

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

AMERICAN AIRLINES, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:11-CV-244-Y
	§	
TRAVELPORT LIMITED, et al.	§	
	§	
Defendants.	§	

**AMERICAN AIRLINES INC.'S MOTION TO SEAL
FILINGS PERMANENTLY AND BRIEF IN SUPPORT**

American Airlines, Inc. (“American”) hereby files this Motion to Seal Filings Permanently and Brief in Support (“Motion”) to protect trade secret and other confidential and proprietary information in various documents filed under seal with the Court. Since final judgment was entered August 16, 2013, and Local Rule 79.3 provides that all sealed documents will be deemed unsealed sixty days after the final disposition of the case, American now seeks to avoid harm to its business interest by moving to seal permanently the documents described in Exhibit 1. (*See* App. at 1-3, Ex. 1.) As grounds therefore, American would show the Court as follows:

I. BACKGROUND

In anticipation of the broad discovery typical in antitrust litigation, the parties filed stipulated protective orders to govern the treatment of highly confidential and proprietary business information likely to be produced during this case. On August 10, 2011, the parties jointly moved to enter the Stipulated Protective Order governing “all documents, the information contained therein, and all other information produced or disclosed during the Proceeding.” (Dkt. No. 127.) On August 15, 2011, the Court granted the parties’ motion for entry of the Stipulated

Protective Order. (Dkt. No. 130.) On March 20, 2012, this original protective order was twice amended by the First Amended Stipulated Protective Order, (Dkt. No. 267), and the Second Amended Stipulated Protective Order. (Dkt. No. 374.) Further, on June 9, 2011, the Court also entered its Order Granting Leave to File Under Seal, which authorized parties and third-parties to file future documents under seal. (Dkt. No. 69.)

As discovery progressed, the parties exchanged numerous documents, including trade secret and proprietary contracts, financial data, and other sensitive business documents belonging to American. For example, American produced copies of its confidential agreements with the defendants. In addition, American produced copies of business plans and financial data that are confidential and proprietary to American. Pursuant to the Court's orders, more than 150 records containing highly confidential and proprietary trade secret information were designated under the protective order and filed under temporary seal.

Now, pursuant to the Court's June 9, 2011 order and Local Rule 79.3, all sealed documents will be deemed unsealed sixty (60) days after the final disposition of the case. Disclosure of a subset of the sealed records would be harmful to American's business, including its competitive position, as well as that of its business associates because they contain American's trade secret, confidential, and proprietary information. (*See Broadfield Aff. (App. at 4-7, Ex. 2.)*.) Accordingly, American asks the Court to seal permanently the pleadings listed on Exhibit 1.

II. ARGUMENT

A party seeking to seal Court records must show that the need for confidentiality outweighs the presumption in favor of public access to court records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978). That presumption is not absolute and the Supreme Court has stated that the "decision as to access is one best left to the sound discretion of the trial

court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Id.* (internal citations omitted); *see also Belo Broad. Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. 1981) (affirming trial court’s denial of public access to videotapes).

The Supreme Court has recognized that sealing may be justified to prevent judicial documents from being used “as sources of business information that might harm a litigant’s competitive standing.” *Nixon*, 435 U.S. at 598. For example, courts have held that documents containing sensitive business strategy and confidential financial information should be kept under seal. *See, e.g., Earle v. Aramark Corp.*, 247 F. App’x. 519, 525-26 (5th Cir. 2007) (holding that district court did not abuse its discretion by sealing documents containing confidential corporate information where opposing party failed to allege any specific harm beyond the general access to court documents); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-2509-LHK , 2013 WL 163779, at *4, *9-10 (N.D. Cal. Jan. 15, 2013) (granting motion to seal company materials because public disclosure would harm company and give third-parties insights into confidential and sensitive aspects of company’s strategies, competitive positions, and business operations). In *In re High-Tech Employee Antitrust Litigation*, the court granted the motion to seal materials that included “confidential information regarding [the company’s] compensation and recruiting strategies, policies, and procedures, including quantitative data concerning those topics [where] the disclosure of this information could cause [the company] competitive harm.” *Id.* at *5. In ordering the documents sealed, the court held that company had “plausibly articulated the need for maintaining their confidentiality given the potential harm that may come from public disclosure.” *Id.*

In addition to confidential and propriety information, courts have similarly held that trade secrets are entitled to protection from disclosure. *See, e.g., In re W. States Wholesale*

Natural Gas Antitrust Litig., No. 203-CV-1431-PMP-PAL, 207-CV-01019-PMP-PAL, 2008 WL 4225454, at *2-3 (D. Nev. Sept. 9, 2008). In *In re Western States Wholesale Natural Gas Antitrust Litigation*, the court granted a company's motion to seal documents that contained "potential business prospects, business strategies, and financial analyses" because they constituted a trade secret and noted that the company "derives economic value from these discussions not being generally known by its competitors." *Id.* To determine whether a party's information constitutes a trade secret, courts also "consider six factors, weighed in the context of the surrounding circumstances: (1) the extent to which the information is known outside of [the party's] business; (2) the extent to which it is known by employees and others involved in [the party's] business; (3) the extent of measures taken by [the party] to guard the secrecy of the information; (4) the value of the information to [the party] and to its] competitors; (5) the amount of effort or money expended by [the party] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 874-75 (5th Cir. 2013). However, the law does not require a "party claiming a trade secret . . . to satisfy all six factors because trade secrets do not fit neatly into each factor every time." *Nova Consulting Grp, Inc. v. Eng'g Consulting Servs., Ltd.*, 290 F. App'x. 727, 734 (5th Cir. 2008); *see also Phillips v. Frey*, 20 F.3d 623, 628 (5th Cir. 1994) ("A trade secret is any formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it.").¹ Further, pursuant to Rule 26(c) of the Federal Rules

¹ On September 1, 2013, Texas adopted the Uniform Trade Secrets Act, which similarly defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or

of Civil Procedure, a trial court has broad discretion to permit sealing of court documents for, among other reasons, the protection of “a trade secret or other confidential research, development or commercial information.” Fed. R. Civ. P. 26(c)(1)(G).

A. Documents Detailing American’s Trade Secret, Confidential and Proprietary Business Strategies Should Remain Sealed.

American seeks to seal permanently certain documents that contain American’s trade secret, confidential, and proprietary business and operational strategies. (*See* Broadfield Aff. (App. at 5, Ex. 2).) Courts have favored sealing documents, such as those described below, when allowing public access would put litigants, such as American, at a competitive disadvantage because its rivals would gain an unfair insight into a litigant’s business and its future plans as well as access to trade secret and propriety information. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 2008 WL 4225454, at *2-3. Therefore, to protect itself from the harm to its competitive business interest through the disclosure of its trade secret, confidential, and proprietary information, see Broadfield Affidavit (App. at 5, Ex. 2), American asks that the court permanently seal the following documents containing its confidential business strategies:

Partial Answer, Affirmative Defenses, and Counterclaims by Travelport (Dkt. No. 172)

Appendix of Exhibits to Travelport’s Opposition to Plaintiff American Airlines, Inc.’s Motion for Protective Order with Respect to Travelport’s Request for Admissions and Interrogatories (Dkt. No. 175)

Travelport’s Response in Opposition to Plaintiff American Airline Inc.’s Motion for Reconsideration (Dkt. No. 182)

Appendix in Support of Travelport’s Response in Opposition to Plaintiff American Airlines, Inc.’s Motion for Reconsideration (Dkt. No. 183)

Travelport’s Response in Opposition to Plaintiff American Airline Inc.’s Motion to Extend Scheduling Order Deadlines (Dkt. No. 184)

use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Tex. Civ. Prac. Rem. Code § 134A.002(6).

Appendix of Exhibits to Travelport's Response in Opposition to Plaintiff American Airlines, Inc.'s Motion to Extend Scheduling Order Deadlines (Dkt. No. 185)

Appendix in Support of Sabre's Response to American Airlines, Inc.'s Motion to Extend Scheduling Order Deadlines (Dkt. No. 190)

Appendix in Support of American Airlines Inc.'s Reply Brief in Support of its Motion to Extend Deadlines (Dkt. No. 206)

Reply in Further Support of Travelport's Rule 12(b)(6) Motion to Dismiss the Third Through Sixth Claims for Relief in Plaintiff's Second Amended Complaint (Dkt. No. 218)

Travelport's Response to Plaintiff's Motion to File Supplemental Brief in Support of its Motion to Extend Scheduling Order Deadlines (Dkt. No. 223)

Motion for an Order to Permitting Defendant Orbitz Worldwide, LLC to Share Certain Documents with In-House Counsel Pursuant to the Protective Order (Dkt. No. 224)

Appendix in Support of Orbitz's Motion for Order Permitting it to Share Certain Documents (Dkt. No. 225)

Appendix to Motion by the Travelport Defendants to Compel Discovery and for Sanctions (Dkt. No. 231)

Plaintiff American Airlines, Inc.'s Memorandum in Support of its Rule 12(B)(6) Motion to Dismiss Travelport's Counterclaims (Dkt. No. 236)

Travelport's Brief in Opposition to Plaintiff American Airlines, Inc.'s Rule 12(b)(6) Motion to Dismiss Travelport's Counterclaims (Dkt. No. 258)

Brief in Support of Motion by Defendants Travelport and Orbitz (A) for Leave to Take Up to Twenty-Five Fact Depositions and (B) for Expedited Treatment (Dkt. No. 326)

Appendix to Motion by Defendants Travelport and Orbitz (A) for Leave to Take Up to Twenty-Five Fact Depositions and (B) for Expedited Treatment (Dkt. No. 327)

Appendix of Exhibits in Support of Sabre Defendants' Response to Americans Motion to Compel the Second Deposition of Sabre Witness & Motion for Protection (Dkt. No. 384)

Sabre Defendants' Answer and Counterclaims to Second Amended Complaint and Supplement to Second Amended Complaint (Dkt. No. 389)

Sabre Defendants' Corrected Answer and Counterclaims to Second Amended Complaint and Supplement to Second Amended Complaint and Supplement to Second Amended Complaint (Dkt. No. 391)

Travelport Defendant's Motion for Reconsideration and Leave to File an Additional Counterclaim (Dkt. No. 433)

Brief in Support of Travelport Defendants' Motion for Reconsideration and Leave to File and Additional Counterclaim (Dkt. No. 434)

Appendix in Support of Plaintiff American Americans, Inc.'s Motion to Authorize Deposit into Court Registry and for Expedited Trial Appendix in Support of Plaintiff American Americans, Inc.'s Motion to Authorize Deposit into Court Registry and for Expedited Trial (Dkt. No. 456)

B. Documents Containing Information Regarding New or Planned Products and Technology That American Is Developing but Has Not Yet Disclosed Should Remain Sealed.

Permanently sealing documents is justified when they contain trade secret, confidential, or proprietary information relating to a company's technology that is not generally available to the public. *See Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-275-D, 2011 WL 902256, at *1 (E.D.N.C. Mar. 15, 2011) (granting permanent sealing of documents containing trade secrets, including information about its unreleased game engine). In addition to containing information regarding American's confidential business strategy, a number of documents describe American's products and technology that American is developing, but has not yet made public. (*See Broadfield Aff.* (App. at 5-6, Ex. 2.)) American seeks to protect information regarding its developing technology, which is extremely valuable to it and American has taken great lengths to keep such information secret. (*See id.*) Further, any disclosure of this information could be used by American's competitors to understand American's currently-undisclosed technology and products and would threaten American's competitive position. (*See id.*) Therefore, American asks that the court permanently seal the following documents similarly describing developing and undisclosed technology (in addition to containing information relating to American's proprietary business strategies):

Appendix in Support of Sabre's Response to American Airlines, Inc.'s Motion to Extend Scheduling Order Deadlines (Dkt. No. 190)

Appendix in Support of Orbitz's Motion for Order Permitting it to Share Certain Documents (Dkt. No. 225)

C. Documents Disclosing the Terms and Conditions of Confidential Commercial Relationships Between American and Other Entities Should Remain Sealed.

American also seeks to seal permanently documents that contain the terms and conditions of its confidential commercial relationships. (*See Broadfield Aff.* (App. at 6, Ex. 2.)) Federal courts have held that “[p]ublic access to materials filed with the court may also be restricted to keep private agreements confidential,” particularly when the disclosure of such agreements would disadvantage the litigant in the marketplace and in future negotiations. *Vista India, Inc. v. Raaga, LLC*, No. CIV-A-07–1262-HAA, 2008 WL 834399, at *2–3 (D.N.J. Mar. 27, 2008) (holding that confidential agreements reflecting negotiation strategies and pricing terms should remain sealed); *Mars, Inc. v. JCM Am. Corp.*, No. CIV-05-3165-RBK, 2007 WL 496816, at *2 (D.N.J. Feb. 13, 2007); *see also In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09–cv–01967 CW (NC), 2013 WL 2403599, at *2 (N.D. Cal. May 31, 2013) (sealing documents that contained confidential payment terms that would harm future negotiations if disclosed). In *Mars*, the court recognized the confidentiality of a business agreement as a legitimate private interest. 2007 WL 496816, at *2. The court reasoned that the plaintiff had a legitimate private interest in maintaining the confidentiality of terms to a business agreement that are not available to the public. *Id.* at *2. Furthermore, the court held that if the terms of the business agreement were disclosed to the public, the parties to the agreement could lose their future competitive negotiating positions and strategies, causing them to suffer serious injury. *See id.*

Like the plaintiff in *Mars*, American seeks to seal its private agreements with other parties as well as confidential information contained in those contracts. Contracts, such as those included in the below listed filings, contain confidential terms, including pricing terms, negotiated between American and other parties. (*See Broadfield Aff.* (App. at 6, Ex. 2.))

Further, the terms of all of these contracts are highly confidential and such information is not generally known outside American. (*See id.*) Disclosure of this information could be used by American's competitors to understand American's negotiating positions and confidential business strategies, would jeopardize American's relationship with those parties, and would threaten American's competitive position. (*See id.*) Therefore, American asks that the Court permanently seal the following documents disclosing the terms of confidential commercial agreements:²

American Airlines Inc.'s Motion for Leave to File Under Seal attaching First Amended Complaint (Dkt. No. 52)

American Airlines Inc.'s Motion for Leave to File Under Seal attaching Opposition to Travelport's FRCP 12(B)(3) and 28 U.S.C. § 1406(A) Motion to Dismiss or Transfer AA's Complaint (Dkt. No. 57)

American Airline Inc.'s Unopposed Motion for Leave to File Under Seal attaching Opposition to Travelport's FRCP 12(B)(3) and 28 U.S.C. § 1406(A) Motion to Dismiss or Transfer AA's Complaint (Dkt. No. 66)

First Amended Complaint (Dkt. No. 70)

Memorandum in Support of Sabre's Motion to Dismiss Pursuant to Rule 12(b)(6) (Dkt. No. 98)

Appendix in Support of Sabre's Motion to Dismiss (Dkt. No. 99)

American Airlines Inc.'s Response in Opposition to Sabre's Motion to Dismiss Pursuant to Rule 12(b)(6) (Dkt. No. 124)

Appendix in Support of American Airlines Inc.'s Response to Travelport's September 9, 2011 Letter (Dkt. No. 139)

American Airlines Inc.'s Motion for Leave to File Second Amended Complaint and Brief in Support (Dkt. No. 148)

Second Amended Complaint (Dkt. No. 159)

² Note that several of these documents are identical or substantially similar to each other. For example, docket numbers 52 and 70 both include the First Amended Complaint and docket numbers 57 and 66 both include American Airline Inc.'s Unopposed Motion for Leave to File Under Seal attaching Opposition to Travelport's FRCP 12(B)(3) and 28 U.S.C. § 1406(A) Motion to Dismiss or Transfer AA's Complaint. Further Sabre Defendants' Answer and Counterclaims to Second Amended Complaint and Supplement to Second Amended Complaint (Dkt. No. 389) and Sabre Defendants' Corrected Answer and Counterclaims to Second Amended Complaint and Supplement to Second Amended Complaint and Supplement to Second Amended Complaint (Dkt. No. 391) are substantially similar.

Appendix in Support of American Airlines, Inc. 's Reply to Travelport's Response in Opposition to Americans Motion for Reconsideration of the Court's November 21, 2011 Order (Dkt. No. 203)

Travelport's Opposed Motion for Leave to File Surreply in Opposition to American Airlines, Inc. 's Motion for Reconsideration (Dkt. No. 222)

Sabre's Supplement to its Motion to Dismiss American Airlines's Second Amended Complaint (Dkt. No. 283)

Appendix of Exhibits to Sabre's Supplement to its Motion to Dismiss American Airline's Second Amended Complaint (Dkt. No. 284)

Brief in Support of Travelport's Supplemental Rule 12(b)(6) Motion to Dismiss Plaintiff American Airlines, Inc. 's Supplement to Second Amended Complaint (Dkt. No. 288)

Appendix in Support of Plaintiff American Americans, Inc. 's Supplemental Brief in Opposition to Travelport's Motion to Dismiss the Second Amended Complaint (Dkt. No. 308)

Reply in Support of Travelport's Supplemental Rule 12(b)(6) Motion to Dismiss Plaintiff American Airlines, Inc. 's Supplement to Second Amended Complaint (Dkt. No. 319)

Appendix in Support of American Airlines Inc. 's Motion to Compel Deposition of Sabre Witness and Motion for Expedited Treatment (Dkt. No. 378)

III. CONCLUSION AND REQUESTED RELIEF

For all of the reasons set forth above and in the Broadfield Affidavit, American respectfully requests that the Court grant this motion and permanently seal the filings described in Exhibit 1. American further requests that the Court grant it any further relief to which it is entitled.

Dated: October 14, 2013

Respectfully submitted,

/s/ T. Ray Guy

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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 14th day of October, 2013.

/s/ T. Ray Guy
T. Ray Guy

CERTIFICATE OF CONFERENCE

Counsel for American Airlines, Inc., Daniel S. Klein, conferred with counsel for Defendants Sabre Inc., Sabre Holdings Corporation, Sabre Travel Int'l Ltd. d/b/a Sabre Travel Network, Orbitz Worldwide LLC, Travelport Limited, and Travelport LP on October 14, 2013. Counsel for all Defendants stated that Defendants are unopposed to relief requested herein.

/s/ Daniel S. Klein
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