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

American Airlines, Inc., a Delaware corporation, Plaintiff, vs. Travelport Limited, et al. Defendants.	)	Civil Action No.: 4:11-cv-244-Y

AMERICAN AIRLINES INC.'S REPLY TO SABRE'S RESPONSE IN OPPOSITION TO AMERICAN'S MOTION FOR RECONSIDERATION

INTRODUCTION

American's Motion for Reconsideration of the Court's November 21, 2011 Order (the "Motion") seeks narrow and targeted relief. It asks the Court to reconsider its dismissal with prejudice of American's vertical Section 1 claim (Count Four of American's First Amended Complaint) and instead to enter a dismissal without prejudice; and to reconsider its decision to grant Sabre's and Travelport's motions to dismiss American's state law claims (Counts Five and Six of the First Amended Complaint), which were rendered moot when American consented to dismissal of those claims. For all of the reasons set forth in the Motion, justice requires reconsideration of these two points.

None of Sabre's arguments in opposition have merit. Contrary to Sabre's assertions, district courts have the authority to—and regularly do—grant reconsideration and leave to amend under circumstances such as those present in this case. American is ready and able to plead specific, detailed facts describing Sabre's anticompetitive contract terms, the travel agencies and airlines that are parties to those contracts, and the percentages of the relevant markets that those contracts foreclose. American could not amend its complaint to plead these facts sooner, first because it did not know them—Sabre's contracts are confidential, and American obtained them only after substantial document discovery—and then because Travelport and Orbitz refused American's request for consent to amend. As a result, American must ask the Court's leave to add these facts.

Sabre argues that it will be prejudiced if American is allowed to replead its vertical Section 1 claim with the degree of detailed, evidence-backed detail that is now available to American. In fact, the only "prejudice" Sabre will suffer is having to answer American's well-pleaded claim. To the contrary, it is *American* that will suffer prejudice if it is not permitted to seek redress for illegal conduct that it now able not only to allege, but to actually prove.

As to the Order's dismissal of Counts 5 and 6 on preemption grounds, American simply asks the Court to recognize that American consented to the dismissal of these counts prior to the Court's Order, thereby rendering moot the Defendants' motions to dismiss them. Vacatur of that portion of the Order is also appropriate because the Order erred in its application of the Airline Deregulation Act and the relevant case law.

I. JUSTICE REQUIRES RECONSIDERATION OF THE ORDER'S DISMISSAL WITH PREJUDICE OF COUNT 4

Cases in this Circuit make it exceedingly clear that this Court has the authority under Rule 54(b) to revisit its decisions for any reason it deems appropriate. *See* Mot. for Recon. at 2-4. In fact, courts regularly grant reconsideration under circumstances like the ones present in this case.[1] *See, e.g.*, *Rana v. Spectra Energy Corp.*, No. H-10-0403, 2010 WL 3257523, at *4 (S.D. Tex. April 19, 2010) (granting reconsideration after deciding, upon review of the case law, that the court's initial decision was incorrect).

Sabre's central argument is that the Court should not reconsider its dismissal with prejudice and allow American to replead Count 4 because, Sabre claims, "[American] concedes it did not plead substantial foreclosure and simply asks for yet another 'do over.'" Sabre Opp. at 3. American concedes no such thing. To the contrary, American continues to believe that the First Amended Complaint pleaded facts sufficient to support a finding that American's access to

[1] In urging the Court to deny American's request for a chance to amend its Complaint, Sabre claims that "[c]ourts often deny leave to amend in these circumstances." Sabre Opp. at 3. In fact, courts liberally grant leave to amend when such leave is sought to add allegations or claims prior to the close of discovery. See, e.g., *The Richards Group, Inc. v. Brock*, No. 3:06-CV-0799-D, 2008 WL 1722250, at *1 (N.D. Tex. April 14, 2008). None of the cases that Sabre cites to the contrary, *see* Sabre Opp. at 4-3, support its argument. In the first case, *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court *reversed* the District Court's denial of leave to amend, counseling that "refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.* at 182. Each of the other cases cited by Sabre either involves leave to amend sought *after summary judgment* or a plaintiff that tried and failed repeatedly to address the court's concerns about the sufficiency of the complaint. Significantly, Sabre fails to cite any case where a court denied leave to a plaintiff that sought a single opportunity, prior to the close of discovery, to amend its complaint to address issues identified by the court on a motion to dismiss.

the market had been substantially foreclosed by Sabre's unlawful agreements. Nevertheless, American did not seek reconsideration of the Order's ruling on substantial foreclosure because, having obtained preliminary discovery from Sabre and Travelport, including discovery of some of their confidential agreements with travel agents and other airlines, it can now add substantial additional detail to its Complaint sufficient to address the issues that led the Court to dismiss the claim.[2] American simply asks the Court to enter a dismissal without prejudice so that American can seek leave to file a new amended complaint that specifies in greater detail the exclusionary terms in Sabre's and Travelport's agreements, the parties to those agreements, and the percentages of the relevant markets the agreements foreclose.[3]

Permitting American to amend will work no prejudice to Sabre. Requiring a defendant to defend itself on the merits against a properly stated claim is not prejudice; it is the very purpose of the federal pleading standard. The Federal Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Kerry v. Takeda Pharm. N. Am., Inc.*, No. 11-2325, 2012 WL 117116, at *1 (E.D. La. Jan. 13, 2012) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)). Furthermore, amendment will cause no delay in this case, which is proceeding with respect to American's monopolization claims. Finally, Sabre has had to brief the sufficiency of American's vertical Section 1 claim (the former Count 4) exactly once. If American is permitted to amend, Sabre will have to brief the issue, at most, one more

[2] Sabre's assertion that American had sufficient facts to amend on December 5, when it filed the Second Amended Complaint in the form ordered by the Court, is irrelevant. As American has explained, *see* American's Opposition to Orbitz's Motion to Dismiss American's Second Amended Complaint [Doc. #199] at 1-2, 17 n.6, 18, American sought consent from all defendants to add this detail to its Second Amended Complaint but Orbitz and Travelport refused to give such consent. *See* Appendix filed contemporaneously herewith in support of this Reply at 1-2. "[A] party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Accordingly, American filed its Second Amended Complaint exactly in the form ordered by the Court.

[3] American attached a copy of its proposed Third Amended Complaint as the Appendix to its Reply to Travelport's Response in Opposition to American's Motion for Reconsideration [Doc. #203].

time. Having to brief an issue twice is not unduly burdensome, as is demonstrated by the mountain of cases counseling in favor of amendment to remedy deficiencies identified by the court at the motion-to-dismiss stage. *See* Mot. for Recon. At 5-7 (citing cases).

On the other hand, denial of the opportunity to amend its claim—a claim for which it already possesses substantial, document-backed proof—will work substantial harm to American. The inability to present a properly pleaded claim is prejudice itself. *See City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 653 F. Supp. 2d 669, 677 (N.D. Tex. 2009) ("Before a district court dismisses claims with prejudice, the plaintiff must be given a fair opportunity to make his case."), *aff'd*, 632 F.3d 148 (5th Cir. 2010) (internal quotation marks omitted)).

Sabre argues that American would suffer no prejudice if the Court denies its request because it can challenge the anticompetitive agreements under Section 2 of the Sherman Act and under Texas state law. But it is obvious that neither Section 2 nor Texas state law is a substitute for a claim under Section 1 of the Sherman Act. These provisions each have different elements, and American is entitled to present all of its properly stated claims.

II. JUSTICE REQUIRES RECONSIDERATION OF THE ORDER'S HOLDING ON ADA PREEMPTION

The Court should not have addressed whether American's state-law claims were preempted by the ADA, because American sought to dismiss these claims by removing them from its proposed amended complaint. Many other courts have held that motions to dismiss claims are moot when a party has consented to dropping those claims, which is precisely what American did here.[4] Rather than grapple with any case law, Sabre makes the conclusory

[4] *See, e.g.*, *Bibbs v. Tukwila Police Dep't*, No. C08-1620Z, 2009 WL 1531797, at *2 (W.D. Wash. May 29, 2009) ("The issue is now moot as Plaintiff dropped his . . . claim in his Proposed Amended Complaint."); *Sigers v. Mich. Dep't of Corr.*, No. 08-13298, 2008 WL 4813103, at *1 n.1 (E.D. Mich. Oct. 31, 2008) (defendant's motion to dismiss was moot where proposed amended complaint voluntarily dropped that defendant); *Cooke v. AT&T Corp.*, No. 05-CV-374, 2007 WL 912222 (S.D. Ohio March 23, 2007) ("Since the time the motion was filed, Plaintiffs have file an amended complaint, dropping [count three], thus rendering the motion for judgment on the pleadings

assertion that Court's ruling "plainly is not advisory" because American's "operative, first amended complaint" raised state-law claims. Sabre Opp. at 14. This ignores American's consent to drop these claims, which is precisely what rendered moot Sabre's motion to dismiss.

Regardless, American's Motion is not an attempt to "forum shop" or "avoid the consequences of the Court's ruling," *id.*, as the Court's interlocutory order will not have any preclusive effect on the state court that has been adjudicating American's state-law claims against Sabre. American is pursuing state-law claims against Sabre in state court, where the state trial judge has twice rejected Sabre's contention that such claims are preempted by the ADA and the Fort Worth Court of Appeals has denied Sabre's petition for writ of mandamus on this issue. Since American filed the Motion before this Court, the Fort Worth Court of Appeals has also denied Sabre's motion for rehearing where it asserted a "conflict" between this Court's preemption ruling and the state court decisions. *See In re Sabre Inc.*, No. 02-11-00440-CV (Tex. App.—Fort Worth Jan. 4, 2012, orig. proceeding) (per curiam).[5]

On the merits of this Court's ADA ruling, Sabre first suggests that American raised "new preemption arguments" in the Motion. Sabre Opp. at 7. Not so. American's Motion explains how the ADA does not preempt claims against non-airline-owned GDSs, and American's initial response to defendants' motion to dismiss distinguishes the line of cases relied upon by Sabre.

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partially moot."); *MMCA Group, Ltd. v. Hewlett-Packard Co.*, No. C-06-7067 MMC, 2007 WL 528035, at *2 (N.D. Cal. Feb. 16, 2007) (claims against a defendant were moot when amended complaint dropped all these claims); *Cotter v. City of Boston*, 73 F. Supp. 2d 62, 64 n.2 (D. Mass. 1999) ("In their amended complaint, filed after the Division's motion to dismiss, the White Officers have dropped the Division as a defendant and, accordingly, its motion is moot."); *Cnty. of Wash. v. Cntys. of Warren & Wash. Indus. Dev. Agency*, 177 F.R.D. 119, 124 (N.D.N.Y. 1998) (plaintiff's "failure to renew its claims" in latest complaint is "consent to drop those claims," so they "are no longer before the Court" and motions regarding those claims are "moot"), *aff'd.*, 2 F. App'x 71 (2d Cir. 2001).

[5] Nevertheless, Sabre has filed a petition for writ of mandamus in the Supreme Court of Texas, arguing that this Court's ADA ruling directly contradicts the state trial court's ruling. *See* Pet. for Writ of Mandamus, *In re Sabre Inc.*, No. 12-0062, at *6 (Tex. Jan. 23, 2012).

See American Response to Travelport's Mot. to Dismiss at 24[6] ("In contrast, courts have held that the ADA preempts claims when they would have had a regulatory effect on the prices, routes, or services of an airline. The cases cited by TVP all fall into this category and are therefore easily distinguishable.") (citing *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002); *Galieo* [sic] *Int'l L.L.C. v. Ryanair. Ltd.*, No. 01-C-2210, 2002 WL 314500, at *5 (N.D. Ill. Feb. 27, 2002); *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1409-11 (D. Colo. 1989); *Manassas Travel, Inc. v. Worldspan, L.P.*, No. 2:07-CV-701-TC, 2008 WL 1925135, at *2 (D. Utah Apr. 30, 2008)); *cf.* Sabre Opp. at 11-12 (citing these cases).

American, therefore, does not raise a new argument in noting that the Court's ADA preemption ruling rests on a misreading of *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.* *Lyn-Lea* is distinguishable because the claims there "were brought *against* an air carrier (American) and its GDS [wholly-owned] 'subsidiary' (Sabre)." Mot. for Recon. at 15. Indeed, American raised this point in its initial response to defendants' motion to dismiss, noting that *Lyn-Lea* only found ADA preemption because the plaintiff travel agency was "'seeking the application of Texas common law in a way that would regulate *AA's* pricing policies, commission structure and reservation practices.'" American Response to Travelport's Mot. to Dismiss at 24 (quoting *Lyn-Lea*, 283 F.3d at 288) (emphasis added). In contrast, "[c]laims 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"—as explained more thoroughly in the Motion. Mot. for Recon. at 15.

This Court's ruling on ADA preemption, however, did not address this crucial distinction with *Lyn-Lea*, and it erroneously replaced airlines with independent GDSs when quoting *Lyn-*

[6] American's response to Sabre's motion to dismiss incorporated by reference American's response to Travelport's motion to dismiss. *See* Sabre Opp. at 7.

Lea. *Compare* Order Regarding Motions to Dismiss at 35-36 ("American 'is seeking the application of Texas common law in a way that would regulate [Sabre's and Travelport]'s pricing policies [i.e., booking fees], commission structure [i.e., sharing booking fees with travel agents], and reservation practices [i.e., biasing American's flights in their displays].' [*Lyn-Lea*, 283 F.3d] at 287."), *with Lyn-Lea*, 283 F.3d at 287 ("Lyn-Lea is seeking the application of Texas common law in a way that would regulate American's pricing policies, commission structure and reservation practices."). Sabre points out that "AA did not own Sabre when *Lyn-Lea* was decided, as the Fifth Circuit specifically recognized." Sabre Opp. at 11. That is irrelevant, because the underlying conduct that gave rise to the lawsuit occurred when American owned Sabre—and the lawsuit was filed when American owned Sabre. 283 F.3d at 284-85. That is precisely why the Fifth Circuit in *Lyn-Lea* explained that its holding was based on the fact that Sabre was "American's subsidiary." *Id.* at 284.

More fundamentally, the Court's ADA preemption ruling is at odds with the plain language of the statute and precedent. *Cf.* Sabre Opp. at 8. The ADA has an anti-deception clause—barring unfair and deceptive practices—that applies to both "air carriers" and "ticket agents" while its preemption clause only applies to "air carriers." *See* Mot. for Recon. at 12-13 (citing 49 U.S.C. §§41712(a), 41713(b)(1)).

Sabre counters that while the ADA preemption clause only enumerates "air carriers"—and not "ticket agents"—the preemption clause's "related to" language sweeps in a whole host of claims that have nothing to do with imposing state re-regulation on airlines. Sabre Opp. at 8-10. But courts have consistently refused to interpret the phrase "related to" in an extremely broad manner that is disconnected from the ADA's purpose. As the Fifth Circuit has explained, the ADA "assured economic deregulation of the airlines by rendering them immune from rate and

service regulation by the states after the demise of federal regulation." *Smith v. Am. W. Airlines, Inc.*, 44 F.3d 344, 346 (5th Cir. 1995) (en banc). That is precisely why the Fifth Circuit held that negligence claims arising from an airplane hijacking were not preempted, even though they were related to airline services. *See Smith*, 44 F.3d at 347 ("If appellants ultimately recover damages, the judgment could affect the airline's ticket selling, training, or security practices, but it would not regulate the economic or contractual aspects of boarding. Any such effect would be 'too tenuous, remote, or peripheral' to be preempted by [the ADA]."). Even *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992), limited the reach of the phrase "related to" by noting that some claims affecting airline prices would nevertheless not be preempted because any effect would be "too tenuous, remote, or peripheral." Many breach of contract claims are "related to a price, route, or service, of an air carrier," 49 U.S.C. §41713(b)(1), but *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), held that these state claims are not preempted by the ADA because they do not impose the states' own theories of regulation on the operation of an air carrier. Mot. for Recon. at 11 (citing *Wolens*, 513 U.S. at 229 n.5, 232).

And *Wolens*' breach-of-contract exception is not the only way a claim can evade ADA preemption even if it relates to airline prices, routes, or services. *See Smith*, 44 F.3d at 347 (examining whether the claim would impose economic re-regulation on airlines, and rejecting the dissent's view that such an analysis cannot be found in the plain meaning of the ADA's text). *Wolens* also noted that both American and the U.S. in that action acknowledged that the ADA did not preempt personal injury claims arising from air crashes. *See Wolens*, 513 U.S. at 231 n.7 ("American does not urge that the ADA preempts personal injury claims relating to airline operations," and the U.S. acknowledged that the ADA would not preempt "safety-related personal-injury claims relating to airline operations"). Moreover, the case that Sabre heralds as

articulating a broad test for ADA preemption, *id.* at 8, actually examined the ADA's purpose and held that preemption turns on whether the state claim will have a regulatory effect on airlines:

> [C]laims 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. Such an impact is not deducible here. Allowing [the claims to proceed] will not have the effect of regulating *American's* pricing policies, commission structure or reservation practices."

All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc., 282 F. Supp. 2d 1161, 1171 (C.D. Cal. 2003) (emphasis added; citation omitted), *quoted in Ginsberg v. Nw., Inc.*, 653 F.3d 1033, 1041 (9th Cir. 2011). This quoted paragraph refutes Sabre's suggestion that *All World* only held that the claim there did not "relate to" an airline's prices, routes, or services. Sabre Opp. at 8 n.3.

Analogously, Sabre would like to explain away key cases as simply holding that the claims in those cases did not "relate to" an airlines, prices, routes, or services, because they involved the airlines' frequent flyer miles or airline vouchers. Sabre Opp. at 13. But these cases did not rest on this rationale. *Alaska Airlines, Inc. v. Carey* explained that an airline's tort claims against a travel agency were not preempted because they "would not frustrate the purpose of the Airline Deregulation Act."[7] 395 F. App'x 476, 478 (9th Cir. 2010). *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.* explicitly reasoned that "[t]he Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines." 281 S.W.3d 215, 221 (Tex. App.—Fort Worth 2009, pet. denied), *cert. denied*, 130 S. Ct. 2061 (2010). And *United Air Lines, Inc. v. Gregory* quoted *Frequent Flyer Depot*'s rationale. 716 F. Supp. 2d 79, 90 (D. Mass. 2010). Moreover, in *Wolens*, the Supreme Court held that claims against an airline arising from its frequent flyer program "relate to 'rates' . . . and to 'services.'" *Wolens*, 513 U.S. at 226.

[7] This is yet another example of courts consistently finding that claims against travel/ticket agents are not preempted by the ADA. *Cf.* Sabre Opp. at 12 (chiding American for citing only one case in support of this proposition).

Nor is there anything "illogical" about the ADA's preemption clause applying only to claims that use state law to re-regulate air carriers, as opposed to non-airline-owned ticket agents like Sabre. *Cf.* Sabre Opp. at 10 n.5. In the context of the ADA preemption clause, the term "air carrier" has been interpreted in accord with its "ordinary meaning" to include domestic and foreign air carriers. *See In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 692 (9th Cir. 2011). But no case stretches the meaning of "air carrier" to include non-airline-owned ticket agents.

Contrary to Sabre's representation, Sabre Opp. at 9, American acknowledges that ADA preemption could apply to a small set of claims against entities that do not, themselves, provide air transportation—if the claims would seek to impose state re-regulation of airlines. Thus, claims against an airline's parent or subsidiary could also be preempted by the ADA, as such claims could impose *de facto* state re-regulation of airlines. *See* Mot. for Recon. at 15 ("[T]he 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)). American has therefore not taken any position that conflicts with *Continental Airlines, Inc.* or *Lyn-Lea*. *Cf.* Sabre Opp. at 9 n.4, 11.

Regardless of the merits of the Court's ADA ruling, however, the Court never had to reach this issue, because Sabre's motion to dismiss American's state-law claims was moot. The Court should therefore grant the Motion and hold that Sabre's motion to dismiss American's state-law claims is moot.

CONCLUSION

For the foregoing reasons, American's Motion for Reconsideration should be granted.

DATED: February 2, 2012

Respectfully submitted,

s/ Yolanda C. Garcia
Yolanda C. Garcia

R. Paul Yetter
State Bar No. 22154200
pyetter@yettercoleman.com
Anna Rotman
State Bar No. 24046761
arotman@yettercoleman.com
YETTER COLEMAN LLP
909 Fannin, Suite 3600
Houston, Texas 77010
713.632.8000
713.632.8002 (fax)

Yolanda Cornejo Garcia
State Bar No. 24012457
yolanda.garcia@weil.com
Michelle Hartmann
State Bar No. 24032401
michelle.hartmann@weil.com
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201-6950
214.746.7700
214.746.7777 (fax)

Bill Bogle
State Bar No. 02561000
bbogle@hfblaw.com
Roland K. Johnson
State Bar No. 00000084
rolandjohnson@hfblaw.com
HARRIS, FINLEY & BOGLE, P.C.
777 Main Street, Suite 3600
Fort Worth, Texas 76102
817.870.8700
817.332.6121 (fax)

Attorneys for Plaintiff American Airlines, Inc.

Of Counsel to Plaintiff:

Richard A. Rothman
Richard.rothman@weil.com
James W. Quinn
james.quinn@weil.com
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
212.310.8426
212.310.8285 (fax)

M.J. Moltenbrey
mmoltenbrey@dl.com
DEWEY & LEBOEUF LLP
1101 New York Avenue, N.W.
Washington, D.C. 20005
202.346.8738
202.346.8102 (fax)

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 2nd day of February 2012.

s/ Robert S. Velevis
Robert S. Velevis