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

American Airlines, Inc., a Delaware corporation, Plaintiff, vs. Sabre, Inc., a Delaware corporation; Sabre Holdings Corporation, a Delaware corporation and Sabre Travel International Ltd., a foreign corporation, d/b/a Sabre Travel Network; Travelport Limited, a foreign corporation and Travelport, LP, a Delaware limited partnership, d/b/a Travelport; and Orbitz Worldwide, LLC, a Delaware limited liability company, d/b/a Orbitz; Defendants.	§ § § § § § § § § § § § § § § § §	Civil Action No. 4:11-cv-0244-Y ODD-DOCKET LAW CLERK (Relates to Motion Referred to Magistrate Judge Cureton)

MEMORANDUM OF NON-PARTIES SOUTHWEST AIRLINES AND AIRTRAN AIRWAYS IN OPPOSITION TO AMERICAN AIRLINES' MOTION TO COMPEL AND IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

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PRELIMINARY STATEMENT

Southwest Airlines Co. ("Southwest") and AirTran Airways, Inc. ("AirTran")[1] are complete strangers to this lawsuit, but they are vigorous competitors of plaintiff American Airlines, Inc. ("American"). Southwest's business has flourished, and it has become the largest domestic air carrier measured by originating domestic passengers boarded. In contrast, American has floundered and is currently in bankruptcy. American hopes to improve its struggling business in part by trying to emulate Southwest's lower-cost methods of distributing tickets and fare, scheduling and availability information—in essence, Southwest's sales and marketing strategy. American has served subpoenas for documents and deposition testimony for the secrets to Southwest's success, and it has moved to compel Southwest to produce those documents. Southwest seeks a protective order to limit the scope of both subpoenas.

Airlines have choices about their sales and distribution strategies. American has chosen to structure its business to maximize sales through Global Distribution Systems ("GDSs") like defendant Travelport Limited ("Travelport"), which makes it dependent on GDSs. With that dependence has come less bargaining leverage—and less ability to resist contract terms American dislikes.

Southwest has chosen a different route. Almost 20 years ago, Southwest chose to limit distributing through GDSs. In doing so, it took a significant business risk that it might lose ticket sales that it might otherwise have made through GDSs. Southwest reshaped its distribution strategy and developed methods and technology to maximize direct sales to customers. It has succeeded, and now it sells the vast majority of tickets directly to its customers. Direct sales reduced Southwest's distribution costs, which advanced its strategy to compete with legacy carriers like American as a low cost carrier. The direct sales strategy also gives Southwest a closer relationship with its customers. Southwest has invested significant resources to

[1] Southwest acquired AirTran in May 2011. They continue to operate as separate airlines while Southwest integrates AirTran into its operations. For purposes of this memorandum, Southwest and AirTran will be referred to together as "Southwest" unless the context requires otherwise.

develop and improve its distribution strategies. It considers its strategies highly confidential, and it strictly limits dissemination of information about its strategies.

American would like to sell more tickets directly to customers—in other words, to adopt Southwest's model. It claims that its contract with Travelport restricts its ability to implement a direct distribution model. But it is unwilling to take the business risks that Southwest took when it ended its relationship with most GDSs. American dislikes the contract terms being offered by Travelport, but is unwilling to risk the loss of sales by ending its relationship with Travelport.

Through this lawsuit, American seeks to have the best of both worlds. It asks the Court to give it the contract terms with Travelport that it wants, but without taking the risks and costs that Southwest incurred to develop its own model. And it wants to use Southwest's documents and testimony to gain that competitive advantage.

The Court should deny American's Motion to Compel ("MTC"). Although American does not say so, Southwest has offered significant information in an effort to reach a compromise of this dispute. Southwest has offered to produce its GDS contracts, as well as significant data concerning ticket sales and payments to and from GDSs. With this information, American can use the data to see how the contracts have impacted Southwest's sales; for example, its economists could construct regressions. Southwest objects, however, to producing information describing, analyzing and planning its distribution strategies. American will have the bottom line results and does not need to know the details of the strategies that Southwest has developed and refined with hard work and experience. After all, American is a different airline, with its own strategies and capabilities, so the details of how Southwest has implemented its strategies would reveal little about what American could do if freed of the burdens of its GDS contracts. Southwest's experience reveals even less about whether American would succeed.

The details of Southwest's strategies are highly confidential, trade secret information. American agrees, because it repeatedly claimed in the Texas state case that its comparable information comprised trade secrets. Indeed, the circumstances of this lawsuit are so confidential that American filed the MTC under seal. American doubts whether all of the documents Southwest collected for the state case are trade secrets, but it cannot seriously dispute that the most sensitive information in those documents is precisely the information that it most wants. American admits that to obtain such highly confidential trade secrets, it must "show that the requested materials are relevant *and necessary*." *Educ. Logistics, Inc. v. Laidlaw Transit, Inc.*, No. 3-11-MC-036-L-BD, 2011 WL 1348401, at *2 (N.D. Tex. Apr. 8, 2011) (emphasis added). Yet it does not even try to prove that Southwest's documents are "necessary." It argues that the documents are relevant, but it does not submit any evidence (such as an affidavit from an expert economist) that Southwest's information is *necessary* to prove its case against Travelport.

That is because the documents are not relevant. At the least, the burden of producing them and the harm to Southwest of disclosing its trade secrets to a competitor outweigh any relevance the documents may have. American does not mention Southwest once in its Complaint because this lawsuit does not involve Southwest or its strategies.[2] In the state case, American contended that its own relationships with third parties "have no bearing on this dispute," (*see* Appendix ("App.") Ex. D at 69), which means that the business and relationships that third party Southwest has with other parties are even more remote from these claims. American says that Southwest's documents would help it rebut various defenses that Travelport asserts, but Southwest is unable to respond because the pleadings that American cites are all under seal. American's similar arguments in the state case were overblown, because American argued that Southwest's documents were relevant to defenses that Sabre denied it was asserting.

[2] American appears to have filed a Second Amended Complaint in this case (Dkt. 159); however, that document was filed under seal and has not been provided to Southwest. All references, therefore, are to the First Amended Complaint ("FAC" or "Complaint") (Dkt. 46).

American seems to want Southwest's documents primarily to respond to arguments that American's Direct Connect system was technically flawed and commercially unworkable. Southwest's documents and experience would not answer those assertions (if Travelport actually makes them). As explained in the declaration of Southwest's Director of Sales and Distribution, Robert N. Brown, Southwest has adopted a very different direct connect strategy using very different technology than American's Direct Connect. (*See* App. Ex. I at 128-34, ¶¶ 4-10; 14-18.) American's system apparently is designed to operate on a travel agent's desktop, while Southwest's direct connect systems operate on internet web pages. While Southwest's strategy has been a commercial success, evidence showing the details of how Southwest achieved that success would say nothing about whether American's different system would also be a success. In the same way, the success of VHS video recorders would reveal nothing about whether Betamax should have been successful, even though both recorded video programs.

Finally, American and Travelport negotiated a Second Amended Stipulated Protective Order ("Protective Order") (Dkt. 374) to protect themselves, but it offers inadequate protection to third parties. The state court found that the protective order there was inadequate, and the same is true here.

American's motion to compel should be denied, and Southwest's motion for a protective order should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit concerns American's contract with Travelport and its GDS. Travelport operates a GDS that provides airline fare, flight, and availability information to travel agents so that they can locate flights and sell tickets to their customers. (FAC ¶ 2.) Travelport charges American a booking fee for this service. (*Id.* ¶ 6.) American alleges Travelport has engaged in anti-competitive and retaliatory practices designed to limit the ability of travel agents to shift bookings among different distribution channels, thereby ensuring that American remains dependent upon Travelport for ticket distribution.

The Complaint makes clear that American has engaged in a campaign to shift its sales distribution strategy to a model that looks more like that of Southwest, with an emphasis on selling tickets directly to consumers and developing channels to distribute fare and schedule information other than through a GDS. Southwest and American, however, are very different airlines. American is a "legacy" carrier, and like most other legacy carriers, American has followed a strategy to sell a significant portion of its tickets through GDSs. This strategy has advantages, as it provides wide exposure for an airline's fares and services to GDS subscribers, but it also adds to an airline's cost structure due to the fees charged by GDSs. Southwest, on the other hand, is a low cost carrier that, in 1994, decided to forgo reliance upon the GDSs in favor of a more direct sales distribution strategy. Southwest took significant business risks, and it invested substantial resources in developing its sales distribution strategy, methods, and technology for direct sales through its internet sites and call centers. This distribution system has proven highly effective and has made Southwest one of the most successful and lowest cost airlines in the country. Competitors would like to copy it.

In July 2011, American served on Southwest a subpoena (the "Document Subpoena") requesting the production of a broad range of documents that would reveal the keys to the commercial success of Southwest's distribution model. (MTC at 6.) The subpoena demanded production of Southwest's GDS contracts, its distribution strategy, and qualitative/quantitative data about Southwest's distribution of content and tickets through GDSs and other channels. (*Id.*) Southwest objected to the subpoena on the grounds that it was overbroad, ambiguous, not reasonably calculated to lead to the discovery of admissible evidence, and because it sought discovery of confidential, proprietary, and trade secret information. (*Id.* at 7.)

American also simultaneously served a subpoena on Southwest in a parallel proceeding in the Texas District Court in Tarrant County, requesting a similar broad range of documents. (*Id.*) In that suit, American made substantially the same allegations that it makes here, although that case named only Sabre entities as defendants. *American Airlines, Inc. v. Sabre, Inc., et al.*; Cause No. 067-249214-10, in the 67th

Judicial District Court in Tarrant County, Texas (the "State Case"), Petition (App. Ex. B at 10-58); (MTC at 2-3). After failing to reach agreement as to the scope of that subpoena, American moved to compel production from Southwest. In April 2012, the trial court granted American's motion to compel, but found the protective order inadequate. Southwest sought a writ of mandamus from the Court of Appeals in Texas, which was granted. (*Id.* at 7.) The Court of Appeals ordered Southwest to submit a privilege log of the documents withheld and to file the documents with the trial court for review *in camera*. Before the court completed its review, American settled the case with Sabre. (*Id.* at 2-8.)

After nearly eighteen months with no communication from American regarding its subpoena in this case, American contacted Southwest on December 13, 2012, demanding that Southwest produce documents. (MTC Ex. 10 at 179.) On December 21, 2012, American also served a new subpoena ("Deposition Subpoena") on Southwest, requesting deposition testimony on a variety of topics, including details about Southwest's direct connect technology, its distribution strategy and methods, quantitative data about Southwest's ticket sales, and Southwest's GDS agreements. (App. Ex. A at 8-9.)

Counsel have conferred several times by telephone and correspondence, but they have been unable to reach such an agreement. (*See* MTC at 7.) Although American barely acknowledges it in the MTC, Southwest offered a substantial compromise: to produce its agreements with GDSs, along with quantitative data concerning its ticket sales, ticket sales by distribution channel, and Southwest's payments to and from GDSs, while continuing to withhold the qualitative information about its distribution system and strategies (the "Offered Materials"). (MTC App. Ex. 10 at 179-80.) Southwest also detailed its concerns with the protections offered to third parties in the Protective Order entered in this case. (*Id.* at 180-81.) American responded on December 26, 2012, all but ignoring Southwest's offer to compromise regarding the scope of the subpoena, stating that Southwest's concerns about the Protective Order were "misplaced," and demanding that Southwest produce all of the requested documents pursuant to the Protective Order as it

currently stands. (MTC Ex. 11.) To this day, however, American has not explained why the information Southwest offered to provide was insufficient or why American needed to know the details of Southwest's strategy. (*Id.* Ex. 9 at 178.) On January 2, 2013, Southwest also submitted objections by letter to the topics listed in American's Deposition Subpoena, raising the same objections to providing information about Southwest's highly confidential distribution strategies. (*See* App. Ex. F at 82-85.) Southwest moves for a protective order to limit disclosure of information under both Subpoenas to the information it has agreed to produce. The parties have agreed to suspend the deposition until this Court resolves the dispute about the scope of permissible discovery.

ARGUMENT

Generally, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" FED. R. CIV. P. 26(b)(1). However, under Rule 45, the Court, upon motion, may modify or quash a subpoena if it requires the recipient to disclose "a trade secret or other confidential research, development, or commercial information." *Id.* 45(c)(3)(B)(i). The Court should quash the Subpoenas because they require disclosure of trade secrets or highly confidential information about Southwest's unique sales distribution models and strategies. FED. R. CIV. P. 26(c)(3)(B)(i). Additionally, American has not shown *substantial need* for the requested material or shown that the material cannot otherwise be secured without undue hardship. *See* FED. R. CIV. P. 45(c)(3)(B); *see Sargent v. Sun Trust Bank, N.A.*, No. Civ.A. 3:03-CV-2701, 2004 WL 1630081, at *3 (N.D. Tex. July 20, 2004); *In re Stewart Title Co.*, No. H–09–247, 2009 WL 1708079, at *2 (S.D. Tex. Junc 17, 2009). "Rule 45 should be read in conjunction with the limitations of discovery found in Rules 26 and 34 of the Federal Rules of Civil Procedure," and, therefore, "the court must balance the burden of production against the need for the requested documents." *BSN Med., Inc. v. Parker Med. Assocs, LLC*, No. 10 Misc. 15, 2011 WL 197217, at *2 (S.D.N.Y. Jan. 19, 2011).

In striking the balance, courts commonly undertake a three-prong inquiry. *E.g.*, *Educ. Logistics*, 2011 WL 1348401, at *2-3 First, the court considers whether the party (or non-party) seeking protection has shown that the information sought is a trade secret or otherwise confidential, and shown that its disclosure might be harmful. *Id.* at *2.

Next, once the party seeking protection establishes that the information sought covers confidential commercial or trade secret information, the burden shifts to "the party seeking discovery [to] show that the requested materials are relevant *and necessary*" to the underlying action. *Id.* (emphasis added). "In instances where a subpoena requires disclosure of a trade secret or other confidential or commercially sensitive information it 'should be quashed unless the party serving the subpoena shows a *substantial* need and the court can devise an appropriate accommodation to protect the interests of the' party opposing such potentially harmful disclosure." *Anderson, Greenwood & Co. v. Nibsco Supply, Inc.*, No. 96-MC-15-E, 1996 WL 377205, at *2 (W.D.N.Y. June 27, 1996) (quoting Advisory Committee Notes to Fed. R. Civ. P. 45) (emphasis added); *Sun Trust Bank*, 2004 WL 1630081, at *3; *In re Stewart Title*, 2009 WL 1708079, at *2. Courts have been particularly receptive to such motions brought by non-parties from whom confidential information is sought. *See In re Vitamins Antitrust Litig.*, 267 F. Supp. 2d 738, 741-42 (S.D. Ohio 2003).

Finally, if those two inquiries are answered in the affirmative, the court balances the need for discovery of the information against the alleged injury which will result from disclosure. *Id.* Where "discovery is sought from a nonparty, the Court should be particularly sensitive to weighing the probative value of the information sought against the burden of production on the nonparty." *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB) (HBP), 2004 WL 719185, at *1 (S.D.N.Y. Apr. 1, 2004) (collecting cases); *see also Cohen v. City of New York*, 255 F.R.D. 110, 117 (S.D.N.Y. 2008); *Premier Election Solutions, Inc. v. Systest Labs Inc.*, Civil Action No. 09-cv-01822-WDM-KMT, 2009 WL 3075597, at *3 (D. Colo. Sept. 22, 2009) ("While the court has considerable discretion with regard to

regulating discovery which is exchanged in a lawsuit, discovery from third-parties in particular must, under most circumstances, be closely regulated"). "Under the authorities, [status as a non-party] is significant in 'determining whether compliance [with a discovery demand] would constitute an undue burden.'" *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (citation omitted), *aff'd*, 870 F.2d 642 (Fed. Cir. 1989). Moreover, "[d]isclosure to a competitor is presumptively more harmful than disclosure to a non-competitor." *Educ. Logistics*, 2011 WL 1348401, at *2 (citation omitted).

I. The Court Should Limit the Scope of the Subpoenas and Enter an Order to Protect Southwest's Confidential Information.[3]

This Court should quash or limit the Subpoenas in several significant respects. First, the Document Subpoena requests confidential and commercially sensitive documents from Southwest. Southwest should not be forced to produce such documents when doing so could foreseeably cause serious and irreparable harm to Southwest's business, particularly when the requesting party is a competitor trying to emulate Southwest's strategies. Second, American cannot show a substantial need for the information requested. Third, the Protective Order in place does not adequately protect Southwest. Finally, American should reimburse Southwest's expenses related to responding to the Subpoenas.

A. The Requested Documents Are Confidential and Commercially Sensitive Sales Distribution Strategies, Disclosure of Which Would Harm Southwest.

American seeks documents from Southwest that disclose the secrets of its unique sales distribution methods and strategies that Southwest has developed by taking business risks (that American is unwilling to take) and with the investment of significant time and resources. This information is highly confidential and

[3] As a technical matter, this Court does not have jurisdiction to compel production of documents from Southwest. American has moved to compel production pursuant to the Document Subpoena, which was issued by the United States District Court for the *Western District of Texas*. (*See* MTC App. Ex. at 1.) In contrast, the Deposition Subpoena was issued by this Court. (*See* App. Ex. A at 1.) Rule 45(c)(2) of the Federal Rules of Civil Procedure clearly states that a motion to compel production pursuant to a subpoena must be made to "the *issuing court* for an order compelling production." FED. R. CIV. P. 45(c)(2)(B)(i) (emphasis added). Accordingly, this Court has jurisdiction only regarding the Deposition Subpoena and not the Document Subpoena that forms the basis of the MTC. *See MobileMedia Ideas LLC v. HTC Corp.*, No. 2:10–cv–112–JRG, 2012 WL 1580423, at *2 (E.D. Tex. May 4, 2012) (holding that "plain reading of the Federal Rules of Civil Procedure and the relevant case law indicates that this Court does not have jurisdiction to compel production" pursuant to subpoena issued by another federal district court) (citing cases). Nevertheless, for reasons of convenience and efficiency to the Court and the parties, Southwest does not object to this Court's authority over the Document Subpoena.

proprietary, and much of it comprises trade secrets. Producing this information would subject Southwest to risks of economic harm that American could use the information to gain a competitive advantage. Under the federal rules, the Court may, for good cause, issue an order "requiring that a trade secret or other confidential, research, development, or commercial information *not be revealed* or be revealed only in a specified way." FED. R. CIV. P. 26(c)(1)(G) (emphasis added). A court *must* quash or modify a subpoena that requires disclosure of privileged or other protected matter when no exception or waiver applies. FED. R. CIV. P. 45(c)(3). This provides an effective deterrent to potentially exploitative abuses of discovery, because a litigant's insistence on production of wide-ranging confidential information reasonably evokes suspicion that it intends to use the requested information for other purposes. *See, e.g., Echostar Commc'ns Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 396 (D. Colo. 1998) (finding that subpoena raised "healthy suspicion" it sought discovery for purposes unrelated to litigation).

In determining whether requested information is a trade secret or otherwise confidential within the meaning of Rules 26 and 45, a court may consider if the request seeks the "'type[] of information that courts have generally viewed as trade secrets or confidential information,' such as product formulas, *marketing plans, or information relating to marketing decisions*." *Allen v. Howmedica Liebinger, GmbH*, 190 F.R.D. 518, 526 (W.D. Tenn. 1999) (emphasis added) (quoting *American Std., Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987)). Texas courts have stated that a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Simmons v. United States*, No. 2:10–CV–360–TJW–CE, 2011 WL 4433572, at *1 (E.D. Tex. Sept. 21, 2011) (quoting *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958)); *see also CQ, Inc. v. TXU Mining Co., L.P.*, 565 F.3d 268, 274 (5th Cir. Tex. 2009). In addition, a court may consider (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent

of measures taken to safeguard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Grand Time Corp. v. Watch Factory, Inc.*, No. 3:08–CV–1770–K, 2010 WL 92319, at *4 n.6 (N.D. Tex. Jan. 6, 2010) (citing *Gen. Universal, Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004)); *Johnson Serv. Group, Inc. v. Olivia France*, 763 F. Supp. 2d 819, 828-29, at *5 (N.D. Tex. 2011).

In this case, there can be no genuine dispute that the requested documents are protected confidential information. Indeed, in the parallel state court proceeding, the Texas District Court implicitly found that the types of information sought by American constituted trade secrets, stating that the court was "very concerned" because "a lot of the air carriers want to be like Southwest, and so they want to find out how they do it." *In re Southwest Airlines Co.*, No. 02-12-00179-CV, 2012 WL 2864507, at *1 (Tex. App.—Fort Worth, July 12, 2012, no pet.). American itself has claimed that similar types of information contained "highly sensitive business and proprietary information." (*See* App. Ex. D at 69-70; Ex. E at 74-75.)

American does not seriously dispute that the requested material here constitutes Southwest's "highly sensitive business and proprietary information."[4] Rather, American's sole argument is that because the material it seeks does not include software source codes, technical schematics, or other technical data, the information does not constitute trade secrets. *See* MTC at 6. American is flat wrong. Because Rule 45 does not define when information may be considered a trade secret or confidential, federal courts often look for guidance to state law. *See Echostar*, 180 F.R.D. at 395 (applying Colorado trade secret statute to

[4] American doubts that all of Southwest's documents rise to the level of trade secrets. (*See* MTC at 9, 12-13.) But Southwest need only show that the documents contain "a trade secret *or* other confidential research, development, or commercial information." Fed. R. Civ. P. 45(c)(3)(B)(i) (emphasis added). American does not dispute that all the documents are highly confidential and competitively sensitive. Nor does it offer to accept a subset of documents that may not be trade secrets. That is because the documents American most wants are the most sensitive, highly confidential ones. American's claim that some documents may not be trade secrets is a red herring.

determine if information is confidential under Rule 45); *Allen*, 190 F.R.D. at 526 (same under Tennessee law); *American Standard, Inc.*, 828 F.2d at 740 (same under Indiana law).

Under Texas law, a trade secret is "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003). Further, "[w]hen money and time are invested in the development of a procedure or device that is based on an idea which is not new to a particular industry, and when that certain procedure or device is not generally known, trade secret protection will exist." *T–N–T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd). A request for strategic information about how a company competes in the marketplace is "confidential by its very nature," particularly when steps are taken to keep this information from the public. *Universal Del., Inc. v. Comdata Network, Inc.*, No. 3:10–mc–00104, 2011 WL 1085180, at *4 (M.D. Tenn. Mar. 21, 2011).

There is no dispute that Southwest has kept it sales distribution strategies confidential. (*See* App. Ex. I at 130, ¶ 11.) Nor is there any dispute that "Texas courts recognize that marketing strategies and tools are generally protected as trade secrets." *Gate Guard Servs. L.P. v. Solis*, Civil Action No. V–10–91, 2012 WL 4625679, at *3 (S.D. Tex. Sept. 30, 2012); *see also Bayco Prods., Inc. v. Lynch*, Civil Action No. 3:10–CV–1820–D, 2011 WL 1602571, at *4 (N.D. Tex. Apr. 28, 2011) (citing *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) ("Customer lists, pricing information, . . ., market strategies, … have all been recognized as trade secrets."); *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 928 (Tex. App.—Dallas 2008, pet. denied) (same); *T–N–T Motorsports*, 965 S.W.2d at 22 (explaining that market strategies can be trade secrets); *Grand Time*, 2010 WL 92319, at *4 (business model, and marketing of "Just Bling" watches were trade secrets). Thus, Southwest's marketing distribution strategies constitute protected confidential information or trade secrets,

particularly when the strategy is sought by a competitor and is not otherwise readily ascertainable. *See Wellogix, Inc. v. Accenture, LLP*, 788 F. Supp. 2d 523, 540 (S.D. Tex. 2011) (finding "process workflow" for plaintiff's software's integration with another software a trade secret and citing *Mabrey v. SandStream Inc.*, 124 S.W.3d 302, 311 (Tex. App.—Fort Worth 2003, no pet.) (business models related to telecommunications architecture are trade secrets)).

Here, American is not only a fierce competitor, but it admittedly is trying to develop its own distribution strategy that is comparable to Southwest's. (*See* MTC at 17 (explaining how Travelport's purported conduct prohibits American's direct connect system from "from profitably competing with Southwest by matching its low fares in direct distribution channels"); *id.* at 16 ("Travelport's contracts . . . undermine American's ability to use direct connect technology to provide booking services directly to travel agencies."); *id.* (allegations about American's ability to "implement[] a direct connect system")). Thus far, without Southwest's information, American has been unsuccessful.

To the extent that the confidential status of the testimony requested is disputed, however, Robert N. Brown, Southwest's Director of Sales and Distribution, explains the extent to which Southwest's marketing distribution methods and sales strategies are proprietary, commercially sensitive, and are not shared or known outside of the company. (App. Ex. I at 130, 132-38 ¶¶ 11, 13(b), 17, 19-23.) Southwest has placed significant restrictions on the number of people, employed only within the distribution team and senior management, who are privy to the details of Southwest's strategies, and each of these people is bound by confidentiality provisions. (*Id.* at 137-38, ¶ 23.) In addition, Southwest has expended significant resources—both financial and otherwise—to develop the business strategies and methods upon which it now relies. (*Id.* at 130, ¶ 10.)

Southwest has placed this high level of emphasis on protecting its unique and highly effective marketing distribution strategy in large part because it is an important component of its commercial success

as a low-cost airline. (*Id.* at 138 ¶ 23.) Southwest took significant business risks to move away from GDSs, and it has developed and refined its strategy with hard work and experience. (*Id.* at 129-30; 135, ¶¶ 8-9, 20.) This system has allowed Southwest to compete successfully in the marketplace against carriers such as American, which has relied on strategies that are heavily dependent on GDSs. (*Id.* at 129; 131, ¶¶ 6, 12.)

As a result of Southwest's success, American and other similarly-situated legacy carriers have sought to emulate Southwest's distribution system. As the state court in Texas recognized, "[I]t's not a secret that…a lot of the air carriers want to be like Southwest, and so they want to find out how they do it. It's more than just, you know, quick boarding passes…" *In re Southwest Airlines,* 2012 WL 2864507, at *1. Disclosure of this information to *anyone* outside of Southwest could result in harm to Southwest's ability to compete; disclosure to American—a company with which Southwest competes directly and vigorously—would give it a competitive advantage based on Southwest's investment of time and resources. *See Educ. Logistics*, 2011 WL 1348401, at *2. The undisputed fact that Southwest and American are direct competitors in the same industry provides a presumption that requiring Southwest to provide the confidential information to American would be harmful. *See Int'l Coal Grp., Inc. v. Tetra Fin. Grp., Inc.*, 2010 WL 2079675, at *2 (D. Utah May 24, 2010).

B. American Cannot Demonstrate a Substantial Need for the Confidential Information, Thus Failing to Meet Its Burden.

Because Southwest has demonstrated that the requested information is of a confidential or trade secret nature, the burden shifts to American to demonstrate that the "disclosure of the trade secret is both relevant and necessary." *Echostar*, 180 F.R.D. at 394 (citing *R & D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo 1993)). American cannot overcome its steep burden of demonstrating the requisite necessity. To obtain Southwest's trade secrets American must show not only that it has a "need," but it also must demonstrate a heightened or "substantial need" that "cannot be otherwise met without undue hardship." *Echostar*, 180 F.R.D. at 394 (quoting FED. R. CIV. P. 45(c)(3)(B)(iii). Here, without having

demonstrated any relevance or substantial need, American demands that Southwest, a non-party, produce a sweeping range of documents containing confidential and privileged information:[5]

1. Documents demonstrating the technological capability between Southwest and the GDSs to implement a Direct Connect distribution model;

2. Internal documents concerning distribution of Southwest products and services to business travelers served by travel agents or travel management companies, including through Direct Connect technology or channels;

3. Communications with GDSs regarding any Direct Connect initiative, including Direct Connect capabilities with respect to marketing unbundled products;

4. Documents relating to whether and to what extend Southwest does or should use, or limit its use of, a GDS, including cost comparisons of distributing directly versus through a GDS;

5. All documents concerning distribution of Southwest Airlines' content through GDSs or to their subscribers;

6. Documents sufficient to show the amounts paid by any GDS to Southwest or paid by Southwest to any GDS since 2006;

7. Documents sufficient to show Southwest's share or percentage of revenue relative to other airlines from business travelers; and

8. Southwest's agreements with each GDS.

(MTC App. Ex. 1 at 11-12). American also seeks deposition testimony on the following topics:

1. The technological capability of Southwest and the GDSs to implement a Direct Connect distribution model;

2. Southwest's distribution of products and services to business travelers served by travel agents or Travel Management Companies, including through Direct Connect technology or channels;

3. Communications with GDSs regarding any Direct Connect initiative, including Direct Connect capabilities with respect to marketing unbundled products;

4. Southwest's internal analyses of whether it should use, or limit its use of, a GDS and the costs of direct distribution versus distribution through a GDS;

5. The amounts paid by any GDS to Southwest or paid by Southwest to any GDS since 2006;

[5] The categories listed in the MTC do not correspond to the Document Subpoena, but they do correspond to the categories American sought to compel in the State Case. Thus, its motion here limits its scope to those categories.

6. Southwest's share or percentage of revenue, including relative to other airlines, from business travelers;

7. Southwest's gathering and production of documents in connection with the dispute between American and any GDS;

8. The terms of all agreements between Travelport and Southwest, and between Sabre and Southwest, and the parties' performance thereunder;

9. The commercial aspects of Southwest's Direct Connect arrangements;

10. The technological aspects of Southwest's connection to and inclusion in Travelport's Universal Desktop and participation in Travelport's uAPI.

(App. Ex. A at 8-9.) American has no need for Southwest's trade secrets, much less a substantial need for that material. It waited more than a year to contact Southwest to discuss the subpoena in the federal case and two months after it settled with Sabre. Its actions certainly do not show a substantial need. Further, while American argues that Southwest's information is relevant to defenses that Travelport may (or may not actually) assert, it does not try to argue that it *needs* Southwest's information to respond or its case would suffer hardship without the information. For example, it offers no evidence, such as an affidavit from an economist, that its economic analysis will be incomplete without Southwest's information.

Further, Southwest's information about its own direct connect system have no bearing on American's system because the two bear little resemblance to one another. The central issue in this case appears to be whether Travelport's "full content" requirement in its GDS contract with American is anticompetitive. The qualitative documents and testimony that American now seeks about Southwest's confidential and proprietary distribution system would provide no relevant information about this issue.

For example, Deposition Topics 1, 3, and 9 and Document Subpoena Requests 1, 2, and 3 request information relating to Southwest's Direct Connect system, including but not limited to its technological capabilities. Southwest, however, utilizes very different technology from the system that American has tried to implement. (App. Ex. I at 132-33; 135-37, ¶¶ 14-17, 21-22.) The American system apparently operates on travel agents' desktops, while Southwest's system utilizes web sites that travel agents and users visit to

place reservations. American's system connects travel agents' computers directly to American's reservation system; Southwest's system does not, and connects them to a web site instead. The functionality and capabilities of Southwest's system have no bearing on whether American's proposed system might be commercially or technically "feasible," as American claims in its MTC. *See* MTC at 14. Southwest's system demonstrates nothing about whether "non-GDS distribution systems, such as those developed by American and its vendors, are inconvenient [or] do not work." *Id.* at 16. Because their systems are so different, Southwest's Direct Connect arrangements shed no light on whether American might be able to pursue or obtain similar arrangements with Direct Connect vendors. (App. Ex. I at 132-33; ¶¶ 14-17.) Permitting American to obtain the details of Southwest's system, however, would give American the technological recipe to revise its own strategies to more closely follow Southwest's. (*Id.* at 135, ¶ 20.)

Deposition Topic 2 and Document Subpoena Request 2 request information regarding Southwest's distribution of products and services to business travelers. But Southwest and American have very different strategies for business travelers. American apparently builds its strategy around business travelers. Southwest, in contrast, has fewer business travelers and thus is not as dependent on them. Further, while American apparently uses GDSs to try to reach business travelers, Southwest uses different strategies. (*Id.* at 130-31; 137, ¶¶ 10, 13(a), 22.) As a result, the ability of Southwest to take advantage of particular distribution strategies and systems has no bearing on whether another, differently-situated airlines, might also be able to pursue those same strategies and systems. (*Id.* at 132-134; ¶¶ 14-18.)

Deposition Topic 4 and Document Subpoena Requests 4, 5, and 6 request information directly relating to Southwest's internal analyses on whether to use GDSs or other distribution methods. This category of information comprises the heart of Southwest's business strategy, which is extremely confidential and proprietary. (*Id.* at 135-37; ¶¶ 21-22.) American will no doubt offer evidence about why it would prefer to sell fewer tickets through GDSs. Perhaps it will offer expert economic expert evidence as

well. The fact that Southwest may have analyzed the pros and cons of doing business through GDSs would add nothing to American's evidence and it would have little bearing on American's case because Southwest would have analyzed the issue based on its commercial position. Similarly, American's request for Southwest's cost analyses is hardly necessary. American's cost analysis should be straightforward—it knows how much it currently pays GDSs, and it would reduce that figure by the lower percentage of sales it would prefer to sell through GDSs. American does not need Southwest's cost information to show that costs would go down if it pays GDSs less, but the disclosure of Southwest's information would reveal extremely confidential information about its cost structure.

American argues that it needs Southwest's information to show that consumers and competition are not harmed if an airline provides less than full content to a GDS. (*See* MTC at 17). Unless American implements the same distribution model as Southwest, however, there is no way to evaluate the effect that specific distribution decisions, in a vacuum, might have on consumers or competition. And Southwest's communications and documents reflecting its considerations of distribution strategies that were not ultimately implemented reveal nothing about what effect those decisions may have had on the marketplace.

Southwest has offered to compromise by producing quantitative data but not information describing the details of its competitive strategies and analysis. Specifically, Southwest has offered to provide American the GDS contracts and data showing (1) ticket sales and ticket sales by distribution channel, and (2) data regarding payments to and from GDSs, in response to Deposition Topics 5, 6, and 8 and Document Subpocna Requests 6, 7, and 8. (MTC Ex. 10 at 179-80.) Southwest would provide American the terms of the contracts, so it can assess the differences between those terms and American's. The data will allow American to analyze the financial results and construct an economic regression if it chooses. American says its needs Southwest's information to assess harm to consumers and competition, and the data will let it do

that. Once it has the data, American does not need the highly confidential descriptive information showing the details of Southwest's strategies.

But American has shown no willingness to narrow the scope of the Subpoenas, nor has it explained why the data is insufficient or why it needs details of Southwest's strategies. The Complaint itself focuses entirely on the GDS defendants' conduct toward *American*. For example, American alleges: (1) "Travelport retaliated against American … in response to American's direct connect technology initiative" (¶ 11); (2) Travelport "misrepresented American's fares in a manner that made them appear more expensive than they actually were" (¶ 12); and (3) Sabre and Travelport charged American excessive booking fees (¶¶ 13; 47). Nothing in the Complaint raises an issue about Southwest or its distribution strategies. American says that Southwest's documents are relevant to defenses raised by Travelport, but it has cited only sealed pleadings unavailable to Southwest. It is fundamentally unfair for American to rely upon documents to which Southwest cannot respond. We note, however, American followed a similar approach in the State Case, but Sabre denied it was asserting the defenses American attributed to it. In any event, American is not targeting information that might relate to Travelport's defenses but is indiscriminately seeking information about all of the details of Southwest's strategies and technology. For example, it wants communications with all GDSs regarding "any" Direct Connect initiative, even though Travelport is the only remaining defendant and American alleges nothing about the vendors with whom Southwest does business.

American itself has contended that information concerning third party relationships is immaterial to these issues. In the State Case, American maintained that documents regarding its own relationships with other third-party reservation systems—the very type of information it now seeks from Southwest—"have no bearing on this dispute." (App. Exs. C-D at 62, 69.) It has never disavowed those claims, nor reconciled them with its position against Southwest. American was correct: the documents and testimony that

American now seeks provide no useful information about whether American's efforts to use particular distribution strategies and methods have been frustrated by Travelport.

Not only has American failed to show a substantial need for Southwest's confidential information, many of the deposition topics are ambiguous, overbroad, and unduly burdensome. As Fed. R. Civ. P. 26 states, a court may issue an order protecting a party from undue burden or expense in responding to discovery requests, particularly those seeking protected trade secrets or confidential commercial or proprietary information. "To determine whether a subpoena presents an undue burden, [the Fifth Circuit] will consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed." *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). And, as noted above, Southwest's status as a non-party must be considered when weighing whether a subpoena is unduly burdensome. *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988); *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998). As discussed above, American has made no effort to tie the scope of its requested deposition testimony to the relevant issues in the case, nor has it adequately demonstrated substantial need for the information. In fact, American has requested deposition testimony from the time period January 1, 2001 to present, despite the fact that the relevant time period of its lawsuit begins in April 2007. Further, many of American's subpoena topics are broad and written in a manner that precludes Southwest from understanding the scope of the requested testimony. (*See* MTC App. Ex. A at 11-12 (topics 2, 6, 8-10 with broad, and vague reference to "Direct Connect," "parties," "performance," "commercial aspects" and "technological aspects").

American's requests constitute a broad fishing expedition into all of the details of Southwest's confidential distribution strategies, and it has failed to show a substantial need for that information.

C. The Potential Harm Outweighs Any Need American May Have, and the Protective Order is Insufficient to Prevent the Harm.

Even if American could meet its burden to demonstrate substantial need for Southwest's information, still the Court would be required to balance the potential harm to Southwest from disclosure of Southwest's strategies against American's need. *See R & D Bus. Sys.*, 152 F.R.D. at 197-198; *see also Echostar*, 180 F.R.D. at 395. There can be no question that the potential harm of disclosing Southwest's competitive weapon to Southwest's competitor, particularly a competitor that has admitted trying to emulate Southwest's business model, is immeasurable. On the other hand, American has, at most, a minimal need for the requested information.

American dismisses Southwest's concerns about competitive harm by stating that the Protective Order in place resolves all of Southwest's concerns about the commercial sensitivity of its information. (*See* MTC at 10-12; MTC App. At 183-184.) However, a "protective order is not a substitute for establishing relevance or need." *Micro Motion, Inc. v. Kane Steel Co., Inc.,* 894 F.2d 1318, 1325 (Fed. Cir. 1990). "[A protective order's] purpose ... is to prevent harm by limiting disclosure of *relevant* and *necessary* information." *Id.* (emphasis in original); *see also R & D Bus. Sys.*, 152 F.R.D. at 198 ("A protective order will only be considered if the defendants can meet their burden of showing a substantial necessity for the information."). And Courts have recognized that "[t]here is a constant danger inherent in disclosure of confidential information pursuant to a Protective Order. Therefore, the party requesting disclosure must make a strong showing of need, especially when confidential information from a non-party is sought." *Insulate Am. v. Masco Corp.*, 227 F.R.D. 427, 434 (W.D.N.C. 2005) (quoting *Litton Indus. v. Chesapeake & Ohio Ry.*, 129 F.R.D. 428, 531 (E.D. Wis. 1990)). When that required showing is not made, a court may appropriately quash all or part of a discovery subpoena. *See id.* ("Applying the balancing test of relevance, need, confidentiality and harm, and also considering that the documents requested in the subpoenas are those of a non-party competitor of both the plaintiff and the defendants...the court concludes that the

request in the subpoenas...should be quashed."); *In re Vitamins Antitrust Litig.*, 267 F. Supp. 2d at 741-42 (quashing subpoena to non-party competitor after court found that (1) subpoena sought trade secrets that were the "lifeblood of the [non-party's] well being;" (2) that certain defendants in the litigation were the non-party's direct competitors; (3) due to a pending motion to dismiss, the subpoena was premature and the court had no enforcement power over the "protective order, and thus would be unable to protect [the non-party's] interests were its terms to be breached;" and (4) the records sought were irrelevant).

The Protective Order here does not adequately protect Southwest's interests for several reasons. First, American is attempting to use this Court system to obtain Southwest's confidential and proprietary distribution model *for the purpose* of implementing that model. Even limiting disclosure to American's outside counsel would be insufficient, since the aim of American's Subpoenas is to leverage Southwest's confidential data to obtain the same type of technological and commercial advantages that have led to Southwest's success, without taking the risks or costs incurred by Southwest to achieve those advantages. Such a result is manifestly unfair and exceedingly harmful to Southwest. *See Insulate Am.*, 227 F.R.D. at 434 ("In deciding whether a request comes within the discovery rules, the court is not required to blind itself to the purpose for which a party seeks information.")

Second, American and Travelport negotiated a Protective Order that protects them, but it does not adequately protect non-parties, which is precisely what the court found in the State Case. *See In re Southwest Airlines,* 2012 WL 2864507, at *1-2. Similarly, in *Allen*, 190 F.R.D. at 526, the court said that the parties in the litigation did not have interests that were aligned with the non-party. *Id.* Because the parties were either competitors or potential competitors of the non-party, they had no strong incentive to defend the non-party's interests when issues of the confidentiality of the documents arise at trial. *Id.*

The same concerns are evident from the face of this Protective Order. It allows Confidential Information to be disclosed to Inside Counselors. (App. Ex. G 88-89.) Recognizing that it would be

difficult for Inside Counselors to forget sensitive information they have seen, American and Travelport stipulated that "Inside Counselors shall agree not to participate in negotiations of commercial agreements between the parties on behalf of their respective clients during the pendency of this litigation (including appeals) and for two (2) years thereafter." (*Id.* at 88.) While that protects American and Travelport from even unintended misuse of their information, it offers no protection whatsoever to a third party. The Inside Counselors could turn around the next day and advise their clients about competition with Southwest, Southwest's contract with Travelport, or any other subject of Southwest's Confidential Information. American responds that Southwest can designate the information Outside Counsel Eyes Only to avoid disclosure to Inside Counselors. (MTC at 11.) But, the parties could challenge such a designation, in which case Inside Counselors advising about matters involving Southwest would have access to the information. Or, the parties might seek to amend the Protective Order to allow designated inside counsel to see Outside Counsel Eyes Only material, as has happened in similar litigation between US Airways and Sabre. *See* Amd. Stip. And Protective Order, *U.S. Airways, Inc. v. Sabre Holdings Corp, et al.*, 1:11-cv-02725 (S.D.N.Y.) (App. Ex. H at 106.) The Outside Counsel Eyes Only category provides inadequate protection for Southwest.

Third, the Protective Order is inadequate because it allows Confidential Information to be disclosed to witnesses "to whom disclosure is reasonably necessary." (App. Ex. G at 90.) That provides virtually no protection for Southwest's confidential information, and Southwest would not even know to whom its information had been disclosed.

Fourth, the Protective Order does not provide any limitations on what experts the parties may use. (*Id.* at 89-92, 99.) The parties could select as their experts employees or consultants who routinely advise Southwest's competitors.

Finally, the Protective Order does not adequately protect Southwest if its confidential information is used in Court. (*Id.* at 98.) While paragraph 28 requires parties to provide "reasonable notice" to Supplying Parties before their information is used in Court, a party in the rush of trial preparation could too easily overlook the interests of third parties.[6] Further, the Protective Order excuses providing notice altogether if a party "cannot practicably provide notice to the Supplying Party"—whatever that means—and then permits the non-party's confidential information to be offered "in camera or under other conditions to prevent unnecessary disclosure". (*Id.* at 98-99.) In short, under the express terms of the Protective Order, Southwest could be denied any notice or opportunity to protect its information.

II. Southwest Is Entitled to Reimbursement for Costs Incurred Responding to the Subpoenas and Filing Its Opposition and Motion for Protective Order.

The Federal Rules of Civil Procedure require courts to "ensure [ ] that the subpoenaed person will be reasonably compensated" for the burden of disclosure. FED. R. CIV. P. 45(c)(3)(C)(ii); *see also Mycogen Plant Sci., Inc. v. Monsanto Co.*, 164 F.R.D. 623, 628 (E.D. Pa. 1996) (subpoenaing party required to compensate non-party for time and labor in producing documents and being deposed). Courts have broad discretion to fashion discovery orders that protect parties and non-parties from excessive costs for compliance with subpoenas. *See, e.g., S.E.C. v. Arthur Young & Co.*, 584 F.2d 1018, 1022 (D.C. Cir. 1978) (Rule 45 can be used to require interim reimbursement and reimbursement of costs at the conclusion of discovery). Reimbursement of costs is especially appropriate when a subpoena is directed to a non-party, such as Southwest. A subpoenaed entity should not be forced to "subsidize" the costs of litigation to which it is not a party. *U.S. v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 371 (9th Cir. 1982) (non-parties "are powerless to control the scope of litigation and discovery). Under these circumstances, American should be ordered to reimburse Southwest for all costs incurred in responding to the Subpoenas, including those related to searching for, reviewing for privileged material, and producing any responsive documents.

[6] In the State Case, for example, American gave non-parties only a few days' advance notice before trial.

CONCLUSION

For the foregoing reasons, Southwest and AirTran request that American's Motion to Compel Production of Documents be DENIED and that their Motion for a Protective Order be GRANTED, and that the Court grant such other and further relief to which they may be entitled.

Dated: February 6, 2013

Respectfully submitted,

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**Application Pro Hac Vice Pending*

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 6th day of February, 2013.

/s/ Elizabeth C. Brandon
Elizabeth C. Brandon