

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

US Airways, Inc.

Plaintiff,

v.

Sabre, Inc.
Sabre Holdings Corp.
Sabre Travel Int'l Ltd.

Defendants.

Civ. Action No. 1:11-cv-02725-MGC
ECF Case

**Defendant Sabre's Memorandum of Law in Support of Its
Motion for Leave to File an Amended Answer and Counterclaim**

Defendants Sabre, Inc., Sabre Holdings Corp., and Sabre Travel International Ltd., (collectively, "Sabre"), by its undersigned attorneys, respectfully submits this Memorandum of Law in support of its motion for leave to file an amended answer and counterclaim.¹

BACKGROUND

Plaintiff US Airways filed its original complaint against Sabre on April 21, 2011. On September 8, 2011, the Court granted Sabre's motion to dismiss Counts II and III and ordered US Airways to file an amended complaint to specify the "sources of information and bases of belief" that were omitted from its initial Complaint.² The Court denied US Airways' request for

¹ The sole change to Sabre's Answer filed on December 19, 2011, other than seeking to add the below-discussed counterclaim, is to incorporate by reference the allegations in Sabre's proposed counterclaim into its previously filed answer.

² Order Granting in Part Sabre's Mot. to Dismiss, Sept. 8, 2011, ECF No. 59.

leave to replead Counts II and III.³ US Airways filed its Amended Complaint on September 22, 2011. Sabre filed its Answer on December 19, 2011.

The parties began exchanging document discovery in November 2011, although document discovery is not yet complete. Party discovery was halted at the parties' joint request in July 2012, with the Court entering a stay of party discovery and depositions until January 1, 2013.⁴ The parties also agreed to a revised proposed case management schedule in which each party would have until February 28, 2013, to amend its pleadings.⁵ Other than one third-party deposition that was taken last summer, depositions began just last week.

During the course of discovery, US Airways and third parties produced documents that establish that, during the same time period as the events US Airways alleges in its Amended Complaint, US Airways has been in a long-running and wide-ranging conspiracy to collude with its airline competitors on the terms on which they will deal with Sabre. This conspiracy violates the antitrust laws. Sabre accordingly asks this Court for leave to amend its answer to assert a counterclaim against US Airways under Section 1 of the Sherman Act.

STATEMENT OF FACTS

US Airways and co-conspirators—including various competitor airlines and a third-party technology provider named Farelogix—have conspired to boycott and otherwise agree on the terms on which they will deal with Sabre and other GDSs through numerous means.

As set forth in greater detail in the proposed counterclaim, Sabre has unearthed evidence that US Airways has regularly met and entered agreements with other airlines that provide air travel in, to, or from the United States (including American, Delta, and United) about the terms

³ MTD Hr'g Tr. 34-35, Sept. 8, 2011.

⁴ Minute Order, July 16, 2012. This order was amended with an August 8, 2012 Minute Order that allowed third-party document discovery.

⁵ Stipulation and [Proposed] Order Regarding Case Management Schedule, July 13, 2012.

on which they would deal with Sabre. These agreements have included agreements to withhold “content” from Sabre, that is, withholding from Sabre the ability to facilitate the sale through travel agents of airline services such as the ticket itself and ancillary services that airlines have started to sell separately, such as preferred seats, baggage, and preferred boarding. Historically, US Airways and other airlines have made that content available to Sabre (and other competitors), and Sabre (and its competitors) has provided computer systems to aggregate multiple airlines’ content to enable efficient searching and booking of air travel by travel agents and, through online travel agents like Expedia, travelers. US Airways and its co-conspirators would like to end such comparison shopping and thus they have conspired to eliminate or constrain access to content by GDSs.

ARGUMENT

Federal Rule of Civil Procedure 15 provides that a court “should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Local 802, Assoc. Musicians of Greater New York v. Parker Meridien Hotel*, 145 F.3d 85, 89-90 (2d Cir. 1998). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Leave to amend should be denied only where there is a clear reason to do so. *Id.* As the Second Circuit has observed, these situations generally involve “undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.” *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (quoting *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981)); *see also Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000) (“In general, a district court should not deny leave unless there is a substantial reason to do so, such as excessive delay, prejudice to the opposing

party, or futility.”) “The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is ‘inconsistent with the spirit of the Federal Rules.’” *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman*, 371 U.S. at 182).

Here, none of the potential reasons for denying leave to amend are applicable.

I. THERE IS NO PREJUDICE TO US AIRWAYS, BAD FAITH OR FUTILITY

Granting Sabre’s motion for leave would in no way prejudice US Airways. In assessing prejudice, the relevant factors are whether the amendment would: “(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial, (ii) significantly delay the resolution of the dispute, or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.” *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). This standard is very high. *See, e.g., id.* at 351 (granting leave to amend even though an entirely new defense was raised and allowing this new defense would harm plaintiffs because of the time, effort, and money they expended in litigating the matter).

Granting Sabre’s motion would have no appreciable impact on discovery, which is in its early stages. Only a few depositions have been taken. Moreover, it appears those individuals whose documents and depositions are most relevant to Sabre’s counterclaim are among those individuals from whom US Airways has already agreed to produce documents and are likely to be deposed in this case in any event. Sabre’s existing document requests cover what Sabre expects to be substantially what Sabre will need to litigate the counterclaim (although US Airways has refused to date to produce certain documents that Sabre has requested). To the (likely extremely limited) extent documents that might be relevant to US Airways’ illegal conduct are found in Sabre’s files, US Airways’ extremely broad and far-reaching discovery

requests covered such documents. As such, US Airways would not have to expend significant additional resources to conduct discovery and prepare for trial were Sabre's motion granted.

Likewise, given that the existing document discovery substantially encompasses the documents relevant to the counterclaim and that the relevant deposition testimony will come from individuals who will be deposed in any event, permitting Sabre leave to amend will not delay the ultimate resolution of the dispute. (No trial date has been set.) Nor would granting leave have any impact on US Airways' ability to bring an action in another jurisdiction.

There likewise is no bad faith. A claim is only brought in bad faith where it is "entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Comm. v. Dasa Corp.*, 560 F.2d 1078, 1087-88 (2d Cir. 1977). As is reflected in the counterclaim, the evidence shows that US Airways has engaged in communications and meetings with competitor airlines and that US Airways and its co-conspirators reached agreement regarding the terms and conditions on which they would—or, importantly, would not—deal with Sabre. Sabre therefore seeks to bring this counterclaim to enforce its right to benefit from a competitive marketplace, undistorted by the airlines' anticompetitive boycott and other collusive activities, not for any wrongful or bad faith purpose.

Likewise, granting Sabre's leave to amend would not be futile. The detailed allegations in Sabre's complaint readily meet the standard for proper pleading under Rule 8 and plainly state a claim under the antitrust laws. *See, e.g., In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 675, 682-83 (S.D.N.Y. 2012) (denying motion to dismiss antitrust claim based on horizontal competitors' alleged agreement to coordinate the terms on which they would deal with a common distributor).

II. THERE IS NO UNDUE DELAY

Mere delay does not provide “a basis for a district court to deny the right to amend,” but rather an additional showing of “bad faith or undue prejudice” is required. *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981); accord *Richardson Greenshields Sec.*, 825 F.2d at 653 n.6 (2d Cir. 1987); *Aktiebolag v. Andrx Pharm., Inc.*, 695 F. Supp. 2d 21, 30 (S.D.N.Y. 2010) (quoting *State Teachers Ret. Bd.*). As a result, parties “have been permitted to amend their pleadings to assert new claims long after they acquired the facts necessary to support those claims.” *Richardson Greenshields Sec.*, 826 F.2d at 653, n. 6; see also, *Green v. Wolf Corp.*, 50 F.R.D. 220, 223 (S.D.N.Y. 1970) (granting leave to amend even though “all of the information necessary for his proposed amended complaint was known to him from the start”). Here, Sabre did not unduly delay in bringing its counterclaim, and, as discussed above, Sabre’s counterclaim is not made in bad faith and will not unduly prejudice US Airways. Moreover, Sabre files this request prior to the parties’ agreed February 28, 2013 deadline for amending their pleadings.

Indeed, in the absence of futility, parties are regularly allowed to amend their complaints during discovery and before summary judgment. See, e.g., *Rachman Bag Co.*, 46 F.3d at 233; *State Teachers Ret. Bd.*, 654 F.2d at 856; *Belgrave v. Pena*, 254 F.3d 384, 387 (2d Cir. 2001). For example, in *Rachman*, the Second Circuit upheld the district court’s granting the defendant leave to amend its answer to assert a defense of fraudulent concealment more than four years after the complaint was filed and after nearly three years of “extensive discovery,” with the plaintiff’s “reasons for the delay” being not “entirely clear.” 46 F.3d at 234. In *State Teachers Retirement Board*, the district court denied the plaintiff leave to amend its class action complaint to allege additional insider trading claims when leave was sought nearly three years after the

plaintiffs instituted the class action. The Second Circuit reversed, stating that “[a]t the time plaintiffs requested leave to amend, no trial date had been set by the court and no motion for summary judgment had yet been filed by the defendants,” and that “it appears that the amendment will not involve a great deal of additional discovery.” 654 F.2d at 856.

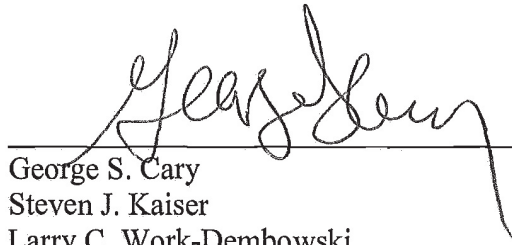
There certainly is no undue delay here. As noted above, depositions are just beginning, and it will be some time before discovery is concluded. Moreover, the facts of the conspiracy did not become fully known to Sabre until discovery in this case. Indeed, some of the activity detailed in the complaint occurred within the last few months. For example, in October 2012, US Airways and its co-conspirator airlines ratified the so-called “New Distribution Capability” plan, which, as set forth in greater detail in the proposed counterclaim, is in effect an agreement on the terms on which US Airways and its co-conspirators will deal with Sabre and its competitors.

CONCLUSION

For the foregoing reasons, Sabre’s respectfully requests that the Court grant its Motion for Leave to File an Amended Answer and Counterclaim.

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Respectfully submitted,



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