IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* v. AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION, *Defendants.*	)	Civil Action No.: 99-1180-JTM

PLAINTIFF'S OPPOSITION TO AMERICAN'S MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE RELATED TO LEGEND AIRLINES, INC.

INTRODUCTION

Defendants (collectively, "American") attempt to preclude testimony from Thomas G. Plaskett of Legend Airlines, Inc. ("Legend").[1] American's motion arises from its unsuccessful attempt to enforce a subpoena for documents issued to Legend. Having failed to obtain the discovery it desired through the appropriate channels, American now attempts to visit the consequences of that failure on the United States. There is simply no basis for granting the relief that American seeks. Mr Plaskett's testimony is relevant and admissible and should be heard by the Court.

[1] Although American styles its Motion as one to exclude "certain testimony," American actually seeks to prevent Mr. Plaskett from testifying entirely. (3/2/2001 American Memo at 2.)

Thus, American's motion should be denied because: (1) the discovery dispute that forms the basis of this motion is not a dispute with the United States, but with Legend -- a non-party over which the United States has no control;[2] to grant American's motion would be to impose sanctions on an innocent party; (2) American did not avail itself of the appropriate channels to effect its discovery from Legend -- never seeking to compel Mr. Plaskett to testify, failing to return to the District Court in Dallas to compel Legend to answer questions and produce documents (even after Legend stopped operations and its concerns about confidentiality and its strategic plans became moot), and not properly pleading its motion before the District Court in Dallas; (3) Mr. Plaskett's testimony is relevant to this case and is admissible; and (4) American's assertion of a *Noerr-Pennington* defense is irrelevant to the issue of whether Mr. Plaskett should be permitted to testify: The United States has never alleged that American violated the Sherman Act by actions that would present a *Noerr-Pennington* issue -- petitioning the government to prevent Legend from starting operations at Love Field.

SCOPE OF POTENTIAL TESTIMONY

Mr. Plaskett has spent twenty years in senior positions in the airline industry. He is Legend's Vice-President and Vice-Chairman of the Board of Directors. He has served as Senior Vice President for Marketing, Vice President for Finance, and Chief Financial Officer at American Airlines, as well as Senior Vice-President of AMR Corporation. Mr. Plaskett also served as President and Chief Executive Officer of Continental Airlines ("Continental") and as Chairman

[2] The United States has encouraged Mr. Plaskett to provide testimony, including waiving any timeliness objection based on the expiration of the discovery deadline, Declaration of Max Huffman in Support of Plaintiff's Opposition to American's Motion in Limine ("Huffman Decl."), Ex. 23, and agrees that American is entitled to obtain relevant discovery.

and Chief Executive Officer of Pan Am Corporation ("Pan Am"). Finally, while working as a consultant, Mr. Plaskett advised Air South Airlines, a small start-up airline. Declaration of Max Huffman in Support of Plaintiff's Opposition to American's Motion in Limine ("Huffman Decl."), Ex. 1. In trial in this matter, the United States may call Mr. Plaskett to testify regarding:

- His experience at American Airlines, including knowledge of the threat that American perceived from more efficient low cost carriers and the fact that American monitored the cash balances of start-up carriers;
- His experience competing with American and other major airlines as CEO of both Continental and Pan Am;
- His understanding of why Legend expended time and resources in litigation against American Airlines and others for the ability to operate from Love Field, rather than simply commencing operations at DFW Airport -- a facility which American claims has no barriers to entry;
- The nature and significance of the statutory restrictions to Love Field service and the impact of those restrictions on the type of service Legend could profitably offer;
- His understanding as to why Legend sought to differentiate its product by providing first class service from Love Field; and
- His understanding of the difficulty Legend had raising money because of American's reputation for predation.

FACTS

A. Legend Background. Legend was organized in 1996. Between 1996 and 1999, Legend lobbied and litigated for the right to serve Dallas's Love Field with 56-seat first class

service on long-haul routes.[3] *American Airlines v. Dep't of Transp.*, 202 F.3d 788, 794-95, 798 (5th Cir.), *cert. denied* 120 S.Ct. 2762 (2000). Beginning in April 2000, Legend provided all first-class 56-seat jet service in reconfigured passenger jets, serving Los Angeles, Las Vegas and Washington-Dulles from Love Field, and later adding service to LaGuardia Airport. Legend publicly stated its intention to serve Chicago and other cities in the near future. Huffman Decl., Exs. 2, 3. Within a month after Legend began service, American converted several jet aircraft to an all first-class 56-seat configuration and began serving Chicago-O'Hare and Los Angeles from Love Field. When Legend announced LaGuardia service commencing in the Fall, American started its own Love Field-LaGuardia non-stop service in August 2000. Huffman Decl., Exs. 3, 4.

B. American Had Knowledge of the United States' Allegations and Their Relationship to Legend. In addition to the detailed allegations contained in the United States' Complaint, the United States has explained its case to American repeatedly through formal and informal discovery. On February 22, 2000, the United States answered an American interrogatory by describing statements that Legend employees had made to the United States during the course of its pre-suit investigation. Huffman Decl., Ex. 5, at 16-19. On May 2, 2000, the United States answered another interrogatory by stating that it believed that Legend had been deterred from providing air service at DFW by American's reputation: "Legend had been prevented and deterred from providing air service from DFW by American's reputation. Legend

[3] Love Field service to long-haul destinations (specifically, beyond certain prescribed states) is limited by statute to 56-seat aircraft. Wright Amendment, Pub. L. No. 96-192, 24 Stat. 35, 48-49 (1980).

believes that it would be 'squashed like a bug' if it entered DFW, and consequentially, incurred sunk costs to provide service to Dallas Love Field." Huffman Decl., Ex. 6, at 124. On July 31, 2000, the United States served American with a witness list that included Mr. Plaskett, Huffman Decl., Ex. 7, at 6, and on August 23, 2000, the United States responded to an American request for information by stating in a letter that it expected Mr. Plaskett to testify about his experience at Legend as well as his experience working for other airlines. Huffman Decl., Ex. 8, at 3-4.

C. American Attempted Discovery in the Northern District of Texas. On June 6, 2000, American served Legend with a subpoena -- issued under the jurisdiction of the United States District Court for the Northern District of Texas, where Legend is headquartered -- that contained fifteen requests for the production of documents. Huffman Decl., Ex. 9, at 6-8. American's subpoena sought sensitive business information from Legend, including past, current, and future business plans, profitability and performance reports, information regarding Legend's methodologies for evaluating profitability, and documents relating to Legend's agreements with Delta Air Lines. *Id.* at 6-8. Through July 2000, counsel for American and Legend exchanged correspondence. Legend was concerned that American's document requests were vague "and that [v]irtually every document in Legend's possession could be responsive." Huffman Decl., Ex. 10, at 3. Legend was also concerned about the financial burden of producing so many documents. *Id.* at 1. Finally, Legend was concerned about which experts and consultants American would show Legend documents.[4] Huffman Decl., Ex. 11, at 2. Legend did not altogether refuse to

[4] American declined to disclose its experts and consultants to Legend because "under the scheduling order, American is not yet required to disclose its experts to the Department of Justice in this case." Huffman Decl., Ex. 12.

comply with American's document requests, but sought "clarification and limitation of the document requests." Huffman Decl., Ex. 10, at 1.

D. American Moved to Compel in the Northern District of Texas. On August 8, 2000, not satisfied with Legend's efforts to compromise, American brought a Motion to Compel Legend to produce responsive documents in the Northern District of Texas. Huffman Decl., Ex. 13. Legend opposed American's motion, characterizing American's subpoena as an "an effort by a monopoly airline to obtain a competitive advantage over a start-up carrier."[5] Huffman Decl., Ex. 14, at 1. On September 12, 2000, American submitted its Reply Brief. Huffman Decl., Ex. 15. American and Legend attended a hearing on American's motion before Magistrate Judge William F. Sanderson, Jr. on September 18, 2000, in which Magistrate Judge Sanderson asked American how Legend's strategic plans were relevant to American's defense in the suit brought by the United States. Huffman Decl., Ex. 16 (hearing transcript at 6:7-15).

Rather than provide Magistrate Judge Sanderson with a coherent explanation of the relevance of Legend's documents to the United States' claims, American instead suggested to the Court that, despite the fact that fact discovery had closed three weeks earlier, at the end of August, it did not even understand the United States' case. Huffman Decl., Ex. 16. (hearing transcript at 7:24-8:4) ("Their complaint, you're correct, is notice pleading and it's very ambiguous, so American has sent a series of interrogatory requests to the government seeking to

[5] While Legend's reluctance to turn over sensitive documents to American needs little explanation, Legend had a recent experience with American that apparently made it particularly cautious. On April 18, 2000, an American employee had gained unauthorized access to Legend's proprietary reservation information through the Sabre computer reservation system. Huffman Decl., Ex. 17.

get more precise definitions as to what the government thinks it's going to prove. One of those issues was on the market definition.").

American further argued that it needed information from Legend to make its defense that entry barriers into the Dallas-Fort Worth metropolitan area are not so high that entry is impossible. "[T]he government has sued American for monopolization *which means only one carrier is operating*. And here Legend has -- as a new entrant has come into the same market that the government accuses us of monopolizing and had made its home base." *Id.* at 8:13-19 (emphasis supplied). American's gross oversimplification of the law relating to monopolization backfired:

> THE COURT: Well, I don't understand why you have to go to Legend to get this information. It seems to me if the government cannot establish that American is *the only carrier* out of Dallas Love Field, which I know it can't because I know Southwest Airlines has been operating there for an extended period of time, nearly thirty years now.

Id. at 9:2-8 (emphasis supplied). Magistrate Judge Sanderson then asked American how the United States would be able to prove that American has a monopoly at Love Field:

> THE COURT: I don't see how in the world the United States is going to prove monopolization if it's going to expand, and it hasn't at this juncture, although apparently its market definition has apparently been expanded in its response to its answers to your interrogatories. But I don't understand how the government can possibly prove that there is a monopoly currently operating at Love Field under the auspices or authority of American. I just can't understand how the government can prove that proposition. Can you?

Id. at 9:11-20. Instead of explaining that the United States had not alleged a Love Field monopoly, but had alleged that American had monopolized certain specified routes to and from

the Dallas/Fort Worth metropolitan area,[6] American's counsel allowed Magistrate Judge Sanderson to operate under the misconception that the United States had alleged a Love Field product market.

> MS. GOLDSTEIN: No, neither do we. But they have come in with these narrow market definitions. It's the government's burden to prove a market in which to assess monopoly power. American, all we have to do is defend against that and attack the various market definitions that the government might be proceeding with.

Id. at 9:21-10:2. Finally, American suggested to Magistrate Judge Sanderson that the United States could still readily amend the complaint: "[T]he government has seen no need to amend their complaint as of yet. I believe the scheduling order allows them substantial more time before they have to amend it." *Id.* at 7:10-13. In fact, as American was aware, this Court's scheduling order made no such provision; indeed the only provision marginally relevant was contained in the Court's December 1999 Scheduling Order and states that the parties agreed that the last date for adding claims had already expired. Huffman Decl., Ex. 18, at 5.

No one can know whether Magistrate Judge Sanderson would have granted American's motion to compel had American chosen to provide the Court with an accurate and straightforward explanation of the relevance of information relating to the competitive conditions

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[6] American is well aware that the United States has never alleged that service from Love Field is a relevant antitrust market. Indeed, from the beginning of the litigation, the United States has alleged that the relevant antitrust markets involved service in "city pairs," not "airport pairs." Huffman Decl., Ex. 19 ¶ 13 ("Airline passenger service in a city pair constitutes a relevant market for antitrust purposes."); Huffman Decl., Ex. 20, at 6-8 ("Airline passenger service in a city pair and nonstop airline passenger service in a city pair constitute the relevant markets for this case.") In its interrogatory responses provided to American, the United States has uniformly stated that it alleges monopoly power in a list of city pair markets and nonstop city pair markets, with Dallas/Ft. Worth as one endpoint. Huffman Decl., Ex. 21, at 7-8.

at Love Field to this case. But the fault for American's failure to provide such an explanation to the Magistrate Judge does not lie with the United States. Rightly or wrongly, the fact remains that Magistrate Judge Sanderson was unconvinced that American could establish a need for documents from Legend and denied American's motion *without prejudice,* holding that "a heightened level of relevance should be established before a competitor should have access to a non-party's highly confidential and sensitive business plans and practices, even when a protective order is contemplated."[7] Huffman Decl., Ex. 16, at 1. Importantly, Magistrate Judge Sanderson invited American to return to the Court if American could show that the documents it sought from Legend were relevant to its defense. Huffman Decl., Ex. 16 (hearing transcript at 25:7-12) ("I am going to enter an order denying this motion without prejudice but I think before American determines that it wishes to re-urge its motion, that these factors that I've pointed out, I think, need to be framed up with some concreteness").

E. Deposition of Mr. Plaskett. Mr. Plaskett sat for a deposition on November 6-7,

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[7] Magistrate Judge Sanderson's decision echoed the sentiments he had expressed at the hearing:

> Well, let me just make this observation. A person who lives in Dallas like myself, like you all, fully understands the competitive nature of the relationship between Legend Airlines and American Airlines, and what you're seeking here, I think, is extremely sensitive data of Legend Airlines. Legend Airlines doesn't have a dog in this fight, as I understand it. And I am quite reluctant to allow a very fierce competitor to have access to the information that relates to a business planning of its competitor unless there is a very good reason for doing so. . . . But when we're talking about a third party I think that the relevancy inquiry that the Court must make is a little higher threshold than when this third party or this party from whom the discovery is being sought isn't even in the lawsuit.

Huffman Decl., Ex. 16 (hearing transcript at 16:3-24).

2000. During the deposition, Mr. Plaskett answered all questions posed to him about an interview he had with the Department of Justice during the summer of 2000. Huffman Decl., Ex. 22, at 250:21-251:3. However, Legend's counsel explained his view of the Court's order relating to the document subpoena and did not allow Mr. Plaskett to answer deposition questions regarding strategic documents that Magistrate Judge Sanderson had declined to order Legend to produce: "We advised American's attorneys during the break that Mr. Plaskett will not testify, consistent with Magistrate Judge Sanderson's order, regarding any matter that might touch on . . . . Legend's either prospective or anticipated service from Love Field anticipating American Airlines' response or any reaction or responses of Legend Airlines, including amendments to its business plan and its start-up operations at Love Field." Huffman Decl., Ex. 22, at 82:19-83:12. American disagreed with Legend's interpretation of Magistrate Judge Sanderson's ruling: "[American has] a different interpretation of the magistrate's ruling." Huffman Decl., Ex. 22, at 82:19-84:4.

F. American's Subsequent Inaction. American has never sought guidance -- from any Court -- as to either the proper interpretation of Magistrate Judge Sanderson's ruling or its implications relating to Mr. Plaskett's testimony. Instead, after completion of Mr. Plaskett's deposition, American informed the United States that it would not seek further assistance from the Court in Texas but instead would attempt to resolve the situation by asking this Court to exclude Mr. Plaskett's testimony. Knutsen Decl. ¶ 4. In December 2000, Legend ceased operations. Huffman Decl., Ex. 27. American has never returned to Magistrate Judge Sanderson to ask him to compel Legend to produce more documents, and even more importantly, American has never attempted to enforce its deposition subpoena of Mr. Plaskett in the District Court from

which the subpoena was issued and which has subpoena power over Mr. Plaskett. As a consequence, Magistrate Judge Sanderson has never had the opportunity to rule on American's discovery dispute with Legend with a full appraisal of the relevant facts. American now seeks relief in this Court, in the form of a motion *in limine*, which is wholly unrelated and inappropriate in the context of the dispute between American and Legend.

ARGUMENT

"The exclusion of critical evidence is an extreme sanction which is not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." *Kotes v. Super Fresh Food Mkts., Inc.*, 157 F.R.D. 18, 20 (E.D. Pa. 1994). Preclusion "is wholly unwarranted in the absence of any indicia of bad faith." *Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp*., 190 F.R.D. 644, 649 (N.D. Cal. 2000); *see also Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp*., 602 F.2d 1062, 1064 (2d Cir. 1979) (noting that preclusion of testimony "is an extreme sanction to be deployed only in rare situations").

American bases its motion upon authority not allowing a *party* to testify at trial after refusing to give a deposition. In *Dunkin' Donuts Inc. v. Taseki*, 47 F. Supp. 2d 867, 872 (E.D. Mich 1999), *United States v. Sixty-Thousand Dollars in U.S. Currency*, 763 F. Supp. 909 (E.D. Mich 1991), and *United States v. Premises Known as 1625 S. Delaware Ave., Philadelphia, Pa*, No. 86-5977, 1989 WL 29271, at *1 (E.D. Pa. Mar. 29, 1989), a party refused, on Fifth Amendment grounds, to testify, while *In re Melridge Inc., Secs. Litig.*, No. 87-1426-FR, 1993 WL 32689, at *1 (D. Or. Jan. 28, 1993), involved the preclusion of a party's experts from testifying on subjects that had not been disclosed pursuant to Fed. R. Civ. P. 26(b)(4)(A)(i) or in

the experts' depositions. These cases do not control here. In this case, American seeks to impose the preclusion sanction not upon the party that failed to provide the discovery, but instead on a party that has no ability to produce the information that American seeks.[8] Moreover, American's inability to obtain the discovery it seeks was not the result of a failure by the United States to comply with the Federal Rules, nor is there any allegation that the United States has acted in bad faith. Indeed, the United States agrees that American is entitled to obtain relevant discovery that is tailored to the United States' allegations, and would be happy to explain the allegations to the Court in Texas if American continues to be unable to do so. American's problems were caused by nothing more than American's failure both to persuade the District Court in Texas that it was in fact entitled to that information and to return to that Court when Mr. Plaskett refused to testify. Preclusion under these circumstances not only is wholly inappropriate but also would be manifestly unjust.

I. American Failed To Plead Its Case Properly, Never Sought to Compel Mr. Plaskett's Deposition Testimony, and Ignored Magistrate Judge Sanderson's Invitation To Return To Compel Legend To Produce Documents

A. This Is a Discovery Dispute Between American and Legend

This is a simple discovery dispute between American and Legend. American sought documents from Legend. Legend opposed producing documents. American brought a motion to compel -- but could not convince the appropriate Court to order production. American notes that the United States did not attend the hearing, suggesting that the United States bore some

[8] Indeed, in order to cause Mr. Plaskett to testify at trial, the United States will have to request that the Court permit it to invoke the nationwide service of process provision contained in the Sherman Act. 15 U.S.C. § 23; Fed. R. Civ. P. 45.

responsibility for convincing the Court in Dallas of the validity of American's claims. (3/2/00 American Memo. at 5-6) ("the Dallas Court was unable to learn from the DOJ how Legend's information, or any testimony from Mr. Plaskett, could be relevant to the instant lawsuit"). It is not, however, the responsibility of the United States to conduct discovery for American, referee its discovery disputes, or explain to the Courts why American needs additional discovery. In addition, American had voluminous discovery from the United States and was perfectly capable of explaining the relevance of the discovery sought.[9] American's inability to convince a Court in the proper forum of the importance of its discovery requests, as well as its decision not to pursue its discovery claims in that same forum, resulted from American's own strategic decisions about how it wished to pursue discovery and not from any wrongdoing on the part of the United States. Knutsen Decl. ¶ 4.

B. American Never Sought to Compel Testimony

It is indisputable that American never sought to compel deposition testimony from Mr. Plaskett. It is likewise indisputable that the only Court with the power to enforce a deposition subpoena directed to Mr. Plaskett is the United States District Court for the Northern District of Texas. American nevertheless filed this motion against the United States under Federal Rule of Civil Procedure 37, which provides for sanctions for the failure to provide discovery. But the

[9] For example, counsel for American stated during Mr. Plaskett's deposition that it had a letter from the United States -- dated August 23, 2000 -- indicating that the United States expected Mr. Plaskett to testify regarding his experience at Legend and that Legend was therefore relevant. Huffman Decl., Ex. 22, at 83:13-84:13. Of course, this letter -- with the huge volume of discovery that American had secured from the United States -- was available for American to present to Magistrate Judge Sanderson in its September 12, 2000 Reply brief. American did not and cannot now blame the United States for its apparent failure to call this information to Magistrate Judge Sanderson's attention.

United States has not failed to provide any discovery to American, and indeed agrees that American is entitled to discover information from Legend relevant to the United States' allegations. It is wholly inappropriate for American to seek relief from this Court for a failure that American has never sought to remedy -- in the appropriate Court, against the appropriate party, *i.e.*, the Court with jurisdiction to order Mr. Plaskett to answer questions in a deposition.

C. American Failed to Return to the Proper Court To Compel Production

Magistrate Judge Sanderson denied American's motion to compel Legend's production of documents without prejudice and specifically invited American to return if it could show relevance. Huffman Decl., Ex. 16 (hearing transcript at 21:7-18) (denial of motion without prejudice permitting American to return to the Court with a showing that the requested discovery was relevant). *American failed to do so*. In addition, American evidently believed that Legend had misinterpreted the Magistrate Judge's order, Huffman Decl., Ex. 22, at 83:13-84:4, and could have sought a further order from Magistrate Judge Sanderson clarifying whether Legend's or American's interpretation was correct. *American never sought such an order*. Finally, even after Legend stopped operations early in December 2000, effectively mooting Legend's concerns regarding confidentiality, *American still made no attempt to obtain a modification of Magistrate Judge Sanderson's order*.

American argues that it would be fruitless to go back to Magistrate Judge Sanderson to renew its motion because Mr. Plaskett did not provide information and Magistrate Judge Sanderson had "limited knowledge of the factual or legal issues in this case." (3/2/00 American Memo., at 11.) However, the fact that American was not confident of its ability to explain the matter to the appropriate Court does not justify its inaction. Indeed, to accept American's

position would validate American's forum shopping -- American did not like the treatment it received in the Texas Court, so it is taking its chances on getting a better result in Kansas.[10]

American also argues that Magistrate Judge Sanderson improperly used a heightened standard for determining the relevance of Legend's documents when the Court held "that a heightened level of relevance should be established" before it would compel the production of documents. Huffman Decl., Ex. 16, at 1 Whether or not American's understanding of the relevant law is correct, American never raised this legal issue with Magistrate Judge Sanderson, nor did it appeal the order based on its view that the Court had applied an overly stringent standard of relevance. American should not now be heard to complain to this Court about an order from a different District Court with which it disagrees, but has not challenged.

Finally, accepting American's tactical decisions in this discovery dispute would create perverse incentives, encouraging litigants to ignore discovery proceedings. American hopes that through the failure of its nominal attempts to obtain documents and deposition testimony, it can now entirely preclude Mr. Plaskett from testifying. If American's motion is granted, a future litigant, met with slight resistance from an unfriendly third party witness, would not bother to

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[10] Although American is not following the Federal Rules to the extent that it has not sought to compel Mr. Plaskett to testify in the Northern District of Texas, it nevertheless asserts that the United States did not provide sufficient disclosure or that it was somehow the responsibility of the United States to make Legend available for American to inspect. (3/2/00 American Memo., at 6, 10.) However, American has cited no authority that suggests that the United States has not made proper disclosures. In fact, the United States offered to discuss making more detailed disclosures of what the parties expected witnesses to testify to so long as it was done in the context of an exchange of information. Huffman Decl., Ex. 23, at 1-2. Nor has American shown any willingness to provide Legend with information that Legend believed was relevant to its concerns about disclosure. Thus, American declined to disclose the identity of its experts to Legend when Legend asked. Huffman Decl., Ex. 12, at 1-2.

pursue the appropriate channels for obtaining discovery, but instead would seek the ultimate reward of preclusion of the entire subject matter of that witness's testimony. The Court should not countenance such a result.

II. Mr. Plaskett's Testimony Is Relevant and Admissible, and Is Not Subject to the *Noerr-Pennington* Doctrine

The United States intends to call Mr. Plaskett to testify about matters that are clearly relevant to the allegations in the instant litigation and about which Mr. Plaskett has knowledge -- indeed, in some cases Mr. Plaskett is the most knowledgeable witness. Further, Mr. Plaskett is not being called as an "expert," but as a lay observer with personal, first-hand knowledge of the subject matter of his potential testimony. Finally, American's *Noerr-Pennington* argument is quite simply a red herring: American points to nothing through the course of investigation or litigation that would lead it to believe that the United States intends to present Mr. Plaskett for the purpose of challenging the legitimacy of American's litigation effort to keep Legend from operating at Love Field. American's failure to do so is not surprising, as the United States has no such intent, has never manifested any, and has repeatedly told American just that.

In this motion seeking to exclude Mr. Plaskett from testifying in trial, American has the burden "of demonstrating that [Mr. Plaskett's testimony] is inadmissible on any relevant ground." *First Savings Bank v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1082 (D. Kan. 2000) (citing *Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67, 69 (N.D. Ill. 1994)). American cannot carry this heavy burden.

A. The United States Intends to Call Mr. Plaskett to Present Relevant Testimony at Trial

First, American has repeatedly argued that there are no entry barriers at DFW Airport.

See, e.g., 1/8/01 American Memo. (Summary Judgment) at 50-57; 5/4/00 American Memo. (Position Paper) at 8-9. Legend nevertheless spent several years litigating with American and others for the right to begin operations at Love Field. *See American Airlines v. Dep't of Transp.*, 202 F.3d 788 (5th Cir.), *cert. denied* 120 S.Ct. 2762 (2000). The United States plans to ask Mr. Plaskett whether American's reputation for predation or other entry barriers at DFW affected Legend's decision to incur the delay and expense necessary to operate out of Love Field, rather than making the ostensibly easier step of merely starting service at DFW Airport. Mr. Plaskett's position as Executive Vice-President and Vice-Chairman of the Board of Legend qualifies him to testify in this regard. Huffman Decl. Ex. 1, at 1**.**

Second, Legend attempted to establish a market niche with first class service at Love Field: "Legend Airlines was established to provide a clearly differentiated and superior product to the business traveler." Huffman Decl., Ex. 24, at 501. The United States intends to ask Mr. Plaskett whether American's expected competitive response influenced Legend's decision to differentiate its product and seek a niche market.[11]

Third, Legend has stated publicly that American's reputation for predation was one problem that prevented if from raising capital. "[Legend CEO Allan McArtor] noted that Legend had a tough time raising investment capital because investors, although enthusiastic about the

[11] American also argues that, because Mr. Plaskett did not join Legend until 1997, he does not have personal knowledge to testify regarding whether American's reputation deterred Legend from serving DFW Airport prior to that time. (3/2/00 American Memo. at 9.) Mr. Plaskett clearly has direct knowledge of Legend's continuing decision to seek to serve Love Field rather than DFW Airport. Moreover, testimony regarding any understanding that Mr. Plaskett has gathered about American's reputation and the effect of that reputation upon Legend and its business plan that he witnessed is admissible under Federal Rule of Evidence 803(21) (hearsay exception for testimony of "a person's character among associates or in the community").

airline's business plan, 'were concerned that American would not allow us to survive.'" Huffman Decl., Ex. 25. The United States intends to ask Mr. Plaskett whether American's reputation for predation affected Legend's ability to raise capital.

Mr. Plaskett's career in the airline industry prior to his joining Legend also provides the basis for much relevant testimony in this litigation. For example, Mr. Plaskett's experience working at American Airlines in senior management positions from the mid-1970s through the 1986, and witnessing how American responded to low cost carriers, is clearly relevant. Mr. Plaskett is able to testify that American monitored the finances of low cost carriers and responded differently to underfunded carriers than well-funded carriers. Huffman Decl. Ex. 22, at 43:10-44:21, 258:8-259:21. Similarly, Mr. Plaskett's experience as President and CEO of Continental and Pan Am is relevant to understanding American's reputation in the industry and, more generally, the dynamics of airline competition.

B. Mr. Plaskett Is Competent to Testify Under Fed. R. Evid. 701

Mr. Plaskett's knowledge of the airline industry, and of Legend specifically, presents a basis under the rules of evidence for the testimony he will offer. Federal Rule of Evidence 701 states that:

> "[i]f the witness is not testifying as an expert, the witnesses's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witnesses's testimony or the determination of a fact in issue.

In addition, one distinguished commentator notes that "nothing in Rule 701 prohibits a lay witness from arriving at an opinion through the application of specialized experience." CHARLES A. WRIGHT & VICTOR A. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6253 & n.23 (1997)

(collecting cases); *see also Burlington Northern R.R. Co. v. Nebraska*, 802 F.2d 994, 1004-1005 (8th Cir. 1986) (reversing a district court that excluded the testimony of an experienced railroad executive, noting "[a] lay witnesses' testimony in the form of opinion or inferences need only be rationally based on perception and helpful to a determination of a fact in issue"). Mr. Plaskett has worked for five airlines in senior management positions for twenty years. He is competent to use that experience to explain his understanding of events that he has witnessed. For example, if Mr. Plaskett's experience working as Vice-President of Marketing at American allows him to understand something about Legend's decision not to compete with American at DFW Airport, that would be admissible regardless of whether Mr. Plaskett was working for Legend at the time. Similarly, if his understanding of Legend's strategy is animated by his experience in the industry, that too would legitimately inform his opinions.

American's conclusory assertion that Mr. Plaskett is not qualified to render a lay opinion pursuant to Federal Rule of Evidence 701, (3/2/00 American Memo., at 14), is flatly wrong and unsupported by any authority. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir. 1979), dealt with an exceptional case where a witness with no qualifications other than five years experience *operating* pressure cookers in the fast-food industry was supposed to testify that a pressure cooker was defectively *designed*. *Id.* at 847-48. The court affirmed the district court's exclusion of the evidence. *Id.* The witness was permitted to testify to matters within the scope of his experience -- *operating* the pressure cooker. *Id.* at 848. By contrast, Mr. Plaskett is a senior executive with Legend and served in senior executive roles with Continental, Pan Am, and American. Just as American's executives are competent to testify to American's actions, Mr. Plaskett is competent to testify regarding matters within the realm of his experience as an airline

executive.

C. American's *Noerr-Pennington* Defense is Inapplicable to the United States Allegations in this Litigation

In an attempt to avail itself of the *Noerr-Pennington* doctrine, American creates from whole cloth an argument that the United States has never advanced, or given any indication that it would advance, in this litigation -- that American's litigation against Legend over service from Love Field was itself a substantive antitrust violation.[12] (3/2/01 American Memo. at 1-2.) Although the doctrine "exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition," *Zimomra v. Alamo Rent-A-Car, Inc*., 111 F.3d 1495, 1503 (10th Cir. 1997) (collecting cases), it does not exclude evidence of the purpose and character of those actions. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (holding that evidence of actions that were not unlawful in themselves could still be admissible).

Evidence of American's litigative effort regarding Love Field is relevant because, and only because, it provides evidence relating to entry barriers at DFW Airport, American's reputation for predation, and the value of American's monopoly power in non-Wright Amendment routes. First, American's litigative effort casts light on Legend's decision to "stick it out" and commence service from Love Field. The fact that Legend elected to incur the delay and expense of litigation -- which delayed the start of its service for two years -- with American and others over the legality of long-haul service from Love Field, rather than simply start operations at DFW Airport, is

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[12] In fact, the United States noted in the proposed Pretrial Order that "the United States does not allege that [American's conduct petitioning in regard to Love Field] was unlawful." Huffman Decl., Ex. 26, at 65.

evidence that entry at DFW Airport is not as easy as American asserts and that potential competitors are not likely to constrain American's monopoly power, and is relevant to showing that American's reputation deterred Legend from entering at DFW Airport.

Second, American's reasons for seeking to prevent Legend from operating at Love Field provide insight into American's desire to protect its monopoly power in long-haul routes from the DFW metropolitan area. "[T]estimony of prior or subsequent transactions, which for some reasons are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Pennington*, 381 U.S. at 670 n.3; *see also MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1160 (7th Cir. 1983) (holding that evidence of AT&T's actions before the FCC was admissible to show the purpose and character of the actions). American's actions regarding Legend's commencement of service at Love Field are evidence that American had monopoly power in DFW routes that it was trying to protect.[13]

CONCLUSION

American brings to the Court in the form of a motion *in limine* a discovery dispute that could have, and should have, been resolved in the Northern District of Texas. Rather than making the barest effort to compel testimony by Mr. Plaskett, or to enforce a subpoena in the Court that issued it, American asks this Court to impose discovery sanctions on the United States, a bystander to American's dispute with Legend. As set forth above, there is no basis for the imposition of such sanctions in this case.

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[13] A measure of American's monopoly power is the resources and public relations costs that American was willing to expend to stop or delay new competition at Love Field.

Moreover, American has failed to meet its burden of demonstrating that Mr. Plaskett's testimony should be excluded on any legal grounds. Mr. Plaskett's testimony is both relevant and admissible.

The United States therefore respectfully requests that the Court deny in its entirety American's motion to exclude Mr. Plaskett's testimony. In the alternative, the United States respectfully requests that the Court reserve ruling on American's motion so that the Court may consider the admissibility question after hearing the testimony. Finally, the United States reiterates that it agrees that American is entitled to obtain relevant discovery from Legend.

Dated: March 15, 2001

Respectfully submitted,

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