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

AMERICAN AIRLINES INC.'S RESPONSE IN OPPOSITION TO DEFENDANT ORBITZ WORLDWIDE, LLC'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

This lawsuit challenges various types of exclusionary behavior and anticompetitive conduct designed to foreclose competition in the distribution of airline tickets. Plaintiff American Airlines, Inc. ("AA") has developed an alternative channel for distributing its flight and fare content information directly to travel agents – called AA Direct Connect – based on modern and less costly technology than the global distribution systems ("GDSs") offer. AA's 165-paragraph First Amended Complaint ("Complaint") details the unlawful behavior, including by Orbitz, designed to foreclose AA Direct Connect from the market for the provision of airline booking services to the detriment of AA and air travelers.

Despite Orbitz's attempts to disparage AA's reasons for naming it as a defendant, AA did so because Orbitz is a knowing and willing participant in the misconduct challenged here. Moreover, Orbitz is a great example of how the GDS monopolists stifle innovation by sharing monopoly profits reaped from the outdated airline ticket distribution system with travel agents in order to co-opt them into preserving the status quo. Specifically, the Complaint details 1) Orbitz's decision to switch from booking flights on AA through a predecessor of AA Direct Connect to a Travelport ("TVP") GDS due to the anticompetitive agreements between the two parties, and 2) TVP's subsequent financial assistance to Orbitz in its dispute with AA. (*See* Compl. ¶¶ 71-73, 89-93, 101.) The Complaint contains admittedly well-pled allegations concerning two *agreements* between TVP and Orbitz to foreclose Orbitz from using AA Direct Connect. In 2007, Orbitz entered into the Subscriber Services Agreement ("SSA") that requires Orbitz to make all of its North American air travel bookings through 2014 through one of TVP's GDSs and to boycott AA Direct Connect in return for sharing the supracompetitive booking fees that TVP charges AA for bookings made by TVP travel agent subscribers. (*Id.* ¶¶ 69-72.) And,

within the past year, during Orbitz's dispute with AA, TVP and Orbitz entered into another agreement whereby TVP will compensate Orbitz for losses due to its inability to offer AA flight and fare content *so long as* Orbitz protects the GDS monopoly ticket distribution system and continues to refuse to adopt AA Direct Connect. (*Id.* ¶¶ 73, 101.)

Unable to deny the sufficiency of these allegations, Orbitz seeks immunity from scrutiny under the antitrust laws because it claims to reside in a single corporate family with TVP. That argument is groundless. As a matter of law, Orbitz seeks to extend the scope of a narrow exception to the antitrust laws far beyond the wholly-owned subsidiary context in which it arose to separate corporate entities merely affiliated through an unknown conglomeration of vaguely-stated minority shareholder interests. Moreover, because this is the pleading stage, AA has not had an opportunity to conduct discovery regarding the complex corporate relationship between Orbitz and TVP to determine whether Orbitz and TVP are in fact under common control. Orbitz's reliance on numerous extra-pleading materials to prove the *truth* of its argument confirms that this is an improper Rule 12(b)(6) argument. If anything, it is clear from the public record that TVP and Orbitz are in fact separate economic entities for purposes of the agreements at issue. Thus, AA has sufficiently alleged a conspiracy to monopolize between TVP and Orbitz and its justifications for these agreements – which AA disagrees with – are not appropriate for resolution at the pleading stage.

Orbitz's remaining challenge to the Complaint is that AA has not alleged substantial foreclosure of AA Direct Connect in any relevant market. Orbitz's argument ignores the well-pled allegations that TVP has locked up all of its travel agent subscribers, *including, but not limited to, Orbitz*. (*Id.* ¶¶ 63-73.) Thus, although Orbitz would like to restrict this Court's analysis to the foreclosure of AA Direct Connect by AA not being able to sell tickets directly

through Orbitz, AA has alleged that AA Direct Connect has been foreclosed from *all* of TVP's travel agency subscribers. Even in the broadest relevant market alleged by AA, TVP has over a 30% share, which is the market share test for stating an unlawful restraint of trade claim. (*See id.* ¶ 3.)

LEGAL STANDARD

As this Court has stated, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Null v. Easley*, No. 4:09-CV-296-Y, 2009 WL 3853765 (N.D. Tex. Nov. 18, 2009) (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)). Under *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" and his "factual allegations must be enough to raise a right to relief above the speculative level." "The complaint need not contain 'detailed factual allegations' but must state 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1476 (U.S. 2011) (quoting *Twombly*, 550 U.S. at 555). The plaintiff is aided by the requirement that, in reviewing the sufficiency of his pleadings, a court must indulge "the assumption that all the [factual] allegations in the complaint are true (even if doubtful in fact)." *Null*, 2009 WL 3853765, at *2. "That is, the Court must accept as true all well pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff." *Id.* (citing *Kaiser*, 677 F.2d at 1050).

ARGUMENT

I. The Exclusionary Agreements Between TVP And Orbitz Are Not Shielded From The Antitrust Laws By *Copperweld*

Orbitz contends, wrongly, that under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), it is legally incapable of conspiring with TVP for purposes of the antitrust laws.[1] Orbitz's reliance on *Copperweld* to defend its exclusionary behavior is both legally and factually flawed.[2] In its narrowly-worded *Copperweld* holding, the Supreme Court said: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 467 U.S. at 767.

Orbitz is not a wholly-owned subsidiary of TVP. The Complaint alleges that TVP owns 48% of Orbitz, and that Orbtiz and TVP are separate legal and economic actors. (Compl. ¶ 91.) Nevertheless, each and every case cited by Orbitz in support of its *Copperweld* defense involves an alleged agreement between a parent and a wholly-owned subsidiary or between two wholly-owned "sibling" subsidiaries.[3] As such, the cases cited by Orbitz are not applicable here.

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[1] Count Three of the Complaint alleges that TVP, Orbitz, and other industry participants entered into agreements with one another and engaged in concerted activities intended to punish and retaliate against AA for its Direct Connect initiative with the specific intent of preserving TVP's monopoly in violation of Section 2 of the Sherman Act. (Compl. ¶¶ 134-36.) The conspiracy element of a Section 2 claim is analyzed like the conspiracy element of claim under Section 1 of the Sherman Act. *See Stewart Glass & Mirror v. Auto Disc. Ctrs., Inc.*, 200 F.3d 307, 316 (5th Cir. 2000).

[2] In *Copperweld*, the Supreme Court established that a parent and its wholly-owned subsidiary are not capable of entering into a contract, combination or conspiracy in violation of Section 1 of the Sherman Act.

[3] *See, e.g.*, *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) ("Each of these companies . . . is a *wholly* owned subsidiary of a common parent corporation . . .") (emphasis added); *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) ("we see no relevant difference between . . . two corporations *wholly* owned by three persons who together manage all affairs of two corporations") (emphasis added); *Greenwood Utils. Comm'n v. Miss. Power Co.*, 751 F.2d 1484, 1488 (5th Cir. 1985) ("[defendant] and its affiliates are all *wholly* owned subsidiaries of the Southern Company") (emphasis added).

Surprisingly, Orbitz completely ignores the Supreme Court's recent decision in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010), which lays out the principles to be considered in determining whether two entities are capable of conspiring under the antitrust laws. There, the Court held that the relevant inquiry to determine whether there is concerted action is one of substance and not form:

> The relevant inquiry, therefore, is whether there is a contract, combination . . . or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision-making, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.

Id. at 2212.

Apparently recognizing the weakness of its position under *American Needle*, Orbitz makes numerous vague factual assertions concerning its affiliation with TVP. First, Orbitz contends: "Orbitz and [TVP] have remained affiliates of the same company at all times during the SSA." (Defendant Orbitz Worldwide, LLC's Brief in Support of Its Motion to Dismiss Plaintiff's First Amended Complaint [Docket No. 77-1] ("Orbitz MTD") at 18.) Orbitz goes on to say that "[TVP] and [unnamed] investment funds that own and/or control [TVP] still own more than half of Orbitz's stock." (*Id.*) Yet, Orbitz never identifies which "same company" Orbitz and TVP are affiliated within, nor does it specify the shareholdings of TVP or the unnamed investment funds that allegedly control TVP. Whether the stock ownership of these investment funds in fact results in common control of TVP and Orbitz is a question of fact. Orbitz's vague assertions are not sufficient to demonstrate that TVP and Orbitz are under common control.

In any event, the point is irrelevant. As discussed above, the Supreme Court has recently stated that outside the context of wholly-owned subsidiaries, the applicability of the Sherman Act is not determined by whether "two legally distinct entities have organized themselves under a

single umbrella." *Am. Needle*, 130 S. Ct. at 2212. Rather, the relevant inquiry is one of "competitive reality" or "whether the agreement joins together independent centers of decision-making." *Id*. Accordingly, the specific ownership shares of various affiliates of TVP and Orbitz is not determinative.

Rather, Orbitz's own Articles of Incorporation demonstrate that Orbitz and TVP are independent centers of decision-making, in particular with respect to any agreements they might enter into with one another. Article Eight of Orbitz's Articles of Incorporation mandates that agreements between Orbitz and TVP be 1) approved by a majority of disinterested board members (i.e., non-TVP affiliated directors), 2) approved by a majority of common stock holders (excluding common stock owned by TVP's affiliates), or (3) deemed independently fair. (Orbitz's Amended and Restated Certificate of Incorporation at 13-15 (App. at 2-4 (Ex. 1)).)[4] If Orbitz and TVP were to enter any agreement without first satisfying these requirements, Orbitz's board members would potentially face legal action from Orbitz's shareholders for breach of fiduciary obligations. Accordingly, the agreements challenged in the Complaint are precisely the type of agreements with respect to which Orbitz's corporate charter limits TVP's ability to control or influence Orbitz. Thus, TVP and Orbitz are in fact separate economic entities for purposes of this case.

In addition to its general assertions that *Copperweld* bars recovery in this case, Orbitz makes a separate argument based on the assertion that it "was owned by [TVP] when it executed the [SSA] and was legally incapable of conspiring with TVP." (Orbitz MTD at 17.) Orbitz

[4] AA cites this and other SEC filings in its Complaint to show that its allegations are plausible and sufficient to state a claim. By contrast, TVP's reliance on SEC filings to prove – at the pleading stage – that it should be immune from the antitrust laws, as a matter of law, goes far beyond what can properly be taken judicial notice of on a motion to dismiss. For example, in *R2 Invs. LCD v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005), cited by Orbitz (*see* Orbitz MTD at 4 n.2), the Fifth Circuit stated that SEC filings "should be considered only for their content and *not for the truth of the statements contained therein*." *Id*. (citing and discussing *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1986)) (emphasis added).

appears to be asserting the incredible proposition that exclusionary agreements between even *wholly unaffiliated* entities are immune from challenge if the agreements were put in place at a time when the companies were affiliated. In support of its argument, Orbitz relies on *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, No. H-08-cv-0857, 2009 WL 7830311 (S.D. Tex. Mar. 25, 2009). But, *Rio Grande* merely involved two *currently wholly-owned subsidiaries*. *Id.* at *1. Orbitz's argument goes well beyond the narrow confines of this holding to immunize the *current* agreements of separate entities on the basis of a past corporate relationship; it suggests that firms can agree with impunity to fix prices, allocate markets, and refuse to deal with competitors for the sole purpose of affecting trade after corporate separation. In fact, that is exactly what happened here. Forty-eight hours before divesting Orbitz, TVP sought to impede Orbitz's ability to deal with TVP's competitors by entering the SSA. Tellingly, TVP did this because it recognized that after divestiture:

> Our agreements with Orbitz Worldwide may not be renewed at their expiration or may be renewed on terms less favorable to us. In the event Orbitz Worldwide terminates its relationships with us … our business and results of operations would be adversely affected.

(Travelport Limited 2010 Form 10-K, filed March 31, 2011 at 34 (App. at 6 (Ex. 2)).)

In any event, the SSA is only one of the agreements between Orbitz and TVP that are challenged in the Complaint. AA clearly alleges in its Complaint that in response to AA's removal of its flight and fare information from Orbitz in November 2010:

> TVP also entered into an express agreement to ensure that Orbitz would stand firm in its refusal to work with AA Direct Connect. TVP agreed to pay Orbitz significant monetary consideration to offset any lost profits that resulted from AA's termination of Orbitz' ticketing authority — *conditioned only on Orbitz' continued refusal to adopt AA Direct Connect.*

(Compl. ¶ 101) (emphasis added.) Orbitz conveniently ignores these allegations, which involve agreements entered into within the past year, well after TVP divested its controlling interest in Orbitz in 2007.

II. AA's Complaint Alleges A Plausible Conspiracy Among TVP, Orbitz, Other Travel Agencies, And Other Industry Participants

Orbitz makes the now almost obligatory motion to dismiss based on *Bell Atlantic v. Twombly*, 550 U.S. 544, 549 (2007), asserting that the Complaint fails to allege sufficient facts to demonstrate that Orbitz participated in a conspiracy to monopolize the distribution of airline tickets through TVP's travel agency subscribers. Orbitz's attack on the conspiracy allegations against it in the Complaint rests on two primary grounds. First, that the allegations do not provide Orbitz with fair notice of AA's claims under Rule 8. (Orbitz MTD at 21.) Second, that the allegations against Orbitz are consistent with lawful behavior, and thus, conspiracy is an implausible inference from the allegations. (*Id.* at 22-23.) Orbitz's arguments fail for several reasons.

The detailed factual allegations in the Complaint are more than sufficient to meet the standards of Rule 8 and *Twombly*. First, the Complaint describes why GDSs and their travel agency subscribers, including Orbitz, share a common economic interest in preserving the GDSs' monopoly positions. Travel agencies that subscribe to a TVP GDS share in the monopoly booking fees that TVP charges AA and other network airlines. Specifically, the Complaint alleges:

- . . . TVP enter(s) into long term contracts *with travel agents*, typically three years but sometimes longer. Most of these contracts include some type of provision that either requires or *provides financial incentives* for the travel agents to use one GDS exclusively, or nearly exclusively. (Compl. ¶ 63) (emphasis added.)
- Some agreements between GDSs and *their subscribers* contain an express provision that requires the travel agent to use one GDS exclusively . . . . Other subscriber agreements *reward travel agents that meet certain booking volume targets with rebates, sometimes*

called "incentive payments." With these payments, . . . *TVP effectively share(s) with the travel agents some of the supracompetitive booking fees they receive from the airline.* (*Id.* ¶ 65.)

- The SSA requires Orbitz "to use TVP "exclusively" as its GDS provider . . . . In exchange for this exclusivity commitment TVP provides Orbitz with a "segment incentive" rebate per booking, which is a substantial portion of the booking fee that AA provides to TVP" (*Id.* ¶ 69.)
- TVP's exclusionary acts and practices include . . . entering into long-term restrictive agreements with travel agent subscribers that require or incentive travel agents to use TVP's GDSs exclusively, or nearly exclusively, [and] *that give those agents a shared financial interest in maintaining the TVP GDSs' market power* vis-a-vis American Airlines and other airlines." (*Id.* ¶ 10) (emphasis added.)

Second, the Complaint describes provisions contained in *written contractual agreements* between TVP and its travel agency subscribers that have the purpose and effect of excluding alternative distribution channels such as AA Direct Connect. (*Id.* ¶¶ 63-73.) The specific contractual agreements between TVP and Orbitz that are described in the Complaint, including but not limited to the SSA, are simply representative examples of the agreements that TVP and its subscribers have entered into in furtherance of their greater common objective of protecting the flow of supracompetitive booking fees from the airlines to TVP, Orbitz, and their co-conspirators. Third, the Complaint describes a series of parallel and retaliatory actions undertaken by TVP, Orbitz and Sabre, intended to punish AA for its Direct Connect initiative. (*Id.* ¶¶ 88-111.) In particular, it alleges that TVP and Orbitz entered into an express agreement pursuant to which TVP paid Orbitz significant sums of money to boycott AA Direct Connect. (*Id.* ¶¶ 73, 101.)

Recognizing that it cannot dispute that the agreements between TVP and Orbitz exist,[5] Orbitz argues that allegations concerning its agreements are insufficient to establish a conspiracy

[5] Orbitz has included copies of both the SSA and its agreement to boycott AA Direct Connect as attachments to filings it made with the SEC. (*See* Orbitz Form 8-K/A, filed Feb. 27, 2008, at Ex. 10.7 (App. at 7-31 (Ex. 3)); Orbitz Q1 2010 Form 10-Q, filed May 6, 2010, at Ex. 10.2 (App. at 32-35 (Ex. 4)).)

if entering into the agreements was a "rational and competitive business strategy." (Orbitz MTD at 22.) It states that the allegations with respect to the SSA "do not suggest Orbitz conspired to do anything; rather, if anything, they describe the commercial reasonableness of entering into the SSA." (*Id.* at 20-21.) This argument is specious in two respects.

First, Orbitz's assertion that it had good reasons for entering into agreements with TVP do not in any way refute that those agreements exist. There is no question that an express written agreement between two parties satisfies the combination or conspiracy requirement of section 2 of the Sherman Act. *See New York ex rel. Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 869 (E.D.N.Y. 1993) ("It is axiomatic that [the challenged] contract will satisfy the [combination or conspiracy] requirement of an antitrust action."). Where, as here, allegations of a conspiracy are based in part on written contracts among the conspirators, not inferences of agreement from parallel conduct, *Twombly* is simply inapplicable.

Second, the Complaint contains specific factual allegations – including based on Orbitz's own SEC filings – showing that Orbitz's agreements with TVP were not in fact rational or part of a competitive business strategy. Orbitz publicly admits in its most recent 10-K:

> [O]ur GDS service agreement with TVP limits our ability to modify the terms of our agreements with existing suppliers or to pursue direct connections with new or existing suppliers…these contractual commitments may reduce our flexibility to implement changes to our business in response to changing economic conditions, industry trends, or technological developments. *As a result, the limitations imposed by the GDS service agreement could place us at a competitive disadvantage and negatively impact our business and results of operation*, particularly in the current economic environment where our suppliers are under increased pressure to reduce their overall distribution costs. (Compl. ¶ 72) (emphasis added).

The Complaint more than adequately pleads additional facts that show that TVP and its travel agent subscribers, including Orbitz, conspired to preserve TVP's monopoly over the provision of airline booking services to its travel agency subscribers. (*Id.* ¶¶ 10, 63-73.) Courts have rejected similar attempts by antitrust defendants to justify their challenged conduct at the

pleading stage. *See, e.g.*, *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321-22 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 901 (2011) (reversing Rule 12(b)(6) dismissal of antitrust complaint and rejecting defendants' "incorrect" argument that at the pleading stage "a plaintiff seeking damages under Section 1 of the Sherman act must allege facts that 'tend[ ] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior'"); *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1362-63 (N.D. Ga. 2010) (denying motion to dismiss conspiracy claim to fix baggage fees in violation of Section 1 of the Sherman Act where, *inter alia*, defendants offered potential justifications for the challenged conduct and the court stated that "it would be both improper and imprudent to dismiss a case of this magnitude, where the interests of consumers are at stake, on the mere hunch that Defendants' conscious parallelism defense (and their other defenses for that matter) may prove valid"); *cf. Null v. Easley*, No. 4:09-CV-296-Y, 2009 WL 3853765, at *3 (N.D. Tex. Nov. 18, 2009) (denying motion to dismiss civil conspiracy claim and holding that unexplained transfers of funds among defendants over a period of several years were more than parallel conduct and were "not more likely explained by lawful, free-market conduct").

III. The Complaint Alleges Substantial Foreclosure Of The Relevant Markets Sufficient To Support A Claim Under Section 1 Of The Sherman Act

Orbitz, focusing solely on the exclusive dealing agreement in the SSA, contends that that agreement with TVP does not foreclose a sufficient proportion of the relevant markets to violate the antitrust laws, and that the Complaint therefore fails to allege a violation of the Sherman Act.[6] This argument is wrong both as to the facts and the law. First, Orbitz again mischaracterizes the allegations in the Complaint. The Complaint's allegations that Orbitz has

[6] Count Four of the Complaint alleges that TVP's agreements with its travel agent subscribers, including Orbitz, unreasonably restrain competition in violation of Section 1 of the Sherman Act. (Compl. ¶¶ 137-42.)

violated sections 1 and 2 of the Sherman Act are not based solely on the exclusive dealing provisions of the SSA, although they are certainly examples of exclusionary agreements. For example, in early 2011, TVP and Orbitz entered into an express written agreement pursuant to which TVP paid Orbitz significant sums of money in exchange for Orbitz continuing to refuse to adopt AA Direct Connect. And AA does not contend that those provisions violate the Sherman Act because, viewed in isolation, those agreements foreclose competition from alternatives to TVP's GDSs. Rather, the Complaint alleges that the SSA and the subsequent agreement between Orbitz and TVP that Orbitz will boycott AA Direct Connect are part of a much broader web of agreements between TVP and virtually all of its subscribers. (Compl. ¶¶ 63-73.) The Complaint alleges that the majority of TVP's contracts with subscribers contain exclusionary provisions, including not only exclusive dealing requirements but also prohibitions on the travel agent combining GDS flight and fare content with flight and fare content obtained from other sources, such as AA Direct Connect. (*Id.*) The Complaint further alleges that these restrictions have seriously impeded the development of new competing methods of distribution. (*Id.*)

The Complaint thus alleges that TVP and its subscribers, including Orbitz, have entered into agreements that have effectively foreclosed virtually all of the market for the provision of airline booking services to TVP subscribers. The Complaint also alleges that TVP controls GDSs that together account for *over 30%* of all airline ticket sales made by U.S.-based travel agencies." (*Id.* ¶ 3 (emphasis added).) Thus, TVP's exclusionary agreements with Orbitz and other TVP travel agency subscribers foreclose over 30% of the broader market for the provision of airline booking services to travel agents in the United States, which is more than sufficient to state a claim under *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), and *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Relying entirely on a single Fourth Circuit case, *Dickson v. Microsoft Corp*., 309 F.3d 193, 210 (4th Cir. 2002), Orbitz argues that the Court cannot consider the cumulative foreclosure effects of TVP's agreements with virtually all of its travel agency subscribers. *Dickson* involved a challenge to certain exclusionary agreements between Microsoft and just two of Microsoft's OEM customers. Orbitz quotes selectively from that decision by the Fourth Circuit, where it stated: "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 agreements potential for anticompetitive effects." (Orbitz MTD at 13 (quoting *Dickson*, 309 F.3d at 210).) However, Orbitz carefully omits from its quote the immediately preceding sentence, which considerably changes its significance. The complete reasoning of the *Dickson* Court was as follows:

> "*The [Complaint], however, did not allege a conspiracy among Microsoft and all OEMs; it alleged discrete conspiracies between Microsoft and Compaq and Microsoft and Dell. Consequently*, 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 agreements potential for anticompetitive effects." (Emphasis added).

Where, as here, individual contracts are elements of a broader conspiracy among industry participants, the cumulative foreclosure of TVP's restrictive agreements with its travel agency subscribers, as pled by AA in the Complaint, is the proper inquiry. *See also Omega Envt'l v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-64 (9th Cir. 1997), in which the Ninth Circuit analyzed the *collective* foreclosure in the relevant market of the defendant's exclusive contracts with its distributors.[7] Thus, AA has stated claims under Sections 1 and 2 of the Sherman Act based on

[7] The other cases relied on by Orbitz (*see* Orbitz MTD at 11-14) are inapposite. For example, *Doctor's Hosp. v. Se. Med. Alliance*, 123 F.3d 301 (5th Cir. 1997), *United Air Lines, Inc. v. Austin Travel Corp.*, 681 F. Supp. 176 (S.D.N.Y. 1998), *aff'd*, 867 F.2d 737 (2d Cir. 1989), *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 394-95 (M.D.N.C. 2002), *Kidd v. Bass Hotels & Resorts, Inc.*, 136 F. Supp. 2d 965, 969 (E.D. Ark. 2000),

TVP's unlawful exclusive dealing arrangements with Orbitz and its other travel agency subscribers.

IV. If The Court Dismisses Any Claims, Leave To Amend Is Appropriate Here

Orbitz asserts that dismissal without leave to amend is appropriate in an antitrust case of this magnitude prior to any ruling by this Court on the sufficiency of the allegations against it solely because the First Amended Complaint contained the same allegations against it in the original Complaint. (Orbitz MTD at 23.) Orbitz's position is without merit for several reasons.

First, in the Fifth Circuit, leave to amend is the rule, not the exception.[8] That makes sense because, as this Court has noted, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Null*, 2009 WL 3853765, at *2 (quoting *Kaiser Aluminum*, 677 F.2d at 1050). Second, AA amended its pleading to add new allegations only against Sabre, not Orbitz. This point is not disputed by Orbitz. (Orbitz MTD at 3.) Thus, there

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Shipper v. Am. Auto. Ass'n, No. 3-94-CV-2558-R, 1997 WL 135672 (N.D. Tex. Mar. 12, 1997), were all summary judgment rulings after discovery. Moreover, in *Austin Travel*, the plaintiffs were travel agents, not an airline, alleging different geographic and product markets than the ones alleged by AA here. *Compare Austin Travel*, 681 F. Supp. at 182-84 (CRS [or GDS] services in Long Island purchased by travel agents), *with* Compl. ¶¶ 117, 119-20 (provision of airline booking services to TVP [travel agent] subscribers in the United States and elsewhere purchased by AA). And, in *Shipper*, the court found that there was no substantial foreclosure after rejecting plaintiff's relevant market that failed to include "reasonable economic alternatives available" for distribution of plaintiff's services, including outlets that the plaintiff had, in fact, distributed its serves too. 1997 WL 135672, at *4. Unlike in *Shipper*, AA has explained in detail why the relevant markets alleged in this industry are plausible and why alternative distribution mechanisms (e.g., an airline website) are not "reasonable economic alternatives available" for AA to distribute flight and fare information to business travelers upon which AA is dependent. (*See, e.g.*, Compl. ¶¶ 30-31, 117-20.) Finally, in *Star Tobacco, Inc. v. Darilek*, 289 F. Supp. 2d 436, 447 (E.D. Tex. 2003), the counterclaimaints failed to even define the relevant market, and in *Insignia Sys., Inc. v. News Corp.*, No. 04-4213, 2005 WL 2063890, at *3 (D. Minn. Aug. 25, 2005), the complaint conceded that the plaintiff still had access to a 25% share of the relevant market. Here, by contrast, AA has alleged a plausible relevant market and that AA Direct Connect has been foreclosed from virtually all of Travelport's travel agency subscribers, including Orbitz.

[8] The cases relied on by Orbitz belie its position that a dismissal without a single post-dismissal opportunity for amendment is appropriate. (Orbitz MTD at 22.) In *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002), the Fifth Circuit stated that "district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case." Also, in *PSKS. Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010), dismissal with prejudice was appropriate where the complaint had been amended several times, and the plaintiff failed to amend its complaint consistent with the Supreme Court's 2009 decision – reversing over 100 years of antitrust law condemning minimum resale price agreements – in those *same* proceedings.

has been no determination that the allegations against Orbitz are insufficient in any respect. Finally, DOJ's formal civil investigation of the GDSs makes clear that AA's Complaint is neither frivolous nor legally insufficient on its face, the two narrow exceptions to the rule. Thus, if the Court were to dismiss any of the claims here against Orbitz, leave to amend is appropriate.

CONCLUSION

AA respectfully requests that the Court deny Orbitz's Rule 12(b)(6) motion.

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Respectfully submitted,

/s/ Yolanda Garcia
Yolanda Garcia

R. Paul Yetter
State Bar No. 22154200
pyetter@yettercoleman.com
Anna Rotman
State Bar No. 24046761
arotman@yettercoleman.com
YETTER COLEMAN LLP
909 Fannin, Suite 3600
Houston, Texas 77010
713.632.8000
713.632.8002 (fax)

Yolanda Garcia
State Bar No. 24012457
yolanda.garcia@weil.com
Michelle Hartmann
State Bar No. 24032401
michelle.hartmann@weil.com
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201-6950
214.746.7700
214.746.7777 (fax)

Bill Bogle
State Bar No. 025661000
bbogle@htblaw.com
Roland K. Johnson
State Bar No. 00000084
rolandjohnson@htblaw.com
HARRIS, FINLEY & BOGLE, P.C.
777 Main Street, Suite 3600
Fort Worth, Texas 76102
817.870.8700
817.332.6121 (fax)

Attorneys for Plaintiff American Airlines, Inc.

Of counsel to Plaintiff:

Richard A. Rothman
Richard.rothman@weil.com
James W. Quinn
james.quinn@weil.com
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
212.310.8426
212.310.8285 (fax)

M.J. Moltenbrey
mmoltenbrey@dl.com
DEWEY & LEBOEUF LLP
1101 New York Avenue, N.W.
Washington, D.C. 20005
202.346.8738
202.346.8102 (fax)

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rule 5.1(d) this 6th day of July, 2011.

/s/ Benjamin L. Stewart
Benjamin L. Stewart