17-960-cv(L)

(and 17-983-cv(XAP))

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

US AIRWAYS, INC., FOR AMERICAN AIRLINES, INC.,
AS SUCCESSOR AND REAL PARTY IN INTEREST
Plaintiff-Appellee-Cross-Appellant

v.

SABRE HOLDINGS CORPORATION, SABRE TRAVEL INTERNATIONAL LIMITED
AND SABRE GLBL INC.,
Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 11-CV-02725-LGS

PRINCIPAL BRIEF OF DEFENDANTS-APPELLANTS-CROSS-APPELLEES SABRE HOLDINGS CORPORATION, SABRE TRAVEL INTERNATIONAL LIMITED AND SABRE GLBL INC.
(PAGE PROOF)

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CORPORATE DISCLOSURE STATEMENT

Sabre Holdings Corporation is the parent company of Sabre GLBL Inc. and the indirect parent company of Sabre Travel International Limited. Sabre Corporation, a publicly held corporation, is the parent company of Sabre Holdings Corporation. No publicly held corporation owns 10% or more of Sabre Corporation.

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Sabre Holdings Corporation, Sabre Travel International Limited and Sabre GLBL Inc. (collectively, "Sabre") appeal from the judgment entered by the District Court (Schofield, J.) in favor of Plaintiff-Appellee-Cross-Appellant US Airways, Inc. ("US Airways") on Count I in the amount of $15,294,426, post-trebling, based on the jury's finding that the 2011 agreement between US Airways and Sabre unreasonably restrained trade under Section 1 of the Sherman Act.

PRELIMINARY STATEMENT

This case is about competition for airline ticket transactions among travel technology platforms that connect travel agents (and their customers) with airlines. Sabre—a Global Distribution System or "GDS" that enables travel agents to search for, book and process tickets offered by airlines—is one such platform. Provisions in US Airways' 2011 contract with Sabre ensured that travel agents could use Sabre to search and compare a broad range of flights and fares without being penalized for using Sabre. Although these provisions are critical to Sabre's ability to compete with other booking platforms, US Airways contended that they unreasonably restrained competition.

This case is controlled by United States v. American Express Co. ("Amex"), 838 F.3d 179 (2d Cir. 2016), where this Court recently reversed the district court's finding of anticompetitive harm and ordered judgment for

defendant Amex. There, as here, the defendant operated a two-sided platform that brought together two sets of consumers for each transaction: Merchants who accept Amex cards and cardholders who use them. There, as here, the platform charged fees to consumers on one side (merchants) and provided benefits and incentives to consumers on the other (cardholders). There, as here, the challenged contract provisions were designed to protect competition among platforms by ensuring that defendants' customers on one side of the platform (merchants) did not discriminate against its customers on the other side of the platform (cardholders).

For years, US Airways claimed that the market and the claims at issue in Amex provided a blueprint for this case, which in US Airways' words would "get resolved in the Second Circuit along with the Amex case". Dkt.299 at 3:15-4:6. But just weeks before the October 2016 trial in this case, US Airways' reliance on Amex backfired. This Court reversed the district court, finding that it erred in (1) defining the relevant market to include only one side of the platform (merchants) while ignoring the other (cardholders); (2) concluding that cardholders' "insistence" on using Amex was evidence of Amex's market power over merchants, rather than a product of Amex's continuous investment in and competition for cardholders; and (3) "erroneously elevat[ing] the interests of merchants above those of cardholders" in its anticompetitive effects analysis and

failing to consider Amex's "two-sided price" that accounts for both the merchant fees and the cost of rewards and benefits Amex offers to cardholders). Amex, 838 F.3d at 196-207.

Following Amex, Sabre moved for reconsideration of the District Court's summary judgment ruling and sought additional Daubert briefing. But the District Court denied Sabre's requests, and the trial that ensued was infected by a misapplication of Amex and numerous other errors and failures of proof. Based on these errors, US Airways and its expert convinced the jury to find a Section 1 violation, although the jury rejected almost all of US Airways' claimed damages.

The judgment below should be reversed because no reasonable jury could have concluded the market was "one-sided", as US Airways claimed. Under Amex, the relevant market must include both sides of a two-sided platform[1] if the two sides of the platform are interdependent, that is, if the platform can affect the volume of transactions by charging more to consumers on one side of the platform and reducing the price for consumers on the other. 838 F.3d at 185-86 & n.3. At a minimum, a new trial is required because the District Court allowed US Airways' expert in contravention of Amex to present testimony about a supposed "mature market" exception to two-sided analysis, and then issued erroneous jury

[1] The "platform" is the service provider (i.e., Sabre or Amex) that connects two groups of consumers.

instructions based on that theory. Because the jury verdict rested on an improper one-sided market definition, the judgment below cannot stand.

As in Amex, this market definition error led to further errors with respect to market power and competitive effects. The District Court erred by allowing US Airways to base its market power arguments on travel agent "insistence" on using Sabre because of incentive payments Sabre makes to travel agents to compete for their business. Amex held that, if anything, such paid-for "insistence" shows that a platform lacks market power. 838 F.3d at 202-04. US Airways' competitive effects arguments likewise fell short. As in Amex, US Airways relied on supposed supracompetitive prices but did not present a "reliable measure of the two-sided price charged by [Sabre] that correctly or appropriately accounts for the network's expenses on the [travel agent] side of the platform". Id. at 205 (citation omitted).

Amex aside, at least four more errors in the District Court's rule of reason analysis require reversal. First, in defining the relevant market, the District Court narrowed the market by assuming that the challenged contractual restraints remained in place, even though market definition cannot be based on challenged contracts. Second, no reasonable jury could have concluded that the challenged provisions were anticompetitive because the provisions only prevented discrimination against Sabre and therefore could not exclude efficient competitors.

Third, the District Court improperly lowered US Airways' burden of proof by instructing the jury that Sabre was liable if the challenged provisions had the capacity to harm competition, rather than if they actually harmed competition. Fourth, US Airways' causation theory was chronologically impossible: There could be no causal link between the challenged conduct (provisions in the 2011 agreement) and the alleged injuries (overcharges under the same 2011 agreement) when booking fees were set before the challenged provisions took effect.

Finally, the District Court made several erroneous rulings that independently require a new trial. The District Court refused to instruct the jury on an equal involvement defense, even though US Airways had lobbied for and developed the challenged provisions, and specifically proposed them to Sabre for the 2011 contract. The District Court further erred by excluding evidence about US Airways' "sign-and-sue" strategy, which refuted US Airways' argument that it was coerced into the 2011 agreement. At the same time, the District Court allowed highly charged and irrelevant testimony in rebuttal about other airlines' disputes with Sabre, and allowed stale government statements about Sabre's supposed market power in a different market under different conditions.

Sabre is entitled to judgment because, under Amex and other precedent, US Airways failed to define a proper relevant market, much less show

competitive harm. At the least, the cascading, overlapping errors in legal analysis, jury instructions and evidentiary rulings require a new trial.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 4 and 15. The District Court entered final judgment on March 22, 2017. Dkt.885. Sabre filed a timely notice of appeal from the judgment and all associated orders and opinions on April 5, 2017. Dkt.893. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in its application of Amex, 838 F.3d 179, including the position that there was evidence from which a reasonable jury could find the relevant market was "one-sided", that Sabre had market power and that the 2011 contract had anticompetitive effects, and in its related evidentiary rulings and jury instructions, requiring judgment in favor of Sabre (or in the alternative a new trial).
2. Whether, regardless of Amex, the District Court erred by misapplying the rule of reason analysis, including by allowing the jury to reach a verdict that no reasonable jury could reach based on: A market definition that improperly assumed the existence of the challenged restraints; supposed evidence of competitive harm that could not have been caused by the

challenged provisions; an improper instruction about US Airways' anticompetitive effects burden; and an illogical theory of causation, each requiring judgment in favor of Sabre (or in the alternative a new trial).

3. Whether the District Court committed reversible error by refusing to give an equal involvement defense instruction, and through evidentiary rulings related to Sabre's market power and alleged ability to force US Airways to agree to the challenged provisions, requiring a new trial.

STATEMENT OF THE CASE

On April 21, 2011, US Airways filed a complaint against Sabre asserting four Sherman Act claims: Two under Section 1 and two under Section 2. Dkt.1.

Sabre moved to dismiss all claims. Dkt.39. On September 8, 2011, the District Court dismissed the Section 2 claims (Counts II and III), leaving only the Section 1 claims (Counts I and IV). Dkt.59. For Count I, US Airways alleged in relevant part that the 2011 agreement between Sabre and US Airways was an unreasonable vertical restraint of trade. For Count IV, US Airways alleged a horizontal conspiracy among Sabre and its GDS competitors.

After discovery, Sabre moved for summary judgment. Dkt.194; Dkt.195; Dkt.196. On January 6, 2015, the District Court granted Sabre's motion with respect to claims for certain damages and injunctive relief, including all

claims under the 2006 agreement between US Airways and Sabre, and otherwise denied it. Dkt.245. The District Court later dismissed US Airways' claim for declaratory relief. Dkt.350.

This Circuit decided Amex on September 26, 2016. On October 3, Sabre moved the District Court to reconsider its summary judgment decision in light of Amex on the ground that US Airways' evidence failed under the proper two-sided analysis. Dkt.547. The District Court denied Sabre's motion. Dkt.586. Sabre also asked to submit additional motions to exclude testimony from US Airways' experts in light of Amex, which the District Court denied. Dkt.596; Dkt.641.

An eight-week jury trial began on October 24, 2016. On December 20, the jury returned a verdict for US Airways on the vertical restraint of trade claim (Count I) and for Sabre on the horizontal restraint of trade claim (Count IV). Dkt.720. While US Airways sought approximately $73 million at trial pre-trebling, the jury awarded just $5,098,142 to US Airways, which, after trebling, resulted in an award of $15,294,426. Dkt.885.

As to Count I, Sabre filed a timely motion for judgment as a matter of law or, in the alternative, a new trial (the "Rule 50/59 Motion"). Dkt.805. The District Court denied the Rule 50/59 Motion on March 21, 2017, Dkt.882, and entered an order for judgment the next day. Dkt.885. Sabre filed a timely notice

of appeal on April 5. Dkt.893. US Airways filed a notice of cross-appeal on April 6. Dkt.896.

STATEMENT OF FACTS

A. GDSs and the Travel Distribution Industry.

1. GDSs.

GDSs are two-sided platforms that connect travel agents in real-time with airlines, hotels, car rental companies and other providers to facilitate travel searching and booking. Tr.3015:18-3016:9. Three main GDSs operate in the United States: Sabre, Amadeus and Travelport. Tr.448:6-9. GDSs provide travel agents with a single, integrated system to search for, compare, book and service reservations using a broad array of airline flights and fares, allowing agents to identify the best options to meet the traveler's needs. Tr.3016:17-3018:1. To offer travel agents robust comparison shopping, GDSs like Sabre need access to the full range of an airline's available flights and fares ("full content"). Tr.3018:2-3019:1. As travel agencies testified, they and their customers demand access to as much content as possible. DX-1511.0007-0008 at 115:8-116:15; DX-1513.0009-.0010 at 172:17-173:4, 173:10-14; DX-1519.0019 at 209:17-25. And, as US Airways' expert testified, comparison shopping enabled by full content promotes competition among airlines and has led to lower airfares for consumers. Tr.1048:20-1049:19; Tr.1055:20-1056:9.

2. Federal Regulation and Deregulation of the GDSs.

Airlines originally developed GDSs as in-house computer reservation systems; for example, American Airlines created and ran Sabre. Tr.967:21-968:6. Over time, airlines provided GDS technology to travel agencies to facilitate ticket sales, Tr.971:11-973:17, and offered flights and fares of other airlines to attract agents to their GDS, Tr.977:20-978:2. In the 1980s and 1990s, the federal government began regulating GDSs because of concerns that GDS-owning airlines were leveraging that ownership to harm competing airlines. Tr.981:1-3; Tr.982:12-23; Tr.987:2-10. Federal regulations required "mandatory participation", i.e., GDS-owning airlines (like American) had to provide full content to all other GDSs. Tr.987:11-988:11. Mandatory participation was the predecessor to the full content provisions challenged in this case. PX-523.0097; PX-6.0003.

In early 2004, after the airlines had sold their respective interests in the various GDSs and with new distribution options (such as airline websites) becoming more prominent, the Department of Transportation ("DOT") deregulated the GDS industry and rescinded the mandatory participation rule. The DOT concluded that airlines' sale of their GDS ownership stake eliminated the need for regulation and any remaining GDS market power over airlines would dissipate. PX-7.0002; Tr.996:20-998:12; Tr.3254:2-18. Notably, US Airways unsuccessfully

fought the repeal of the mandatory participation rule, arguing that full content requirements played a "critical role" in "ensuring access for consumers to fare and service information", "leveling the playing field for all carriers" and "preventing future abuse by large carriers". Tr.1119:15-1120:23; DX-91.0016.

3. Sabre's Business After Deregulation.

Once government rules no longer guaranteed access to content or regulated booking fees, Sabre and other GDSs were left to negotiate booking fees and content agreements that would attract both travel agents and airlines to their platforms. Sabre's business model depends on widespread participation on both sides of its platform: Airlines will use a GDS that has more travel agents making more bookings, Tr.1581:8-11, and travel agents will use a GDS that has access to more fares and flights from more airlines, Tr.1584:7-14.

To compete with other GDSs, Sabre must balance the needs of both sets of customers. Sabre negotiates booking fees with individual airlines, Tr.452:19-453:15, and is willing to charge less if airlines agree to provide the comprehensive content that Sabre's travel agent customers demand, DX-14; DX-129.0007; DX-1482.0003. Sabre then uses booking fee revenue to provide volume-based incentives to travel agents to encourage them to use Sabre, not other GDSs or competitors. Tr.1088:19-1089:6; Tr.1584:15-24; Tr.2012:17-2013:8.

Sabre can affect the volume of transactions by charging more to consumers on one side and reducing the price paid by consumers on the other. For example, if Sabre charged higher booking fees and provided more travel agent incentives, more travel agents would make more bookings through Sabre. Tr.1580:10-1581:11; Tr.5532:1-18. By contrast, "[i]f the booking fees that the airlines pay Sabre went down, the incentives to the travel agent would go down" too, which in turn would reduce Sabre bookings for that airline. Tr.1584:22-24; see Tr.1934:12-16. US Airways recognizes the importance of incentives; airlines pay travel agents two to four times more than Sabre pays them. Tr.1408:16-18; DX-1513.0003 at 150:16-25. Because of competitive pressures on Sabre from both sides of its platform, the booking fees Sabre charges airlines have decreased since deregulation, while payments Sabre makes to travel agents have increased. DD-282; DX-3000.

B. US Airways' Agreements with Sabre.

1. The 2005 Agreement.

Following deregulation, most major airlines signed one-year agreements with Sabre "to provide Full Content (all available fares, including internet-only specials) to the GDS in exchange for a 15% reduction in fees". DX-14.0002; see DX-129.0007 (US Airways budget anticipating "[f]ull content agreement", "[i]n return for lower rate"); DX-481.0009 (US Airways presentation

explaining that "[i]n exchange for having access to web fares, GDS provided booking fee discounts").

US Airways worked with Sabre to develop a full content agreement, and was the first airline to sign one. Tr.3140:15-3141:6. US Airways extolled the benefits of the agreement it helped create, explaining that full content solved "discrepancies among the various fares airlines offer online versus more traditional distribution methods . . . by eliminating the barriers and making Web Fares available via all Sabre channels". DX-2524.0004-0005.

2. The 2006 Agreement.

In 2006, again in exchange for reduced fees, Tr.289:7-11, US Airways agreed to similar terms that prevented discrimination against Sabre and its customers on the other side of the platform:

(i) full content provisions, which required US Airways to provide Sabre the same content offered through its website and other channels, PX-5.0002;

(ii) parity provisions, which, like full content, prohibited US Airways from discriminating against Sabre with flight availability, marketing, promotions or benefits, id.;

(iii) no direct connections provisions, which prevented freeriding by prohibiting US Airways from bypassing the Sabre GDS through a "direct connection" between US Airways' reservation system and travel agents (otherwise,

US Airways might ask travel agents to search Sabre but book directly with US Airways to avoid fees), PX-5.0002-0003; and

(iv) no surcharge provisions, which prevented US Airways from imposing certain fees or surcharges on travel agents for using Sabre, PX-5.0009.

These terms were akin to the terms previously required by the Government and fought for by US Airways. DX-91. Together, they promote competition among platforms by ensuring that Sabre can offer comprehensive airline content that attracted travel agents to the Sabre GDS.

Like the 2004 contract, US Airways was "extremely pleased" with the 2006 agreement because, in US Airways' words, it "provide[d] attractive economics to US Airways" and "ensure[d] our most loyal customers will have easy access to our low fares through the distribution channel most convenient for them". DX-96.0001. US Airways told investors that the 2006 agreement was "good for our customers" and "good for us financially". DX-105.0008; see DX-14.0003 (management presentation recommending approval and estimating "$14.1M (17.1%)" annual savings).

3. The 2011 Agreement.

With its Sabre contract up for renewal in 2010, US Airways' internal goal again was to exchange full content for lower fees. PX-116. But US Airways had another goal too. After it signed, it wanted to sue Sabre for supposed antitrust violations based on the provisions it agreed to.

In May 2010, US Airways' lead negotiator told Sabre regarding renewal: "Let me be as clear as possible—US [Airways] is willing to provide Sabre access to full content at parity with other distribution partners. The choice as to whether or not to access such full content is entirely yours." DX-134.0001. In October 2010, US Airways told Sabre that it was "interested in [a] negotiated solution" for "renewal of full content terms", which would be a "win win", but that US Airways would not "accept a rate increase". PX-116.

Having made its desire for full content known, US Airways put a parallel plan in motion. Handwritten notes titled "Sabre—Sign & Sue" taken by US Airways' director of distribution at a December 2010 meeting documented US Airways' strategy to "force Sabre to show that we do not have a rack rate option" (an option in which an airline might agree to pay undiscounted booking fees and in exchange be under no contractual obligation to provide full content).

Dkt.707-7 (DX-147, excluded by the District Court).[2] Days later, US Airways emailed Sabre about the possibility of rack rates, without full content. PX-714.0002. When Sabre wrote back about not wanting rack rates and expressing confusion "given the amount of time we've been in discussions", PX-714.0001, US Airways' officials congratulated themselves and placed the email in the file for litigation, concluding "[t]hat's a keeper", Dkt.707-14 (DX-425, excluded by the District Court). US Airways sent a similar inquiry weeks before the 2006 agreement was set to expire, and Sabre declined to make a non-full content offer given the late date and US Airways' failure to propose any concrete terms. PX-715; Tr.711:13-717:12. Meanwhile, US Airways' internal goal remained full content. DX-2540; DX-2551.

US Airways ultimately reached an agreement to pay Sabre $3.41 per flight segment in 2011 under a full content agreement—the lowest booking fee US Airways negotiated with any of the three major GDSs. DD-293; PX-6.0010. Less than two months after signing the agreement, US Airways sued Sabre, claiming the same provisions it had agreed to were anticompetitive. PX-6.0003-0004, 0027.

[2] As explained below, the District Court erroneously excluded evidence of US Airways' sign-and-sue strategy. Infra at 22-23.

C. US Airways' Amex Blueprint.

US Airways built its subsequent case against Sabre around Amex, in which the United States (and 17 states) had sued Amex over non-discrimination provisions ("NDPs") similar to those at issue here. Amex facilitates transactions between merchants and cardholders, charging fees to merchants while providing benefits and other incentives to cardholders (including rewards for using their Amex card). Amex, 838 F.3d at 189. To ensure Amex can compete with other payment-card networks for transactions, Amex's contracts with merchants contain NDPs that prevent merchants from steering cardholders to another network at the point of sale. The NDPs "aim to increase cardholders' certainty as to whether [Amex's] cards will be accepted and on what terms", which "makes the network more attractive to cardholders", which "in turn . . . makes [Amex] cards more attractive for merchants to accept". Id. at 191-92.

The challenged provisions in this case serve the same function. Just as the NDPs prevent discrimination against Amex, Sabre's full content provisions prevent discrimination that drives travel agents elsewhere or undermines confidence in Sabre. In fact, the challenged provisions in this case provide added competitive benefits: Full content meets consumer demand for transparent comparison shopping, booking and fulfillment, which keeps airline ticket prices competitive. Supra at 9-12; Dkt.245 at 23.

1. The District Court Opinion in Amex.

In 2015, after a seven-week bench trial, the district court found that Amex's NDPs violated Section 1 of the Sherman Act. United States v. Am. Express Co., 88 F. Supp. 3d 143, 238 (E.D.N.Y. 2015). It concluded that even though "[a] payment-card network sits at the center of a two-sided platform . . . the relevant market for antitrust analysis" is only one side of that platform—"the market for 'network services'", not cardholder services. Amex, 838 F.3d at 192. Examining just that side of the platform, the district court concluded that Amex had market power and the NDPs harmed competition. Id. at 192-93.

2. US Airways Modeled Its Case on Amex.

Stressing the similarity in the cases, US Airways adopted the district court's decision in Amex as its model and went to great lengths to obtain an identical outcome. US Airways criticized Sabre for requesting a jury, claiming Sabre was trying to prevent a judge from following the district court decision in Amex, Dkt.304 at 10, and that "this case is going to get resolved in the Second Circuit along with the Amex case", Dkt.299 at 3:15-4:6.

US Airways hired Joseph Stiglitz as its economic expert, claiming he would "provide in this case the same type of testimony that he provided for the

plaintiff [merchants] . . . in the case against AmEx". 6/30/2015 Tr.15:16-20.[3] After all, in Stiglitz's opinion, the challenged provisions in Amex "were similar to and akin to and directly analogous to the contract provisions in this case". Tr.1596:19-1597:4. Meanwhile, US Airways argued that the Amex district court's ruling required exclusion of "irrelevant 'two-sided market' testimony" from Sabre's economist, Dr. Kevin Murphy, "[t]o comport with the law and to avoid confusing the issues". Dkt.389 at 1, 11.[4]

3. Weeks Before Trial, this Court Reversed the District Court in Amex.

Shortly before trial in this case, this Court reversed the district court in Amex, concluding that the relevant market must "encompass the entire multi-sided platform". 838 F.3d at 200 (citation omitted). "Separating the two markets . . . ignores the two markets' interdependence" and "allows legitimate competitive activities . . . to be penalized no matter how output-expanding such activities may be." Id. at 198.

[3] See In re Am. Express Anti-Steering Rules Antitrust Litig. II, 11-md-02221(NGG)(RER) (EDNY) (private litigation brought by merchants against Amex, coordinated (before trial) with the Government action).

[4] In Amex, this Court cited scholarship by Dr. Murphy explaining that provisions like those here improve competition among two-sided platforms. 838 F.3d at 196 n.43.

In holding that the market in Amex was two-sided, the Second Circuit referenced findings directly analogous to the market characteristics here:

- Platforms compete for transactions between two sets of consumers, "the cardholder and a merchant". Id. at 184.
- The two sides of the platform—"[t]he cardholder and the merchant[—]both depend upon widespread acceptance". Id. at 185.
- "[T]he platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board." Id. at 185 n.3 (citation omitted).
- "The interdependency that causes price changes on one side can result in demand changes on the other side." Id. at 186.
- "The revenue earned from merchant fees funds cardholder benefits, and cardholder benefits in turn attract cardholders." Id. at 205.

The district court's erroneous market definition was "fatal to its conclusion that Amex violated § 1". Id. at 196. The faulty market definition

tainted findings of market power (which was based on a theory of cardholder insistence) and anticompetitive effects (which was not based on a calculation of two-sided prices). Id. at 203-04.

4. The District Court Refused To Reconsider Summary Judgment or Permit Renewed Daubert Briefing in Light of Amex.

Following Amex, Sabre moved the District Court to reconsider its denial of summary judgment, explaining that US Airways' claims failed because the market was two-sided. Dkt.547. US Airways abandoned its prior argument that Amex and Sabre were alike and asserted instead—for the first time and contrary to its own expert—that "the credit card market at issue in Amex is nothing like the airline ticket distribution market at issue here". Dkt.566 at 2 (emphasis added). The District Court denied Sabre's motion, reasoning, among other things, that there was a factual dispute as to whether the relevant market was two-sided. Dkt.586; Dkt.579 at 6:4-8:7.

Sabre also asked to file additional Daubert motions because "[p]ermitting US Airways to try a case with expert analysis that does not pass muster under Amex would invite the jury to disregard the Second Circuit's decision and result in prejudicial error". Dkt.569 at 1. The District Court denied Sabre's request. Dkt.596 at 1.

D. Evidentiary Rulings.

A jury trial began on October 24, 2016. Even though the District Court stated that "the central question is whether US Airways was compelled . . . to accept these features of the contract" with Sabre, Tr.5018:16-20—in other words, whether Sabre had market power that it used to force US Airways to agree to the contractual provisions—the District Court systematically excluded Sabre's evidence on this point while permitting US Airways to present prejudicial and irrelevant evidence on market power.

1. The District Court Excluded Evidence of US Airways' "Sign-and-Sue" Strategy.

A centerpiece of US Airways' trial position was its witnesses' claims that they were forced to "acquiesce" and accept Sabre's terms because they "didn't have a choice", Tr.522:24-523:9; that "Sabre had the economic gun to our head", Tr.249:3-10; that "being removed from a GDS was like death", Tr.768:20-769:6; and that Sabre would have bankrupted US Airways if it had not agreed to the challenged provisions, Tr.219:6-16. See Tr.389:11-19; Tr.839:22-840:9; Tr.2260:7-8. Stiglitz furthered that analogy by stating that "if the bargain is a gun is at your head and life or death if you don't go along, then there's market power". Tr.1996:4-9. US Airways argued to the jury: "[A] fair question in this case is, if US Airways didn't want to enter into those contracts, why did it do it twice? . . .

The reason is that it had no choice." Tr.2254:17-22. As evidence, US Airways repeatedly emphasized its made-for-litigation exchanges with Sabre. Tr.522:3-523:9; Tr.3927:1-15; Tr.4478:14-24; Tr.5679:16-25.

In response, Sabre proffered evidence that US Airways wanted to sign a full content agreement and its last-minute posturing was a ploy to set up Sabre for this suit. Supra at 15-16. Despite finding Sabre's arguments "fairly persuasive", the District Court excluded the sign-and-sue evidence. Tr.5012:5-5022:1; Tr.5123:5-5125:6; Dkt.483.

2. The District Court Admitted Testimony About Unrelated Disputes with Other Airlines.

Months before trial began, the District Court correctly excluded all evidence of Sabre's disputes with other airlines because "proof of these prior disputes is not critical to US Airways' case, will open the door to lengthy rebuttal and explanation by Sabre as to the reasons for, and legitimacy of its position in each dispute, and will likely confuse the jury as to whether these other disputes are at issue in this case, when they are not." Dkt.456 at 1-2. The District Court further explained that exclusion was warranted because "providing the jury with evidence and argument of numerous alleged 'prior bad acts'" would unfairly prejudice Sabre. Id. at 2.

Despite that earlier ruling, the District Court allowed US Airways to elicit testimony at trial about Sabre's prior disputes with other airlines. US Airways' witnesses testified that Sabre threatened to and, in some instances, did "bias" certain airlines in the Sabre display, including Northwest, Spirit, Air Canada and United. Tr.190:17-193:7; Tr.493:3-16; Tr.1680:3-1704:8. The Court then permitted US Airways to call two witnesses from other airlines—one never before disclosed—in its rebuttal case on the last day of trial, with no opportunity for Sabre to respond. These witnesses offered precisely the type of testimony about their airlines' disputes that previously had been excluded. See, e.g., Tr.5194:21-23 ("Sabre had big issues with [Northwest's] initiative" to surcharge GDS tickets and would impose "serious consequences if we didn't remove that initiative"); Tr.5201:25-5202:9 ("[Northwest] estimated that during that first week it cost us nearly $50 million in revenue"). Although ostensibly offered to show US Airways' state of mind during negotiations with Sabre, the testimony was not limited to what US Airways knew. Other airlines simply slung mud at Sabre in front of the jury.

Sabre moved for a mistrial, which the District Court denied. Tr.5206:11-5207:22. US Airways repeatedly emphasized these unrelated disputes in its closing argument: "[J]ust in the last 48 hours you've heard from representatives of three companies that Sabre uses . . . market power . . . to force

airlines into full content agreements whether they want to or not. United in 2006; Northwest, 2005; US Airways in 2006, and in 2011." Tr.5666:13-17; see Tr.5665:4-5666:3; Tr.5671:12-5673:12.

3. The District Court Admitted Decades-Old Government Conclusions of Sabre's Market Power Over Airlines.

Over Sabre's objection, the District Court allowed US Airways' industry expert, Daniel Kasper, to testify that the DOT and the U.S. Department of Justice ("DOJ") concluded in the 1980s, the 1990s and again in 2004 that "GDSs have market power over airlines" and charged "higher than competitive booking fees" that "led to higher fares for consumers", and admitted the stale government statements. Tr.982:12-987:1; Tr.996:14-19; Dkt.505; PX-522; PX-523; PX-7.

The government statements were admitted even though the GDS market has significantly changed since the government deregulated the GDS industry in 2004. Other booking platforms, including airline websites and aggregators, have gained ground on the GDSs. By 2011, GDS alternatives were responsible for over half of all U.S. airline bookings. DD-298. Meanwhile, airlines' own bargaining power has strengthened after a number of large airline mergers. Tr.797:3-7.

The District Court allowed the government statements because they might provide industry "context and history", Dkt.505 at 2, but US Airways'

expert instead described the statements as official Government determinations that the GDSs had market power and that their practices were anticompetitive. Notably, during deliberations, the only hard copy exhibits the jury requested were the 2006 and 2011 agreements between US Airways and Sabre and the 2004 DOT statements about market power. PX-7; Tr.5811:7-17.

E. Jury Instructions.

Market Definition. In accordance with Amex, Sabre asked the District Court to instruct the jury that the market is two-sided if a change in the price or content on one side of a platform (i.e., Sabre) would affect demand on the other side of the platform. See, e.g., Amex, 838 F.3d at 186 (discussing interdependency in the context of a particular card). Specifically, Sabre requested that the Court instruct the jury:

> "[F]or US Airways to prove that the market in this case is not a two-sided market, it must show that a GDS operator like Sabre cannot increase the overall number and value of airline tickets it sells by paying incentives to travel agents on the one side of the market and charging airlines a fee on the other to cover the cost of those incentives." Dkt.684 at 14 (emphasis added).

See Tr.5454:15-24. But over Sabre's objection, the District Court instructed that two-sided interdependency relates to the market overall, not platforms within the market: The jury was told that two-sided analysis applies only if "a change in

price on one side of the market affects demand on the other side". Tr.5626:19-22 (emphasis added).

Competitive Harm. Sabre argued that MacDermid Printing Solutions LLC v. Cortron Corp., 833 F.3d 172 (2d Cir. 2016) required US Airways to show the challenged provisions caused actual harm to competition. Dkt.514 at 7-8. Over Sabre's objection, the District Court incorrectly instructed the jury that Sabre could be liable if it had market power and the provisions had "the capacity to harm competition". Tr.5627:25-5628:5 (emphasis added).

Equal Involvement Defense. Sabre requested that the District Court instruct the jury on an equal involvement defense, which applies when plaintiffs are substantially equal participants in the challenged conduct. Sabre had presented evidence that US Airways willingly offered, accepted and benefited from the challenged provisions. US Airways also has a long history of proposing and supporting full content. Supra at 10-16. The District Court refused to issue an equal involvement instruction, ruling that it was categorically unavailable and that Sabre had not presented evidence supporting such a defense. Tr.5360:9-5366:13. The District Court instructed that "[i]t is irrelevant for the purpose of determining antitrust injury whether US Airways knew the terms were anticompetitive, agreed to them voluntarily, or used them to obtain other concessions". Tr.5632:19-22.

F. The Verdict Form and Jury Verdict.

Reasoning that "the state of the law is somewhat in flux" and "the last thing I want to do is try it again, if that is at all avoidable", the District Court decided sua sponte, and over Sabre's objection, to present the jury with "hypothetical questions" about two-sided market analysis. Tr.5434:2-5435:14; Tr.5769:6-5770:24. The jury was instructed:

> "[I]f you found for the contract claim that the market was one-sided, then you should assume for these questions that the market is two-sided. On the other hand, if you found that the relevant market was two-sided, then you should assume that it is one-sided for these questions. And the questions are basically the same questions, just with a different assumption as to whether the market is one-sided or two-sided." Tr.5795:3-5796:2.

The jury found the relevant market was one-sided and Sabre was liable, although it awarded US Airways a small fraction of what it had requested. Dkt.720. Having already deliberated for four days, the jury's responses to the hypothetical questions mimicked its responses to the real questions. Id.

SUMMARY OF ARGUMENT

The District Court erred at every step of the rule of reason analysis. In both the credit card and GDS markets, two-sided platforms compete for transactions, which requires attracting and maintaining consumers on both sides. Because consumers on each side demand widespread adoption on the other side, the platforms' price structure matters, and fees charged to one side of the platform pay for incentives and other benefits that attract and retain participants on the other. Based on these shared market dynamics, Amex required a two-sided analysis, and US Airways' proposed one-sided market definition failed. Part I.A.

As in Amex, failure to apply a two-sided market definition infected the rest of the rule of reason analysis. Any supposed market power over consumers on one side of the market (airlines) was the result of customer preference (or "insistence") by consumers on the other side (travel agents). If anything, insistence showed that Sabre lacked market power because Sabre was required to continue investing in the travel agent side of the platform to compete for business. Part I.B. The District Court's analysis of competitive harm also was faulty. US Airways did not present any reliable calculation of a two-sided price, and the challenged provisions undisputedly improved GDS quality by ensuring access to full content. Part I.C.

Amex aside, the District Court made additional mistakes in its rule of reason analysis that require judgment for Sabre or a new trial. US Airways' proposed market failed to include available substitutes because it wrongly (and circularly) assumed the existence of the challenged contractual restraints. Part II.A. The District Court also erred in finding sufficient evidence of anticompetitive effects because the challenged provisions are incapable of harming competition. Part II.B. The District Court further erred because its anticompetitive effects instructions mischaracterized US Airways' burden. Part II.C. In addition, US Airways' theory of causation was circular and logically incoherent. Part II.D.

Finally, the District Court made a series of prejudicial errors that require a new trial. The District Court improperly refused to instruct the jury on Sabre's equal involvement defense. Part III.A. The District Court further erred in rulings on evidence related to what it termed a "central question" of whether Sabre "compelled" US Airways to sign the 2011 agreement. The District Court wrongly excluded evidence of US Airways' sign-and-sue strategy and then allowed irrelevant, unduly prejudicial testimony regarding Sabre's disputes with other airlines and stale government statements about Sabre's market power. Part III.B.

STANDARD OF REVIEW

This Court applies de novo review to the denial of Sabre's Rule 50/59 Motion, which should be granted if a court, viewing the evidence in the light most favorable to the non-movant, concludes that a reasonable juror would have been compelled to accept the view of the moving party. MacDermid, 833 F.3d at 180 (reversing denial of antitrust defendants' post-verdict motion for judgment as a matter of law).

Errors in jury instructions also are reviewed de novo. Bank of China, N.Y. Branch v. NBM LLC, 359 F.3d 171, 176 (2d Cir. 2004). Rulings admitting or excluding evidence, including expert witness testimony, are reviewed for abuse of discretion. Nimely v. City of New York, 414 F.3d 381, 392-93 (2d Cir. 2005). Errors in evidentiary rulings or jury instructions require reversal where, either individually or collectively, they likely had an effect on the outcome. Cweklinsky v. Mobil Chem. Co., 364 F.3d 68, 77 (2d Cir. 2004) (when an appellate court cannot "determine with certainty that the district court's erroneous instruction did not affect the jury's verdict, [it] cannot deem that error harmless"); Phoenix Assocs. III v. Stone, 60 F.3d 95, 105 (2d Cir. 1995) (reversing based on the "cumulative effect" of "three erroneous evidentiary rulings").

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO APPLY AMEX.

The judgment under Section 1 of the Sherman Act was based on rulings that are irreconcilable with Amex. The challenged provisions are vertical agreements analyzed under the rule of reason. See Amex, 838 F.3d at 195-196; Dkt.882 at 6. A plaintiff bears the initial burden to define a relevant market and to demonstrate that challenged behavior "had an actual adverse effect on competition as a whole in the relevant market". Amex, 838 F.3d at 194 (citation omitted). The relevant market must be defined to include all products "reasonably interchangeable by consumers for the same purposes", in a way that "identif[ies] the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output" and "encompass[es] the realities of competition". Id. at 196-97 (citations omitted). Here, the jury verdict was based on a legally insufficient one-sided market definition. This Court should reverse the judgment or order a new trial.

As in Amex, the erroneous market definition also meant US Airways failed to present sufficient evidence of harm to competition as a whole. "[A] plaintiff may offer direct evidence of harm to competition by proving higher prices, reduced output, or lower quality in the market as a whole." MacDermid, 833 F.3d at 182. "Alternatively, a plaintiff may demonstrate an adverse effect

indirectly by establishing that the alleged conspirators had sufficient 'market power' to cause an adverse effect, 'plus some other ground for believing that the challenged behavior has harmed competition.'" Id. (citation omitted). Under either method, US Airways failed to demonstrate that the challenged provisions "made all [Sabre] consumers on both sides of the platform—i.e., both [airlines] and [travel agents]—worse off overall." Amex, 838 F.3d at 205.

A. Sabre Was Entitled to Judgment Because the Relevant Market Is Two-Sided.

US Airways argued that the relevant market is one-sided and includes only "the airline side", without "the travel agent side", Tr.5626:5-12, but the market is indisputably two-sided under this Court's decision in Amex.

US Airways therefore failed to prove its proposed relevant market and Sabre was entitled to judgment in its favor. City of New York v. Grp. Health Inc., 649 F.3d 151, 155-56 (2d Cir. 2011) (judgment for defendant should be entered when "the market alleged" by the plaintiff "is legally insufficient").

1. The Market Is Indisputably Two-Sided Under the Second Circuit's Decision in Amex.

US Airways repeatedly argued—before the Second Circuit decision in Amex—that the markets in Sabre and Amex were essentially the same and that "this case is going to get resolved in the Second Circuit along with the Amex case". Dkt.299 at 3:22-24. US Airways described the Amex district court opinion

as "relevant and useful authority" because of "the similarity in the two cases". Dkt.219 at 1. Even at trial, Stiglitz testified that the "credit card market is a two-sided market from which a useful comparison to the GDSs can be made" and that the provisions in Amex "are akin to and analogous to the provisions in this case". Tr.1593:11-1599:10.

Amex was based on findings that US Airways' expert admitted also describe the market here: (1) a platform brings together two sets of consumers simultaneously for a transaction, with the platform's products consumed in fixed proportions by consumers on both sides;[5] (2) demand on each side of the platform depends on widespread adoption by the other side;[6] (3) price structure matters on both sides of the platform;[7] and (4) fees on one side of the platform fund incentives

[5] 88 F. Supp. 3d at 155; Tr.1559:24-1560:4 (GDSs "provide travel agents the ability to search and book air travel on participating airlines by linking the airlines and travel agents").

[6] 838 F.3d at 185-86; Tr.1584:7-14 ("[I]f Sabre didn't have full content, you could have a po[r]tion of travel agents switching business away from Sabre"); Tr.1581:18-1582:15 ("US Airways gets value from Sabre by having more travel agents on Sabre"; "if Sabre had one travel agent on it, US Airways wouldn't care about using Sabre").

[7] 838 F.3d at 185-86 & n.3; Tr.1580:10-13 ("[T]he more incentives that Sabre . . . pays, the more bookings they attract to their . . . particular platform"); Tr.1581:8-11 ("[T]he more travel agents that Sabre has on its platform, the more benefit to US Airways of using the Sabre platform").

that attract consumers on the other.[8] As in Amex, the Sabre GDS competes with other platforms for transactions that bring two interdependent sides together. Thus, the relevant market must be defined as "a single platform-wide market for transactions". Amex, 838 F.3d at 197 (citation omitted).

a. The Judgment Rests on an Unprecedented "Mature" Market Theory That Would Effectively Overrule Amex.

Despite the undisputed similarity between the markets in this case and Amex, the District Court allowed US Airways' expert to contradict this Court by testifying that the two-sided market analysis required by Amex does not apply when the market is "mature". Stiglitz asserted that two-sided price effects worked only as "introductory offer[s]" and that once "the market is fully developed" and consumers on both sides are "all linked", the market "cease[s] being a two-sided market" because "there's not the growing of the market. That's the core of the two-sided interdependence." Tr.1374:14-1377:9. Stiglitz claimed that the GDS market is a "mature market" because "essentially every travel agent is linked to US Air through one or the other of the GDSs". Tr.1375:22-1376:10. Stiglitz then

[8] 838 F.3d at 186; Tr.1338:10-15 (travel agents use Sabre in significant part because of "incentive pay that they get every time they make a booking"); Tr.1584:15-18 (travel agent incentives "are funded by and come from the booking fees from the airlines"); Tr.1584:22-24 ("If the booking fees that the airlines pay Sabre went down, the incentives to the travel agent would go down"); Tr.5536:13-5537:1 (travel agents, "if faced with lower incentives, might start using a different mix of channels").

testified, and the District Court credited, that "the relevant market . . . was one-sided, even though Sabre and the other GDSs are two-sided platforms". Dkt.882 at 15.

This "mature market" theory cannot be squared with Amex, which held that the relevant market must include both sides of a two-sided platform when price structure affects volume on both sides of that platform. 838 F.3d at 185-86 & n.3. Even for supposedly mature markets, there are many reasons why "profit-maximizing prices may entail below-cost pricing to one set of customers over the long-run". David S. Evans & Richard Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, Competition Policy Int'l 151, 152 (Spring 2007) (cited in Amex). Critically, in a market composed of multiple platforms like GDSs, each platform competes with others to expand its consumer base, whether or not the market as a whole is growing. Tr.5098:4-5100:11. In a recent amicus brief asking the Supreme Court to review and reverse Amex, Stiglitz conceded that competition among platforms is what matters: "The important economic point is that in two-sided markets, the relevant competition occurs at the platform level (i.e., competition among the credit card companies)." Brief for Amici Curiae Connor et al. at 11, Ohio v. Am. Express Co., No. 16-1454 (U.S. July 6, 2017) ("Stiglitz Amicus"); see id. at 2 ("With two-sided platforms, pricing on one side of

the platform impacts demand on the other. . . ."); id. at 3 ("The price competition is on each side of the platform.").

Competition among platforms was a central basis for the decision in Amex: Platforms use feedback effects to "compete[] fiercely" with each other, 838 F.3d at 190, whether or not the market is expanding to new consumers. Thus, if two-sided platforms within a market have feedback effects, the market definition must be two-sided, regardless of "maturity".[9] Amex makes it clear: If antitrust law instead failed to recognize platforms' need to compete on both sides, it could chill rather than promote competition. Id. at 204 n.51 ("The relief sought by the government in this case could even increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit.").

Here, Stiglitz conceded that there was competition among GDS platforms and that Sabre's two-sided platform "can be expanded" using feedback effects. Tr.5532:19-5534:10. If Sabre lacked full content, "you could have a po[r]tion of travel agents switching business away from Sabre", benefiting GDS

[9] See 838 F.3d at 185 n.3 ("A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount . . . ." (citation omitted)); id. at 202 ("In order to remain competitive on the cardholder side of the platform, a payment-card network might need to increase cardholder rewards . . . .").

competitors at Sabre's expense. Tr.1584:7-14. Indeed, Stiglitz admitted that, "[i]f Sabre alone were a market, it would be two-sided". Tr.5532:19-25.

The mature market theory is also unsupportable because, by Stiglitz's own admission, feedback effects in the GDS market ensure that GDSs must continue paying travel agency incentives to retain customers that might otherwise leave a GDS platform. For example, Stiglitz testified that travel agents, "if faced with lower incentives, might start using a different mix of channels" such that a reduced "portion of the bookings go to the GDS versus . . . for instance, a direct channel", like an airline website, which would affect the value of GDSs to airlines. Tr.5536:19-5537:3.

Stiglitz concedes that the mature market theory and Amex are incompatible. At trial, he testified that the "credit card market was a mature market" too, Tr.1599:8-10, and therefore, to him, not two-sided, despite this Court's holding that the market in Amex is two-sided, 838 F.3d at 200. Stiglitz has argued to the Supreme Court that Amex was wrong because "Amex's credit card network is a mature business" and "[t]here is no evidence that significant two-sided externalities remain". Stiglitz Amicus at 7. Stiglitz even cited the District Court's reliance on the mature market theory in this very case as a model for reversing Amex. See id. at 5-7 & n.4. In sum, Stiglitz simply "disagree[s]" that "the appellate court w[as] correct that different and new economic analysis is

required in two-sided markets", and the mature market theory is his latest effort to overturn Amex. Id. at 9.[10] The jury's verdict and the District Court's decision depended on the mature market theory. Its proponent has left no doubt that the theory—and the District Court's decision—cannot be reconciled with Amex.

b. Stiglitz's "Maturity" Opinion Had No Factual Foundation.

Even if Amex did not foreclose the mature market theory, Stiglitz's testimony should have been excluded because he had no "facts or data" to support his conclusion that the GDS market is mature. Fed. R. Evid. 702(b). Stiglitz admitted that price incentives can encourage consumers to use a platform more frequently, even if the number of consumers remains the same. For example, incentives defray costs of using a travel agency, causing more travelers to book more flights through agencies and GDSs. Tr.5535:6-5536:18. Stiglitz also had no basis for opining that the travel agent population was frozen because he did not study entry into the market. He conceded that incentives "might actually encourage people to enter the travel agency business", but he "didn't look at that".

[10] Ironically, in amicus briefs before the Second Circuit and the Supreme Court, Stiglitz used a platform just like a GDS (connecting hotels and travelers) to illustrate the "essence of a two-sided market". Brief for Amici Curiae Connor et al. at 3, Amex, No. 15-1672 (2d Cir. Nov. 14, 2016) (ECF No. 404); see Stiglitz Amicus at 10-11.

Tr.1578:3-1579:12. Stiglitz also did not consider that less than half of all airline bookings are made using GDSs, leaving plenty of room for growth. DD-298.

2. The Market Definition Errors Require Reversal.

Stiglitz never should have been permitted to testify about his "mature" market theory, and did so only through a series of reversible errors. The District Court erred in refusing to reconsider its summary judgment decision in light of Amex. Dkt.586. The District Court further erred in refusing to allow renewed Daubert motions in light of Amex, Dkt.569 at 1; Dkt.596, and then allowing Stiglitz to present prejudicial, baseless "mature market" testimony that confused the relevant market analysis. Stiglitz's testimony related to a central issue in the case, on which a verdict could not otherwise be supported, and requires judgment as a matter of law. See, e.g., Weisgram v. Marley Co., 528 U.S. 440, 455-56 (2000).

Over Sabre's objection, the District Court instructed the jury that two-sided analysis applies only if "a change in price on one side of the market" as a whole—as opposed to a particular GDS platform competing in that market—"affects demand on the other side". Tr.5626:19-22 (emphasis added); see Dkt.716. Amex made clear that a two-sided definition is necessary "if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount". 838 F.3d at 185 n.3

(emphasis added) (citation omitted); see id. at 186 (analyzing interdependence for a particular card). Even Stiglitz told the Supreme Court that "the relevant competition occurs at the platform level". Stiglitz Amicus at 11. There is also no dispute that the Sabre platform is a two-sided platform in which increased airline participation increases travel agency demand and vice versa. Stiglitz expressly conceded as much. Tr.5533:19-23. The Court's instruction was clearly erroneous on a critical issue, and US Airways failed to introduce sufficient evidence to meet its burden of proof. Thus, reversal, or at a minimum a new trial, is required.

Finally, the District Court erred in denying Sabre's Rule 50/59 Motion because no reasonable jury could have found that the market was one-sided under Amex. US Airways' proposed market definition was legally insufficient and Sabre was entitled to judgment, or at the very least a new trial. See Grp. Health Inc., 649 F.3d at 155-56.

3. Hypothetical Questions on the Verdict Form About a Two-Sided Market Only Compounded the District Court's Error.

The District Court decided sua sponte to add what it told the jury were "hypothetical questions" regarding two-sided analysis to the verdict form, Tr.5795:3-5796:5, because the District Court believed the law on two-sidedness was "somewhat in flux" and "the last thing I want to do is try [the case] again", Tr.5434:2-5435:14. See Tr.5769:6-5770:24; Dkt.720 at 4.

Hypothetical, nonbinding questions are irrelevant and cannot form the basis for a legitimate jury verdict or act as any sort of cure-all. See Castle v. Sangamo Weston Inc., 837 F.2d 1550, 1560-61 (11th Cir. 1988) (rejecting hypothetical, alternative jury findings as "advisory", even though "the district court's procedural maneuvers . . . were all designed to promote judicial economy"). The jury was instructed to answer the hypothetical questions after it made its liability findings, and thus after the jury knew the case had been decided. "[I]f it is understood that the jury is deciding a moot question, some jurors . . . may be less insistent and persistent in urging their own views than they would be" if the issue were not "merely an intellectual exercise in the theoretical evaluation of a claim". Romer v. Baldwin, 317 F.2d 919, 923 (3d Cir. 1963). It is no surprise that the jury simply mimicked its responses on these questions.

In addition, the hypothetical market definition questions "must be read in conjunction with the district court's charge". Romano v. Howarth, 998 F.2d 101, 104 (2d Cir. 1993) (citation omitted). The jury's answers to the hypothetical two-sided questions were tainted because the instructions inaccurately described two-sided analysis under Amex. Together, the hypothetical questions and instructions served only to "mislead and confuse the jury" and "inaccurately frame the issues to be resolved". Id. (citation omitted). Answers to the hypothetical questions are at best irrelevant and cannot avoid a retrial.

B. As in Amex, Any Evidence of Market Power Failed Because It Was Based on Travel Agency Insistence.

US Airways failed to show indirect evidence of harm to competition because, as in Amex, it impermissibly relied on travel agent "insistence" as the basis for supposed market power. 838 F.3d at 203. In Amex, "insistence" described individuals "who insist on paying with their Amex cards" due to "cardholder rewards" that create "customer loyalty". Id. at 202. This Court recognized that a platform's need for "continuing investment" in incentives for consumers on one side "indicates, if anything, a lack of market power". Id. at 203. "A firm that can attract customer loyalty only by reducing its prices does not have the power to increase prices unilaterally." Id. Indeed, the insistence theory fails under one- or two-sided analysis because, in either case, competitive realities limit the platform's market power: "[S]o long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene". Id. at 204. Here, as in Amex, the fact that Sabre was required continually to pay travel agency incentives demonstrates a lack of market power. See Tr.5536:13-5537:1 (Stiglitz testifying that agents would stop using GDSs if "GDSs stopped paying incentives"); PX-1095 (Sabre's incentive payments to the four largest U.S. travel agencies

increased substantially from 2006 to 2012). Sabre is therefore entitled to judgment in its favor.[11]

Even if Sabre were not entitled to judgment, a new trial is certainly required because the District Court permitted US Airways to argue for and present evidence of market power based on travel agent incentives. In its opening statement, US Airways emphasized that "the big reason why Sabre travel agents are so loyal to Sabre" is that "[i]t pays them". Tr.56:9-10. Stiglitz characterized Sabre's incentives as "sharing the monopoly profits", and a "vicious circle" that "reinforces market power". Tr.1259:13-19; Tr.1272:22-1275:17; Tr.1347:4-8; Tr.1379:17-23; Tr.1505:2-5; Tr.1521:7-12; Tr.1535:6-10; Tr.1584:15-21; Tr.1604:24-1605:2; Tr.1935:17-24; Tr.1952:13-16. In closing argument, US Airways reiterated that Sabre "is a company that spends more paying travel agents to stay loyal to its platform than it does on technology". Tr.5657:3-5. Stiglitz tried to avoid the term "insistence", but agreed that he used "the same explanation" of market power as in Amex. Tr.1598:1-1599:10. Because US Airways relied on this faulty legal theory, the error is not harmless and a new trial is required. See Rotolo v. Dig. Equip. Corp., 150 F.3d 223, 225-26 (2d Cir.

[11] US Airways also did not meet its burden through indirect evidence because, as explained below, it presented no ground for believing the challenged provisions harmed competition. As in Amex, the provisions "increased rather than decreased competition overall". 838 F.3d at 206; infra at 51-53.

1998) (ordering new trial where it is possible the judgment was "substantially swayed by improperly admitted evidence").

C. As in Amex, the Erroneous Market Definition Caused an Erroneous Anticompetitive Effects Analysis.

US Airways also failed to show direct evidence of harm to competition—through supracompetitive prices or decreased quality—because US Airways did not establish that the challenged provisions made consumers "on both sides of the platform . . . worse off overall". Amex, 838 F.3d at 205 (citation omitted).

1. Supracompetitive Prices.

US Airways did not present any "reliable measure of the two-sided price charged by [Sabre] that correctly or appropriately accounts for the network's expenses on the [travel agent] side of the platform". Id. Before trial, US Airways' experts ignored the travel agent side of the market.

At trial, testimony from US Airways' experts confirmed that Sabre's two-sided prices were competitive. US Airways' experts calculated a "reasonable profit booking fee" that supposedly measured Sabre's cost of production plus a "normal" return on capital. Tr.1602:5-1603:15. Originally, contrary to Amex, US Airways' experts excluded the cost of travel agent incentives from this calculation. Tr.1603:16-1605:5. Sabre demonstrated at trial that, after accounting

for travel agent incentives, Sabre's fee for large domestic "legacy" carriers like US Airways matched what US Airways called a normal return. Tr.4931:11-4934:25 ("[W]hat you get is . . . essentially the same number."); Tr.1973:8-13 (Stiglitz agreeing that the "reasonable profit booking fee is actually a little bit higher than the average booking fee for the US point of sale legacy airlines"); see MacDermid, 833 F.3d at 184 ("To prove an actual adverse effect on price, a plaintiff must show just that—that prices actually increased.").

In an attempt to account for Amex, US Airways' experts offered at trial a new, previously undisclosed opinion about Sabre's net fee, but that calculation was fundamentally flawed because it was driven by data drawn from outside US Airways' own proposed relevant market. The last-minute calculation included data from all of North America, not just the relevant geographic market of the United States, Tr.1976:14-16, and from hotel and car rental bookings, which are outside the relevant product market, Tr.1899:20-23. In addition, the new calculation was not limited to the major legacy carriers, even though Stiglitz opined that the "important" airlines for his analysis were "all the major airlines, all the legacy airlines", not "some of the smaller airlines", over which Sabre did not have market power. Tr.1932:15-1933:7. Stiglitz testified that he did not know which, if any, non-legacy airlines paid higher booking fees or had full content agreements, Tr.1968:1-2; Tr.5557:12-18, but the new calculation nonetheless

included all airlines, large and small, with and without full content deals. Tr.1962:20-25. As in Amex, US Airways failed to meet its burden of presenting a reliable measure of the two-sided price in the relevant market. In fact, the evidence made clear that Sabre's two-sided price was competitive.

2. Decreased Quality.

Alternatively, US Airways argued that "the GDS's tools were technologically inefficient and outdated". Dkt.882 at 24. US Airways failed to include in its analysis the needs and demands of both sides of the market, once again ignoring the travel agent side of the Sabre platform.

US Airways' expert conceded that GDS technology is the "most efficient way for agents to search and book tickets". Tr.2062:21-23; see Tr.1452:4-1453:22; Tr.2064:7-11. After all, GDS products were designed to meet, and satisfy, travel agents' needs. DX-812.0001 (internal travel agency correspondence explaining that "so called GDS Alternatives lack the content", "the reach", "the promised technology" and "the data integration" of the GDSs); Tr.4586:14-4593:10; Tr.4604:16-4605:14; Tr.4620:21-4626:16; Tr.4773:18-4774:19; Tr.4777:3-15.

Evidence also established that Sabre invested heavily in developing its technology to meet travel agents' needs. Tr.1452:4-1453:22 (Stiglitz conceding "Sabre continues to invest hundreds of millions of dollars in its technology every

year"); Tr.4611:1-4612:9; Tr.4788:17-4789:24; DX-1520 at 282:19-284:2 (travel agency testimony that "[o]ne of the great benefits of a GDS is they have spent hundreds of millions of dollars to create a system that accesses tens of millions of fares and can quickly go through them based upon a request to find those fares that are most accurate and available for the request").

Moreover, US Airways failed to introduce any evidence that supposed technological limitations of Sabre's GDS, even if they existed, were caused by the challenged contractual provisions. In fact, the challenged provisions greatly improved product quality. Even the District Court at summary judgment recognized the undisputed fact that the challenged full content provisions "result in a better or more efficient product to meet consumer demand . . . because consumers can more easily find the best flight for their needs and can comparison shop more easily". Dkt.245 at 23. Thus, as in Amex, the "services have significantly improved in quality" because of the challenged provisions. 838 F.3d at 206; see Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-55 (1977). US Airways "failed to provide sufficient proof that [the challenged conduct] had, in fact, resulted in any decrease in the quality of service". Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 96 (2d Cir. 1998).

II. REGARDLESS OF WHETHER THE MARKET IS ONE- OR TWO-SIDED UNDER AMEX, THE DISTRICT COURT ERRED BY FUNDAMENTALLY MISAPPLYING THE RULE OF REASON.

A. US Airways' Market Definition Improperly Assumed the Existence of the Challenged Provisions.

Markets are defined by reference to functional substitutes, without regard to a plaintiff's contractual constraints. Where the only barrier to substitution "stems not from the market but from plaintiffs' contractual agreement", "no claim will lie"; therefore, "a court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." Smugglers Notch Homeowners' Ass'n v. Smugglers' Notch Mgmt. Co., 414 F. App'x 372, 376-77 (2d Cir. 2011) (summary order) (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997)). In fact, "no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff". Queen City Pizza, 124 F.3d at 438; see also Hack v. Presidents & Fellows of Yale Coll., 237 F.3d 81, 85 (2d Cir. 2000) ("Economic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for [an antitrust] claim.").

US Airways' proposed market—GDS services linking airlines with traditional travel agents—was improper because it assumed the existence of the challenged contractual restraints. Tr.5625:20-23. Stiglitz testified that he sought to define "a relevant market with the constraints in place", and conducted no analysis free from the contractual provisions. Tr.1364:20-1365:8. Stiglitz excluded GDS substitutes, like Kayak (an aggregator) and airline websites, because he believed the challenged provisions limited the airlines' ability to switch to these alternatives, even though, without the challenged provisions, "there probably would be enough substitution that [bookings over the web] would be a competitive constraint". Tr.1364:20-1365:8; see Tr.1282:7-12. If the contractual provisions are disregarded, as the law requires, there is no dispute that the relevant market is far broader than US Airways argued.

The District Court misunderstood and misapplied the Queen City Pizza line of cases, reasoning that it was proper to assume the existence of challenged contractual provisions because US Airways presented "evidence that it had no choice but to accept Sabre's contractual terms because of Sabre's economic market power". Dkt.882 at 13. The District Court's reasoning is entirely circular because it relied on alleged market power in a GDS-only market to find that US Airways had "no choice". For example, the District Court reasoned that US Airways had been forced into the contract because "Sabre had over 50% of the

bookings made in the GDS market". Dkt.882 at 13. This point begins and ends with the assumption that a GDS-only market was proper, even though the purpose of defining a market is to set the parameters for evaluating market power and anticompetitive effects.[12]

The judgment below should be reversed because US Airways failed to meet its burden to prove its proposed relevant market, and made no attempt to prove anticompetitive harm in the broader non-GDS market. See Amex, 838 F.3d at 205-06.

B. Under Any Market Definition, Sabre Was Entitled to Judgment Because Full Content Provisions Cannot Harm Competition.

A plaintiff bears the burden of demonstrating that the defendant's challenged conduct harmed competition. MacDermid, 833 F.3d at 182. A contractual provision that is not exclusionary does not harm competition. The antitrust laws allow competitors to "do as well as they can" with their business and do not provide an "'umbrella' under which less efficient firms could hide from the stresses and storms of competition." Ne. Tel. Co. v. AT&T Co., 651 F.2d 76, 87, 93 (2d Cir. 1981). The antitrust laws are concerned with conduct that excludes equally efficient competitors, not with providing advantages for less efficient

[12] The District Court's reasoning also highlights the significant prejudice caused by the exclusion of sign-and-sue evidence, which would have rebutted US Airways' argument that it had "no choice" in signing the contract. Infra at 59-61.

competitors that otherwise could not compete. Id. at 87; see Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 466-67 (S.D.N.Y. 1996).

The provisions at issue were not exclusionary. A US Airways official testified that full content provisions only required US Airways to provide Sabre "equal content, the same content", that "[t]here are no restrictions in my Sabre agreement about me providing content to somebody else", and that "nothing in the [Sabre] contract prevents [competitors] from investing in their product and competing on the basis of the merits of their product". Tr.631:25-632:8; Tr.633:1-4; Tr.636:4-9. Stiglitz agreed that there is "nothing in the contract that prevents a competitor from coming into the market, having better technology, better service, matching the incentives that Sabre pays to the travel agencies, with all of the same content." Tr.1468:22-1469:2; accord Tr.1396:8-1399:1. US Airways' only complaint was that US Airways could not "put Sabre at a disadvantage" by providing special benefits or content to steer sales to a competitor. Tr.1293:15-25; Tr.1466:13-21. But that argument underscores that full content cannot harm competition because, as Stiglitz admitted, all "efficient" competitors are free to "compete on price or quality", Tr.1559:3-5; see Tr.4907:8-23.

Amex again is instructive because this Court found that very similar provisions improved, not harmed, competition, and had "no monopolistic danger". 838 F.3d at 204; id. at 206 ("Amex's [business] model, supported by its NDPs, has

increased rather than decreased competition overall within the credit-card industry."). Here, too, undisputed evidence shows that full content provisions prevent airlines from impeding competition by discriminating against efficient distribution channels. Tr.1468:6-10 (Stiglitz testifying "[i]t is advantageous" to have "all the different airlines' content, all the flights and fares in one place, like Sabre provides . . . because it reduces the cost to the travel agent of shopping for travel"). In 2003, US Airways shared this concern, warning the DOT that removing full content regulations, as requested by "the 'larger airlines' (namely, Delta, American, United, and KLM) . . . would have grave anti-competitive consequences for the non-larger carriers and all consumers". DX-91.0002, 91.0016. US Airways (merged with American) is now itself a very large carrier, but the nature of full content has not changed.

Sabre is entitled to judgment because US Airways failed to present sufficient evidence that full content provisions harmed competition.

C. The District Court's Instruction Improperly Lowered US Airways' Burden To Prove Anticompetitive Effects.

The District Court also improperly instructed the jury as to the proper competitive effects analysis under MacDermid, which requires plaintiff to demonstrate actual harm to consumers. 833 F.3d at 182. Clarifying prior decisions, this Court held that a plaintiff could not meet its burden by showing that

conduct "could harm" or "will harm" competition. Id. Instead, this Court's "cases have always required, as a practical matter, some evidence that the challenged action has already had an adverse effect on competition." Id. Whether a plaintiff relies on "direct" or "indirect" evidence, "there is really only one way to prove an adverse effect on competition under the rule of reason: by showing actual harm to consumers in the relevant market." Id.

The District Court erroneously instructed the jury that US Airways could meet its burden through indirect evidence by showing market power and a ground for believing that Sabre's conduct had "the capacity to harm competition". Tr.5405:22-5406:14; Tr.5627:25-5628:5. By instructing the jury to consider potential, not actual, harm, the District Court improperly lowered US Airways' burden of proof, which requires a new trial. See, e.g., Bank of China, 359 F.3d at 176 ("If an instruction improperly directs the jury on whether the plaintiff has satisfied [its] burden of proof, it is not harmless error . . . and a new trial is warranted.").

D. US Airways' Causation Theory Was Circular and Illogical.

US Airways further failed to present a sufficient, non-circular theory of how the challenged provisions caused the alleged harm. See Konik v. Champlain Valley Physicians Hosp. Med. Ctr., 733 F.2d 1007, 1019 (2d Cir. 1984).

US Airways contended that provisions in the 2011 contract "caus[ed] US Airways and travelers to pay more than they would have under competitive conditions". Tr.5619:22-5620:4; see Tr.5622:4-6; Tr.5640:11-14. But US Airways' theory was temporally impossible because the allegedly supracompetitive prices were negotiated and fixed before the challenged terms in the 2011 contract took effect. Only conduct before the agreement was signed could affect the booking fee written into the agreement. See In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252-53 (D.C. Cir. 2013) (plaintiffs who "were bound by rates negotiated before any conspiratorial behavior was alleged to have occurred" could not have suffered "injury in fact . . . attributable to the defendants' collusive conduct"); Konik, 733 F.2d at 1019 (affirming dismissal when plaintiff "failed to present any evidence from which it could rationally be inferred that she was injured by reason of the [term] in the Contract"). US Airways thus failed to prove that the alleged violation caused its asserted antitrust injury.[13]

In concluding that US Airways met its burden of proving causation, the District Court erred by analyzing the alleged effect of contractual provisions

[13] The flaw in US Airways' causation theory is highlighted by undisputed evidence that US Airways paid lower booking fees in exchange for the challenged provisions. Supra at 12-15.

not at issue. The District Court said that the 2006 agreement "further ingrained [Sabre's] market power" and allowed it "to impose the challenged contractual terms in the parties' 2011 Contract", Dkt.882 at 34, but the 2006 contract is irrelevant to US Airways' claims. To avoid even stronger evidence that US Airways willingly embraced the contractual terms during the 2006 contractual negotiations, US Airways expressly disavowed any argument or claim related to the 2006 contract. Tr.4476:19-25; Tr.5675:20-22. Thus, the District Court's reasoning answered the wrong question—and not the question the jury was asked to decide—by analyzing the impact of the unchallenged 2006 contract rather than the challenged provisions of the 2011 agreement, which could not have caused fees in that same contract to be higher.

III. THE DISTRICT COURT MADE FURTHER ERRONEOUS RULINGS THAT REQUIRE A NEW TRIAL.

Although Sabre is entitled to judgment under the proper rule of reason analysis, at a minimum, a string of additional errors viewed individually or by their "cumulative effect" substantially prejudiced Sabre and requires a new trial. Malek v. Fed. Ins. Co., 994 F.2d 49, 55 (2d Cir. 1993); see Phoenix Assocs. III, 60 F.3d at 105.

A. The District Court Erred by Refusing To Instruct the Jury About an Equal Involvement Defense.

An equal involvement defense prevents recovery when the plaintiff "bears at least substantially equal responsibility for an anticompetitive restriction" because the plaintiff helped create or approve it, or actively supports, relies upon or benefits from it. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1107-08 (1st Cir. 1994); see U.S. Football League v. Nat'l Football League ("USFL"), 842 F.2d 1335, 1369 (2d Cir. 1988).

In ruling that an equal involvement defense is categorically unavailable in private antitrust actions, the District Court misinterpreted Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968). Tr.5362:19-22. Perma Life did not disapprove of an equal involvement defense, and the Supreme Court since has cited Perma Life in stating that a "substantially equal responsibility" defense "should be recognized in antitrust litigation". Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 308-09 & n.17 (1985). This Court also has explained that Perma Life is no bar to the defense and a plaintiff's "participation in the [challenged conduct] would make it a particularly dubious recipient of treble damages for its belated and questionable enforcement efforts." Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 80 (2d Cir. 2013);

see Republic of Iraq v. ABB AG, 768 F.3d 145, 161 (2d Cir. 2014). Other circuits also recognize the defense.[14]

To be entitled to a jury instruction, "[a]ll that a party needs to show is that there is some evidence supporting the theory behind the instruction so that a question of fact may be presented to the jury." Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994). Here, substantial evidence showed that US Airways willingly offered, accepted and benefited from the challenged provisions. US Airways lobbied for and supported full content requirements when GDSs were federally regulated. Supra at 10-16. US Airways developed the concept of a GDS full content agreement and signed the first such agreement with Sabre. Id. In 2006, US Airways offered full content for steep booking fee discounts. Id. During the 2011 negotiations, US Airways' stated goal was to reach a full content agreement; it sent Sabre a full content term sheet. Id.; PX-117. Numerous witnesses testified at trial about whether US Airways participated equally in the challenged provisions.[15] Sabre presented more than enough evidence to submit the defense to

[14] See, e.g., Sullivan, 34 F.3d at 1107; Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 830 F.2d 716, 720-24 (7th Cir. 1987); Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 279 (9th Cir. 1976); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 15-16 (4th Cir. 1971).

[15] E.g., Tr.305:24-306:24 (Kirby); Tr.849:1-11 (Gustafson); Tr.835:9-15; (Nocella); Tr.3223:11-3224:4 (Webb); Tr.2607:1-13 (Klein); Tr.3840:1-22 (Wilding); Tr.4296:2-4299:17 (Gross); Tr.4529:11-4532:9 (Toothman).

the jury. See Sullivan, 34 F.3d at 1107-08; USFL, 842 F.2d at 1369. The District Court's refusal to issue an equal involvement instruction requires a new trial. See Anderson, 17 F.3d at 558.

B. The District Court Made Erroneous and Highly Prejudicial Evidentiary Rulings Related to Market Power.

The District Court made several evidentiary errors related to what it called "the central question [of] whether US Airways was compelled . . . to accept these features of the contract" by Sabre's supposed market power. Tr.5018:16-20. Individually or collectively, they require a new trial.

1. The District Court Erred by Excluding Evidence of US Airways' "Sign-and-Sue" Strategy.

US Airways' trial presentation centered on testimony that US Airways "didn't have a choice" but to accept Sabre's terms and "Sabre had the economic gun to [US Airways'] head" due to Sabre's supposed market power. Supra at 22-23.

Sabre proffered evidence that disproved US Airways' argument: US Airways strategically agreed to a full content contract so it could sue Sabre. After telling Sabre it wanted full content, US Airways developed a secret "sign-and-sue" strategy to generate supposed evidence that Sabre forced US Airways to provide full content. Dkt.707-7 (DX-147, excluded). US Airways emailed Sabre late in the negotiations about a non-full content option, and celebrated a response it

believed was litigation fodder. Dkt.707-14 (DX-425, excluded). At trial, US Airways spotlighted these last-minute exchanges as evidence of duress, even though internal documents showed US Airways' negotiating goal remained full content. Supra at 15-16, 22-23. Because the District Court excluded sign-and-sue evidence, the jury never saw that US Airways' posturing was theater.

Sabre was "entitled to show that there is evidence that suggests that [US Airways] had a different motive" for signing the 2011 contract. USFL, 842 F.2d at 1369. In USFL, this Court concluded that the district court would have erred had it not allowed the defendant to present evidence that plaintiffs' actions were part of a strategy to bring antitrust litigation, not the result of "pressure" from the defendant. Id. at 1351-52, 1370-71 (affirming admission of testimony that plaintiff sought to profit through "tickets, television and treble damages"). As this Court observed, excluding such state-of-mind evidence "defies logic"—"[c]ourts do not exclude evidence of a victim's suicide in a murder trial". Id. at 1370.

Here, sign-and-sue evidence negates a key piece of US Airways' market power argument: It indicates that US Airways accepted full content not under duress, but because it wanted to get the benefits of full content while setting Sabre up for a lawsuit. Tr.5012:5-5021:11; Tr.5123:5-5125:6. This evidence also shows that any alleged injury was caused by US Airways' choices, not Sabre. USFL, 842 F.2d at 1369. Excluding Sabre's sign-and-sue rebuttal to US Airways'

coercion narrative caused severe prejudice and requires a new trial, particularly in combination with the District Court's refusal to instruct on an equal involvement defense. See Phoenix Assocs. III, 60 F.3d at 105-06 (ordering a new trial based on exclusion of evidence on issue of "particular emphasis" because "it is substantially likely that the complete absence of such [evidence] affected the outcome").

The District Court reasoned that admission of this evidence could create attorney-client privilege issues, Tr.5124:14-17, but US Airways did not invoke privilege over any sign-and-sue documents Sabre presented (and acknowledged that privilege did not apply to relevant internal discussions). Tr.4039:24-4040:24; Tr.5014:16-5015:2; Dkt.707-1 at 223:17-23. The District Court also wrongly stated that sign-and-sue evidence could "requir[e] a mini-trial about when US Airways actually decided to sue". Dkt.483 at 1. The relevant question is not when US Airways decided to sue, but why US Airways agreed to the challenged provisions. The sign-and-sue evidence indicates US Airways signed the contract to concoct a lawsuit, not because it was coerced. A new trial is required because the jury never heard that key piece of the story.

2. The District Court Erred by Admitting Prejudicial Evidence of Prior Sabre Disputes with Other Airlines.

Before trial, Sabre moved to bar improper evidence about prior disputes between Sabre and other airlines, including situations where Sabre had

allegedly "biased" other airlines (i.e., gave the airline's content less-favorable treatment in the GDS display) when the airlines breached contracts or discriminated against Sabre. Dkt.456. Initially, the District Court excluded this evidence as a "lengthy detour" that would confuse the jury as to the conduct at issue, especially because there was no evidence Sabre biased or threatened to bias US Airways during negotiations over the 2011 agreement at issue. Id. at 2; Tr.253:1-4, 596:3-7.

At trial, however, the District Court reversed course and allowed US Airways to present improper, highly prejudicial testimony about disputes with other airlines and Sabre's alleged threats to bias them. Tr.190:17-193:7; Tr.493:3-16; PX-113. The District Court exacerbated its error by permitting US Airways to call two witnesses from other airlines in its rebuttal case on the last day of trial, leaving Sabre no opportunity to respond to their highly prejudicial testimony. Tr.5152:11-5158:3; Tr.5201:25-5203:7. One, from United Airlines, was never identified on any witness list. Tr.4640:21-4641:3. The other, a former Northwest Airlines official, offered an inflammatory and never-before-disclosed quantification that Sabre's biasing in 2005 had "cost us nearly $50 million in revenue just for that week". Tr.5194:21-23; Tr.5201:25-5202:14. There was no evidence that anyone at US Airways knew of this alleged loss during the 2011 contract negotiations. And because the testimony came in rebuttal, Sabre could not

respond, for example, to explain that Sabre took action against Northwest only after the airline breached its reciprocal contractual obligation not to discriminate against Sabre's customers. Dkt.712.

US Airways wielded this evidence in its closing argument to suggest—incorrectly and improperly—that Sabre was an anticompetitive actor with a propensity for antitrust violations. Supra at 24-25. This evidence tainted the trial, especially in rebuttal when Sabre could not mitigate the prejudice. See USFL, 842 F.2d at 1371-73 (evidence of prior alleged anticompetitive activities should not be admitted unless they "had an injurious effect upon the plaintiff" (quoting Buckhead Theatre Co. v. Atlanta Enters., Inc., 327 F.2d 365, 368-69 (5th Cir. 1964))).

3. The District Court Erred in Admitting Stale Government Statements.

The District Court allowed an expert witness for US Airways to describe decades-old statements made by the DOT and DOJ that referred to Sabre's supposed market power and anticompetitive conduct—most of which occurred when American Airlines owned Sabre. Tr.962:12-16 ("[T]he government has consistently found market power, that the GDSs enjoy market power over the airlines. The government has conducted three separate reviews of this, in the early

1980s and the early 1990s and in 2003 and 2004."); see also PX-522; PX-523; PX-7. Allowing these statements was error for several reasons.

First, each statement was based on a market definition fundamentally different from US Airways' proposed market definition. The DOT concluded that each GDS constituted its own relevant market, PX-7.0011, but US Airways defined the relevant market as the market for GDS services as a whole (in other words, at a minimum, all of the GDSs, not just Sabre), Tr.1365:9-12.

Second, the government statements occurred years before the challenged conduct and under vastly different market conditions. Each statement occurred prior to 2004, when the GDSs remained subject to government regulation. See PX-7.0001 (allowing regulations to sunset because of "ongoing changes in the airline distribution and [GDS] businesses"). Since that time, distribution over the internet and airline websites has exploded and airlines have consolidated through a series of mega-mergers. Supra at 25. Outdated government market power assessments have no bearing on this dispute.

Third, any limited relevance was far outweighed by unfair prejudice. Government findings can carry special weight and cause significant confusion for a jury. Sulton v. Lahood, No. 08-cv-2435, 2009 WL 3815764, at *2 (S.D.N.Y. Nov. 6, 2009) ("The danger of jury confusion arises because jurors would not know what weight, if any, to give the [government finding].").

These statements were critical to the jury's evaluation of the case. Tr.5670:5-24 (closing argument highlighting government findings); Tr.5811:7-17 (jury requesting PX-7, the DOT's 2004 market power statements). A new trial is necessary to cure the prejudice and confusion they caused. See Cameron v. City of New York, 598 F.3d 50, 66 (2d Cir. 2010) (ordering a new trial based on improper admission of law enforcement statements).

CONCLUSION

Sabre respectfully requests that the judgment on Count I be reversed and that this case be remanded with directions to enter judgment for Sabre or, in the alternative, for a new trial on Count I.

Dated: July 19, 2017

CRAVATH, SWAINE & MOORE LLP,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Principal Brief of Defendants-Appellants-Cross-Appellees Sabre Holdings Corporation, Sabre Travel International Limited and Sabre GLBL Inc. (Page Proof) is prepared in a proportionally spaced typeface (14-point Times New Roman) and contains 13,967 words, as calculated by the Microsoft Word 2007 word processing program and excluding parts of the Brief exempted by Rule 32(f). Accordingly, it complies with Federal Rule of Appellate Procedure 32(e) and Local Rule 32.1(a)(4)(A).

July 19, 2017

/s/ Evan R. Chesler
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