

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

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

**AMERICAN'S BRIEF IN OPPOSITION TO TRAVELPORT'S
MOTION FOR LEAVE TO FILE SURREPLY**

American opposes Travelport's Motion for Leave to File Surreply in Opposition to American Airlines, Inc.'s Motion For Reconsideration [Doc. #222]. The questions at issue in American's Motion for Reconsideration have been fully briefed by both sides. Allowing Travelport to continue the argument unilaterally will prejudice American and will add no value to the proceedings.

"The purpose for having a motion, response, and reply is to give the movant the final opportunity to be heard, and to rebut the nonmovants' response, thereby persuading the court that the movant is entitled to the relief requested by the motion." *Murray v. TXU Corp.*, 2005 WL 1313412 at *4 (N.D.Tex. 2005) (internal quotation marks omitted). "A sur-reply is appropriate by the non-movant only when the movant raises new legal theories or attempts to present new evidence at the reply stage." *Id.* The questions at issue in American's Motion for Reconsideration—whether the Court should reconsider its dismissal with prejudice of American's vertical Section 1 claims and state-law claims—were fully briefed in American's motion, Travelport's response in opposition, and American's reply. In fact, Travelport's surreply

does not even purport to address these issues. Instead, Travelport seeks to argue—in a manner that gives American no opportunity to respond—about the sufficiency of the Third Amended Complaint that American intends to seek leave to file if its Motion for Reconsideration is granted.

American did not "raise[] new legal theories" or "present[] new evidence" on the issues germane to reconsideration when it attached a copy of the proposed Third Amended Complaint to its reply brief. American attached a copy of the proposed Complaint to its Reply to rebut Travelport's assertion that American's "failure" to append a draft Complaint was an admission that it would not be able to amend its Complaint. *See* Travelport Opp. at 1, 7. Nor did American "deliberately withhold" its proposed Third Amended Complaint to prevent Travelport from addressing it. American was unable to file its proposed amended Complaint earlier because of Travelport's and Sabre's own intransigence in producing their contracts with travel agencies.¹

Moreover, appending the proposed Third Amended Complaint did not convert American's Motion for Reconsideration into a motion for leave to amend, thereby inviting Travelport to launch an un rebuttable attack on the merits of the proposed Complaint. If the Court grants the narrow relief sought in the Motion for Reconsideration, Travelport's arguments could properly be considered when American seeks leave to file a Third Amended Complaint.²

¹ Neither Travelport nor Sabre has produced all of the contracts that American has sought through discovery, but virtually every one of the contracts that they have produced, which cover a sizable majority of American's total bookings made through travel agents, includes the exclusionary provisions that American's proposed Complaint would challenge.

² Certain of Travelport's arguments are inappropriate on a motion on the pleadings. For example, Travelport makes reference to recent agreements between American and certain travel agencies—such as American Express's agreement to "pilot test" a direct connect—to argue that its agreements are not exclusionary. *See* Proposed Surreply at 2 n.3. Arguments based on facts outside the pleadings are clearly inappropriate at this stage of proceedings. *Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979).

American will be prejudiced if Travelport is allowed to use a surreply to raise arguments on the merits to which American will have no way to respond—arguments that, in any event, would be more appropriate on a motion for summary judgment than a motion to dismiss. First, Travelport argues that, because a few of the largest travel agencies with which it has contracts also contract with Sabre, American's allegations that Travelport's travel agency contracts prevent American from moving bookings off of Travelport are "illogical[]." Proposed Surreply at 2. This argument simply ignores the Complaint, which explains that "although some travel agencies subscribe to more than one GDS, most rely on a single GDS in any particular location or for any given corporate customer." SAC ¶¶ 42. Even an agency that subscribes to two GDSs cannot easily move any individual customer from one to the other. And even if agencies had the technical ability to move customers, the GDSs' contracts impose crushing financial penalties on agencies that seek to do so. SAC ¶¶ 44, 72-73. Travelport's argument is merely a backhanded attempt to relitigate the issue of market definition—an issue the Court already decided in American's favor.

Travelport similarly ignores the Complaint's allegations and the Court's ruling on market definition when it argues that the proposed Third Amended Complaint does not allege that Travelport's contracts foreclose access to a substantial share of the market because Travelport's contracts cover less than 30% of the broader market for the provision of airline booking services through travel agents. *See* Proposed Surreply at 3. By Travelport's own admission, however, the proposed Third Amended Complaint alleges that Travelport's illegal agreements foreclose American from access to at least 60% of the Travelport submarket, which the Court already held was properly pleaded.

Travelport should not be permitted to prejudice American and waste the Court's time by ignoring its rulings and advancing frivolous arguments. Accordingly, Travelport's request for leave to file this surreply should be denied.

DATED: February 9, 2012

Respectfully submitted,

s/ Yolanda C. Garcia

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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 9th day of February 2012.

s/ Robert S. Velevis

Robert S. Velevis