSs. In fact, controlling Fifth Circuit precedent *Lyn-Lea Travel Corp.* holds that the ADA preempts state tortious interference claims against Sabre. 283 F.3d at 286. The Fifth Circuit even rejected the exact argument AA makes here:

> Lyn-Lea also argues, without citing supporting authority, that its claims against Sabre cannot be preempted because Sabre is not an air carrier. *ADA preemption is not limited to claims brought directly against air carriers.* Rather, claims are preempted if they "relate to" the prices, routes, or services of an air carrier.

Id. at 287-88 & n.8 (noting that GDSs have a "significant relationship to the economic aspects of the airline industry" and the role GDSs play as "intermediaries between carriers and passengers") (citations omitted) (emphasis added). AA's only response to this binding precedent is to say that Sabre was at one time an AA subsidiary. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 15.) But AA did not own Sabre when *Lyn-Lea* was decided, as the Fifth Circuit specifically recognized. 283 F.3d. at 285 n.2 ("Sabre succeeded American as defendant and counter-plaintiff in this suit"). Nor did AA's past ownership of Sabre play any role in the analysis: the Fifth Circuit based its analysis on the statutory text, focusing on whether the claims "related" to the prices, routes, or services. In addition, the Fifth Circuit noted that "[t]he ADA's legislative history … provides clear and convincing evidence that Congress intended to preempt state law in the regulation of [GDS] services." *Id.* at 288-89 (citation omitted).

Other courts have also held that ADA preemption applies to state law claims against GDSs. *See Frontier Airlines, Inc. v. United Airlines, Inc.*, 758 F. Supp. 1399, 1408, 1410 (D. Colo. 1989) (holding "[f]ederal law preempts state laws regulation the provision of [GDS] services" and "preempt[s] a state's attempt to enforce its law to determine whether conduct related to the provision of [GDS] services was improper," recognizing that the legislative history

provides "clear and convincing evidence that Congress intended to preempt state law in the regulation of [GDS] services," and recognizing that "the access [the GDS] provides airlines and travel agents is not only unique to the airline industry, but essential to competition for passengers"); *Manassas Travel, Inc. v. Worldspan, L.P.*, Case No. 2:07-CV-701-TC, 2008 U.S. Dist. LEXIS 35217, at *6-7 (D. Utah Apr. 30, 2008) (granting a GDS's motion to dismiss tortious interference claims because the ADA preempted plaintiff's non-contract state law claims); *Galileo Int'l, L.L.C. v. Ryanair, Ltd.*, Case No. 01 C 2210, 2002 U.S. Dist. LEXIS 3317, at *12-15 (N.D. Ill. Feb. 27, 2002) (applying ADA preemption to state law claims against a GDS because the allegations "relate to airline 'services' within the scope of the ADA's preemption clause").

Against these authorities, AA over-reads a handful of inapposite cases that did not involve GDSs. AA boldly claims that "[c]ourts consistently find that claims against travel/ticket agents are not preempted," but then cites only an unpublished appeal from a small claims court verdict in Ohio state court. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 14). That case involved a claim by a customer against his travel agent after he missed his flight and had nothing to do with an airline's prices, routes, or services or with a GDS. *See Kneuss v. Ritenour*, No. 2001AP110097, 2002 WL 31518175 (Ohio App. Nov. 6, 2002). The other cases AA cites involve state law claims either brought by or against airlines. Because the entity before the court was an airline, the courts in these cases sometimes use phrases like "upon airlines" or "on airlines" when discussing the reach of ADA preemption. *E.g.*, *Ginsberg v. Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011); *Trujillo v. Am. Airlines, Inc.*, 938 F. Supp. 392, 393-94 (N.D. Tex.

1995); *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 282 (Tex. 1996).[6] But such phrasing under the circumstances cannot fairly be read to show that ADA preemption applies exclusively to airlines, especially when that issue was not before any of these courts.

Other cases involved claims against non-airlines where the claims simply did not sufficiently relate to prices, routes, or services to trigger ADA preemption. *See Alaska Airlines Inc. v. Carey*, 395 Fed. App'x 476, 478 (9th Cir. 2010); *United Airlines, Inc. v. Gregory*, 716 F. Supp. 2d 79, 90 (D. Mass. 2010); *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 221-22 (Tex. App.—Fort Worth 2009, pet. denied). These courts did not apply ADA preemption because the claims were too far removed from prices, routes, or services, not because ADA preemption never applies to claims against a non-airline. Specifically, all these cases involved attempts to prevent individuals from illicitly brokering frequent flyer miles or airline vouchers.[7] *Carey*, 395 Fed. App'x at 477-78; *Gregory*, 716 F. Supp. 2d at 82, 92; *Frequent Flyer Depot*, 281 S.W.3d at 22-210. Here, by contrast, Sabre plays a central role in the distribution of airline flights and fares, and AA does not dispute that its tortious interference claims are closely related to its prices, routes, and services. That is enough to trigger ADA preemption.

Third, AA asks the Court to "withdraw" its prior opinion because AA sought to drop its state law claims in its motion to file a second amended complaint. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 15-16.) For the reasons given in the Court's original opinion, the Court should deny this request too. The Court explained that AA's motion

[6] Moreover, *Ginsberg* involved a contract claim, *Ginsberg*, 653 F.3d at 1034-35, and the Supreme Court has held that the ADA does not preempt contract claims, *see Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-33 (1995). AA's Counts 5 and 6 were state law tort claims.

[7] Another distinction is that these cases involved contract or quasi-contract claims, *see Carey*, 395 Fed. App'x at 478; *Gregory*, 716 F. Supp. 2d at 92; *Frequent Flyer Depot*, 281 S.W.3d at 221, and, as already noted, the ADA does not preempt enforcement of private agreements.

to file a second amended complaint came "subsequent to the Court's consideration" of the motions to dismiss. (Order on Mot. to Dismiss, Dkt. 156, Nov. 21, 2011, at 38.) The Court then recognized that AA's request was "a moot point, given the Court's decision to dismiss those claims." (*Id.*) AA does not now claim that the Court lacked authority to decide the motion to dismiss on Counts 5 and 6; instead, AA says only that the Court was "entitled" to consider these issues moot and then goes on to trivialize the Court's consideration of the issue and its opinion as "advisory." (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 15-16.) Yet the Court was entitled to issue its ruling on the pending motion to dismiss first, and its opinion plainly is not advisory because it was deciding a specific, fully briefed controversy on an issue properly before the Court at the time due to AA's operative, first amended complaint.[8] AA's request for reconsideration should be recognized for what it is: an attempt to forum shop this dispute and avoid the consequences of the Court's ruling.

In sum, the Court's dismissal of Counts 5 and 6 was correct. A motion for reconsideration should not be used to raise arguments that could have been raised earlier but were not. AA offers no excuse for not making these arguments in response to the motions to dismiss, and points to no new law or facts that should allow it to make these arguments now. Even if a motion for reconsideration were proper, AA is wrong on the merits and cannot show any legal error at all, much less clear error, in the Court's decision. Nor is dismissing these claims unjust: AA had a full opportunity to argue about preemption on the merits, did argue the issue, and lost; AA also admits that it no longer wants to pursue these claims, so depriving AA of that opportunity by dismissing them also cannot be unjust.

[8] AA gripes in a footnote that preemption received inadequate briefing. (AA Mot. for Reconsideration, Dkt. 162, Dec. 19, 2011, at 16 n.5.) Even if AA now believes its briefing was incomplete, that assumes the Court did not carefully study the issue. Inadequate briefing also is not a recognized ground for reconsideration.

* * *

For the foregoing reasons, Sabre respectfully requests that the Court deny American Airline's motion requesting the Court reconsider its November 21, 2011 order.

DATED: Jan. 19, 2012

Respectfully submitted,

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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) on January 19, 2012.

/s/ Scott A. Fredricks
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