

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

American Airlines, Inc.

Plaintiff,

v.

Travelport Limited, et al.

Defendants.

No. 4:11-CV-00244-Y

(ODD-DOCKET LAW CLERK)

**SABRE'S EMERGENCY MOTION TO MODIFY THE PROTECTIVE ORDER
AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE**

American sued Sabre¹ in state and federal court, making substantively identical antitrust allegations in both cases. American's state-court lawsuit² is set to begin on October 22 (the parties have already selected a jury). And while American plans to use deposition discovery from this case at the state court trial, it refuses to permit Sabre to do the same. Sabre, therefore, requests that the Court modify the Protective Order to allow Sabre to use "confidential" depositions taken in this case at trial in American's parallel state suit.

Sabre seeks emergency relief because trial in the state case is already underway, and the evidence at issue is necessary to the presentation of its defense. Voir dire in the state case began on October 9th, a jury was empaneled on October 11th, and the parties' evidentiary presentations are set to begin on October 22nd. Though Sabre tried to resolve this matter a month ago in order to avoid motion practice, those efforts have been unsuccessful. Accordingly, expedited relief is proper.

¹ "Sabre" refers to Defendants Sabre Inc., Sabre Holdings, and Sabre Travel International Limited.

² *American Airlines, Inc. v. Sabre Inc., et al.*, No. 067-249214-10 (67th Judicial Dist., Tarrant County).

Sabre's Efforts to Compromise

Over the past month, Sabre and American have conferred on numerous occasions regarding the use of federal depositions in the state case. Specifically, Sabre conferred with American on September 15th, 19th,³ and 24th. (*See* Exs. 1, 2, App. 1, 2.) Each time, American informed Sabre that it would not permit Sabre to use federal deposition testimony from its witnesses at trial in the state case. Then, on September 28, 2012, American designated testimony for use in the state trial from five non-AA witnesses deposed in the federal case. (Ex. 4, App. 18, 22, 27, 31, and 35.) In light of this, Sabre asked American again on October 6 to reconsider its position, and American again refused. (Ex. 3, App. 6.)

Over the course of these negotiations, Sabre attempted to compromise by offering to use certain transcripts for impeachment purposes only and proposing to restrict the number of federal depositions that could be designated affirmatively. (Ex. 2, App. 2.) But American refused to engage in any meaningful negotiation. It flatly rejected any proposal that would allow any use of its own deposition testimony in the parallel state suit, and refused even to state its position in writing. At the same time, American insisted on its *own* ability to use the federal testimony of non-AA witnesses at trial in the state case. Given American's position, Sabre now seeks relief.

Argument

Over Sabre's objection, American recently sought and obtained a stay of this proceeding. (Doc. Nos. 394, 399, 407.) Until then, discovery in this case and the state case had proceeded in parallel, and a number of depositions had been cross-noticed between the two matters. This is because the subject matter of the discovery taken in this action is virtually identical to those issues being tried in the state case.

In the parties' state court pre-trial deposition designations, *both* American and Sabre designated deposition testimony from the parallel federal case for use at trial. (*See e.g.*, Exs 4 and 5,

³ The conferral on the 19th was by telephone.

App. 18, 22, 27, 31, 35, 39–41.) Ordinarily, the Texas Rules of Evidence and Civil Procedure would permit the parties to use these depositions at trial.⁴ But here, the depositions have been designated as “Confidential” under the federal Protective Order, and thus those depositions cannot be used in the state case without the parties’ agreement or leave of court. However, the agreed federal protective order has a provision addressing this very issue:

The parties agree that Confidential Information can be used in any other proceeding between the parties in which a protective order agreed to by the parties is in place, with the written permission of the Supplying Party, *which permission shall not be unreasonably withheld*. In the event that permission to use Confidential Information is not given by the Supplying Party, the Receiving Party may petition the Court for relief.

(Doc. 130, Protective Order ¶ 9 (emphasis added); *see also id.* ¶ 14.)

Although Travelport and Orbitz (the other parties to this action) have consented to the bilateral use of depositions in the state case,⁵ American has unreasonably withheld such consent. Instead, American has taken the position that while it should be permitted to use “confidential” depositions taken in this action during the trial of the state case, Sabre should not be extended the same accommodation.

American cannot have it both ways; it should not be able to use confidential discovery taken in this action as a sword against Sabre in the trial of the state case while simultaneously

⁴ American’s refusal to consent under the Protective Order is the only impediment to Sabre’s using depositions taken in this action in the state case. Texas Rules of Evidence 801 and 804 and Texas Rule of Civil Procedure 203.6(c) provide that depositions from other proceedings are admissible in a Texas proceeding, subject to rules of evidence. *See, e.g., Dillee v. Sisters of Charity*, 912 S.W.2d 307, 310 n.6 (Tex. App.—Houston [14th Dist.] 1995, no writ) (deposition from other case admissible under Texas Rule of Evidence 801(e)(2) as admission by party opponent); *Smith v. Smith*, 720 S.W.2d 586, 599–600 (Tex. App.—Houston [1st Dist.] 1986, no writ) (under Texas Rule of Evidence 804(b)(1), deposition of nonparty taken in another proceeding is admissible as former testimony if nonparty is not available to testify).

⁵ Specifically, in the process of conferring on the instant motion, Travelport and Orbitz have informed Sabre that they agree to the use of their federal depositions in the state court case under the state court protective order, on the conditions that (i) the federal testimony of all parties, including American, is similarly usable in the state-court action, and (ii) Travelport or Orbitz can designate and assert protections over confidential information in the state-court action, under the state-court protective order. Sabre agrees to these conditions.

deploying this Court's Protective Order as a shield to prevent Sabre from using American's federal depositions as part of its defense.

Sabre is entitled to use the depositions of American's witnesses for two reasons: (1) to impeach their credibility to extent they try to testify inconsistently in the state court case, and (2) as substantive admissions. American has never questioned the admissibility of these depositions as a basis for withholding its consent. The Protective Order is the only issue that stands in the way.

Although American has not stated its position in writing, it appears to argue that Sabre should not be permitted to use the testimony of American's witnesses because Sabre's witnesses have not yet sat for depositions in the federal case. The parties' dispute over duplicative depositions, however, should not be used as a basis to deprive Sabre access to relevant evidence it could use to defend itself. That is particularly true considering that American seeks to cherry-pick from that same pool of evidence for its own purposes.

Accordingly, Sabre respectfully requests this Court to amend the Protective Order to permit Sabre and American to use "Confidential" or "Highly Confidential" depositions taken in this case in the trial of the state case, subject to the Texas Rules of Evidence and Civil Procedure, the parties' protective order,⁶ and the rulings of the state court.

Expedited Relief Requested and Proposed Briefing Schedule

Given that presentation of evidence in the state court trial is imminent, Sabre seeks prompt resolution of this dispute. Accordingly, Sabre requests that the Court give this motion expedited consideration and that it enter an order requiring the following briefing schedule: American will file and serve any response to this motion on or before October 15, 2012, and Sabre

⁶ Ex. 6, App. 45-57: Second Amended Confidentiality Stipulation and Protective Order, entered by the state court on April 25, 2012.

shall file any reply on or before October 17th. Sabre further proposes that all briefs submitted on this matter be limited to 5 pages.

Dated: October 12, 2012

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on September 15, September 19, September 24, September 28 and October 6, I conferred with American attorney Angela Zambrano regarding the merits of this Motion. American would not agree. Orbitz and Travelport do not oppose relief sought herein, subject to the conditions set forth in footnote 4. Therefore, this motion is submitted to the Court for determination.

/s/ Rob Addy

Rob Addy

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 October 12, 2012.

/s/ Philip A. Vickers

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