UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

US Airways, Inc. Plaintiff, v. Sabre Inc. Sabre Holdings Corp. Sabre Travel Int'l Ltd. Defendants.	Civ. A. No. 1:11-cv-02725-LGS ECF Case **UNDER SEAL**

SABRE'S MOTION FOR SUMMARY JUDGMENT
ON US AIRWAYS' REMAINING CLAIMS

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PRELIMINARY STATEMENT

Sabre is entitled to summary judgment because the "full content" provisions in its contracts with US Airways are not anticompetitive. It is undisputed that they do not give Sabre any exclusive—or even preferential—access to anything. The challenged provisions do not prohibit US Airways from giving Sabre's competitors everything it gives Sabre. They have not foreclosed competition or excluded any competitor.

To the contrary, the challenged provisions are procompetitive. These provisions—under which US Airways agreed to make essentially all of its flight and fare information ("content") available through Sabre, on a non-exclusive basis, and not to discriminate against Sabre's customers—were the product of protracted negotiations between the parties. [redacted] The full content provisions allow Sabre to provide its customers the ability to search, compare, and book as many flight and fare options as possible. Sabre's access to full content is procompetitive because it serves the needs of consumers, reduces their costs of searching for and booking travel, and increases competition among the airlines, all without depriving Sabre's competitors of access to any of the same content.

Despite twice agreeing to the very terms it now challenges—and declaring them "good for us" and "good for our customers"—US Airways has now decided it would rather have a different deal. But it cannot use the antitrust laws simply to change the terms of the agreements it entered. It must prove the challenged provisions are anticompetitive, and that proof must be supported by facts, rather than speculation by paid experts, no matter how well-credentialed. Here, the terms at issue are not anticompetitive and US Airways has no legal basis to try to rewrite its agreement.

This case involves the longstanding business relationship between US Airways, an airline now part of American Airlines, and Sabre, which operates a Global Distribution System (GDS). (¶¶ 1, 2.)[1] A GDS is a computerized system that helps travel suppliers, such as airlines, distribute their tickets to travel agents and the traveling public. (¶ 1.) The several competing GDSs all enable travel agents and their customers to search across numerous travel suppliers' options, compare each option to the competition, and to book the itinerary that best meets their needs.

GDS services provide value to airlines—as US Airways own proffered experts have acknowledged—because they help airlines sell tickets and they service and manage the reservations of the airlines' customers. (¶ 3.) GDS services also provide value to travel agents and travelers, because they enable them to search efficiently across virtually all flight and fare options of multiple airlines and book the best flight and fare available. (¶ 4.) The efficient, one-stop comparison shopping GDSs offer also fosters price competition among airlines. (¶ 34.)

As is common in the travel industry and in many other industries in which companies pay for distribution of their products, to compensate Sabre for its services US Airways and other airlines typically pay Sabre a "booking fee" for each booking made through the Sabre GDS.[2] (¶ 5.) Sabre competes with other GDSs for the travel agents' business by providing financial incentives to the agents, which encourages agents to use the Sabre GDS, enables the agents to charge consumers less, and lowers the cost to travelers of booking an airline ticket. (¶¶ 8-9.)

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[1] Citations to (¶ XX) are to the corresponding numbered paragraphs of the contemporaneously-filed Statement of Undisputed Facts, which includes specific citations to the record.

[2] This model is known as the "booking fee" model. (¶ 5. [redacted] (¶ 6.) Instead, US Airways bypasses Sabre and negotiates agreements directly with the travel agencies whereby it pays the agencies a ticketing fee for each booking. (¶ 7.) The agency, in turn, compensates Sabre for the use of the GDS by paying Sabre a separately negotiated per-booking amount. (*Id.*) [redacted]

The two contracts US Airways challenges in this case were signed in 2006 and 2011. They contain the same basic terms—including the challenged "full content" provisions.[3] (¶ 11.) (¶ 20.) US Airways brought this case in April 2011, less than two months after renewing its contract. (¶ 21.) Through this suit, US Airways seeks to side-step the commitments it made while retaining all the benefits it received in exchange for those commitments.

US Airways' complaint asserted four claims: two for monopolization under Section 2 of the Sherman Act, and two for agreements in restraint of trade under Section 1. US Airways' monopolization claims alleged that Sabre was monopolizing an alleged market for distribution of airline tickets through Sabre. Recognizing that other GDSs compete with Sabre, and relying upon case law that disfavors attempts to define a relevant market consisting solely of the defendant's product, Judge Cedarbaum dismissed US Airways' monopolization claims (Counts II and III), leaving only US Airways' Section 1 claims that Sabre's contracts with US Airways are an unreasonable restraint of trade (Count I) and that Sabre conspired with its GDS competitors (Count IV). (ECF No. 59, Order Granting Defs.' Mot. to Dismiss Counts II and II of the Compl.)

[3] US Airways challenges four specific provisions, each of which is discussed below. Because they are, according to US Airways' expert, "clearly related" and the "flip side" of each other having the "same effects" (¶ 13), the parties often refer to them collectively as the "full content" provisions.

In support of its remaining claims, US Airways asserts that the "full content" provisions are anticompetitive, and without them US Airways would have received Sabre's services for free. According to US Airways, in the absence of the challenged provisions, travel agents and their customers—rather than US Airways—would have paid the costs of Sabre's services, thus increasing the cost of travel to the consumer.

The antitrust laws do not support US Airways' claims. The law does not require that US Airways receive distribution services for free, nor does it entitle US Airways to impose higher costs on consumers. Section 1 of the Sherman Act condemns only agreements that *harm* competition. The challenged provisions do not harm competition because—it is undisputed—they do *not* require US Airways to provide flights, fares, or *anything* else exclusively through Sabre to the disadvantage of Sabre's competitors. (¶ 22.) In fact, US Airways *does* provide all of the same content it provides Sabre to Sabre's competitors. (¶ 23.) US Airways is also free to pay any amount of booking fees to Sabre's competitors and those competitors are free to pay any amount of financial incentives to travel agencies to convert them from Sabre. (¶ 24.) In short, full content does not exclude equally efficient rivals, and thus cannot be anticompetitive.

It is not surprising, therefore, that there is no evidence that the challenged contract terms caused the exclusion of any competitor. [redacted]. (¶ 41-42.) The undisputed evidence shows that to the extent some of Sabre's competitors have not been as successful as they had hoped, it is because they did not offer the features, functionality and services travel agencies demand. (¶ 43.) The evidence is also undisputed that in light of those deficiencies, the additional costs to travel agents of using such alternative systems would be substantial. (¶ 48.) There is no evidence that any alternative distribution channels were foreclosed from competing due to the challenged contract provisions.

The full content provisions are in fact procompetitive because they *benefit* competition. The undisputed evidence makes clear that travel agents and travelers *demand* access to as many flight and fare options as possible to ensure they get the best flight and fare for their needs. (¶ 25.) The full content provisions Sabre negotiated with US Airways enable Sabre to meet its customers' requirements and thus make Sabre's product better. (¶ 26.) And by enabling travelers to efficiently compare the flights and fares of all airlines in one place, full content fosters competition among airlines. (¶ 34.)

Sabre is also entitled to summary judgment because the "harm" US Airways asserts—the inability to shift the cost of its booking fees to the traveling public—is not protected under the antitrust laws. The antitrust laws protect only against "antitrust injury," which is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). US Airways' alleged inability to *increase* the cost of travel to the consumer is the opposite of antitrust injury. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (holding that a plaintiff's inability to raise prices "is not antitrust injury").

US Airways' assertion that absent the challenged provisions it would be able to "steer" travelers to "lower cost" distribution channels, such as its website, cannot save its case. US Airways claims that it would steer bookings to alternative channels by withholding content from Sabre (or surcharging its users) and giving content (or other benefits) exclusively to Sabre's competitors. US Airways' "steering" theory rests on the premise that it should be allowed to disadvantage Sabre's product by making it less attractive or more expensive, thus making Sabre less competitive.[4] US Airways' inability to degrade Sabre's product does not harm competition. Moreover, it is not sufficient for US Airways to claim that it would be better off in the absence of

[4] Ironically, US Airways' "steering" scheme is significantly *more restrictive* than the bargain US Airways struck with Sabre, under which no competitor is at a disadvantage.

the challenged provisions. It must show that these provisions excluded competition. *Jefferson Parish Hosp. Dist. No. 2 v.* Hyde, 466 U.S. 2, 16 (1984). It cannot.

Finally, Sabre is entitled to summary judgment for the independent reasons that (1) there is no evidence of a causal connection between the harm US Airways claims and the challenged contract provisions; and (2) US Airways has failed to provide a reasonable basis to calculate the amount of harm it allegedly suffered, and instead offers only speculative theories based on unproven assumptions.

In sum, the antitrust laws do not support US Airways' attempt to challenge contract terms that are undisputedly non-exclusive and that undisputedly help Sabre to meet the demands of its customers and improve its product. Nor do they allow US Airways to avoid its contractual commitments—while retaining the benefits it received in exchange—by merely asserting that a different set of contractual terms would yield an outcome its expert deems preferable. US Airways must demonstrate that the challenged provisions are anticompetitive and unreasonably foreclosed a significant amount of competition. Because the challenged provisions did not foreclose competition, US Airways has no legal basis under the antitrust laws to renege on its agreement. The Court should reject US Airways' request to intervene in the market and rewrite the parties' contract when that contract does not harm, and in fact fosters, competition.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where no genuine dispute exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Resolving antitrust claims at the summary judgment stage is favored because it helps to "avoid[] wasteful trials and prevent[] lengthy litigation that may have a chilling effect on pro-competitive market forces." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). If the evidence is ambiguous, all

reasonable inferences are drawn in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88. However, in an antitrust case, a court may not draw inferences from ambiguous evidence to support a claim that "makes no economic sense." *Id.* at 587.

Importantly here, "expert testimony without . . . a factual foundation cannot defeat a motion for summary judgment." *Virgin Atl. Airways Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571, 579 (S.D.N.Y. 1999) (antitrust case rejecting plaintiff's expert opinions and granting summary judgment in defendant's favor), *aff'd Virgin Atl. Airways v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001). Expert testimony submitted in opposition to summary judgment must "be based on actual . . . data . . . , rather than theory-grounded assumptions." *Id.* at 580 (rejecting expert opinion "based on assumptions that have not been supported by market data"). In opposing summary judgment, therefore, "an expert's opinion is not a substitute for a plaintiff's obligation to provide evidence of facts that support the applicability of the expert's opinion to the case." *Id.* at 579; *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."); *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 42, 46 (2d Cir. 1986) (a plaintiff cannot sustain its burden on summary judgment by making "self-serving statements" or pointing to "naked conclusions" of an expert).

ARGUMENT

I. The Challenged Provisions Do Not Violate the Antitrust Laws (Count I).

US Airways claims that the full content and related terms in its contract with Sabre are an "unreasonable restraint of trade" in violation of Section 1 of the Sherman Act. To recover on its claim, US Airways must establish, among other factors, that the challenged contract provisions are anticompetitive, in that they have an "actual adverse effect on" and substantially foreclose

competition. *Capital Imaging Assocs. v. Mohawk Valley Med. Ass'n*, 996 F.2d 537, 543 (2d Cir. 1993); *see also Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring). US Airways must also prove causation: that "the injuries alleged would not have occurred *but for* [Sabre's] antitrust violation." *Argus*, 801 F.2d at 41. In addition, it must prove that its alleged injury is "antitrust injury," which is "injury of the type the antitrust laws were intended to prevent." *Brunswick*, 429 U.S. at 489. Finally, to recover damages, US Airways must provide a reasonable, non-speculative basis to prove "the amount of [its] losses caused by [Sabre's] wrongful act [apart] from the amount caused by other factors." *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988).

As set forth below, US Airways cannot establish the elements of its claim for at least the following reasons, each of which is an independent basis to grant Sabre summary judgment:

- The full content provisions do not harm competition because they do not give Sabre any exclusive rights to any content or prevent US Airways from providing any of its content to any other competitor. They do not, therefore, exclude anyone from competing with Sabre.
- The challenged provisions are procompetitive, not anticompetitive. Full content *promotes competition* because it makes Sabre's product better, enabling Sabre to meet customer demand, improve efficiency, and reduce free riding, while leaving Sabre's rivals free to do the same. Moreover, full content also creates price transparency, and thus increases competition among the airlines.
- There is no evidence that a substantial share of the market was foreclosed to competitors or that any competitor was excluded from the market due to the complained of contract provisions.
- US Airways has not suffered an "antitrust injury"—injury of the type the antitrust laws were intended to prevent.
- The challenged terms were not a material cause of US Airways' alleged harm, in part because no evidence exists that the challenged contract terms actually reduced competition by excluding any potential competitor.
- US Airways has not provided a reasonable, non-speculative method of calculating the amount of damages.

A. Full Content and the Related Contract Terms Are Not Anticompetitive

US Airways has a heavy burden in proving the challenged contract provisions are anticompetitive. The Supreme Court has recognized that "vertical" agreements—such as the ones here, between a supplier and a distributor—are generally procompetitive because they have the "real potential to stimulate interbrand competition.'" *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)). A plaintiff challenging a vertical agreement, therefore, must prove that the contract terms it challenges had "an *actual* adverse effect on competition as a whole in the relevant market." *See Capital Imaging*, 996 F.2d at 543 (recognizing that "the antitrust law[s] [were] enacted to ensure competition in general, not narrowly focused to protect individual competitors").

To do so, a plaintiff must show that the challenged agreements "foreclose competition in a substantial share" of the relevant market. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 76-77 (2d Cir. 1999) (affirming summary judgment for defendant where plaintiff failed to show "anticompetitive effects" because the defendant's contracts did not "foreclose[] a substantial share of the . . . market" (internal citations omitted)). Moreover, the plaintiff bears the burden of showing that any anticompetitive effect outweighs the "pro-competitive 'redeeming virtues'" of the contract. *Capital Imaging*, 996 F.2d at 543. US Airways cannot carry its burden because the challenged provisions are non-exclusive, are procompetitive, and have not foreclosed competition.

1. Full Content Is Non-Exclusive

As an initial matter, the challenged contract terms do not foreclose competition because they are not exclusive. It is undisputed that they do not require US Airways to provide *anything*—including any content—exclusively to Sabre. They do not, therefore, give Sabre any advantage over its competitors. (¶ 22.) They merely ensure Sabre's ability to offer travel agencies a full

range of flight and fare options on equal terms with Sabre's competitors, without US Airways penalizing travel agencies simply for using the Sabre GDS. US Airways is free to provide whatever content it desires to any of Sabre's competitors. (*Id.*) These provisions cannot exclude competition because any competitor can obtain exactly the same content that Sabre has and compete with Sabre on equal footing.

For this reason alone, because the challenged provisions neither exclude competitors from providing travel agents with any content US Airways chooses to give them, nor give Sabre any competitive advantage, they are not anticompetitive. *See, e.g.*, *CDC Techs.*, 186 F.3d at 80; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059-60 (8th Cir. 2000) (granting judgment as a matter of law for defendants where plaintiffs "did not demonstrate that [defendant]'s discount program was in any way exclusive"); *Stitt Spark Plug Co. v. Champion Spark Plug. Co.*, 840 F.2d 1253, 1257-58 (5th Cir. 1998) (affirming directed verdict to defendant where plaintiff failed to provide evidence of exclusivity).[5]

2. Full Content Is Procompetitive

Far from being anticompetitive, full content is procompetitive because it facilitates efficient comparison shopping, enables Sabre to meet the demands of its travel agent customers, and thus makes Sabre's product better. Full content enables Sabre to provide agents and travelers the ability to search across many different flights and fares and to book the most suitable option available. (¶ 27.) It is undisputed that travel agents and travelers benefit from having more options to compare. (¶ 28.) US Airways recognized this fact in public statements to its

[5] Indeed, the nonexclusive nature of the challenged contract terms is the opposite of the type of provision that courts have held to be potentially anticompetitive. In cases where the contract requires *exclusive* use of one competitor at the exclusion of others, the courts have condemned such provisions if the contract terms substantially foreclose competitors from access to an important input or a critical mass of customers. By contrast, Sabre's contract with US Airways does not does not exclude its competitors from anything Sabre receives.

investors—which, of course, were subject to stringent securities laws against misrepresentations and omissions—in which US Airways emphasized that its full content agreement with Sabre is "good for our customers." (¶ 19.)

Travel agents uniformly testified that they demand full content to enable efficient searching and comparison of travel options. (¶ 29.) [redacted] (*Id.*)

Similarly, the undisputed testimony from travel agents is that the lack of full content in Sabre would force them to spend additional time to make and change reservations, thereby increasing their costs, and thus the cost to travelers. (¶ 31.) [redacted] Depriving Sabre of

[6] HRG, BCD and CWT, along with American Express, are the four largest travel agencies in the country. (¶ 30.)

full content would also force agents to make substantial investments in the additional technology necessary for them to search across multiple distribution platforms instead of a single-source GDS like Sabre. (¶ 32.)

As US Airways' expert economist, [redacted]

If Sabre did not have access to full content, its product would be degraded, the travel agencies costs of searching and booking travel would be higher, there would be less demand for Sabre's product, and Sabre would be less competitive. Courts have long held that contract provisions that result in a better or more efficient product to meet customer demand are *procompetitive*. *See, e.g.*, *Cont'l T.V.*, 433 U.S. at 54-55 (contract restrictions that incentivize retailers to provide better services are procompetitive); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 189-90 (2d Cir. 1992) (explaining that the defendant's "legitimate business justifications" for its vertical distribution restraints, such as protecting "the quality and image it wishes to project for its products," "establish a prima facie case of lawful conduct" and "prevent a rational trier of fact from finding" antitrust liability); *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) (concluding that "improvement in the quality of a product or service that enhances [customers'] desire for that product or service" is a "procompetitive virtue"); *Ne. Tel.*

Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 93 (2d Cir. 1981) (holding that defendants "must be allowed to do as well as they can with their business"); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (a defendant has "no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches"). Nothing in the antitrust law prohibits Sabre from negotiating to obtain non-exclusive access to full content in order to make its product more attractive to its customers.

Finally, full content is also procompetitive because it enhances competition among airlines to the benefit of consumers. When consumers can comparison shop by easily searching across all travel options, airlines have greater incentives to offer competitive prices and services to win business than if consumers could not comparison shop due to a lack of full content. (¶ 34.)

For each of these reasons, Sabre has the incentive to negotiate for full content regardless of any effect it could have on its competitors, because providing the most content possible makes Sabre's product better and helps Sabre meet the demands of travel agents and travelers. Indeed, the procompetitive efficiencies associated with full content are evident from the undisputed evidence that the other GDSs—each of which accounts for a smaller portion of US Airways' bookings than Sabre—also negotiate for full content. (¶¶ 35-36.) The fact that full content is a common industry practice that is demanded even by competitors that US Airways has not accused of being "dominant" suggests that the conduct is procompetitive. *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 79 (3d Cir. 2010) (conduct was not anticompetitive when it was "a common and generally accepted practice"); *Concord Boat*, 207 F.3d at 1062 (same); *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) (same). For all these reasons, full content is procompetitive as a matter of law.

3. The Other Challenged Contract Provisions Are Part-and-Parcel of Full Content and Are Similarly Procompetitive

The other contract terms US Airways challenges, which US Airways labels as the "parity" and "no surcharge" provisions (¶ 12), are an integral part of full content. Without them, full content would be meaningless and its goals would be frustrated. [redacted] Thus, the parity and no surcharge provisions do not violate the antitrust laws for the same reasons that full content does not.

The parity provision provides that US Airways will not discriminate against Sabre in terms of flight availability, marketing, promotions, and in the benefits (such as commissions) available to travel agents or their customers. (¶ 37.) Without parity provisions, US Airways could undermine full content by, for example, allowing Sabre to display US Airways' lowest fares, but making those fares unavailable for booking through Sabre, or by not providing the same commissions to travel agents who book fares through Sabre, effectively raising the price of tickets booked through Sabre and thereby depriving Sabre of access to the lowest fares (*i.e.*, best content).

Similarly, the "no surcharge" provision provides that US Airways will not impose additional fees on travel agents or customers for using Sabre. (¶ 38.) Without the no surcharge provision, US Airways could undermine full content by allowing Sabre to provide access to US Airways' lowest fares, but then imposing a surcharge on bookings through Sabre, again effectively increasing the price of tickets booked through Sabre and thereby depriving Sabre and its customers of the lowest fare. Thus, these related provisions prevent US Airways from

circumventing its agreement to provide full content, including its lowest fares, by effectively increasing the cost of travel to travel agents and consumers that book through Sabre.

Even aside from the fact that these provisions are integral to full content, courts have held that contract terms that prevent a supplier from surcharging (or withholding a benefit from) customers are procompetitive and do not violate the antitrust laws. *See, e.g.*, *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 90-91 (6th Cir. 1989) (affirming dismissal of antitrust complaint challenging a credit card issuer's contract provision that limited surcharges merchants could impose on consumers because a "credit card surcharge cap is obviously a proconsumer device"); *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 924-25 (1st Cir. 1984) (reversing district court and holding that defendant insurer's ban on doctors surcharging patients beyond what the insurer paid the doctor does not violate the antitrust laws); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502, 503 (2d Cir. 1982) (holding that "maximum billable amount" agreements that prevented pharmacies from surcharging patients above what the insurer paid do not violate the antitrust laws).

Moreover, the parity and no surcharge provisions are not anticompetitive because they deter free riding. Without these provisions, US Airways could incentivize travel agents to use Sabre to *search* for the best available flight, but to *book* the flight on another channel, in which case Sabre would receive no compensation for providing its resources and services.[7] *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (reducing the incentive of "discounting retailers [to] free ride on retailers who furnish [greater] services" is a

[7] Although courts routinely uphold restrictions against free riding on the basis of the theoretical potential for such conduct, free riding in this case is far more than a theoretical concern. [redacted]

business justification for resale price maintenance); *Cont'l T.V.*, 433 U.S. at 55 (limiting "'free rider' effect" promotes efficiency and enhances competition); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190 (2d Cir. 1992) (limitations on product resale that were designed to prevent the "free-rider effect" are "legitimate.").[8]

4. The Challenged Contract Provisions Do Not Foreclose Competition or Exclude Competitors

US Airways cannot prove that the challenged contract provisions harm competition because it has failed to show that a substantial share of the market has been foreclosed, and it cannot identify any excluded competitor.

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[8] US Airways also challenged a contract term that it calls the "no direct connect" provision, although it has not pursued that argument. In its contract with Sabre, US Airways agreed, subject to a number of exceptions, to use the Sabre GDS for bookings through Sabre-subscribing travel agents rather than implement a "direct connection" between US Airways' internal reservation system and the travel agents to circumvent Sabre. (¶ 55.) In effect, US Airways agreed to buy Sabre's distribution services rather than make its own, a common practice in this and other industries. And a direct connection would serve only a single airline, US Airways. (¶ 56.) Thus, direct connects on their own do not allow a travel agency to comparison shop, and they lack other vital GDS functionalities, such as the ability to book and track travelers' flights on a connecting airline or to book and track hotel and car rental reservations. (¶ 57.) Because of this undisputed lack of functionality, the "no direct connect" provision is not an unreasonable restraint of trade for at least two reasons [redacted] (¶ 58.) Thus, preventing US Airways from using a direct connection could not reduce competition or violate the antitrust laws. *Almeda Mall, Inc. v. Hous. Lighting & Power Co.*, 615 F.2d 343, 349, 353, 355 (5th Cir. 1980) ("[T]he activity sought by the appellants is more akin to mere 'substitution' than to competition. By achieving the goal to resell electricity on the retail level, appellants will be merely plugging themselves into the flow of electricity . . . pre-empt[ing] the utility's business for their own profit, not as true competitors for the same market."). Second, due to its single-airline coverage and its lack of other functionality, travel agents using a direct connection to book tickets on US Airways would still have to use Sabre (or another GDS) to comparison shop for flights and manage reservations, for which the GDS does not receive any compensation. (¶ 59.) The no direct connect provision prevents such free riding. As discussed above, limitations on free-riding provide a strong business justification for a challenged vertical agreement.

a) US Airways Cannot Show Substantial Foreclosure of the Market

US Airways' claim that its contracts with Sabre excluded competition also fails for the independent reason that no evidence exists that the complained of contract provisions substantially foreclosed the market. An antitrust plaintiff alleging the exclusion of competitors must demonstrate that a substantial share of the market was foreclosed. *Jefferson Parish*, 466 U.S. at 45 (an unreasonable restraint of trade exists "only when a significant fraction of buyers or sellers are frozen out of a market") (O'Connor, J., concurring); *CDC Techs.*, 186 F.3d at 77, 80-81. Here, no evidence exists, including from any of US Airways' proffered experts, as to what share of the market has allegedly been foreclosed, much less that it is substantial. Indeed, given the undisputed fact that US Airways' Sabre GDS bookings accounted for 8% or less of total U.S. GDS bookings in each year between 2006 and 2013 (when US Airways merged with American), and that Sabre is only one of multiple competing GDSs, the challenged provisions in the US Airways' contracts with Sabre cannot possibly have substantially foreclosed the relevant market even as defined by US Airways (*i.e.*, all GDS bookings through traditional travel agencies). (¶ 40.)

b) US Airways Cannot Show Any Excluded Competitor

In light of the undisputed fact that full content is non-exclusive and the lack of evidence that it foreclosed access to any substantial portion of the market, it is not surprising that US Airways cannot show that any competitor was actually foreclosed from competing due to the challenged contract provisions, as the law requires. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 16 (holding that "there can be no adverse impact on competition" when "no portion of the market which would otherwise have been available to other sellers has been foreclosed"); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) (where the challenged vertical

agreement does not facilitate collusion, like here, an antitrust plaintiff must prove "foreclose[ure of] competitors from entering or competing in a market"); *Rambus Inc. v. FTC*, 522 F.3d 456, 465 (D.C. Cir. 2008) (rejecting claim that a defendant's conduct produced higher prices because in the absence of any excluded rivals the alleged injury did not flow "from a less competitive market" (quoting *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998))); *Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition.").

To the contrary, the undisputed evidence shows that no competitors were excluded. [redacted] (¶ 42.) Without any excluded competitor, there is no "actual harm" to competition, as the law requires.[9]

[9] In addition to challenging the provisions in its agreement with Sabre, US Airways' Complaint also originally alleged that Sabre's incentive agreements with travel agents were unreasonable restraints of trade. *See* FAC ¶¶ 153 & 156. US Airways has since abandoned that claim. In responding to interrogatories about their allegations, US Airways did not include Sabre's travel agent contracts in the list of contracts that US Airways contends violate the antitrust laws. US Airways abandoned this claim for good reason, as the law is clear that monetary incentives cannot unlawfully foreclose rivals unless the incentives result in "below-cost" pricing, such that paying the incentives would be unprofitable for an equally efficient competitor. *See e.g.*, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 325 (2007); *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 466, 467 (S.D.N.Y. 1996) (only financial terms that "drive equally efficient competitors out of business" are exclusionary); *see also Virgin Atlantic*, 69 F. Supp. 2d at 580 (applying price-cost test to airlines' market share incentives to travel agencies). [redacted]

c) US Airways' "Steering" Theory Fails

Unable to show that the challenged provisions actually foreclosed competition, US Airways falls back on the theory that, absent those provisions, it would be better off because it could "steer" bookings to purportedly lower cost channels, such as its website. [redacted]

US Airways' agreement to give up some ability to "steer" customers away from Sabre by discriminating against Sabre is *not* anticompetitive. [redacted] The plaintiffs in those cases, like US Airways here, argued that their inability to impose surcharges violated antitrust law. In each of those cases, however, the courts rejected such claims as a matter of law.

Moreover, here, the challenged provisions do not interfere with competition or prevent steering bookings to Sabre's competitors. [redacted] (¶ 52.) Rather, US

[10] US Airways asserts that in the "but for" world, it would withhold its lowest fares from the Sabre GDS, or effectively do so by charging Sabre customers a surcharge, in either case making the cost of travel higher through the Sabre GDS. (¶ 51.) US Airways' lawyers and experts sometimes call this "price signaling," because a consumer who bought her ticket through a travel agent using Sabre would be forced to pay a higher price for the same seat. (*Id.*)

[11] To the extent equally efficient competitors exist and they truly are lower-cost, they necessarily would be able to profitably match (and exceed) Sabre's incentives to steer bookings their way.

Airways only agreed not to directly disadvantage Sabre with Sabre's own customers. It certainly is not remarkable that a supplier like US Airways would promise its distributor that it would not directly impede its distributor or pay its distributor's customers to use a different distributor.

By contrast, US Airways' scheme to steer bookings to one channel, by giving that channel the advantage of exclusive content, is *less competitive* than the provisions US Airways challenges here, which do not give Sabre any advantage over its competitors. US Airways' scheme to disadvantage Sabre's product by making it less attractive or more expensive would hamstring Sabre and *decrease* competition. US Airways' agreement not to degrade Sabre's product does not harm competition. *See supra*, Section I.A.2. (the antitrust laws do not require a company to degrade its product to the advantage of its rivals).

Moreover, the challenged contract provisions are merely a *less restrictive* version of the type of arrangement US Airways advocates. The crux of US Airways' argument is that, absent the full content provisions, it could negotiate a better price (*i.e.*, lower distribution costs) from some other booking channel by offering that channel an explicit advantage over Sabre. Presumably, US Airways deems such a bargain procompetitive. But US Airways already secured lower distribution costs *from Sabre*, in the form of a reduced booking fee, in exchange for its agreement not to disadvantage Sabre.[12] US Airways now wants to keep the booking fee discount it received from Sabre as a result of that negotiated trade, but seeks as "damages" a second reduction it claims it would have received had it not made that trade. US Airways cannot have it both ways.

In any event, US Airways cannot base its antitrust claims merely on a contention that it would be better off if it could steer customers away from Sabre. As discussed in the preceding

[12] The evidence is undisputed that US Airways agreed to give Sabre "access to full content," including its "web fares" (*i.e.*, lower fares offered through US Airways' website), "in exchange for" lower booking fees. (¶ 15.)

sections, US Airways must show that the challenged provisions excluded competition. Through this lawsuit, US Airways is simply attempting to renege on its agreement, without any evidence that the agreement excluded competition.

In addition, the entire premise of US Airways' argument—that such steering would increase competition because the channels to which it would steer business are "lower cost"—has no evidentiary support. [redacted] Thus, US Airways has no non-speculative evidence that distributing its tickets through these supposedly "lower cost" alternatives would in fact be less costly than through Sabre. *See Virgin Atlantic*, 69 F.Supp.2d at 580 (expert testimony must "be based on actual … data …, rather than theory-grounded assumptions").

Finally, to the extent US Airways argues that the challenged provisions have prevented it from steering customers to their website, that is not harm to competition for an independent reason. [redacted] (¶ 54.) Thus, preventing US Airways from steering customers to its website could not reduce competition *in the relevant market* for this reason alone. *See Almeda Mall*, 615 F.2d at 351-52; *Winstar Commc'ns., LLC v. Equity Office Props., Inc.*, 170 F. App'x 740, 742 (2d Cir. 2006) (explaining that a plaintiff "must allege a competition-reducing effect on the relevant market" and dismissing claims because the "injuries [plaintiff] alleges bear upon a different market"). In any event, US Airways has already been

[13] Similarly, consumers who use US Airways' website are not consumers in the relevant market.

compensated in the form of lower booking fees for agreeing to limit its ability to steer customers to its own website. It is undisputed that Sabre provided US Airways with booking fee discounts specifically in exchange for US Airways providing Sabre access to "web fares." (¶ 15.)

B. US Airways' Alleged Injuries Do Not Constitute Antitrust Injury

Sabre is also entitled to summary judgment because US Airways cannot prove that it suffered "antitrust injury." Antitrust injury is an essential element of any private antitrust action. It allows a plaintiff to recover only for "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Here, none of the categories of damages US Airways claims is the type of injury the antitrust laws were intended to prevent.

1. US Airways' Booking Fee Damages Are Not Antitrust Injury

US Airways' primary damages theory is that it would not have paid booking fees to Sabre in its but-for world. Instead, US Airways assumes that but-for the challenged contract provisions, travel agents and travelers would pay for the costs of Sabre's services. Specifically, US Airways complains that the challenged contract provisions prevent it "from passing on the booking fees Sabre charges US Airways to travel agents in the form of a surcharge or other fee." (¶ 60.) Similarly, [redacted] (¶ 61.) US Airways' damages theory, therefore, seeks to shift its distribution costs (*i.e.*, raise prices) to travel agencies and ultimately consumers. That is not antitrust injury.

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[14] [redacted]

The Supreme Court has made clear that a plaintiff's inability to *increase* prices "is not antitrust injury." *Atl. Richfield*, 495 U.S. at 331, 338 (rejecting a challenge to a restriction in a gasoline distributor's vertical agreement that required its dealers to sell gasoline below a prescribed price because any loss from the inability to charge a *higher* price is not antitrust injury); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1996); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121-22 (2d Cir. 2007). Specifically, "the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low." *Kartell*, 749 F.2d at 931 (emphasis in original).

Similarly, the federal courts have made clear that the antitrust laws are not intended to protect plaintiffs whose interests are "not congruent with the interests of consumers generally." *Tennessean Truckstop*, 875 F.2d at 90. In *Tennessean Truckstop*, a truck stop sued a company that operated a credit card system used at truck stops, claiming that the credit card company improperly limited participating truck stops' ability to impose a surcharge on customers using its credit cards. *Id.* at 87. The Sixth Circuit concluded that the surcharge cap could not constitute antitrust injury because "[t]he credit card surcharge cap is obviously a proconsumer device, and if it has cost [the truckstop] some profit, the 'injury' is not 'of the type the antitrust laws were intended to prevent.'" *Id.* at 90 (emphasis added). The injury for which US Airways seeks to recover here—lost profits from the inability to *increase* the cost of travel to consumers in the relevant market—similarly is not the type of injury the antitrust laws were intended to prevent.

2. US Airways' Choice Seats Damages Are Not Antitrust Injury

US Airways also claims damages relating to sale of its "Choice Seats"—certain seats in coach class that US Airways allows travelers to reserve for an extra fee. (¶ 62-63.) Prior to the introduction of Choice Seats, the price US Airways charged for a coach ticket was the same regardless of the specific seat the customer chose or was assigned. (¶ 63.) US Airways alleges

that but-for the challenged contract terms, it would have sold more Choice Seats and seeks to recover as damages the extra fees it assumes it would have collected from travelers for those sales. (¶ 64.) That is not an antitrust injury. Selling more Choice Seats results in charging consumers more for seats that otherwise would have been provided at no additional cost. Choice Seats are simply a price increase to consumers, and the inability to charge consumers more is not protected "antitrust injury." *E.g.*, *Atl. Richfield Co*, 495 U.S. at 338; *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003); *Stamatakis Indus., Ins. v. King*, 965 F.2d 469, 471 (7th Cir. 1992).

C. The Challenged Contract Provisions Were Not a Material Cause of the Alleged Injuries

In addition to showing an antitrust injury, US Airways must prove that "the injuries alleged would not have occurred but for [Sabre's] antitrust violation." *Argus*, 801 F.2d at 41. To do so, US Airways must prove a "causal connection" between Sabre's challenged conduct and the alleged injury such that the conduct was a "material element of" and "substantial factor in producing" the alleged harm. *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401 (7th Cir. 1993); *see also Bowen v. N.Y. News, Inc.*, 522 F.2d 1242, 1255 (2d Cir. 1975).

Courts routinely dismiss antitrust claims where, as here, the plaintiff fails to provide actual evidence that the defendant's challenged conduct materially caused the claimed injury. *See, e.g.*, *Argus*, 801 F.2d at 46; *see also Natl. Ass'n of Review Appraisers & Mortg. Underwriters, Inc. v. Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir. 1995); *Greater Rockford Energy*, 998 F.2d at 402; *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494-96 (8th Cir. 1992).

1. The Challenged Contract Provisions Did Not Cause Exclusion of Any Competitor

The lack of evidence of any excluded competitor shows not only that the challenged contract terms are not anticompetitive, but also that they did not *cause* any substantial foreclosure of the market. US Airways' claims fail for this independent reason. *See, e.g.*, *Roland Mach.*, 749

F.2d at 394; *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1356 (S.D. Fla. 2011) (recognizing the requirement that a rival be excluded as a result of challenged conduct), *aff'd*, *Sunbeam Television Corp. v. Nielson Media Research, Inc.*, 711 F.3d 1264, 1272 (11th Cir. 2013).

As discussed in Section I.A.4.b above, US Airways cannot identify any competitor foreclosed *as a result of* the complained of contract provisions. [redacted] (¶ 42.) [redacted]

In fact, undisputed evidence shows that these competitors failed to gain traction for reasons having nothing to do with the challenged agreements. Specifically, the overwhelming and uncontroverted travel agency testimony shows that these entities were less competitive than they had hoped because they did not offer the same features, functionality and service as the GDSs, and would have imposed material inefficiencies and significantly higher costs on travel agencies. (¶¶ 43-47.) Even US Airways' experts were unable to identify any firm or entrant that is as efficient as the Sabre GDS and could provide the same level of features, functionality and service. (¶ 67.)

US Airways simply cannot link the challenged contract provisions to any foreclosure of competition. Because none of the challenged contract terms caused the exclusion of any competitor, they could not have caused US Airways' claimed injury.

2. The Challenged Provisions Cannot Have Caused Booking Fee "Overcharges" Because US Airways Paid *Less* in Booking Fees in Exchange for the Challenged Provisions

US Airways contends that the per-booking fee it paid Sabre was higher than it would have been in a world without the challenged provisions, and thus that it is entitled to "overcharge" damages. There is, however, no evidence that US Airways' agreeing to the challenged provisions caused Sabre's booking fees to be higher than they otherwise would have been. [redacted] (¶ 15 n.15.) After entering this negotiated exchange in 2006, US Airways emphasized that it was "extremely pleased" and "happy" with the contract, which it described as "good for us" and "good for our customers." (¶ 19.)

As an initial matter, this undisputed evidence shows that the parties' exchange of content for lower booking fees is not anticompetitive. [redacted]

[redacted] (¶ 16.) Thus, under US Airways' own theory, a booking fee reduction in exchange for more airline content is a *procompetitive* bargain.

Moreover, because US Airways paid Sabre *less* by agreeing to the challenged provisions than it would have without them, the challenged provisions did not harm US Airways and thus cannot provide a basis for an antitrust claim. *See, e.g.*, IIA Areeda & Hovenkamp, Antitrust Law 145, ¶ 361a3 (3d ed. 2007) ("Indeed, the plaintiff participating in a violation will often have borne no injury that was not inherently offset by the advantages that induced it to participate in the arrangement it now challenges."). US Airways' statements at the time that it benefitted from the contract further belie US Airways' litigation-driven assertion that the challenged provisions caused it harm. *See Argus*, 801 F.2d at 42 (granting summary judgment for the defendant and explaining "[t]he failure of a [plaintiff's] management to note at the time what is later claimed by its lawyers to have been a mortal commercial wound weighs heavily against such a claim").

3. The Challenged Contract Provisions Cannot Have Caused Overcharges Under the 2006 Contract

US Airways' booking fee damages under the 2006 contract fail for another reason. They are based on the assertion that challenged provisions in the 2006 contract allegedly reduced competition and caused the booking fee US Airways agreed to pay in the *very same* 2006 contract to be above competitive levels. That is, however, chronologically impossible. The booking fees in the 2006 contract were fixed at the same time or before the challenged provisions in that very contract went into effect. (¶ 17.) Whatever effect the challenged provisions in the 2006 contract had after they took effect, they could not have given Sabre the power to demand a higher booking fee at the time the parties signed that very contract. Thus, no causal connection exists between the challenged conduct and the 2006 contract booking fees. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013) (explaining that price fixing

could not injure class members who "were subject to legacy contracts" and thus "were bound by rates negotiated before any [challenged] behavior was alleged to have occurred").

4. The Challenged Contract Provisions Did Not Cause Fewer Choice Seats Sales

US Airways also cannot show that any antitrust violation caused it to sell fewer Choice Seats than it otherwise would have. US Airways' proffered experts speculate a long chain of causation in support of its Choice Seats damages: (1) because of the challenged contract provisions, Sabre faced less competition; (2) because Sabre faced less competition, it became less innovative; (3) because Sabre was less innovative, it did not implement sales of Choice Seats through its GDS as quickly or as well as it otherwise would have.

But the antitrust laws do not dictate how any company designs, implements, and sells its products, and they do not require a company to develop new products or change existing products to help other companies. *See, e.g.*, *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1231-32 (S.D.N.Y. 1981) (rejecting argument that defendant's "failure to introduce a new product" violated the antitrust laws, explaining that "[o]rdinarily, a firm may market new products if and when it chooses" and that deciding this type of claim would be beyond "the ability of the judicial system" and require "prohibited speculation"); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08, 410 (2004) (holding that defendants who "establish[] an infrastructure that renders them uniquely suited to serve their customers" have no duty to assist rivals by building "[n]ew systems [that] must be designed and implemented"). US Airways' allegations about Sabre's sale of Choice Seats therefore cannot be the basis for an antitrust claim as a matter of law.

Further, US Airways' multiple-level speculation about how and when Sabre would have implemented Choice Seats in a "but for world" cannot support a claim for damages. There is no

evidence of any connection between the challenged contract provisions and the speed or quality of Sabre's implementation of Choice Seats on the Sabre GDS. To the contrary, to date, Sabre is the *only* GDS that has enabled the sale of Choice Seats. (¶ 68.) Notably, neither Travelport nor Amadeus—both of which operate competing GDSs that US Airways does not allege to be "dominant"—have implemented Choice Seats at all. (¶ 69.)

In short, US Airways' allegations are "too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages," *Reading Indus. Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980), and "depend[] upon a series of events that would engage the fact finder in prohibited speculation." *GAF Corp.*, 519 F. Supp. at 1232.

5. Other Lawful Factors Caused Any Alleged Injuries

An antitrust plaintiff must show that its injury was caused by the challenged conduct, rather than by lawful, unchallenged factors. *See, e.g.*, *Greater Rockford Energy*, 998 F.2d at 402 (affirming summary judgment where "[d]efendants identify numerous intervening economic and market factors which they argue may have been the actual cause of the plaintiffs' injuries [and] the plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries"); *Amerinet*, 972 F.2d at 1494-96 (affirming summary judgment because plaintiff's "decline was caused at least partly by, if not substantially or mainly by, other factors than [defendant's] alleged antitrust violations"); *see also Argus*, 801 F.2d at 43-45 (detailing evidence of lawful factors that caused decline in the plaintiffs' business and explaining that plaintiffs' "causality claims are thus thoroughly implausible").

It is undisputed that many of the hurdles that US Airways claims impeded the success of competitors, and thus purportedly led to higher booking fees and fewer Choice Seats sales, were the result of many unchallenged, lawful factors. [redacted]

[redacted]

No evidence exists—not even the opinions of US Airways' paid experts—to show that the challenged contract provisions, rather than these other lawful, unchallenged factors, caused US Airways' alleged injuries. To the contrary, US Airways' causation theory is based on nothing other than its experts' naked assertion that the challenged contract provisions caused its alleged injury. That assertion is unsupported by any facts and simply ignores the effect of lawful, unchallenged factors that those same experts identify. Such a "naked conclusion" does not satisfy US Airways' burden to avoid summary judgment. *Argus*, 801 F.2d at 42, 46.

D. US Airways Does Not Provide a Reasonable, Non-Speculative Damage Calculation

To recover damages, US Airways must also provide a reasonable, non-speculative method to prove "the amount of [its] losses caused by [Sabre's] unlawful acts [apart] from the amount caused by other factors." *U.S. Football League*, 842 F.2d at 1378-79. US Airways has failed to offer such a reasonable, non-speculative calculation of damages and, accordingly, cannot go forward with its claims. *See, e.g.*, *RSE, Inc. v. Penny. Supply, Inc.*, 523 F. Supp. 954, 966-71 (M.D. Pa. 1981) (granting judgment as a matter of law for defendant where "plaintiff's damage

model [was] incredible and not based upon reason"). As Judge Friendly explained in affirming a directed verdict for the defendant when a "plaintiff failed to present evidence of damage sufficient to warrant submission to the jury," the judicial duty to exclude "material [that] does not rise to a clearly sufficient degree of value" is "especially pertinent" when evaluating an antitrust damage model with "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir. 1962).

1. US Airways Does Not Provide a Reasonable, Non-Speculative Calculation of Booking Fee "Overcharge" Damages

Moreover, it is undisputed that the distribution services Sabre provides have value to US Airways, and that Sabre incurs costs to provide them. (¶ 77.) US Airways' assumption that it should not have paid anything for Sabre's distribution services is therefore plainly unreasonable.

(¶ 80.) By ignoring these undisputed features of the but-for world, US Airways puts forth an unsupported damages claim.

In fact, the evidence is undisputed that for the *same* level of service US Airways receives, airlines that choose not to provide Sabre with full content pay a *higher* booking fee. The Air Canada-Sabre GDS contract, for example, is a more comparable proxy.

US Airways' booking fee damages are also unreasonable and speculative as a matter of law because US Airways' damage calculations do not segregate the effects of the challenged

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[13] *See, e.g.*, XII Areeda & Hovenkamp, Antitrust Law 180, ¶ 2022c.1 ("[T]he discount or rebate is part of the price . . . [O]ffering a $2 rebate on a good with a $10 price is also no different from offering an $8 price."). (¶ 51.) As noted, US Airways did not account for this feature of the but-for world in its damages, yet another reason those damages are unreasonable.

contract provisions from the other lawful, unchallenged factors discussed above (*e.g.*, historical regulation and natural barriers to entry) that US Airways claims also affected competition, and thus Sabre's booking fee. Rather, US Airways' damages calculations simply assumed that all of US Airways' alleged harm resulted from the contract provisions. Because this assumption results in the assessment of damages for lawful conduct, this assumption is impermissible as a matter of law. *See, e.g.*, *Herman Schwabe*, 297 F.2d at 911; *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir.1985) (reversing jury award due to plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to [defendant's] unlawful scheme"); *MCI Commc'ns Corp. v. Am. Tel. & Tel.*, 708 F.2d 1081, 1163 (9th Cir. 1983) (same); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) (same); *ILC Peripherals Leasing Corp. v. Int'l Bus. Mach. Corp.*, 458 F. Supp. 423, 436 (N.D. Cal. 1978) (granting directed verdict for defendant because of "failure to explain away the effect" of other factors, such as mismanagement of the plaintiff).

2. US Airways Does Not Provide a Reasonable, Non-Speculative Calculation of Choice Seats Damages

US Airways' Choice Seats damages model is fatally flawed as well. It rests on two purely speculative assumptions. First, it assumes that but for the challenged contract terms, Sabre would have started selling Choice Seats at the same time US Airways did through its website. The only basis for this assertion is the pure speculation of US Airways' paid expert.

Second, it assumes that US Airways' Choice Seats revenue per booking—the "take rate"—would have been identical whether seats were booked through Sabre or directly through US Airways' website. Again, there is no evidence supporting this assumption. [redacted] (¶ 90.)

E. US Airways Cannot Recover for Booking Fees It Paid Travelocity Under Their Separate Agreement Because US Airways Lacks a Legal Claim for Such Relief, and Because Travelocity Is Outside the Alleged Relevant Market

US Airways also claims damages on bookings made through Travelocity, an online travel agent (OTA) owned by Sabre's parent company. [redacted] (¶ 92.) US Airways, however, does not assert that anything in its contract with Travelocity is anticompetitive, and thus has no legal claim entitling it to relief for alleged overcharges paid under that contract.

Nor can US Airways show any causal connection between the challenged provisions in its Sabre GDS agreement and any claimed overcharges in its Travelocity agreement. US Airways has not pled, nor attempted to show, how the "full content" provisions in its GDS agreement would have inflated the ticketing fees US Airways pays directly to Travelocity under their agreement.

Further, US Airways' claimed Travelocity damages also fail because Travelocity is outside the relevant market. [redacted] (¶¶ 93-94.) Because Travelocity and the other OTAs are not in the relevant market that US Airways defines, US Airways cannot recover these damages. *See Winstar Commc'ns*, 170 F. App'x at 742 (explaining that a plaintiff "must allege a competition-reducing effect on the relevant market" and dismissing claims because the "injuries [plaintiff] alleges bear upon a different market").

[16] Ironically, this "wholesale" model where the travel agent (Travelocity)–instead of the airline (US Airways)–pays the GDS fee is exactly what US Airways argues would be the competitive result without the allegedly anticompetitive contract provisions. Yet US Airways *still* seeks damages under that payment model. US Airways' contradictory theories are further evidence of the irrationality of its damages theories and further proof that who directly pays the GDS fees is irrelevant to any logical theory of antitrust harm.

II. Sabre Is Entitled to Summary Judgment on US Airways' GDS Conspiracy Claim (Count IV)

Count IV of US Airways' complaint alleges that Sabre and competing GDSs Travelport and Amadeus conspired to limit competition for content by agreeing (1) to demand full content from US Airways, and (2) to implement an industry standard method for distributing US Airways' Choice Seats product. FAC ¶¶ 96, 98, 101, 122-23, 125, 170, 172. US Airways seems to have abandoned this conspiracy theory. For example, its experts say nothing about it. As an initial matter, US Airways has not provided any causal connection between the alleged conspiracy and its alleged injury or any reasonable, non-speculative calculation of the amount of damages from the conspiracy. The claim should be dismissed on this basis alone.

In any event, this claim fails because no evidence supports finding a conspiracy. On the allegation that the GDSs conspired to seek full content, there is no evidence of such a conspiracy or evidence that could support the inference of a conspiracy. The fact that each of the GDSs sought full content does not support such an inference. Parallel conduct alone cannot prove a conspiracy; instead, to support a conspiracy claim the parallel conduct must be coupled with "plus factors" that "tend to rule out the possibility that the defendants were acting independently." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *Matsushita*, 475 U.S. at 588; *Mayor and City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136-37 (2d Cir. 2013).

Here, the undisputed fact is that each GDS had an individual interest in obtaining full content regardless of what the other GDSs did, because full content makes the GDS product better and a GDS that lacked full content would be at a competitive disadvantage. Thus, the parallel pursuit of full content cannot support the inference of a conspiracy. *See Twombly*, 550 U.S. at 566 (affirming dismissal of conspiracy claim where defendants' actions were nothing "more than the natural, unilateral reaction" of each defendant and that "there is no reason to infer that the

companies had agreed among themselves to do what was only natural anyway"); *Matsushita*, 475 U.S. at 587; *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954).

As to the alleged Choice Seats conspiracy, there is not even evidence of parallel conduct because Sabre in fact gave in to US Airways' demands and created for it a customized Choice Seats distribution system, whereas the other GDSs did not. (¶ 95.) But even if there were parallel conduct regarding an industry standard method to implement Choice Seats, there would be no reason to infer a conspiracy, because it was in each GDS's independent interest to pursue an industry standard technical way of distributing this product, instead of developing an airline-specific system for each airline. (¶ 96.) A GDS acting in its self-interest naturally would prefer not to develop a system that was unique to one airline: doing so is inefficient and requires additional resources because it deviates from the standard technical ways that airlines provide content to GDSs. There is thus no reason to infer that GDSs' resistance to creating a customized system for US Airways was caused by a conspiracy, and Sabre is therefore entitled to summary judgment on this claim. *Matsushita*, 475 U.S. at 587.

CONCLUSION

For the foregoing reasons, Sabre is entitled to summary judgment on all of US Airways' remaining claims.

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