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 **FILE UNDER SEAL**

AMERICAN AIRLINES, INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO TRAVELPORT'S FRCP 12(B)(3) AND 28 U.S.C. § 1406(A)
MOTION TO DISMISS OR TRANSFER AMERICAN AIRLINES' COMPLAINT

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Cherry picking amongst the forum selection clauses in its agreements with American, Travelport Limited and Travelport, LP (collectively, the "Travelport Defendants" or "Travelport") seek to implicate a narrow forum selection clause in an eighteen year old form distribution contract drafted by one of Travelport, LP's predecessors to have this major and multiparty antitrust matter transferred to a forum in which they no longer have any significant presence. Given the relative significance of this single contract to the allegations in this case—which implicate multiple contracts as well as serious misconduct unconnected to any contract—and the lack of any meaningful nexus between Travelport and Illinois, it is readily apparent that this motion is meritless as a matter of law and was filed solely for purposes of delay.[1] The motion is particularly devoid of merit now that Sabre, a global distribution system with its principal place of business in this forum, has moved to intervene and American has added Sabre as a defendant in this case. Accordingly, the motion should be denied, and American's choice of forum should be given the deference to which it is entitled.[2]

[1] American responds to this transfer motion well before its deadline because it is important to resolve the issue of where this case will be litigated as quickly as the Court's schedule permits. As further set forth in American's request for a Rule 16(a) status conference, American anticipates needing to request emergency relief if Travelport takes punitive actions against it this summer, as history indicates is likely—particularly given Travelport's (and Sabre's) refusal to provide American with reasonable assurance that it will not do so. Delay is thus to Travelport's benefit, and this motion appears to be merely the newest roadblock erected by Travelport. Indeed, Travelport never mentioned that it planned to make a venue challenge despite multiple rounds of correspondence with American concerning discovery and the form of a protective order in this case.

[2] Travelport has filed its transfer motion pursuant to Rule 12(b)(3) or Section 1406(a). But neither Rule 12(b)(3) nor Section 1406(a) applies to this case because venue in this court is not *improper*. Travelport confuses the concept of statutorily *proper* venue with that of *permissible* venue—the former being governed by Rule 12(b)(3) and Section 1406 and the latter being governed by Section 1404. *See Eres N.V. v. Citgo Asphalt Refining Co.*, 605 F. Supp. 2d 473, 479 (S.D.N.Y. 2009) ("A forum selection clause does not, by itself, render venue in an alternative forum improper, as *venue is improper only if the statutory venue requirements of 28*

I. BACKGROUND

A. This Lawsuit Concerns A Multi-Part Anticompetitive Scheme Of The Defendants And Other Industry Participants.

American's lawsuit involves serious violations of Sections 1 and 2 of the Sherman Act, as well as provisions of Texas law. As explained in the First Amended Complaint (the "Complaint"), the U.S. Department of Justice (the "DOJ") and the U.S. Department of Transportation ("DOT") have consistently raised the same concerns about the anticompetitive conduct of global distribution systems ("GDSs") that American has asserted in this lawsuit. Indeed, the DOJ has recently launched an antitrust investigation into the matters at issue in this lawsuit by serving Civil Investigative Demands on the GDS defendants in this case as well as upon airlines and other industry participants affected by the defendants' conduct.

At issue here is an industry-wide dispute as to how airline tickets are distributed to travel agents and, ultimately, consumers. Historically, computer reservation systems ("CRSs"), rebranded as GDSs, have been the pipelines for distributing airline flight, fare, and availability information to travel agents. Travel agents do not pay to use the services of GDSs. Because travel agents rely almost exclusively on one GDS to sell airline tickets, and a majority of American's passenger revenues come from tickets sold by travel agents to a large number of business travelers—a group of customers that is essential to American's profitability—each GDS is a monopolist "gatekeeper" providing American with access to their travel agent subscribers. As DOJ has stated, "[e]ach [GDS] provides access to a large, discrete group of travel agents, and

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U.S.C. § 1391 have not been satisfied.") (emphasis added); *accord Interactive Music Technology, LLC v. Roland Corp. U.S.*, Civil Action No. 6:07-CV-282, 2008 WL 245142, at *7 (E.D. Tex. Jan. 29, 2008) ("Where the designated venue in a forum selection clause is another federal court . . . the proper way to enforce the clause is through a venue transfer pursuant to 28 U.S.C. § 1404(a)."); *see also* 5 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3803.1 (3d ed.) ("a forum selection clause does not render venue improper in an otherwise proper forum . . . ."). Section 1404(a)'s discretionary factors weigh heavily against Travelport's requested transfer here.

unless a carrier is willing to forego access to those travel agents, it must participate in every [GDS]." Accordingly, as a result of American's dependence on the GDSs, the GDSs charge American exorbitant, monopoly "booking fees" for every airline reservation made by a travel agent through a GDS.

To reduce its dependency on GDSs and provide more innovative and customized flight and fare offerings to customers, American has developed an alternative channel of distribution—called AA Direct Connect—based on modern, efficient, flexible, and less costly technology than the technology that GDSs use. AA Direct Connect allows travel agents to obtain information and book tickets directly in American's internal reservation system, and allows American direct access to its customers so that the customer experience can be personalized in real time. Threatened by the potential competition from AA Direct Connect, GDSs have used their monopoly power and coordinated attacks to quash that threat. Each of the GDS defendants has retaliated against technology companies that have assisted American in the development of AA Direct Connect, enforced exclusionary provisions in its contracts with travel agent subscribers to prevent those subscribers from utilizing AA Direct Connect, punished American for its attempts to compete by raising its booking fees and degrading the quality of the services it provides to American, and otherwise penalized those in the air traveling industry who show support for American's effort to break their respective monopolies. American's original and amended Complaint challenged this conduct and other anticompetitive and exclusionary conduct by multiple parties and involving many third parties. For example, American challenges:

- Travelport's refusal to do business with technology companies, such as Farelogix, that work with AA Direct Connect. (Compl. ¶¶ 84-85.)

- Travelport's refusal to do business with American unless American foregoes AA Direct Connect. (*See id.* ¶¶ 14-15.)

- Travelport's retaliatory actions taken to punish American for pursuing AA Direct Connect, including the doubling of American's booking fees and engaging in display bias of American's flights in its GDSs. (*See id.* ¶¶ 96-100.)

- Travelport's exclusive dealing arrangements with its travel agency subscribers, including Orbitz, which effectively preclude them from using AA Direct Connect to book American flights. (*See id.* ¶¶ 63-73.)

- Travelport's conspiracy with Orbitz and its other travel agency subscribers to block AA Direct Connect. (*See id.* ¶¶ 110-11.)

In addition, on June 1, Sabre sought to intervene in this action. That same day, American filed an amended Complaint naming Sabre as a defendant, based on Sabre's strikingly similar anticompetitive conduct. Like Travelport Limited and Orbitz Worldwide, LLC, none of the Sabre defendants is a party to the contract containing the narrow forum selection clause upon which the Travelport Defendants' transfer motion is based. American has challenged various forms of exclusionary conduct and anti-competitive behavior by Sabre, including:

- Sabre's refusal to do business with technology companies, such as Farelogix, that work with AA Direct Connect, and threats to other technology companies, such as PASS Consulting, for working with Farelogix on AA Direct Connect. (Compl. ¶¶ 82-83.)

- Sabre's refusal to do business with American unless American foregoes AA Direct Connect. (*See id.* ¶¶ 14-15.)

- Sabre's decision to come to the aid of Travelport, its supposed competitor, by doubling American's booking fees and engaging in display bias of American's flights in its GDS, rather than competing on the merits to try to gain additional travel agency customers and bookings at Travelport's expense when Travelport took punitive actions against American that resulted in Travelport's travel agency customers being unable to find and book flights on American (*See id.* ¶¶ 102-06.)

- Sabre's exclusive dealing arrangements with its travel agency subscribers that effectively preclude them from using AA Direct Connect to book American flights. (*See id.* ¶¶ 63-68.)

And Sabre seeks to assert its own antitrust claims against American. While American believes that Sabre's claims are groundless, they underscore the fact that the issues in this case extend well beyond any single contract or single GDS, and instead concern a whole host of practices involving not only American and Travelport, but also the relationships among network airlines, GDSs, traditional "brick and mortar" agencies, travel management companies, online travel agencies, technology providers, corporate subscribers, and other participants in the air travel industry, including the traveling public.

B. An Amendment To The Contract Upon Which Travelport's Motion Is Based Was Cited As One Example Of The Defendants' Broad Anticompetitive Scheme.

One aspect of the GDS's broad scheme to maintain their monopoly power over American that was referenced by American in the Complaint is the widespread use by GDSs of most-favored nation provisions in participating carrier agreements. (*See, e.g.*, Compl. ¶ 10.) More specifically, in one paragraph of American's 165-paragraph Complaint, American cited, by way of "example" (*id.* ¶ 52), the most-favored nation provision in the Preferred Fares Amendment (the "PFA") to the agreement between American and one of Travelport LP's predecessors, Galileo. The 2006 PFA amended the 99-page form Galileo International Global Airline Distribution Agreement (the "GIGADA"), executed December 15, 1993, which Galileo required all airlines "participating" in its GDS to execute.[3] A form contract, GIGADA contained the following "Governing Law" provision, which includes a choice of law provision and then a forum selection clause:

[3] In 1992, shortly before the GIGADA was executed, DOT readopted its rules governing the GDSs. *See* 14 C.F.R. Part 255, adopted at 57 Fed. Reg. 43780 (Sept. 22, 1992). At that time, DOT acknowledged the GDS's market power over the airlines, noting, "[t]he carriers' dependence on agencies for marketing their services and the agencies' reliance on [GDSs] for choosing and booking airline services are among the factors that give each of the [GDSs] market power over other carriers . . . . [GDSs] accordingly do not need to compete for airline participants in their systems." *Id.* at 43783.

> This Agreement and all *disputes* arising *under or in connection with* this Agreement, including actions in tort, shall be governed by the internal laws of the State of Illinois, without regard to its conflicts of laws principles. All *actions* brought *to enforce or arising out of* this Agreement shall be brought in federal or state courts located within the County of Cook, State of Illinois, USA, the parties hereby consenting to personal jurisdiction and venue therein.

(App. at 3 § 20 (emphasis added).) As the plain language reflects, the choice of law clause—applicable to "all disputes arising under *or in connection with*" the agreement—is significantly broader than the forum selection clause—which applies only to actions "arising out of" the agreement. And, as discussed below, this distinction, clearly intentional in a contract drafted by Travelport LP's predecessor, is highly significant as a matter of law.

In any event, the sentences in the provision of the amendment to the GIGADA cited in the Complaint are not pled to support claims that Travelport breached these provisions; rather, these contractual provisions are referenced as merely one example of Travelport's unlawful conduct concerning only one of the myriad serious violations of Sections 1 and 2 of the Sherman Act that form the basis of American's lawsuit. And Travelport's statement that American's Complaint is "replete with allegations" about the GIGADA, (Def.'s Mot. at 7), is false. In fact, the GIGADA is mentioned just twice in the Complaint—once in "The Parties" section as part of a description of defendant Travelport, LP (Compl. ¶ 24), and once as an example of how Travelport uses the most-favored nation clause found in the amendment to the GIGADA to prevent American from encouraging travel agents to use alternative distribution methods. (*Id.* ¶ 52.) American does not allege a claim for breach of the GIGADA in its Complaint. (*See generally id.*) Nor does American assert any claims that require interpretation of the GIGADA or that arise out of the GIGADA. (*Id.*)

C. Defendants' Other Contracts At Issue In This Case And The GIGADA Have Inconsistent Forum Selection Clauses.

The GIGADA is just one of numerous contracts Travelport has with airlines and travel agents that are at issue in this antitrust case. (*See id.* ¶¶ 84-87.) Travelport controls three GDSs and American annually pays tens of millions of dollars in booking fees to Travelport for flights that travel agents book through *two* of the Travelport GDSs—Galileo *and Worldspan*. (*See id.* ¶¶ 3-6.) [redacted]

Further demonstrating that no single contract controls the case or where venue is proper (rather than merely permissive), numerous other contracts relevant to American's antitrust claims that are cited in the Complaint contain forum selection clauses. Specifically:

- [redacted]

[redacted] Through its action to intervene, Sabre has agreed that this Court is an appropriate forum.

- With respect to American's allegations of Travelport's and Orbitz's retaliatory attacks on American and Travelport's tortious interference, (Compl. ¶¶ 137-42), American's Complaint cites the Second Amended and Restated Airline Charter Associate Agreement, effective December 19, 2003, between American and Defendant Orbitz (the "ACAA"). (*Id.* ¶ 85-95.) [redacted]

- American alleges that Travelport tortiously interfered with contracts between American and other travel agents. (*See* Compl. ¶¶ 144-51.) Many of these contracts include forum selection clauses providing for various fora.

In sum, the antitrust claims asserted in this case against the six defendants—five of which are not even parties to the GIGADA including Travelport Limited—do not arise out of the GIGADA, which is merely one of many contracts with some relevance to this case.

II. ARGUMENT AND AUTHORITIES

A. The Forum Selection Clause Does Not Govern This "Action."

In the Fifth Circuit, before considering whether to enforce a forum selection clause, a court "must first decide whether the clause applies to the pending action." *Am. Airlines v. Yahoo!, Inc.*, No. 4:08-CV-626-A, 2009 WL 381995, at *1 (N.D. Tex. Jan. 16, 2009). Whether a forum selection clause applies to a given case depends on the language of the clause at issue. *Smith v. Lucent Tech., Inc.*, No. Civ.A. 02-0481, 2004 WL 515769, at *7 (E.D. La. Mar. 16, 2004) ("[T]his Court 'must look to the language of the parties' contracts to determine which causes of action are governed by the forum selection clause.'") (quoting *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216, 222 (5th Cir. 1998)). Here, the Court should find that the narrowly-drafted forum selection clause does *not* apply because "the *substance* of [American's] claims, stripped of their labels," is outside the scope of the forum selection clause.

TransFirst Holdings, Inc. v. Phillips, No. 3:06-CV-2303-P, 2007 WL 631276, at *11 (N.D. Tex. Mar. 1, 2007); *see also Am. Airlines*, 2009 WL 381995, at *1 (declining to enforce forum selection clause—or even evaluate its enforceability—because the clause did not apply to the pending action).

1. This Action Did Not "Arise Out Of" The GIGADA.

American's Complaint alleges that Travelport, Sabre, Orbitz, and other industry participants "with an interest in preserving the GDSs' dominant market positions have engaged in a broad and unlawful multi-part anticompetitive scheme." (*See* Compl. ¶ 9.) Specifically, while American asserts (and Travelport highlights in its brief) that, in order to retain their market dominance, Sabre and Travelport have collectively imposed anticompetitive contract terms that severely limit the ability of airlines to develop, promote, and use competing distribution channels, (*id.* ¶ 10), only one of these agreements to which Travelport is bound selects Illinois in its nearly two-decade old forum selection clause. Moreover, American also claims, among other things that the GDSs and those acting in concert with them have: (i) entered into other long-term restrictive agreements with travel agent subscribers that require or incentivize travel agents to use them exclusively or nearly exclusively; (ii) unreasonably refused to deal with technology companies whose products threaten to erode barriers to entry in the distribution of airline services; and (iii) retaliated against American and other companies that take action to potentially threaten the GDS monopoly position. (*Id.*) These and other unlawful and anticompetitive acts by Sabre, Travelport, and Orbitz form the basis for American's claims that the defendants have violated Sections 1 and/or 2 of the Sherman Act by monopolizing and/or conspiring to monopolize the distribution of airline tickets.

The most-favored nation provision in the 2006 amendment to the 1993 GIGADA cited in the Complaint (*id.* ¶ 52), is merely one of the many anticompetitive and exclusionary

acts detailed in the Complaint that Travelport has employed to unlawfully preserve and maintain its monopoly power. [redacted] The Complaint also identifies various acts by Travelport and Sabre that in no way depend on, and are unrelated to, the GIGADA, including the actions they have taken to erect unlawful barriers to entry by *new GDS entrants* and to retaliate against American for developing a new, more innovative alternative channel of distribution than that used by the incumbent GDSs.

Moreover, the GIGADA is irrelevant to American's claim that Travelport tortiously interfered with American's existing and prospective relations with Orbitz and other travel agents; [redacted]. (Compl. ¶¶ 134-42; App. at 20.) Similarly, the GIGADA is completely immaterial to American's claims that Travelport tortiously interfered with American's contracts with its brick and mortar travel agent partners and its numerous corporate partners that have been granted permission to sell American's tickets. (*Id.* ¶¶ 143-51.) These claims arise from independent exclusionary acts committed by Travelport and relate to yet another set of contracts, many of which also contain their own forum selection clauses.

Travelport's claim is similar to that rejected in *Imation Corporation*. There, the court had to determine whether antitrust claims were within the scope of a forum selection clause that governed claims "arising [t]hereunder." *See Imation Corp. v. Quantum Corp.*, Case No. 01-1798, 2002 WL 385550, at *5 (D. Minn. Mar. 8, 2002). The court applied a broad test—incorporating analyses from the First, Third, Eighth, and Ninth Circuits—to determine whether the forum selection clause applied to the antitrust claims and decided that it did not. *Id.* at * 4-5.

In so doing, the court noted that Imation's "antitrust allegations do not ultimately depend on the existence of the license agreement, the resolution of the antitrust violations do not relate to the interpretation of the license agreement, and the antitrust allegations do not involve the same operative facts as a parallel claim for breach of contract." *Id.* at *5 ("[A]lthough it is true that some of the facts alleged in the Second Amended Complaint could state a claim for breach of the license agreement, Imation's claims involve much more than a simple breach of contract action and are broader than the claims contemplated by the license agreement."); *see also Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc*., 806 F.2d 848, 852-53 (8th Cir. 1987) (abrogated on other grounds by *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989)) (affirming decision that claims were not in the scope of forum selection clause where "the suit [was] broader than the clause"); *cf. Anselmo v. Univision Station Group*, No. 92 Civ. 1471(RLC), 1993 WL 17173, at *2 (S.D.N.Y. Jan. 15, 1993) (forum selection clause properly applied when "claims grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship").

2. The Forum Selection Clause At Issue Is Narrow In Scope.

The narrowly-tailored language of the forum selection clause in the GIGADA further compels the determination that this "action" falls outside of its scope. The forum selection clause includes the restrictive term "actions," rather than a broader term such as "disputes," and it uses the restrictive modifying terms "to enforce or arising out of," rather than broader terms such as "related to" or "arising under or in connection with." (App. at 3.) "Arise" is defined as "[t]o originate; to stem (from)," BLACK'S LAW DICTIONARY (9th ed. 2009), whereas "relate" and "connection" are defined more broadly as "to show or establish logical or causal connection between" and a "causal or logical relation or sequence," respectively, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2009). American's claims challenging a broad

array of conduct in the current marketplace by multiple parties did *not* "originate" or arise out of an eighteen year old form distribution contract with a predecessor to one party in this case.

Courts faced with similar restrictive terms have held them to be narrow in scope. *See, e.g.*, *Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, 651 F. Supp. 2d 550, 557-58 (N.D. Tex. 2009) (citing *MaxEN Capital, LLC v. Sutherland*, No. H-08-3590, 2009 WL 936895 (S.D. Tex. Apr. 3, 2009), and distinguishing between clauses that are "broadly written" with "related to" language and those with "arising from" language because the latter are "viewed as relatively narrow"); *Smith*, 2004 WL 515769, at *8 ("[C]ourts should generally assume that each of the terms ('arising out of' and 'relating to') have distinct and independent meanings . . . ."). As the Second Circuit explained in *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007), "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or 'arise in connection with' the contract."[4]

Moreover, the language drafted by Travelport, LP predecessor for the GIGADA's choice of law clause, which immediately precedes the forum selection clause further confirms

[4] The cases cited by Travelport that include broadly-worded forum selection clauses (Def.'s Mot. at 9), are thus inapposite to the narrow forum selection clause before the Court. *See ABC Rental Sys., Inc. v. Colortyme, Inc.*, 893 F. Supp. 636, 637 (E.D. Tex. 1995) (case involved breach of contract claims, and forum selection clause at issue covered "any action brought by either party against the other"); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987) (forum selection clause governed any case "arising under or in connection with" the contract); *Bense v. Interstate Battery Sys.*, 683 F.2d 718, 719 (2d Cir. 1982) (forum selection clause governed "any suits or causes of action arising directly or indirectly" from the parties' contract, and antitrust claims were based on wrongful termination of the contract); *Univ. Grading Serv. v. eBay*, No. 08-CV-3557, 2009 WL 2029796, at *15 (E.D.N.Y. June 9, 2009) (forum selection clause applied to any claim "aris[ing] out of this Agreement or [defendant's] services"; defendant conceded that antitrust claims did not arise out of the "Agreement" but argued forum selection clause applied because claims arose out of defendant's services); *Ward Packaging, Inc. v. Schiffman*, No. 4:02-CV-518-A, 2002 WL 31086077, at *2-3 (N.D. Tex. Sep. 13, 2002) (forum selection clause applied to actions "in connection with" the contract, and plaintiffs' DTPA claims were based on defendant's alleged breach of the contract).

that a narrow interpretation of the forum selection clause is required. Thus, while the forum selection clause is limited to "actions" to "enforce" or that "aris[e] out of" the GIGADA, the choice of law clause broadly encompasses "all disputes" that "aris[e] under" or "in connection with" the GIGADA. (App. at 3.)[5] The plain differences between these two clauses—contained in the same contractual provision—were clearly deliberate, and are significant as a matter of law, as they confirm the intent of the drafter, Travelport, LP's predecessor, to make the forum selection clause narrower than the choice of law provision. *See Compliance Source, Inc. v. GreenPoint Mortg. Funding, Inc.*, 624 F.3d 252, 259 (5th Cir. 2010) (courts "must examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless"); *Aviall Servs., Inc. v. Cooper Indus., LLC*, 694 F. Supp. 2d 567, 595 (N.D. Tex. 2010) ("A court in construing a contract must also avoid interpretations that render provisions meaningless.").

Under Travelport's strained reading, any action involving a complaint that references the GIGADA or notes provisions in the GIGADA as examples of illegal conduct constitutes an "action . . . arising out of the Agreement." Its position is untenable in the face of the deliberately-drafted narrower language of the forum clause and the fact that this antitrust case concerns parties—including Sabre—and claims that do not arise out of the GIGADA and that range far beyond the single clause of the amendment to the GIGADA cited in the Complaint.

Finally, the forum selection clause was drafted by Travelport's predecessor as part of boilerplate language in a 99-page form distribution contract, and, as a form adhesion contract,

[5] In addition, the choice of law clause (unlike the forum selection clause) expressly includes "actions in tort." (*Id.* ("This Agreement and all *disputes* arising *under or in connection with* this Agreement, *including actions in tort*, shall be governed by the internal laws of the State of Illinois, without regard to its conflicts of laws principles.") (emphasis added).)

it should be construed against Travelport.[6] *See Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 402 (5th Cir. 2008) ("forum-selection clauses are interpreted *contra proferentem*: when presented with two reasonable, but conflicting, interpretations of a contract provision, we adopt the interpretation less favorable to the drafter"); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974) (construing forum selection clause against the drafter); *See American Airlines, Inc. v. Yahoo!, Inc.*, No. 4:08-626-A, 2009 WL 381995, at *1 (N.D. Tex. Jan. 16, 2009) (declining to enforce a forum selection clause that constituted "boilerplate terms and conditions" in an agreement). As such, American's reasonable interpretation, though less favorable to Travelport, should be adopted. *See Alliance Health Group*, 553 F.3d at 402; *Keaty*, 503 F.2d at 957.

B. The Court Should Decline To Adopt Travelport's Selective Enforcement Of The GIGADA's Forum Selection Clause.

Even if this Court were to determine that any of American's claims fell within the scope of the GIGADA's forum selection clause, the Court should nevertheless decline to transfer this case.

1. Even If The Forum Selection Clauses In The Various Form Contracts With Travelport LP's Predecessors Were Relevant, They Conflict And Thus Do Not Compel Transfer.

A party seeking enforcement of a contract must demonstrate that the contract is the product of a meeting of the minds between the parties. *See Crowell v. CIGNA Group Ins.*, No. 09–51086, 2011 WL 365284, at *4-5 (5th Cir. Feb. 7, 2011). Where parties agree to

[6] The regulatory environment in 1993, when the GIGADA was drafted by Travelport's predecessor, is important in that regard. The industry was regulated and the DOT had just mandated that carriers which then-owned GDSs, such as American, provide their flight and fare content to all the GDSs. *See* DOT Computer Reservations System (CRS) Regulations 14 C.F.R. § 255.7 (1992) ("Each system owner shall participate in each other system . . . if the other system offers commercially reasonable terms for such participation."). Given the GDS's well-documented market power (*supra* note 3), American had no power to negotiate or reject the clause or the contract as whole.

different contractual provisions, there can be no meeting of the minds. *See, e.g.*, *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*, 660 F. Supp. 1536, 1542 (S.D. Tex. 1987) ("the existence of contradictory clauses would evidence a lack of meeting of the minds on the issue of forum for suit, and the clause should be dropped from both contracts."). Here, Travelport, LP and American are parties to contracts with inconsistent forum selection clauses.

Specifically, as noted by Travelport, the GIGADA contains a forum selection clause favoring Cook County, Illinois. But, to the extent the Galileo distribution contract and its amendment (the GIGADA and the PFA) are relevant to the case, so too are the Worldspan distribution contract and its amendment (the Worldspan PCA and the WCA) are equally relevant.

[redacted] (App. at 12, WPCA Addendum at 8 (¶ 30); App. at 8-9, WCA at 9 ¶ 6.2.) Given the differing forum selection clauses in the two distribution agreements and their amendments drafted by Travelport LP's predecessors, American and Travelport, LP plainly did not have a meeting of the minds with respect to venue. *See Falcoal, Inc.*, 660 F. Supp. at 1542.[7] [redacted]

[7] [redacted] The ability of American to declare the forum selection clause void as to Travelport further confirms that the parties lack mutual assent to Illinois as a forum.

2. Because Travelport No Longer Has Any Nexus To Illinois, Transfer To Illinois Would Serve No Legitimate Purpose And Would Be Unreasonable.

Travelport has no material presence in Illinois, and transfer there would thus be "unreasonable' under the circumstances." *MaxEN Capital*, 2009 WL 936895, at *7. Fort Worth is the plaintiff's choice of forum, and it is also where American is headquartered, where its witnesses and documents are located, and where key negotiations and conduct occurred. Travelport Limited is a foreign corporation, and Travelport LP is a Delaware limited partnership with its principal place of business in Georgia. (Compl. ¶¶ 23-24.) After Travelport purchased Galileo in 2006, it moved Galileo's operations from Chicago to Georgia, where Worldspan also is headquartered. Thus, the forum selection clause in the GIGADA is a remnant from years gone by when Travelport's predecessor—Galileo—was still located in Chicago and wanted to litigate matters on its home turf.

Given the broad range of conduct at issue in the Complaint, the numerous relevant agreements, and the multiple defendants that are not subject to the GIGADA's forum selection, the Court can and should decline to apply it. *See Farmland Indus., Inc.*, 806 F.2d at 852-53 (affirming district court's finding that it would be unreasonable to enforce a forum selection clause in a case including multiple claims and defendants not subject to the clause); *Anselmo*, 1993 WL 17173, at *3 (courts "have refused to dismiss or transfer a case which is broader than the forum selection clause"); *Snider v. Lone Start Art Trading Co., Inc.*, 659 F. Supp. 1249, 1257 (E.D. Mich. 1987) (enforcement of a forum selection clause would be unreasonable where the case alleged a conspiracy among six defendants and the clause was contained in a contract with only one defendant).[8]

[8] Travelport (incorrectly) claims that both Travelport defendants are parties to the amendment to the GIGADA (Def.'s Mot. at 2) but then in a footnote improperly attempts to enforce its forum selection clause *on behalf of Orbitz and Travelport Limited* on the basis that Travelport Limited

C. Travelport's Request For Fees And Costs Is Groundless And Should Be Denied.

Travelport's request to have this Court impose fees and costs against American for allegedly engaging in "improper forum selection" is baseless. (Def.'s Mot. at 10.) To support its claim, Travelport points to American's previous "dismissal" of Travelport from pending litigation in Texas. (*Id.*) In fact, American filed a notice of nonsuit Travelport *without prejudice* from a Texas state case after Travelport filed suit against American in Chicago on the same day that American filed its suit against Travelport. The Texas state case against Travelport involved a narrow declaratory judgment claim seeking a determination of "the parties' rights, obligations, and status under the Preferred Fares Amendment" between American and Travelport. (Travelport's App. at 6.) That claim is not before this Court.

Travelport's transfer motion is an exercise in litigation gamesmanship designed to delay the prosecution of this important antitrust case. In the face of American's repeated efforts to move this case expeditiously in this forum due to its anticipated preliminary injunction motion, Travelport remained conspicuously silent as to its intention to file this motion. Travelport never mentioned that it planned to make a venue challenge despite multiple rounds of correspondence with American concerning discovery and the form of a protective order in this case. (*See* Rule 16(a) Conf. Request, Ex. A thereto.) Travelport's fee request in the face of its persistent silence on the subject of venue is groundless and should be summarily denied. *See*

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and Orbitz are "closely related" to Travelport, LP. (Def.'s Mot. at 5-6 n.3.) Orbitz is a separate legal entity from Travelport (*see* Compl. ¶ 91) that is not a party to the GIGADA and would have no right to enforce its forum selection clause, which Orbitz has not done. *See Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, 651 F. Supp. 2d 550, 557 (N.D. Tex. 2009) (permitting a non-signatory to enforce a forum selection clause where, unlike here, the non-signatory was an intended beneficiary of the agreement containing the clause at issue, and the party opposing enforcement of the clause at issue characterized the non-signatory as a party to the agreement).

McPhail v. Cumulus Media, Inc., No. 3:10-CV-1109-B, 2010 WL 3239155, at *2 (N.D. Tex. Aug. 16, 2010).

III. CONCLUSION

For the foregoing reasons, American respectfully requests that the Court deny Travelport's Motion to Dismiss or Transfer and grant American any other and further relief to which it may be justly entitled.

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Respectfully submitted,

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