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)

REPLY OF NON-PARTIES SOUTHWEST AIRLINES AND AIRTRAN AIRWAYS IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Southwest[1] developed an innovative and lower-cost distribution strategy, and now American wants to do the same. Unwilling to make the hard commercial decisions Southwest made, it wants Southwest's information to persuade the Court to give it a shortcut to emulate Southwest's strategy. In effect, Southwest would be placed at a competitive disadvantage precisely because it innovated and took business risks American refuses to take. Other than conclusory assertions, American's Reply offers no evidence or reason that Southwest's information is *necessary* for its case. And, as it admitted in its opening brief but tellingly ignores in Reply, that is the standard for obtaining a third-party competitor's trade secrets and confidential commercial information. Indeed, American offers little more than the assertion that the protective order—negotiated to protect American and Travelport but not third parties—solves all of Southwest's concerns, although the state court found substantially the same protective order wanting. The Motion of Non-parties Southwest and AirTran for a Protective Order modifying the Document Subpoena and the Deposition Subpoena should be granted.

A. Disclosure Would Expose Southwest to Competitive Harm.

This lawsuit centers on American's claims that Travelport has engaged in anticompetitive conduct to impede American's ability to utilize its direct connect system with travel agents. There is no dispute that Southwest is American's direct competitor. American admits that it wants to model its distribution system on Southwest's very successful strategy. Indeed, American seeks to rely on Southwest's success to prove that American's direct connect system can work interchangeably with Travelport's GDS. (AA Reply at 6-7.) While American doubts that all of Southwest's information is a trade secret, it does not dispute that the information is

[1] Capitalized terms have the same meaning as described in Southwest's Motion for a Protective Order and Memorandum in Opposition to American's Motion to Compel and in Support of Motion for a Protective Order.

highly confidential, competitive information. Nor does it challenge Southwest's assertion of the obvious—that the information American most wants is the information that is the most sensitive. In other words, American's Reply makes clear that the kind of information it wants Southwest to produce is exactly the kind of confidential information that would give Southwest's competitor a significant advantage in the ultracompetitive airline industry. It would provide American with detailed information concerning Southwest's technology and systems, which could then be duplicated. In addition, it would give American internal information concerning Southwest's capabilities, distribution strategies, costs, competitive advantages, and inner workings that could enable it to compete more effectively against Southwest. The requested information goes to the heart of Southwest's successful strategies and advanced technologies. It is precisely the type of information that courts have consistently deemed trade secret (SWA Mem. at 10-13), although it need only be "confidential research, development, or commercial information" to deserve protection. Fed. R. Civ. P. 26(c). The law is clear that while no absolute privilege for confidential information or trade secrets exists, disclosure of such information to a competitor is presumptively more harmful than disclosure to a non-competitor. *Educ. Logistics, Inc. v. Laidlaw Transit, Inc.*, 2011 WL 1348401, at *2 (N.D. Tex. Apr. 8, 2011); *CMedia, LLC v. Lifekey Healthcare, LLC*, 216 F.R.D. 387, 391 (N.D. Tex. 2003); *Anderson, Greenwood & Co. v. Nibsco Supply, Inc*., 1996 WL 377205, at *2 (W.D.N.Y. 1996). Southwest simply seeks to protect its highly confidential, proprietary information from disclosure to its direct competitor.

B. American Disregards the Applicable Standard.

Although American initially acknowledged the applicable standard, in its Reply, it completely ignores the balancing test this Court should apply when considering production of commercially sensitive, confidential information from a third party. (SWA Resp. at 7-9); *see, e.g., Mycogen Plant Science v. Monsanto Co.*, 164 F.R.D. 623, 628 (E.D. Pa. 1996) (holding that

the court "bear[s] a special responsibility to alleviate the risk that the subpoenas present to the nonparty"). American does not dispute that it seeks Southwest's confidential information. Thus, pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure, American bears the burden to show that the information that it seeks is both relevant *and necessary* by showing a "substantial need" for the documents. (SWA Resp. at 7-9; AA MTC at 10); *see Nibsco Supply,* 1996 WL 377205, *2 ("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.") (quotation omitted). Only after this showing can the Court balance the need for discovery of the confidential material against the claims of injury resulting from disclosure. *Id.*

In *RyCon Specialty Foods, Inc. v. Wellshire Farms, Inc.*, 2011 WL 1342998, at *6-8 (W. D. Pa. April 7, 2011), a party resisted discovery of its marketing strategies, customer lists, vendor networks, pricing policies, sales programs, corporate logistics, and internal corporate financing. In denying the discovery, the court applied the principles described above, concluding that the party resisting the discovery had "shown that the wholesale disclosure of this broad array of sensitive proprietary business information to [defendant], a rival in a competitive marketplace, would be harmful" and that it had "carried its threshold burden of proving both that the information is confidential and that the disclosure would be harmful." *Id.* at *7-8 (quotation omitted). The court then considered whether the party seeking the discovery had met its "countervailing burden to establish that disclosure of trade secrets and confidential information is *relevant and necessary to its case*." *Id.* (emphasis in original; citations omitted). The court noted that the party seeking discovery "must demonstrate both relevance and current necessity

for access to these trade secrets." *Id.* at 8. The court held that the discovery had "only a marginal relevance" and that the party seeking the discovery had "not shown the current necessity of the particularly invasive form of discovery." *Id.*

American has failed to show that Southwest's information is both relevant and necessary for its case. American says that its own direct-connect technology "is already developed and is being implemented in those few places where it has not been blocked by GDS anticompetitive tactics." (AA Reply at 4.) Only the viability of *American's* direct connect system could *possibly* have any relevance in this case. The viability of *Southwest's* direct-connect system says nothing about the viability of *American's* system. Southwest's director of distribution, Robert Brown, submitted a comprehensive declaration explaining why Southwest's systems use different technology and operate in fundamentally different ways than American's direct connect system. In other words, Southwest's system would not answer the question that American poses. American's only response is "there is no evidence to indicate that [Southwest's system] is different in ways that are relevant for purposes of this case." (*Id*. at 10.) But just the opposite is true. The only *evidence* before the Court is that the systems are completely different. American had the opportunity to submit evidence, but it offers only rhetoric.

American says it needs Southwest's documents to refute Travelport's argument that full content is pro-competitive by allowing comparison shopping. (*Id*. at 6-7.) But Southwest has offered to produce its GDS agreements, which will show the commercial terms Southwest operates under, and the quantitative information showing how those terms have affected sales and costs. The proof of whether Southwest's strategy is pro-competitive is in the pudding—the sales and cost data—which Southwest has offered to produce. American says now that it wants details of Southwest's "qualitative descriptions or analyses of actual experience," including: (1)

"*why* Southwest distributed its fares in particular ways;" and (2) "emails and documents that describe how major actors and new distribution systems like direct connects actually work in the marketplace." (*Id*. at 10-11.) But American does not explain how evidence of "why" Southwest made its strategic decisions or "how" systems work informs analysis into whether direct connects are pro- or anti-competitive. To the contrary, Southwest's motivations do not advance the economic analysis. *See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.,* 881 F.2d 1396, 1402 (7th Cr. 1989) ("Stripping intent away brings the real economic questions to the fore."); P. Areeda & H. Hovenkamp, *Antitrust Law* § 1506 (2d ed. 2003).

Particularly telling is American's failure to show a need, let alone a substantial need, for this qualitative information. Although it claims that "the discovery is essential to American's ability to prosecute its case" (AA Reply at 7), American does not do any of the following:

- explain how Southwest's quantitative data would be insufficient to show that full content is pro-competitive to counter Travelport's claims;
- identify a single hole in its case that Southwest's qualitative information is needed to fill; or
- provide any evidence from an expert explaining how Southwest's qualitative data is necessary for his/her analysis.

Southwest invited American to submit evidence to prove need, but it has not. American simply wants to undertake a fishing expedition through Southwest's highly confidential information to see if there might be evidence to bolster its case. But that is not enough. Other courts have quashed subpoenas under similar circumstances where the third party demonstrated that the potential harm in producing the proprietary documents was greater than the other party's need for discovery. *See, e.g., Litton Indus., Inc. v. Chesapeake & Ohio Ry Co*., 129 F.R.D. 528, 530-31 (E.D. Wis. 1990) (partially quashing subpoenas that sought production of documents relating to cost and profit information from non-parties and recognizing right of third parties to privacy in

their financial affairs); *In re Vitamins Antitrust Litigation,* 267 F. Supp. 2d 738, 741-42 (S.D. Ohio 2003) (granting third party's motion to quash a subpoena that would have resulted in disclosure of its trade secrets to direct competitors and recognizing that such trade secrets were "the lifeblood" of the movant's business).

The circumstances here are substantially similar to those presented in *Litton* and *Vitamins*. The documents American seeks include Southwest's most sensitive strategic distribution commercial information—the lifeblood of Southwest's business—and American has failed to make a proper showing to compel production. Where, as here, information called for by a third-party subpoena involves trade secrets and confidential commercial information, a protective order is not only appropriate, but crucial. *See CMedia*, 216 F.R.D. at 391; *Exxon Chem. Patents, Inc. v. Lubrizol Corp*., 131 F.R.D. 668, 671 (S.D. Tex. 1990).[2]

C. The Responses of Other Third-Party Airlines Do Not Advance American's Cause.

American seeks to isolate Southwest's efforts to protect its confidential material by pointing to the numerous third parties that have produced confidential information under the stipulated protective order in place in this lawsuit. (AA Reply at 2-3.) By its own admission, however, American says Southwest is in a "unique commercial position" because Southwest is the only airline of the five other third-party airlines (each of which produced documents in this case) that utilizes its own direct-connect technology in connection to GDSs. (AA Reply at 7.) More importantly, Southwest is the only airline whose distribution system American wants to copy, so it should come as no surprise that Southwest seeks to protect its information more zealously. American argues that Southwest's GDS contracts are different from those of other

[2] Southwest pointed out that the Court should balance the burden of production against any need for the documents. (SWA Mem. at 8-9.) American responds that there is little burden because Southwest already collected the documents. (AA Reply at 12.) But the burden is not limited to the cost of collecting and reproducing the documents. It is also measured by the risk of harm from disclosure of confidential commercial information. (SWA Mem. at 21-22.)

airlines, so other airlines may have been sympathetic to American's case. Whatever the motivation of other third parties, the production of their commercial information does not pose the same competitive concerns as Southwest's information.

D. The Parties' Stipulated Protective Order Is Inadequate.

American says the Court should give little weight to the highly confidential nature of the information it seeks because there is a protective order. Other courts, however, have quashed subpoenas seeking highly confidential, but marginally relevant, information from non-party direct competitors, even when there is a protective order. *See In re Stewart Title Co.*, 2009 WL 1708079, at *2 (S.D. Tex. Jun. 17, 2009) (quashing subpoena on third party "who would be entrusting the confidentiality of its documents to parties who do not represent its interests."); *In re Vitamins Antitrust*, 267 F. Supp. 2d at 741-41 (stating "wise course is to nip any potential economic harm" by quashing subpoena instead of relying on protective order where, among other things, request was for trade secrets which were the "lifeblood" of the non-party's well-being and some defendants were direct competitors of non-party); *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 528 (D. Del. 2002) (quashing subpoena seeking sensitive information from non-party direct competitor for failure to show both relevance and substantial need); *Litton Indus.,* 129 F.R.D. at 531 (rejecting claim that protective order would adequately protect movants' interests, concluding it was "not sanguine that a protective order could be constructed to sufficiently maintain the confidential nature" of the information sought). Even with a protective order, mistakes happen, particularly in cases like this where large teams are feverishly preparing for trial.

American dismisses Southwest's' concerns as "hypothetical" or "specious." (AA Reply at 4-5.) But the state court did not find them specious when Southwest objected to substantially the same protective order. The state court ordered Southwest to produce documents only after

the protective order was strengthened, and even with the stronger protective order the court of appeals vacated the order compelling production and instructed the trial court to inspect the documents *in camera*. American claims that Southwest gives an "incomplete and misleading" portrayal of the state court litigation and says that "American agreed to amend the protective order to address any legitimate concerns." (AA Reply at 5 n.4., 8) But it does not acknowledge that it agreed to make those changes only after the state court ordered it to do so. Implicitly acknowledging the inadequacy of the protective order here, American offers for the first time to apply the terms of the amended state-court protective order to documents produced in this case.

Moreover, Southwest pointed out that the parties negotiated the stipulated protective order in this case to protect their interests and gave little thought to the unique interests of third parties. That is evident on the face of the stipulated order, which restricts future activities of Inside Counselors to protect the parties' Confidential Information but places no similar restrictions to protect third parties. American does not answer that concern. Instead, it argues that the "Outside Counsel Only" designation sufficiently protects Southwest's information. But if Southwest's information were later determined to be Confidential Information, American does not offer to prevent inside counsel from having access. And if they were given Southwest's information, nothing in the stipulated order prevents them (or a hired expert/consultant) from turning around and advising their employers about the same commercial issues involving Southwest. Other courts have recognized this real concern:

> If [a competitor] were to be allowed access to [plaintiff's] proprietary business records, he could through no conscious fault of his own, base future business decisions on the information obtained during discovery. The information would become part of a residue of knowledge which [ ] would not shed after the termination of litigation.

C.A. Muer Corp. v. Big River Fish Co., 1998 WL 488007, at *4 (E.D. Pa. Aug. 10, 1998);

> But once an expert has digested this confidential information, it is unlikely that the expert will forget. The expert's raison d'être is to assimilate information in his or her chosen field and formulate that material into various theories. The information obtained [ ] will be added to the expert's repository of other information for possible future use. Even with stern sanctions for unauthorized disclosure, how does one practically police a protective order? If the expert is called upon two years after this litigation to assist a potential competitor in structuring its business, will he really be able to compartmentalize all he or she has learned and not use any of the information obtained from [the competitor]?

Litton Indus., 129 F.R.D. at 531;

> [I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so. Long after divestiture may have been ordered in this case, it is possible that these prominent members of [defendant's] legal staff will help manage and advise [defendant's] effort. We find no abuse of discretion in the decision of the District Court that they should do so without ever having access to confidential information of . . . a possible major competitor.

F.T.C. v. Exxon Corp., 636 F.2d 1336, 1350-51 (D.C. Cir. 1980); and

> [T]he Court agrees that once seen it would be very difficult for [plaintiff's] scientists to 'unlearn' the secrets revealed [about its competitor's process]. Should [plaintiff] later develop a similar process, a court may be placed in the difficult position of having to determine whether [plaintiff] would have developed the process anyway.

Genentech, Inc. v. Bowen, 1987 WL 10500, at *2, (D.D. Cir. Apr. 21, 1987).

To be sure, this Court would make the determination about whether information is entitled only to the lower level of protection, but in that situation the parties explicitly protected themselves but not third parties. Further, American revealingly refuses to commit to provide Southwest a minimum amount of notice before using Southwest's information in Court. It wants to preserve its flexibility to decide the night before trial to use Southwest's information and to impose on Southwest the burden of scrambling at the last minute to protect its information. Instead, Southwest, as the non-party, should be protected by requiring a minimum of seven days' advance notice. American goes on to say that if it fails to provide sufficient advance notice to Southwest, the protective order still provides enough protection by requiring it to move for the information to be submitted *in camera* "or under other conditions to prevent unnecessary disclosure."

(AA Reply at 6.) Yet American fails to provide any commitments about what those "conditions" would be or what disclosure is "unnecessary." American cites several cases, but none resembles these circumstances.[3] The protective order does not adequately protect third parties, and American's vague assurances only magnify those flaws. As one court said:

> [T]he parties to this litigation are left with the option of how disclosure of such confidential information is handled at trial. As a result, control is in the hands of [the third-party's] undisputed competitors and the court. Despite [plaintiff's] arguments to the contrary, it would be divorced from reality to believe that either party here would serve as the champion of its competitor . . . to maintain the confidentiality designation or to limit public disclosure . . . during trial.

Mannington Mills, 206 F.R.D. at 530-31 (citation and quotation omitted). The same is true here.

E. Southwest Is Entitled to Cost Reimbursement.

Southwest is entitled to its costs for collecting, reviewing and producing the requested documents. (*See* SWA Mem. at 24.) American says the costs should be minimal because Southwest collected the documents at American's behest for the state court. But American settled with Sabre before the trial court completed its *in camera* review, and Southwest never produced the documents to American. Having put Southwest to the burden of collecting the documents in the first place, American should not be excused of the obligation to pay Southwest because it now seeks the same documents in a different proceeding.

CONCLUSION

For the foregoing reasons, Non-parties Southwest and AirTran's Motion for a Protective Order should be granted together with such other relief as the Court deems just and proper.

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[3] *See id.* at 3 (citing *Retractable Techs., Inc. v. Int'l Healthcare Worker Safety Center*, 2011 WL 3555848 (W.D. Va. 2011) (denying reconsideration of motion to compel after defendant failed to respond to numerous requests and finding confidentiality concerns minor); *AFMS LLC v. United Parcel Service Co.*, 2012 WL 3112000 (S.D. Cal. 2012) (finding protective order in lawsuit sufficient because third party and plaintiff operated in the same line of business and shared the same business model so plaintiff's interest was aligned with the third-party's); *Taiyo v. Phyto Tech Corp.*, 275 F.R.D. 497, 500 (D. Minn. 2011) (finding protective order sufficient to protect actual parties in the lawsuit); *Albany Molecular Research, Inc. v. Schloemer*, 274 F.R.D. 22, 26 (D.D.C. 2011) (finding protective order sufficient because third party was not a direct competitor to any party in the litigation so there was "little or no threat [third party's] financial health will be impacted by the document disclosures or that their direct competitors would gain unfair access to the confidential information and use it against the company.")).

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Respectfully submitted,

/s/ Elizabeth C. Brandon

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 1st day of March, 2013.

/s/ Elizabeth C. Brandon
Elizabeth C. Brandon