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

AMERICAN AIRLINES, INC.,	)	
Plaintiff,	)	
vs.	)	Case No. 4:11-cv-00244-Y
TRAVELPORT LIMITED, et al.,	)	
Defendants.	)	

DEFENDANT TRAVELPORT'S BRIEF IN RESPONSE TO AMERICAN AIRLINES, INC.'S EMERGENCY MOTION TO MODIFY PROTECTIVE ORDER

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INTRODUCTION

Plaintiff American Airlines, Inc. ("AA") has burdened the Court and the Parties with an emergency motion to clarify that the First Amended Stipulated Protective Order (the "Protective Order") does not prevent a Receiving Party from using information that it learned through means other than disclosure of Confidential Information[1] by a Supplying Party. But AA, citing a number of explicit provisions in the Protective Order, admits that this interpretation of the Protective Order is already so "plain" and "clear" that "no party could mistake the scope of the existing terms of the Protective Order to [provide otherwise]." (AA Br. [Doc. 363] at 7.) Thus, the proposed revisions are entirely unnecessary to achieve the result that AA purportedly seeks to achieve.

Moreover, the circumstances of AA's proposed revisions are suspect. AA seeks these revisions because AA's expert, for some undisclosed reason, refuses to sign the Protective Order, and because AA and its expert have apparently violated the disclosure provisions of the Protective Order in this case and the use restrictions of the protective order in the Tarrant County case. Rather than taking steps to remedy those violations, AA seeks to re-write the Protective Order to absolve its wrongful conduct. Travelport raised significant concerns with AA about its proposed revisions and the reasons AA seeks them, but AA has not been candid – with Travelport or the Court – about the reasons for its proposed revisions, how AA seeks to apply them, how they relate to AA's violations of the two protective orders, how they would cure AA's violations, or why AA's expert refuses to sign the Protective Order. Indeed, AA has not even

[1] "Confidential Information" under the Protective Order refers to information that a "Supplying Party" designates as "Confidential" when it "produces or provides" the information. (*See* Protective Order [Doc. 267] ¶¶ 3, 6.) Certain provisions of the Protective Order that apply to Confidential Information also apply to "Outside Attorneys' Eyes Only Information," which is information that a Supplying Party designates as "Outside Attorneys' Eyes Only" when it produces or provides the information. (*See Id*. ¶¶ 3, 6, 12.)

acknowledged Travelport's concerns, but has instead issued ultimatums, accused Travelport of "gamesmanship" for asking legitimate questions, and unnecessarily burdened this Court with its pointless "emergency" motion.

AA's motion should be denied. AA has not shown good cause why the Protective Order should be modified as AA proposes. Rather, there is good cause why the Protective Order should not be so modified, as AA's proposed revisions raise significant risks that the protections put in place by the Protective Order will be rendered meaningless. As proposed, AA's revisions would allow a Receiving Party unilaterally to override a Supplying Party's designation of Confidential Information without consent, without approval of the Court, and even without notice to the Supplying Party. AA should not be allowed to undercut so significantly the confidentiality protections on which the Parties and non-parties have relied in producing information in this case.

Although plainly unnecessary, if AA genuinely seeks greater clarity about the use of information that a party learns through means other than disclosure of Confidential Information by a Supplying Party, the alternative amendments described in Section II.C below should adequately resolve AA's concerns without raising the significant risk of abuse associated with AA's proposed revisions.[2]

ARGUMENT

I. AA'S PROPOSED REVISIONS ARE UNNECESSARY.

AA's purported reason for asking the Court to revise the Protective Order is to clarify that the Protective Order "does not restrict the disclosure or use of information already known to,

[2] Travelport files this brief on behalf of Defendants Travelport Limited and Travelport LP, and does not speak for the other Defendants. The other Defendants may have different views on the alternative amendments that Travelport is proposing to accommodate AA's concerns.

or independently obtained by, a recipient of material designated under the Protective Order." (AA Mot. [Doc. 363] at 1, 5.) No such clarification is necessary. As AA acknowledges in its brief, this is already the "clear implication" of the existing language in the Protective Order, and "no party could mistake the scope of the *existing terms* of the Protective Order to [provide otherwise.]" (*Id*. at 6, 7 (emphasis added).)

That a Supplying Party's confidentiality designations do not apply to materials that the Supplying Party did not produce is already explicit in the Protective Order. (*See* Protective Order [Doc. 267] at ¶ 3 (a Supplying Party has "the right to identify and designate 'Confidential' or 'Outside Attorneys' Eyes Only' any document or other materials *it produces or provides*") (emphasis added); ¶ 6 ("Specific documents and interrogatory answers *produced by a Supplying Party* shall, if appropriate, be designated pursuant to this Protective Order . . . .") (emphasis added); ¶ 9 (Persons having knowledge of Confidential Information b*y virtue of disclosure of such information by a Supplying Party* in discovery in this Proceeding shall use that Protected Information only in connection with ….") (emphasis added); ¶ 14 (Persons having knowledge of Outside Attorneys' Eyes Only Information *by virtue of the disclosure of such information by a Supplying Party* …") (emphasis added); ¶ 30 ("Nothing contained in this Protective Order shall preclude any party from using its own Confidential Information or Outside Attorneys' Eyes Only Information in any manner it sees fit, without prior consent of any party or the Court.").)

Thus, it is already clear that a Supplying Party's confidentiality designations apply only to its own documents produced in discovery and do not subject to the Protective Order the Receiving Party's documents containing the same information. In addition, if a Receiving Party believes that a Supplying Party's designation is improper because the information is already in the public domain, the Receiving Party has the ability to challenge the designation under

Paragraph 17 of the Protective Order. AA's proposed revisions are thus not necessary to achieve AA's purported objectives.

II. AA'S PROPOSED REVISIONS ARE PROBLEMATIC.

A. As Drafted, AA's Proposed Revisions Do Not Address Use and Disclosure of a Receiving Party's Own Information but Use and Disclosure of "Confidential Information" Produced by a Supplying Party.

In addition to being unnecessary, AA's proposed revisions threaten to undermine significantly the protections provided to Supplying Parties under the Protective Order. AA proposes to modify the Protective Order by inserting the italicized clauses below into Paragraph 10 of the Protective Order.

> 10. Nothing shall prevent disclosure of Confidential Information beyond the terms of this Protective Order (a) if the Supplying Party (or its counsel) consents in writing to such disclosure, (b) if a Supplying Party knowingly discloses its own Confidential Information in a public or non-redacted pleading filed in the Court's public record or in a publication disseminated to the general public, (c) if the Court, after reasonable written notice to counsel for all the parties, and after an opportunity to be heard by counsel for the Supplying Party, orders such disclosure, *(d) if the Confidential Information was or is acquired from a third party possessing such information and having no obligation of confidentiality to the designating party, or (e) if the Receiving Party can establish that the Confidential Information is in its rightful and lawful possession at the time of disclosure or is developed independently by the Receiving Party without the use of Confidential Information.*

(AA Br. [Doc. 363] at 11.) But, AA's proposed revisions are problematic for at least three reasons.

First, Paragraph 10 is not a provision that governs a Receiving Party's use of its own information. Rather, it is a provision that allows a Receiving Party, in limited circumstances, to override a Supplying Party's confidentiality designations so that the Receiving Party may use and disclose "Confidential Information," including documents and data, it obtained from the Supplying Party. If AA were truly concerned about its ability to disclose and use its own

information or information received from someone other than a Supplying Party, Paragraph 10 is the wrong paragraph to amend.

Second, AA's proposed revisions would significantly expand the circumstances under which a Receiving Party could override a Supplying Party's confidentiality designations. Under the current version of Paragraph 10, a Receiving Party may override a Supplying Party's confidentiality designations only in three narrow circumstances: (a) if the Supplying Party consents; (b) if the Supplying Party publishes the designated information in a public non-redacted filing or other publication disseminated to the general public; or (c) if the Court, after reasonable written notice to counsel for all the parties and, after an opportunity to be heard by counsel for the Supplying Party, orders such disclosure. (Protective Order [Doc. 267] ¶ 10.) Under circumstances (a) and (c), the Supplying Party is provided with notice and an opportunity to object before the Receiving Party may override the Supplying Party's confidentiality designations, and, under circumstance (b), the parties can point to an objectively verifiable publication to confirm that the Receiving Party has the right to override the Supplying Party's designation.

In contrast, AA's proposed expansion of Paragraph 10 would allow a Receiving Party to override the Supplying Party's designations without any notice to the Supplying Party and without any independent way to verify that the Receiving Party is entitled to such an override. AA could simply ignore Travelport's designations and disclose or use Travelport's designated materials in any way AA chooses based on AA's unilateral determination that AA or its expert already knew the information that Travelport disclosed. Travelport would not even have notice that AA was ignoring Travelport's confidentiality designations until Travelport independently discovers that AA is using or disclosing Travelport's Confidential Information beyond the terms

of the Protective Order, at which point, the damage would have already been done.[3] These significant expansions of Paragraph 10 go far beyond AA's purported objectives in seeking to amend the Protective Order and present significant risks of abuse.

Third, AA's proposed revisions are unacceptably vague. Clause (d) would allow AA to ignore confidentiality designations for "Confidential Information [that] was or is acquired from a third party possessing such information and having no obligation of confidentiality to the designating party."[4] Is AA suggesting that, if Travelport produces an email between Travelport and a third party and designates it "confidential," AA can ignore Travelport's designation if AA acquires the same email from a production that the third party makes? Can AA also ignore the third party's confidentiality designation on the basis that AA already acquired the same email from Travelport, such that both designations are meaningless? And, what if the third party has no legal right to possess Travelport's information? As drafted, clause (d) would allow AA to override Travelport's confidentiality designations even if AA's expert or another third party obtained Travelport's information through fraud or theft.

Clause (e) is even more problematic. Under clause (e), a Receiving Party can override a Supplying Party's confidentiality designations "if the Receiving Party can establish that the Confidential Information is in its rightful and lawful possession at the time of

[3] Indeed, despite the fact that clause (e) seems to require that the Receiving Party "establish" that it already possessed the Confidential Information at the time of disclosure or "establish" that it independently developed the information, AA's brief reveals that a Receiving Party would not need to seek permission of the Court before using the Supplying Party's Confidential Information, and that the burden would be placed on the Supplying Party to challenge the Receiving Party's disclosure or use after the fact. (*See* AA Br. [Doc. 363] at 11 ("Of course, nothing in the proposed amendment would prevent the Supplying Party from challenging the use or disclosure of confidential information by a recipient, but the recipient should not have the burden in the first instance of seeking the Court's permission . . .").)

[4] This clause does not make sense as drafted because "Confidential Information," by definition, is information that is designated "confidential" by a Supplying Party. (*See* Protective Order [Doc. 267] ¶¶ 3, 6.) AA can acquire "information" from a third party, but cannot acquire "Confidential Information" from anyone except a Supplying Party. Thus, it makes no sense that AA could acquire "Confidential Information" from a third party.

disclosure or is developed independently by the Receiving Party without the use of Confidential Information."[5] But, what constitutes "rightful and lawful possession?" Can AA ignore Travelport's confidentiality designations for any documents AA has already received from Orbitz, because AA is in the "rightful and lawful possession" of the same information by virtue of the Orbitz copies? Can AA ignore all of Travelport's confidentiality designations in this case because AA in the "rightful and lawful possession" of Travelport's Confidential Information by virtue of Travelport's productions in the Tarrant County case?[6] Again, as applied to a Supplying Party's "Confidential Information," AA's vague amendments threaten to render the Protective Order in this case meaningless.

B. There Is a Significant Difference Between the Terms of the Tarrant County Protective Order and AA's Proposed Revisions to the Protective Order in this Case.

AA makes much of the fact that the Tarrant County protective order contains language similar to what AA proposes to insert into Paragraph 10 of the Protective Order in this case.[7] But, there is a very important difference between the Tarrant County protective order and AA's proposed revisions to Paragraph 10. The similar language in the Tarrant County protective order addresses the use and disclosure of "information" *acquired* by the Receiving Party, not the use and disclosure of "Confidential Information" *produced* to the Receiving Party by a Supplying Party. Thus, unlike AA's proposed revisions to Paragraph 10, the Tarrant County protective

[5] Again, this clause does not make sense as drafted because "Confidential Information," by definition, is information that is designated "confidential" by a Supplying Party. (*See* Protective Order [Doc. 267] ¶¶ 3, 6.) AA can independently develop "information," but cannot independently develop a Supplying Party's "Confidential Information."

[6] It is also not clear whether the "time of disclosure" means the time that the Supplying Party disclosed the Confidential Information to the Receiving Party or the time that the Receiving Party disclosed the Supplying Party's Confidential Information to a third party.

[7] Travelport is not a party to the Tarrant County case and did not negotiate the protective order in that case.

order does not allow a Receiving Party to override a Supplying Party's confidentiality designations.

For example, the Tarrant County protective order states, "The restrictions of this Protective Order shall not apply to *information* which . . . (c) the receiving party can establish that the *information* [sic] is in its rightful and lawful possession at the time of disclosure or is developed independently by the receiving party without the use of *Confidential Information*." (App. at 34 (emphasis added).) In contrast, AA's proposed revisions state, "Nothing shall prevent disclosure of *Confidential Informatio*n beyond the terms of this Protective Order . . . (d) if the Receiving Party can establish that the *Confidential Information* is in its rightful and lawful possession at the time of disclosure or is developed independently by the Receiving Party without the use of *Confidential Information*." (AA Br. [Doc. 363] at 11 (emphasis added).) Thus, the Tarrant County provisions clearly distinguish between "information" that the Receiving Party acquired on its own and "Confidential Information" that the Supplying Party produced. And the Tarrant County protective order allows the Receiving Party to use and disclose only the former. In contrast, AA's proposed revisions apply even to "Confidential Information" produced by the Supplying Party.

Travelport can tolerate the vagueness of the clauses under the Tarrant County protective order because those clauses do not apply to Travelport's Confidential Information, and apply only to information that AA obtained through means other than Travelport's production. But AA's vague clauses are not acceptable in this case because AA has inserted those clauses into Paragraph 10, which governs a Receiving Party's use of Confidential Information produced by Supplying Parties, including Travelport's Confidential Information.

C. A Much Less Problematic Revision Would Cure AA's Purported Concerns.

If AA genuinely believes that it is necessary to make it even more clear that a Supplying Party's designation of Confidential Information does not apply to information that the Receiving Party obtained through means other than disclosure by a Supplying Party, these alternative edits to Paragraph 30 should suffice to address any of AA's concerns.

> 30. Nothing contained in this Protective Order shall preclude any party from using its own Confidential Information or Outside Attorneys' Eyes Only Information in any manner it sees fit, without prior consent of any party or the Court. *Information that a Receiving Party acquired or acquires through means other than through disclosure of Confidential Information or Outside Attorneys' Eyes Only Information by a Supplying Party does not become Confidential Information or Outside Attorneys' Eyes Only Information for the purposes of this Protective Order on the basis that a Supplying Party produces Designated Materials containing the same information. A Receiving Party possessing or acquiring information other than through disclosure by a Supplying Party may use or disclose that information without prior consent of any party or the Court, but may not, under any circumstance, use or disclose Confidential Information, Outside Attorneys' Eyes Only Information, or Designated Materials produced by a Supplying Party except as provided by the terms of this Protective Order.* If a Supplying Party knowingly discloses its own Confidential Information or Outside Attorneys' Eyes Only Information in a public or non-redacted pleading filed in the Court's public record or in a publication disseminated to the general public, the Supplying Party shall be deemed thereby to have consented to the removal of that designation with respect to the information disclosed.

However, Paragraph 10, which governs the use and disclosure of Confidential Information produced by a Supplying Party should <u>not</u> be modified.

III. AA'S PROPOSED REVISIONS ARE SUSPECT IN LIGHT OF AA'S VIOLATIONS OF THE FEDERAL AND TARRANT COUNTY PROTECTIVE ORDERS.

The problematic nature of AA's proposed revisions is compounded by the circumstances under which AA seeks these revisions. Although AA had sought to amend the Protective Order as early as June 18, AA did not disclose until the afternoon of June 29, the last business day before AA filed its motion, that AA was seeking amendment because AA's expert, Monte Myers, refused to sign Exhibit A to the Protective Order. (App. at 41.) And AA did not disclose

until later that same evening that, notwithstanding Mr. Myer's refusal to certify compliance with the terms of the Protective Order, AA had disclosed Travelport's Confidential Information to Mr. Myers and Mr. Myers was using that information to prepare an expert report in this case. (App. at 44.)

AA apparently believes that it was proper for AA to disclose Travelport's Confidential Information to Mr. Myers because most, but not all, of Travelport's Confidential Information was subject to the Tarrant County protective order, which Mr. Myers signed. (App. at 44.) But AA's disclosure of Travelport's Confidential Information to Mr. Myers still violates the disclosure provisions of the Protective Order in this case, and Mr. Myers' use of information produced in Tarrant County to prepare an expert report in this case also violates the use restrictions of the Tarrant County protective order. (*See* App. at 30-31.) The very fact that AA believes that Travelport's production of documents to AA in Tarrant County relieves AA of its obligations to comply with the Protective Order in this case further confirms Travelport's concerns about how AA will apply its proposed revisions. (*See* Section II.A *supra.*)

That AA's proposed revisions to the Protective Order are motivated by AA's violations of the protective orders and Mr. Myers' continued refusal to certify his compliance make it highly suspicious that AA seeks the broad and unnecessary expansion of Paragraph 10 for reasons that have not been fully disclosed to Travelport or the Court. AA has not been forthcoming with its reasons for seeking amendment, has not explained how or why the proposed revisions would cure AA's violations of the protective orders, and has not explained why Mr. Myers still refuses to sign the Protective Order in its current form.

Indeed, AA has not even bothered to pick up the phone to call Travelport about Travelport's concerns despite Travelport's invitation to "discuss these issues further if you

wish." (App. at 42.) Rather, in response to Travelport's emails asking why AA's revisions are necessary, AA hid its true reasons for seeking amendment and responded only with ultimatums that Travelport agree to AA's "minor change" or AA "will be forced to seek relief from the Court if you do not." (App. at 42.) Most egregious is the fact that, after AA finally disclosed to Travelport that AA had violated the protective orders, and after Travelport responded with questions about how AA's proposed revisions were related to AA's violations (App. at 45), AA did not respond, but proceeded to file its "emergency" motion[8] in which AA accused Travelport of engaging in "gamesmanship" for raising legitimate concerns. (AA Br. [Doc. 363] at 1.) Then, only after AA's motion had been filed, did AA respond to Travelport's email by arguing that Travelport's concerns were "unfounded," that Travelport's was engaging in "pure gamesmanship" by asking questions, and that Travelport's invitations to discuss AA's proposed revisions constitutes an "outright refusal to consent or even consider [AA's] proposal [that] is part and parcel of [Travelport's] pattern of hardball litigation tactics." (App. at 48.)

Apparently, AA believes that the meet and confer requirements of Local Rule 7.1(a) allow AA to withhold information, issue ultimatums, and then accuse affected parties of hardball litigation tactics if they ask questions. As discussed in Section II.C. above, this motion may have been altogether avoided if AA had been forthcoming about its reasons for seeking the amendments or if AA made any attempt to address Travelport's concerns instead of dismissing those concerns and attempting to cover up its violations of the protective orders.[9]

[8] AA's motion is only an "emergency" because AA's expert inexplicably refuses to be bound by the Protective Order.

[9] Travelport has proposed to AA that it accept Travelport's proposed revisions to Paragraph 30 in lieu of AA's proposed revisions to Paragraph 10. (App. at 50.) But due to the expedited briefing schedule, Travelport was unable to develop and offer this proposal until the date of this filing. Travelport is hopeful that, if AA's concerns truly are as AA states in its motion, Travelport alternative proposal will fully address both AA and Travelport's concerns and thus resolve the motion without a need to involve the Court.

CONCLUSION

For the foregoing reasons, Travelport respectfully requests that the Court deny AA's motion. In the alternative, Travelport would propose that the Court address AA's motion with the alternative proposed amendments set forth in Section II.C. above.

Dated: July 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2012, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, Fort Worth Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Craig G. Falls
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