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-00244-Y**

DEFENDANT ORBITZ WORLDWIDE, LLC'S BRIEF IN SUPPORT
OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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STATUTE

Defendant Orbitz Worldwide, LLC is the direct or indirect parent company of multiple online travel companies which through their websites provide travel reservation services, including Orbitz.com, which is owned and operated by Orbitz, LLC ("Orbitz"). Orbitz submits this brief in support of its motion to dismiss plaintiff American Airlines, Inc.'s ("American") First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

This antitrust case is primarily directed at Sabre and Travelport, two operators of competing global distribution systems, which American claims are each trying to monopolize separate, implausible markets for "[t]he provision of airline booking services to [their respective] subscribers." Orbitz, an online travel agency (or "OTA"), is one such Travelport "subscriber" and—alone among all travel agents, including OTAs—has been named as a defendant. According to American, Orbitz is named because it entered into an agreement with Travelport which restricted Orbitz from expanding its direct-booking relationship with American.[1]

This is a strange theory because American *chose* to terminate its contractual relationship with Orbitz, (FAC ¶ 93), and then opposed an effort to enjoin that termination by claiming that the termination would cause no irreparable harm. (Notice of Other Litigation, Dkt. No. 3, filed Apr. 12, 2011.) Until June 1st, when an Illinois state court enjoined its termination of Orbitz, American *ran advertisements* telling the world that its flights could not be booked through Orbitz. That does not sound like a set of facts that gives American a right to sue Orbitz for a conspiracy to monopolize or restrain trade by cutting American off from potential customers, and it is not. Even on the pleadings, American's case against Orbitz fails for multiple reasons.

First, the basis for American's antitrust claims against Orbitz is an allegedly unlawful exclusive dealing contract, the Subscriber Services Agreement, between Orbitz and one of the GDS defendants, Travelport. (FAC ¶¶ 69-73, 135, 138.) American asserts that the Subscriber

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[1] Orbitz is not alleged to have any relationship, contractual or otherwise, with Sabre, the subject of American's amendment to its original complaint.

Services Agreement is unlawful because it prevents Orbitz from entering into a new contractual relationship with American that would permit American to sell tickets directly through Orbitz, thereby bypassing Travelport. (FAC ¶¶ 69-73.) However, an exclusive dealing contract only can violate the Sherman Act if it locks-up or "forecloses" a "substantial" portion of the market—which under the case law is on the order of 30% or more. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 625 (5th Cir. 2002); *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436 (E.D. Tex. 2003). Here, American's SEC filings state that only 3% of American's revenue was attributable to bookings that consumers made through Orbitz, which means that American has no basis whatsoever to claim that the Subscriber Services Agreement is unlawful. Indeed, American alleges that all OTAs (of which Orbitz is but one and the "third largest") constitute just 10-15% of American's revenues. (FAC ¶¶ 29, 89.) So even if one assumed, incorrectly, that Travelport locked-up not just Orbitz but all OTAs, American is still left far below the 30% market foreclosure threshold that the Supreme Court has recognized is necessary to sustain such a claim. *See Jefferson Parish*, 466 U.S. at 45; ABA Section of Antitrust Law, *Antitrust Law Developments* 217 (6th. ed. 2010).

Second, companies within a single corporate family are legally incapable of conspiring with one another for purposes of Sections 1 and 2 of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (a company cannot conspire with its parent or sibling companies). American has long known that the Subscriber Services Agreement it claims is the "concerted action" in restraint of trade *was executed when Orbitz was a wholly owned subsidiary of Travelport*. In fact, the Subscriber Services Agreement was attached to Orbitz's SEC filings in 2007 and American has thus known about it—and when it was executed—for years. The Subscriber Services Agreement does not, and cannot as a matter of law, establish concerted

action under the Sherman Act. There is no need for any further proceedings to conclude that the Subscriber Services Agreement provides no basis for suing Orbitz in a conspiracy case.

Finally, Orbitz is not meaningfully present in the balance of the FAC about American's alleged efforts to achieve better economic terms for distribution of airline tickets, and Sabre and Travelport's alleged efforts to thwart that. Indeed, none of the "new allegations" in the FAC—which relate almost exclusively to conduct attributed to Sabre—concern Orbitz, which is not alleged to have *any* business dealings with Sabre. Instead, the only well-pleaded averments concerning Orbitz relate to the Subscriber Services Agreement. Because that agreement cannot support a claim under the Sherman Act, dismissal is warranted because the remaining conclusory allegations about actions supposedly taken by "industry participants" fail to meet the pleading standard set by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

American amended its complaint after Orbitz filed its motion to dismiss. Although it added a new defendant, Sabre, it did not change any material averments about Orbitz. Accordingly, Orbitz's motion to dismiss the FAC should be granted with prejudice.

II. SUMMARY OF ALLEGATIONS

This lawsuit concerns the ways in which American sells tickets for its flights. American, like other airlines, sells tickets through two channels: (1) direct sales (*e.g.*, via its own website, call centers and ticket offices); and (2) indirect sales through travel agencies, which includes traditional brick-and-mortar agencies and online travel agencies, such as Orbitz. (FAC ¶ 29.) According to the FAC, "[a]pproximately 51% of American's revenue is generated by brick and mortar travel agencies," which include "major agencies such as American Express and Carlson Wagonlit Travel." (*Id.*) American alleges that only "10-15% [of its revenue] is generated by online agencies." (*Id.*) Implicit from these averments, the remaining 35-40% of American's ticketing revenues are attributable to its own direct sales to customers. And with respect to Orbitz, specifically, prior to its termination, "approximately 3% of American's passenger

revenue, on an annualized basis, was generated from bookings made via Orbitz," which the FAC describes as the "third largest online travel agency in the U.S." (*Id.* ¶ 89.)[2]

A. Airlines and Travel Agents Alike Choose Global Distribution Systems to Sell Airlines Tickets to Consumers.

Defendants Sabre, Inc. ("Sabre") and Travelport Limited and Travelport, LP (collectively, "Travelport") operate global distribution systems ("GDSs"). (*Id.* ¶ 2.) GDSs distribute airline fare, flight, and availability information provided by American and other airlines to travel agents, and "enable travel agents to search for flights, fares and seat availability on airlines that participate in the GDS, and to make reservations and issue tickets for airline travel." (*Id.* ¶¶ 2, 32.) GDSs were originally created and owned by airlines, and then regulated by the U.S. Department of Transportation ("DOT") beginning in the early 1980s. (*Id.* ¶ 33) Around 2004, the DOT decided to deregulate GDSs, which were no longer owned by airlines, enabling them to operate as independently owned businesses. (*Id.*)

Airlines and travel agents alike choose GDSs to sell airline tickets. In order to reach as many travel agencies as possible, American has contracts with multiple GDSs, including Sabre and Travelport, through which it supplies content regarding its flights, seat availability and fares. (*Id.* ¶¶ 24, 50-54.) GDSs, in turn, hold contracts with various travel agencies—including both brick-and-mortar and online agencies, such as Orbitz—to provide aggregated flight information

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[2] In its SEC Form 10-Q, filed April 20, 2011, American stated: "On December 21, 2010, American terminated its agreement with Orbitz. Prior to termination of such agreement, approximately 3% of American's passenger revenue, on an annualized basis, was generated from bookings made via Orbitz." [OWW APX 5-6.] District courts may take judicial notice of SEC filings and other public documents when ruling on a motion to dismiss. *See R2 Investments LDC v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005) (citing *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996)); *see also Borne v. River Parishes Hosp.*, 2011 U.S. Dist. LEXIS 28089, *7-8 (E.D. La. Mar. 18, 2011). Courts may also properly consider documents supplied by the defendant "if they are referred to in the plaintiff's complaint and are central to her claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000); *see also Maxwell v. Chase Home Fin. LLC*, 2011 U.S. Dist. LEXIS 4797, *7-8 (S.D. Tex. Jan. 19, 2011); *Fin. Inst. Track Litig. v. Heartland Bank (In re Heartland Payment Sys.)*, 2011 U.S. Dist. LEXIS 34953, *53-55 (S.D. Tex. Mar. 31, 2011).

from multiple airlines. In terms of economics, the GDS charges participating airlines a booking fee for each "segment" (each point-to-point flight in a traveler's itinerary) booked through the GDS. (*Id*. ¶¶ 6, 35.) Then, pursuant to a separate agreement between a travel agency and its Subscriber GDS, the GDS passes on a share of the booking fee collected from the airline to the travel agent who made the reservation for its customer using the GDS. (*Id*.)

Airlines also hold direct contractual relationships with travel agencies. Indeed, American holds a contractual relationship directly with Orbitz. Beginning in 2001, "Orbitz was established as a direct-connect-centered agency by its then airline owners, using a system called 'Subscriber Link' to search for and make bookings without using a GDS." (*Id*. ¶¶ 89-90.) Later, in 2004, American and Orbitz entered into a set of agreements through which "Orbitz could book eligible [American] tickets through the Subscriber Link interface." (*Id*.)

B. Commercial Realities in the Travel Industry Have Required Orbitz, as Well as Other Travel Agencies, To Align With GDS Providers.

In order to compete effectively, Orbitz, as well as other travel agencies, often choose to align with a GDS provider. American alleges that "[t]ravel agents have no commercially reasonable alternatives to using a GDS to sell air travel. Even a travel agent that elects to use AA Direct Connect is still dependent upon a GDS to obtain information and make bookings on other airlines' flights." (*Id*. ¶ 34.) "Second, GDSs enable travel agents to conduct a single search for flights, fares and availability on multiple airlines and to review the search results in a single integrated display." (*Id*. ¶ 36.) Finally, "[a]lthough some travel agencies subscribe to more than one GDS, most rely on a single GDS in any particular location or for any given corporate customer. Using multiple GDSs imposes additional costs on the travel agent because of the additional time, effort and expense" related to search, training, accounting, billing and recordkeeping costs. (*Id*. ¶ 38; *see also id*. ¶ 44.) Orbitz is not alleged to have a contractual relationship with Sabre and, in fact, is only alleged to (and only has) a contractual relationship with Travelport.

In 2007, Orbitz entered into the Subscriber Services Agreement with Travelport, its then-corporate parent, in order to use Travelport's GDSs. (*Id*. ¶ 91.) During the period of that agreement, Orbitz continued booking flights for its customers through both Travelport's GDSs and American's direct-connect Subscriber-Link. (*Id*. ¶¶ 90-92.) Then, in mid-2010, American sought to expand the scope of its relationship with Orbitz to establish a new "AA Direct Connect" link. (*Id*. ¶ 93.)[3] When these negotiations stalled, American terminated its contractual relationship with Orbitz via a notice served on November 1, 2010. (*Id*. ¶¶ 93-94.) Days later, Travelport filed suit against American in the Circuit Court of Cook County, Illinois, seeking to preliminarily enjoin American's termination of Orbitz. (*See* Notice of Other Litigation, Dkt. No. 3, filed Apr. 12, 2011.) Travelport's motion for preliminary injunction was initially denied. (*See id*.) American then initiated this lawsuit.

Although outside the pleadings, following its termination of Orbitz, American ran advertisements touting the fact that passengers could not book flights on American using Orbitz and encouraging passengers to book directly through its own website:[4]

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[3] American's AA Direct Connect initiative is an effort by American to bypass GDSs, such as Sabre and Travelport, and instead distribute ticket information directly to travel agents such as Orbitz. (FAC ¶ 8.)

[4] The Court "may take judicial notice of documents in the public record," such as advertising, "without converting a motion to dismiss into a motion for summary judgment." *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008); *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *Lautenberg Found. v. Madoff*, 2009 U.S. Dist. LEXIS 82084, *3-4 (D.N.J. Sept. 9, 2009) (taking judicial of certain facts in ruling on a motion to dismiss "because as matters of public record extensively and globally covered in news, legal, financial and other media, it seems to the Court that not to take notice of them would be to isolate this Complaint from reality."). Because Orbitz need not rely on American's advertising campaign to prevail on this motion, we point this out simply to put American's allegations in context.

This would be most peculiar behavior if the loss of Orbitz crippled American's ability to distribute tickets, as the FAC alleges.

On June 1, 2011, the Circuit Court of Cook County, Illinois entered an Order reconsidering its earlier ruling, granting Travelport's motion for preliminary injunction and directing American to "reinstate Orbitz Worldwide's ability to ticket American Airlines flights." (Prelim. Inj. Order, Travelport v. American, No. 10-CH-48028 (Ill. Chancery, June 1, 2011) [OWW APX 1-4].) American subsequently ended its advertising campaign.

C. The FAC's Narrow Allegations Against Orbitz Are Centered On Orbitz's Subscriber Services Agreement With Travelport.

American's FAC names Sabre, Travelport and Orbitz as defendants. Notably, there is no mention of Orbitz in most of the FAC's 165 paragraphs. The few allegations specific to Orbitz focus almost entirely on Orbitz's Subscriber Services Agreement ("SSA") with Travelport. Under that agreement, American avers, Orbitz is required "to use Travelport 'exclusively' as its GDS provider for North American air travel bookings through 2014," and "[i]n exchange for this exclusivity commitment, Travelport provides Orbitz with a 'segment incentive' rebate per booking …." (*Id.* ¶ 69.) It also alleges that the SSA provides financial incentives to Orbitz for booking a certain minimum number of flight segments through its GDSs and that, "[i]n addition to the use of powerful financial incentives to discourage Orbitz from using alternatives to the

Travelport GDS, the SSA prohibits Orbitz from entering into new direct connect relationships with any airline and from expanding or renewing any existing direct connect agreement with any airline, including American, that would bypass the Travelport GDS." (*Id*. ¶¶ 70-71.) In essence, American's complaint is that the SSA prevented Orbitz from entering into a Direct Connect agreement with American that would bypass Travelport and permit American to distribute ticketing information directly to Orbitz and thus the 3% of American customers who bought tickets through Orbitz.

The FAC asserts six claims for relief, of which only two are against Orbitz: (1) the Third Claim for Relief, for conspiracy to monopolize the distribution of airline tickets through travel agents in violation of Section 2 of the Sherman Act, based upon "Orbitz, Travelport and other unnamed industry participants" having entered into "agreements with one another … intended to punish and retaliate against American for its direct connect initiative" (*id*. ¶¶ 134-136); and (2) the Fourth Claim for Relief, for violation of Section 1 of the Sherman Act, based on "restrictive provisions in Travelport's contracts with travel agency subscribers, including provisions in its agreements with Orbitz …." (*Id*. ¶¶ 137-138, 140, 142.)

Consistent with the focus of American's claims, the "Relief Requested" by American's FAC does not seek anything from Orbitz. (*Id*. ¶¶ 158-165.)

III. ARGUMENT

A. A Motion to Dismiss Should Be Granted Where The Complaint Fails to Plead Facts Sufficient to Demonstrate the Plaintiff's Entitlement to Relief.

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The complaint "must provide the plaintiff's grounds for entitlement to relief above the speculative level. Conversely, 'when the allegations in a complaint, however true, could not

raise a claim of entitlement to relief, "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuviller v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*); *Texas Grain Storage, Inc. v. Monsanto Co.*, 2008 U.S. Dist. LEXIS 53513 (W.D. Tex. June 26, 2008) (same).

Courts in this Circuit dismiss antitrust claims on the pleadings when they fail to raise a right to relief, or when the theory under which they proceed is foreclosed as a matter of law. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 419 (5th Cir. 2010) (affirming district court's dismissal of complaint where facts pleaded were "legally insufficient" to support a violation under the Sherman Act, because "[n]o rule of reason can require defendants to litigate antitrust claims that do not state an antitrust injury beyond motion to dismiss"); *see also Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436 (E.D. Tex. 2003). In *Star Tobacco*, the court dismissed the defendant's exclusive dealing and monopolization counter-claims for failure to allege facts which, even accepted as true, could support a violation of the antitrust laws. *Id*. at 447 (holding that the counterclaims "failed to allege that the competition foreclosed by Plaintiff's alleged agreements constitutes a substantial share of the relevant market, which is necessary under the Supreme Court's three-part test in *Tampa Electric Co.*"); *accord Wellnx Life Sciences, Inc. v. Iovate Health Sciences Research, Inc.*, 516 F. Supp. 2d 270, 293 (S.D.N.Y. 2007) (granting motion to dismiss Sherman Act claim where the challenged exclusive distribution agreement could not "freeze out a significant fraction" of the market).

The only well-pleaded facts concerning Orbitz are based on an allegedly unlawful exclusive dealing contract, the Subscriber Services Agreement (or SSA), between Orbitz and Travelport. (FAC ¶¶ 69-73, 135, 138.) This theory of liability fails as a matter of law for two independent reasons: first, the SSA does not foreclose a "substantial" portion of the relevant market (even as pleaded); and second, because the SSA was entered into at a time when Orbitz was wholly owned by Travelport, there can be no conspiracy within the meaning of Sections 1

and 2 of the Sherman Act. Finally, to the extent the FAC purports to include Orbitz in some grand conspiracy to monopolize some "GDS market," it fails under *Twombly*.

B. The "Exclusive Dealing" Allegations Cannot Support a Sherman Act Violation.

American contends that Orbitz violated Sections 1 and 2 of the Sherman Act by entering into the SSA, which required it to use Travelport "exclusively" as its GDS provider for North America air travel bookings, and provided "powerful financial incentives" to restrict Orbitz from entering into any new "direct connect" contractual relationships with an airline. (FAC ¶¶ 69-71.) In other words, American complains that the agreement between Orbitz and Travelport prevented American from selling tickets directly through Orbitz and, instead, required that American work through Travelport in order to reach those customers who purchased American tickets using Orbitz. These allegations purport to challenge an alleged "exclusive dealing" arrangement between Orbitz and Travelport. *See Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 625 (5th Cir. 2002) ("Exclusive dealing … occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller").[5]

The antitrust concern with exclusive dealing is foreclosure, *i.e.*, that by "locking-up" scarce supplies or distribution outlets, one competitor can impair "the ability of competitors … to reach the market." ABA Section of Antitrust Law, *Antitrust Law Developments* 217 (6th. ed. 2010); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (the "ultimate issue in exclusivity cases

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[5] "In the Fifth Circuit, to allege a violation of § 1 of the Sherman Act, a plaintiff must plead that (1) the defendants engaged in a conspiracy, (2) the conspiracy restrained trade, and (3) trade was restrained in the relevant market." *Vaughn Med. Equip.*, 2010 U.S. Dist. LEXIS 88958 at *23 (citing *Wampler v. Sw. Bell Tele. Co.*, 597 F.3d 741, 744 (5th Cir. 2010)). For purposes of a Section 2 claim, "[a] conspiracy to monopolize can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Stewart Glass & Mirror v. Auto Discount Ctrs., Inc.*, 200 F.3d 307, 316 (5th Cir. 2000).

remains the issue of foreclosure and its consequences"). For that reason, an exclusive-dealing arrangement does not violate the antitrust laws "unless the probable effect of the agreement 'will foreclose competition in a substantial share of the line of commerce affected.'" *Apani*, 300 F.3d at 625 (citing *Bob Maxfield, Inc. v. Am. Motors Corp*., 637 F.2d 1033, 1036 (5th Cir. 1981), quoting *Tampa Elec.*, 365 U.S. at 327-328). Thus, "[t]o properly allege that an exclusive dealing agreement violates the Sherman Act, a plaintiff must first define the relevant market in terms of its product and geography. [] A plaintiff must then plead facts to demonstrate that the 'competition foreclosed by the arrangement constitutes 'a substantial share' of the relevant market.'" *Vaughn Med. Equip. Repair Service, L.L.C. v. Jordan Reses Supply Co.*, 2010 U.S. Dist. LEXIS 88958 at *52 (E.D. La. Aug. 26, 2010) (citing *Apani*, 300 F.3d at 625-626). Accordingly, for purposes of this motion, "the focus of the analysis remains on market effect." *Id*. at *51; *see also Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 410 (5th Cir. 1962) ("the question to be decided in this type of case is, '… whether the contract forecloses competition in a substantial share of the line of commerce involved …'" citing *Tampa Elec.)*.

Even accepting as true the alleged "relevant market" for purposes of this motion, the FAC fails as a matter of law because it does not—and cannot—allege that a "substantial share of the relevant market" is foreclosed as a result of the SSA.[6]

1. American Admits that the SSA Does Not Result in a Substantial Foreclosure in the Alleged Relevant Market.

As a general principle, market foreclosures of less than 30% are not considered "substantial" as a matter of law. *See Jefferson Parish*, 466 U.S. at 45 (O'Connor, J. concurring)

[6] The FAC purports to define the relevant market as follows: "[t]he distribution of airline fare, flight, and availability information and the provision of reservations and ticketing capability to travel agents" is the relevant product market; "[t]he provision of airline booking services to [Sabre and Travelport] subscribers is a relevant product submarket"; and "[e]ach country served by American in which Travelport accounts for a substantial percentage of airline bookings is a relevant geographic market, including the United States, the United Kingdom, Belgium and Switzerland." (FAC ¶¶ 136-140.) There are issues, to be sure, with American's product and geographic market definitions—especially the contention that there is a proper market limited to Sabre subscribers or Travelport subscribers—but Orbitz accepts them for purposes of its motion.

(explaining that "[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal," and then noting that a 30% market foreclosure was insufficient); *see also Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-64 (9th Cir. 1997) (concluding that a series of exclusive dealing agreements which, collectively, foreclosed 38% of a market was insufficient to support an antitrust claim); *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 828 (M.D. N.C. 2000) (21.5% and 18% "fall short of any value presumed to be substantial and lie on the margin of what is considered to be significant").

The FAC does not meet this threshold requirement, because American does not allege foreclosure of (and the SSA does not foreclose) anywhere near a sufficient portion of the pleaded markets. Initially, the FAC does not directly allege *any* foreclosure resulting from the SSA and thus fails. *Insignia Sys., Inc. v. News Corp., Ltd.*, 2005 U.S. Dist. LEXIS 42851 at *10-11 (D. Minn. Aug. 25, 2005) (dismissing complaint for failure to allege "some indication of the percentage of the local, regional, or national markets … allegedly under exclusive contract" because without such allegations "it is impossible to evaluate the percentage of the market with which [plaintiff] and other competitors are prevented from doing business."); *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d at 447. However, what the FAC does allege, more generally, confirms that the SSA does not foreclose a substantial portion of any market. Indeed, according to the FAC, online travel agencies taken together (of which Orbitz is just one and the "third largest" (FAC ¶ 89)) constitute only 10-15% of American's passenger ticketing revenues. (*See id*. ¶ 23 ("Approximately 51% of American's revenue is generated by brick and mortar travel agencies, and another 10-15% is generated by online agencies").) Accordingly, the SSA between one of several online agencies, Orbitz, and Travelport falls far short of meeting the "substantial foreclosure" requirement under *Jefferson Parish*. *See Kidd v. Bass Hotels & Resorts, Inc.*, 136 F. Supp. 2d 965, 969 (E.D. Ark. 2000) ("Since the early 1970's, 'judicial

decisions have established a virtual safe harbor for market foreclosure of 20% or less,'" quoting ABA Section of Antitrust Law, *Antitrust Law Developments* 214 (4th. ed. 1997)).

It is also improper to consider any cumulative foreclosure of Travelport's agreements with multiple OTAs or travel agencies in general. American has alleged a supposed conspiracy between Travelport and one OTA, Orbitz. As a result, this Court's analysis is limited to the foreclosure effects of the individual agreement alleged to be in restraint of trade; here, the SSA. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 210 (4th Cir. 2002), which affirmed a Rule 12(b)(6) dismissal of Sherman Act claims against Microsoft and two PC manufacturers which entered into supposedly anticompetitive agreements with Microsoft: "the district court correctly determined that it could not consider the cumulative harm of Microsoft's agreements with all OEMs but instead was required to consider – individually – Microsoft's agreements with Compaq and Dell to evaluate each agreement's potential for anticompetitive effects."

Orbitz is the only travel agency (online or otherwise) that is a party to the SSA, (*see* FAC ¶¶ 69-70), and American admits that Orbitz made up only 3% of its passenger revenues. (4/20/2011 American SEC Form 10-Q [OWW APX 5-6].) Even if the SSA resulted in a complete foreclosure of American's effort to sell tickets directly to Orbitz and thus its customers, the Sherman Act claims against Orbitz fail as a matter of law. *See Doctor's Hosp. v. Southeast Medical Alliance*, 123 F.3d 301, 311 (5th Cir. 1997) (affirming judgment in favor of PPO and hospital defendants where evidence showed that the agreement underlying the plaintiff's Section 1 claim foreclosed a customer that constituted 6% of plaintiff's total revenues); *Bass Hotels*, 136 F. Supp. 2d at 965 (granting summary judgment in favor of defendant furniture manufacturer against Sherman Act claims, where the alleged exclusive agreement with a hotel chain foreclosed the plaintiff, a competing furniture manufacturer, from only 9% of all U.S. hotel rooms).

A previous district court ruling from the travel services industry is instructive. In *United Air Lines, Inc. v. Austin Travel Corp.*, a defendant travel agency counter-claimed against United Airlines alleging that the airline had engaged in unlawful exclusive dealing and anticompetitive

practices based on United's contracts with certain travel agents for subscriptions to United's "computerized reservation systems" and related services. 681 F. Supp. 176, 180-181 (S.D.N.Y. 1988). In rejecting the exclusive dealing counterclaim, the court held that United's "share of the only relevant market, 3% of the [travel] agencies and 8% of the revenues from CRSs, was insubstantial and was not sufficient to foreclose competition in that area. That dictates a finding that United's Apollo contracts were not a clog on competition required to be removed by the application of antitrust legislation." *Id*. at 184 (citing *Tampa Elec.*, 365 U.S. at 328); *accord, Shipper v. AAA, Inc.*, 1997 U.S. Dist. LEXIS 23887 at *17-18 (N.D. Tex. Mar. 12, 1997) (rejecting an exclusive dealing claim because "[defendant] controls less than three percent of the market. Therefore, any anticompetitive effect the AAA/Auto Plan agreement may have is trivial, definitely not legally sufficient to prove an antitrust violation").

No matter how the allegations are analyzed, the SSA's alleged foreclosure of American's efforts to sell directly to customers of a single online travel agency which made up just 3% of American's revenues cannot constitute a substantial foreclosure of any market—even the most narrow market pleaded by American. This conclusion is only underscored by American's unilateral termination of Orbitz's ability to sell *any* tickets on American flights, either directly or through the Travelport GDS. (FAC ¶¶ 93-94.) While that termination was ultimately enjoined, American plainly was not foreclosed from pursuing Orbitz customers, let alone a substantial portion of any market, and its Section 1 claim thus fails as a matter of law.

2. The FAC's Inability to Plead Substantial Foreclosure is Also Fatal to Its Section 2 Claim Against Orbitz.

The FAC's overlapping allegations against Orbitz for allegedly conspiring to monopolize the distribution of airline tickets in violation of Section 2 of the Sherman Act also fail because there is no substantial foreclosure of any pleaded market.

A conspiracy to monopolize can only be established by showing, among other things, that the conspiracy had "an effect upon a substantial amount of interstate commerce." *Stewart Glass*

& Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc., 200 F.3d 307, 316 (5th Cir. 2000).[7] Here, again, the only well-pleaded allegations concerning Orbitz are based on the SSA. (FAC ¶¶ 69-71.) Where contracts are the alleged anticompetitive conduct in a Section 2 claim, a district court must look to the substantiality of foreclosure, just as it does in evaluating a claim in the context of Section 1 of the Sherman Act. *See Tampa Elec.*, 365 U.S. at 327 (disposing of Sherman Act claims under both Sections 1 and 2 because there was inadequate market foreclosure); *see also Ticketmaster Corp. v. Tickets.com Inc*., 127 Fed. App'x. 346 (9th Cir. 2005) (where market foreclosure did not rise to the level of exclusionary conduct in support of Section 1 claim, Section 2 claim based on the same conduct failed "[b]ecause an attempt claim under section 2 similarly requires 'predatory or anticompetitive conduct"); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 394-95 (M.D. N.C. 2002) (dismissing Section 2 claims because challenged contracts did not foreclose a sufficient portion of the market to constitute exclusionary conduct under Section 1).

Because the SSA does not substantially foreclose the market within the meaning of Section 1, the Section 2 claim also fails. *See Nynex Corp. v. Discon*, 525 U.S. 128, 138-140 (1998) ("The Court of Appeals also upheld the complaint's charge of a conspiracy to monopolize in violation of § 2 of the Sherman Act. It did so, however, on the understanding that the conspiracy in question consisted of the very same purchasing practices that we have previously discussed. Unless those agreements harmed the competitive process, they did not amount to a conspiracy to monopolize. We do not see, on the basis of the facts alleged, how Discon could succeed on this claim without prevailing on its § 1 claim"); s*ee also Dickson*, 309 F.3d at 211-213 (affirming Rule 12(b)(6) dismissal and holding that a complaint which failed to plead

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[7] "A conspiracy to monopolize can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Stewart Glass*, 200 F.3d at 316.

sufficient foreclosure to support a Section 1 claim, was also insufficient to plead facts showing anticompetitive effects under Section 2).

C. The Sherman Act Claims Against Orbitz Also Fail Because It is Incapable of Conspiring With Travelport as a Matter of Law.

Dismissal of the Sherman Act claims against Orbitz is warranted for the independent reason that Orbitz and Travelport were not separate economic actors when the SSA was formed, and are incapable of conspiring as a matter of law under *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752 (1984); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1464g (3rd ed. 2010) ("Affiliated corporations that constitute a single entity so as to be incapable of conspiring for purposes of Sherman Act § 1 are equally incapable of conspiring to monopolize under Sherman Act § 2.").

In *Copperweld*, the Supreme Court held that parent and subsidiary entities are legally "incapable of conspiring with each other for purposes of § 1 of the Sherman Act." 467 U.S. at 777. The Court explained that the requisite "contract, combination … or conspiracy" in that situation could not be met because coordinated activity between a parent and subsidiary "must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Id*. at 771. This is because a parent and its subsidiary "always have a unity of purpose or a common design. They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id*. at 771-72 (internal quotes omitted).

Here, both Sherman Act claims against Orbitz require an agreement, combination or conspiracy with Travelport. *See Wampler v. Sw. Bell Tele. Co.*, 597 F.3d 741, 744 (5th Cir. 2010); *Stewart Glass*, 200 F.3d at 316. The only well-pleaded allegations specific to Orbitz relate to its having been a party to the SSA with Travelport. (FAC ¶¶ 69-73, 135, 138.) However, because Orbitz was wholly owned by Travelport at the time the SSA was formed, and is still majority owned by Travelport or its owners, the two entities could not have entered into

an unlawful restraint of trade or otherwise have conspired to monopolize within the meaning of the Sherman Act.

1. Orbitz Was Owned By Travelport When It Executed the Subscriber Services Agreement and Was Thus Legally Incapable of Conspiring With Travelport.

"In 2006, a Travelport affiliate acquired a controlling interest in Orbitz." (FAC ¶ 91.) In fact, Orbitz was wholly owned by Travelport. (5/10/2007 Orbitz SEC Form S-1) (prior to stock offering, Orbitz and its affiliates were "wholly owned subsidiaries of Travelport") [OWW APX 7-8].) While it still owned Orbitz, Travelport entered into the SSA with Orbitz on July 23, 2007. (7/27/07 Orbitz SEC Form 8-K, Ex. 10.7 [OWW APX 9-37].) Travelport's "subsequent partial divestiture" of its holdings in Orbitz, referenced in the FAC (*see* FAC ¶ 91), did not take place until later that month—*and after execution of the SSA*. (8/13/2007 Orbitz SEC Form 8-K, Ex. 99.1) ("On July 25, 2007, Orbitz Worldwide, Inc. completed its initial public offering…") [OWW APX 38-39].) Accordingly, for purposes of the Sherman Act, the SSA was effectively executed by a "single enterprise" given that Travelport could "assert full control at any moment if [Orbitz] fail[ed] to act in [Travelport's] best interests." *Copperweld*, 467 U.S. at 771-72; *see also Va. Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 282 (4th Cir. 2002) ("We reaffirm what was made clear by *Copperweld*, that concerted activity susceptible to sanction by Section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests by way of profit maximizing choices.").[8]

[8] The FAC's conclusory assertion that, "[f]or purposes of the antitrust laws, Orbitz is a separate legal and economic entity" is not entitled to any weight. (FAC ¶ 91.) It is well established that courts need not treat as true such "legal conclusions," unsupported by facts, for purposes of a motion to dismiss. *See Norris v. The Hearst Trust*, 500 F.3d 454, 464 (5th Cir. 2007) (when deciding motions to dismiss, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'"). Indeed, American's conclusory allegation is particularly inappropriate since American has long been aware that the SSA was executed when Orbitz was wholly owned by Travelport; in addition, Orbitz brought the issue to American's attention again in its motion to dismiss American's original complaint but American chose to continue to rely on its improper conclusory allegation.

A recent Southern District case illuminates this principle. In *Rio Grande Royalty Co. v. Energy Transfer Ptnrs., L.P.*, the plaintiff, Rio Grande Royalty Co., brought suit against Energy Transfer Partners and others claiming violations of Sections 1 and 2 of the Sherman Act based on allegedly unlawful contracts for the sale of natural gas. 2009 U.S. Dist. LEXIS 126696 at *21-23 (S.D. Tex. Mar. 25, 2009). The court analyzed the various defendants' corporate relationships, including through Energy Transfer Partners' public filings with the SEC, and found that, with the exception of one company which became affiliated at a later date, each of the alleged conspirators were part of a single corporate family during execution of the challenged contracts. *Id*. As a result, the court dismissed the plaintiff's claims, finding that "internally coordinated conduct of a corporation and its divisions or its subsidiaries cannot give rise to a claim under Section 1." *Id*. at *22 (citing *Copperweld*, among other cases).

As was the case in *Rio Grande*, American's claims against Orbitz, based entirely on the allegedly anticompetitive provisions in the SSA, are legally foreclosed because Orbitz was wholly owned by Travelport when the agreement was formed.

2. Orbitz and Travelport Have Remained Affiliates of the Same Company At all Times During the SSA.

Even after Travelport partially divested some of its shares of Orbitz following execution of the SSA, the two entities have remained affiliates. In fact, Travelport and investment funds that own and/or control Travelport still own more than half of Orbitz's stock. (3/01/2011 Orbitz SEC Form 10-K) ("At December 31, 2010 and December 31, 2009, there were 102,342,860 and 83,831,561 shares of our common stock outstanding, respectively, of which approximately 56% and 57% were beneficially owned by Travelport and investment funds that own and/or control Travelport's ultimate parent company, respectively") [OWW APX 40-41].) This also precludes a legally cognizable "contract, combination … or conspiracy" sufficient to support a Sherman Act claim.

Courts applying *Copperweld* have held that, like parents and subsidiaries, sibling companies are equally incapable of conspiring with one another for purposes of the Sherman Act. *See, e.g., Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (finding that, consistent with *Copperweld's* teachings, a company cannot conspire with its parent or sibling companies under the Sherman Act); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) ("A contract between [members of a corporate family] does not join formerly distinct economic units. In reality, they have always had 'a unity of purpose or a common design'"); *Greenwood Utils. Com v. Miss. Power Co.*, 751 F.2d 1484, 1496-1497 (5th Cir. 1985) ("Mississippi Power and its sister companies must be viewed as one economic enterprise. We therefore disregard the allegations that Mississippi Power violated Section 1 by conspiracy or agreements with its parent, the Southern Company, and its sister companies, Alabama, Georgia and Gulf Power").

D. The FAC's Efforts to Include Orbitz in Some Vast "Conspiracy" to Monopolize the Distribution of Airline Tickets Fails Under *Twombly*.

The overwhelming majority of the FAC is directed at American's business dispute with Sabre and Travelport, and highlights American's frustration with the terms of its own agreements with GDS providers. Orbitz appears to have been named only as an afterthought—or even worse, to attempt to increase American's leverage as it tries to renegotiate its contracts with Travelport. The only well-pleaded averments involving Orbitz concern the SSA, which cannot support American's claims against Orbitz as a matter of law. Equally plain, American cannot simply infer that Orbitz, because it entered into a supply agreement with Travelport, was involved in some vast conspiracy supposedly seeking to monopolize the distribution of airline tickets. Each of the FAC's allegations about the GDS industry, American's contracts with Sabre and Travelport, and the anticompetitive actions allegedly undertaken by those GDSs fail to provide the required facts to plausibly plead a conspiracy, let alone Orbitz's involvement in any conspiracy, to monopolize the distribution of airline tickets.

1. *Twombly* Requires Factual Allegations Against Each Defendant to Support a Plausible Claim of Conspiracy.

In *Twombly*, the Supreme Court held that a complaint asserting a violation of the Sherman Act cannot survive a Rule 12(b)(6) motion by simply alleging an unlawful agreement in conclusory terms without specific facts to demonstrate that the allegation is more than just conjecture. 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level"). Because concerted action through a supposed conspiracy among Orbitz and Travelport lies at the heart of its Sherman Act claims, American must include enough factual allegations, rather than mere speculation or conjecture, to "nudge[]" their conspiracy claim "across the line from conceivable to plausible." *Id*. at 570. Indeed, without some level of "factual enhancement," a "naked assertion of conspiracy" does not plausibly suggest a preceding agreement to conspire. *Id*. at 557. Legal conclusions also "must be supported by factual allegations" under *Twombly*, because Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950.

2. Allegations With Generalities About the GDS Industry and Allegedly Anti-Competitive Conduct by Sabre and Travelport Cannot Support a Conspiracy Claim Against Orbitz.

The bulk of the FAC makes general "market power" allegations about GDS providers, and then points to the terms of American's own contracts with Sabre and Travelport as being indicative of GDS providers' supposed "monopoly power." (*See, e.g.*, FAC ¶¶ 1-4, 6-7, 10, 16, 29-52, 54-55, 57-60.) Neither set of allegations implicates Orbitz in any unlawful restraint of trade.

The "market power" allegations claim that "[t]ravel agents have no commercially reasonable alternatives to using a GDS to sell air travel," that "[e]ven a travel agent that elects to use AA Direct Connect is still dependent upon a GDS to obtain information and make bookings on other airlines' flights," and that "most [travel agencies] rely on a single GDS in any particular location or for any given corporate customer." (*Id*. ¶¶ 34-38.) These allegations do not suggest Orbitz conspired to do anything; rather, if anything, they describe the commercial reasonableness

of entering into the SSA with Travelport. For the same reasons, the FAC's allegations about "anticompetitive" terms in American's contracts with Sabre and Travelport, (*see id*. ¶¶ 49-52, 54-55, 57-60), have nothing to do with Orbitz—which is not a party to those agreements, nor is it alleged to have participated or otherwise influenced the negotiations incidental to those agreements.

Simply claiming that Orbitz "benefits from Travelport's monopoly" does not lend these empty allegations any sufficiency. (FAC ¶ 1.) Vague averments, such as these, do not provide Orbitz notice of the claims against it (*i.e*., to show how Orbitz joined, agreed or participated in an alleged conspiracy), and fail under *Twombly*. 550 U.S. at 565; *see also*, *e.g*., *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) ("Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*."); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (concurring with the district court's conclusion that the averments in that case were "in entirely general terms without any specification of any particular activities by any particular defendant"); *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007) ("to state a claim in federal court, a complaint must explain what *each* defendant did to him or her; when *the defendant* did it; how *the defendant*'s action harmed him or her; and, what specific legal right the plaintiff believes *the defendant* violated" for purposes of "permitting the defendant sufficient notice to begin preparing *its* defense") (emphases added).

The allegations of "retaliatory" conduct fare no better. The FAC purports to describe various acts of "retaliation" in response to American's efforts to market the "AA Direct Connect" initiative, but none of the actions identified involve Orbitz. First, American claims that Travelport doubled American's booking fees for reservations made outside the United States (*see id*. ¶¶ 96-97); it also claims that Travelport "misrepresented" American's fares to make them appear more expensive to consumers outside the United States (*see id*. ¶¶ 98-99); and, finally, it

contends that "Travelport caused American's flights to be displayed less frequently relative to other airlines' flights." (*See id*. ¶¶ 12, 98-99.) There is not a single factual allegation linking Orbitz to any of these actions.

Similarly, each of the "new allegations" related to Sabre, including averments about "biasing the display of American information," (FAC ¶¶ 104-108), say nothing about Orbitz's participation in any alleged conspiracy. Orbitz and Sabre have no contractual relationship and there is not a single allegation which links Orbitz to any alleged anticompetitive actions taken by Sabre. Simply put, this is a lawsuit challenging the relationships between airlines and GDSs—and Orbitz, alone as a defendant among numerous travel agencies, is not a proper party.

3. The FAC's Ancillary Allegations Are Also Insufficient to Plausibly Support Orbitz's Involvement in the Pleaded Conspiracy.

The remaining allegations in the FAC also fail under *Twombly*. American claims that "Travelport and Orbitz agree[d] to stand together against American," by contending that, following American's termination of Orbitz's ticketing authority, Travelport agreed to offset any resulting lost revenues which Orbitz suffered. (FAC ¶ 101.) This allegation does not support a conspiracy: first, this conduct does not foreclose any portion of American's business, insofar as American had already terminated Orbitz; and, more fundamentally, these facts do not plausibly suggest that Orbitz was part of an alleged conspiracy to monopolize the distribution of airline tickets. If true, it shows only that Orbitz received money from its GDS partner (and sister company) to offset losses caused by American's wrongful termination of its business relationship with Orbitz. Allegations which are as consistent with "rational and competitive business strategy" or that have "obvious alternative explanation[s]," are insufficient to plead a conspiracy claim under the antitrust laws. *Twombly*, 550 U.S. at 554, 567; *see also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between

possibility and plausibility of entitlement to relief'"); *Iqbal*, 129 S. Ct. at 1950 (noting that on a motion to dismiss, conclusory allegations "are not entitled to the assumption of truth").[9]

E. Dismissal Without Leave to Amend is Appropriate Because Amendment Is Futile Where Plaintiff's Claims Are Foreclosed as a Matter of Law.

The FAC is American's second chance to plead a claim against Orbitz in this Court. Orbitz moved to dismiss American's original complaint and demonstrated, as a matter of law, why the SSA was insufficient to support a Sherman Act claim and why the remaining conspiracy allegations failed under *Twombly*. Rather than joining the legal arguments raised by Orbitz, American opted to file an amended complaint that only restates the same insufficient allegations vis-à-vis Orbitz. Its failure to plead any factual allegations against Orbitz, aside from repeating the legally insufficient claim that Orbitz was a party to the SSA, is not something which further amendment would cure. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (noting that courts need not allow a plaintiff an opportunity to amend when "it is clear that the defects are uncurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal"); *PSKS*, 615 F.3d at 418 (5th Cir. 2010) (affirming district court's dismissal with prejudice); *see also Abecassis v. Wyatt*, 2011 U.S. Dist. LEXIS 37047 at *31-33 (S.D. Tex. Mar. 31, 2011) ("[A] plaintiff should be denied leave to amend a complaint if the court determines that 'the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face" quoting 6 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1487 (2d ed. 1990)); *Ayers v. Johnson*, 247 Fed. Appx. 534, 535 (5th Cir. 2007) (unpublished) (per curiam) ("'[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile'") (citation omitted).

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[9] The FAC's allegations about "contemporaneous actions by Sabre," a separate GDS, also say nothing about Orbitz's participation in any alleged conspiracy. (FAC ¶¶ 103-107, 109.)

IV. CONCLUSION

There simply is no basis for Orbitz, a company with which American tried to stop doing business, to remain a party in this lawsuit. American's FAC against Orbitz is insufficient to establish a violation of either Sections 1 or 2 of the Sherman Act, and Orbitz respectfully requests that the FAC be dismissed with prejudice.

DATED: June 15, 2011

Respectfully submitted,

s/ Christopher S. Yates

Christopher S. Yates (admitted *Pro Hac Vice*)
California State Bar No. 161273
Email: Chris.Yates@lw.com

Daniel M. Wall (admitted *Pro Hac Vice*)
California State Bar No. 102580
Email: Dan.Wall@lw.com

LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095

and

John J. Little
Texas State Bar No. 12424230
Email: jlittle@lpf-law.com

Stephen G. Gleboff
Texas State Bar No. 08024500
Email: stevegleboff@lpf-law.com

Megan K. Dredla
Texas State Bar No. 24050530
Email: mdredla@lpf-law.com

LITTLE PEDERSEN FANKHAUSER LLP
901 Main Street, Suite 4110
Dallas, TX 75202-3714
Telephone: (214) 573-2300
Facsimile: (214) 573-2323

ATTORNEYS FOR DEFENDANT ORBITZ WORLDWIDE, LLC

CERTIFICATE OF SERVICE

On June 15, 2011, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, Fort Worth Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Christopher S. Yates
Christopher S. Yates

SF\857406