UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

US AIRWAYS, INC., Plaintiff, v. SABRE HOLDINGS CORPORATION, *et al.*, Defendants.	Miscellaneous Case No. 13-mc-91163 Civil Action No. 11-cv-02725 (MGC) (Pending before the U.S. District Court in and for the Southern District of New York)

MEMORANDUM IN SUPPORT OF GOOGLE INC.'S MOTION TO QUASH SUBPOENA AND (ASSENTED-TO) TRANSFER MOTION TO QUASH SUBPOENA TO THE TRIAL COURT

Dated: July 26, 2013

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Google Inc. ("Google") submits this memorandum in support of its Motion to Quash Subpoena and (Assented-to) Transfer Motion to Quash Subpoena to the Trial Court. US Airways, Inc. ("US Airways"), the issuing party, has communicated its assent to the Motion to Quash being brought before the United States District Court for the Southern District of New York, the court where the underlying action is pending.[1]

INTRODUCTION

A. Background

The subpoena *ad testificandum* directed to Mr. Jeremy Wertheimer, dated July 15, 2013, (the "Subpoena")[2], which is the subject of this Motion to Quash, arises out of an antitrust action brought by US Airways against Sabre, Inc. and related entities in the United States District Court for the Southern District of New York. That action is pending before Judge Miriam Goldman Cedarbaum. US Airways alleges that Sabre "operates the largest Global Distribution System ("GDS") in the United States." FAC ¶ 2.[3] "A GDS provides travel agents with information on [airline] schedules and fares offered by participating airlines and the ability to book tickets." *Id.* US Airways allegedly pays tens of millions of dollars each year for bookings made through Sabre's GDS. *See id.* ¶ 4.

US Airways avers that Sabre has harmed US Airways through a series of allegedly anti-competitive agreements, including: (1) Sabre's 2006 agreement with US Airways; (2) a 2011 agreement between Sabre and US Airways; and (3) agreements that Sabre has entered into with other GDSs, other airlines, and travel agents. *Id.* ¶ 60; *see also id.* ¶¶ 61-130. For purposes of its antitrust claims, US Airways defines the relevant markets as: (1) the GDS Market—the

[1] *See* Declaration of Andrew J. Calica, dated July 26, 2013 ("Calica Decl."), at ¶2.
[2] A copy of the Subpoena is attached as Exhibit A to the Calica Decl.
[3] A copy of US Airways' First Amended Complaint is attached as Exhibit B to the Calica Decl. Citations to that pleading shall take the form "FAC ¶ __."

distribution of GDS services including airline fare, flight, and availability information and reservation and ticketing capability to travel agents in a relevant market (*id.* ¶ 132); and (2) the Sabre Submarket—the distribution of GDS services to Sabre subscribers (*id.* ¶ 137).

Google (which acquired ITA Software, Inc. in 2011) is a disinterested third party to US Airways' dispute with Sabre. As US Airways makes clear in its First Amended Complaint, neither Google nor ITA is part of the "GDS Market" or the "Sabre Submarket." *See, e.g., id.* ¶¶ 131-32, 137. "Other Internet companies, such as search engines like Google . . . are not GDS competitors, but merely direct Internet users to OTAs or airline websites where a user can book a flight. Likewise, a search technology company like ITA Software does not compete with the GDSs. ITA Software does not provide booking capabilities." *Id.* ¶ 39.

In the mid-2000s, ITA developed the 1U platform as a potential alternative to existing GDSs. ITA engaged in exploratory negotiations with airlines and travel agencies, but the 1U platform never took off and was discontinued by the end of 2006. Indeed, there is no reference to the 1U platform in the operative complaint. Thus, neither Google nor ITA has information pertinent to the events or the agreements that are principally at issue in this litigation.

Notwithstanding the above, US Airways served Google with a subpoena *duces tecum* in late November 2012 seeking, among other things, documents relating to ITA's retired 1U platform. Following several meet-and-confers between counsel and written objections and responses by Google[4], Google commenced its document production. Google's production was comprised of: representative term sheets from negotiations between ITA and airlines or travel agencies regarding 1U; documents demonstrating the reasons why 1U was discontinued; comparisons between 1U and Sabre or other GDSs; and documents demonstrating that QPX

[4] A copy of Google's Objections and Responses to US Airways' subpoena *duces tecum*, dated March 12, 2013, is attached as Exhibit D to the Calica Decl.

(described below) does not offer booking capability. In addition, Google authorized US Airways to use documents produced by Google in prior GDS litigation involving American Airlines. When counsel could not resolve Google's objections to four of US Airways' requests, a pre-motion conference was held before Judge Cedarbaum on May 14, 2013. At the May conference, the Court specifically declined to order Google to produce additional documents and instead instructed the parties to further meet-and-confer.

In an effort to resolve that dispute, Google thereafter searched for and voluntarily produced documents responsive to each of US Airways' four remaining requests. That supplemental production included documents concerning: 1U's prospective profitability; 1U's technology; Sabre's authorized developer program; and, Sabre's passive segment fees. Having provided a complete response to US Airways' requests, Google anticipated that its involvement in this matter was at its end. Instead, following the completion of Google's document production, and, apparently, only days before the close of fact discovery, US Airways issued a subpoena *ad testificandum* from this Court directed to Mr. Jeremy Wertheimer, founder of ITA and current Vice President of Travel at Google.

Tellingly, (1) the subpoena was directed to Mr. Wertheimer at a residential address, and not to Google[5], and (2) US Airways made no attempt to specify the topics it proposes to address at the deposition, which runs counter to the custom when subpoenaing non-parties.[6] In the absence of a list of the subject matters on which US Airways seeks to elicit testimony, the Subpoena is presumptively over broad and burdensome. Mr. Wertheimer has no knowledge regarding any of the Sabre-related agreements that US Airways alleges form the basis of its

[5] It was not until Google's counsel made a further inquiry that US Airways represented that the Subpoena seeks information from Mr. Wertheimer in his capacity as a Google employee.

[6] *See, e.g., Price Waterhouse LLP v. First Am. Corp.*, 182 F.R.D. 56, 61 (S.D.N.Y. 1998) (explaining that Rule 30(b)(6) is the means to depose a corporation and is applicable to both parties and non-parties. It requires the issuer to describe with reasonable particularity the matters on which examination is requested).

antitrust claims. In any event, as discussed, US Airways concedes that Google is not a GDS competitor or a customer of Sabre's services. Moreover, any testimony Mr. Wertheimer could offer about the documents produced by Google would merely be cumulative of the documents themselves. US Airways' election to target Mr. Wertheimer and to omit a description of the matters on which his examination is requested must therefore be seen for what it is: a fishing expedition.

Accordingly, this Motion to Quash followed.

B. Transfer Of The Motion To Quash On Consent

Google and US Airways agree that the Motion to Quash should be resolved by Judge Cedarbaum of the Southern District of New York. Accordingly, the Motion to Quash should be transferred to the trial court and this Court need not be burdened with the task of resolving the motion on its merits.

The underlying action has been pending before Judge Cedarbaum since 2011, and fact discovery is scheduled to close on August 2, 2013. Judge Cedarbaum is uniquely knowledgeable about the facts and discovery issues in this case and those presented by the Subpoena. In particular, Judge Cedarbaum presided over a May 2013 conference between Google and US Airways concerning the initial document subpoena directed to Google and has reviewed letter submissions related to both subpoenas.[7] In addition, Judge Cedarbaum has actively managed what counsel for Google understands to have been voluminous third party discovery in this action. Transfer would further Rule 45's objective of protecting non-parties without imposing any prejudice on US Airways, which chose to bring its case in New York federal court. Thus, Google respectfully requests that this Court exercise its discretion to transfer Google's Motion to

[7] *See, e.g.*, Letters from Google to Judge Cedarbaum attached as Exhibits E and F to the Calica Decl. and Letter from US Airways to Judge Cedarbaum attached as Exhibit G to the Calica Decl.

Quash to Judge Cedarbaum's court in the Southern District of New York.

C. Quashing The Subpoena, In The Alternative

If the Court elects not to transfer this proceeding, Google's Motion to Quash should be granted for the reasons set forth herein, namely: (1) the Subpoena fails to identify the topics on which testimony is sought and therefore threatens to impose undue burden on a non-party, Rule 45(c)(3)(A)(iv); (2) US Airways cannot demonstrate a substantial need for testimony related to Google's ongoing use of proprietary technology, Rule 45(c)(3)(B)(i); and (3) the Subpoena was not accompanied by the requisite fees for attendance and the mileage allowed by law, Rule 45(b)(1).

LEGAL STANDARD

A motion to quash a subpoena is properly directed to the issuing court. *See* Fed. R. Civ. P. 45(3). Nonetheless, the issuing court has discretion to transfer a dispute concerning a non-party subpoena to the district court possessing the underlying action. *See, e.g., In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8th Cir. 1991) (court that issued deposition subpoenas pursuant to Rule 45 may remit consideration of objections to court where underlying case is pending); *Peterson v. Douglas County Bank & Trust Co.*, 940 F.2d 1389, 1391 (10th Cir. 1991) ("The absence of any language in Rule 45(d) prohibiting transfer of a motion to quash, coupled with this permissive language [in Rule 26] regarding transfer of motions for protective orders which refers to Rule 45 deponents as well as to parties, is enough to validate the [transfer] action of the Kansas magistrate.") (citation omitted); 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2463 at 79 (2d ed.1994).

Counsel serving a subpoena must "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). Rule 45(c) "provides additional protection for non-parties subject to a subpoena by mandating that a court 'quash or

modify the subpoena if it ... subjects [the] person to undue burden.'" *See Jones v. Hirschfeld*, 219 F.R.D. 71, 74 (S.D.N.Y. 2003); *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."). On a timely motion, the issuing court "must" quash or modify a subpoena that "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). The issuing court may also quash a subpoena that requires disclosure of a trade secret or other confidential research, development or commercial information. Fed. R. Civ. P. 45(c)(3)(B)(i).

ARGUMENT

II. THE MOTION TO QUASH SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF NEW YORK

Courts have discretion to transfer actions involving subpoena disputes, including a motion to quash, to the court presiding over the underlying litigation. *See, e.g., In re Digital Equip. Corp.*, 949 F.2d at 231; *Douglas Cnty Bank & Trust Co.*, 940 F.2d at 1391; *Devlin v. Transp. Comm. Int'l Union*, No. 95 Civ. 0742, 2000 WL 249286, at *1 (S.D.N.Y. Mar. 6, 2000) (Francis, M.J.) ("There is substantial support in the case law, among the commentators, and in the Advisory Committee Note to Rule 26(c) of the Federal Rules of Civil Procedure for the proposition that the court from which a subpoena has issued has the authority to transfer any motion to quash or for a protective order to the court in which the action is pending.").[8] Here, Google and US Airways agree that the Motion to Quash should be adjudicated by Judge

[8] *See also Stanziale v. Pepper Hamilton LLP*, No. M8-85, 2007 WL 473703, at *5 (S.D.N.Y. Feb. 9, 2007) (transferring a motion to compel directed to a non-party to the court overseeing the litigation because that judge was well-suited to resolve the subpoena dispute in light of his familiarity with the underlying facts and prior consideration of similar discovery issues); *United States v. Star Scientific*, 205 F. Supp.2d 482 (D. Md. 2002) (transferring motion to compel non-party to comply with subpoena to district in which the underlying action was pending); *Smithkline Beecham Corp. v. Synthon Pharm. Ltd*, 210 F.R.D. 163, 169 n. 7 (M.D.N.C. 2002) ("The third-party subpoena route has the added benefit of allowing the court in which the main litigation is pending to make the ruling.").

Cedarbaum, who is presiding over the underlying litigation and is familiar with the prior discovery involving Google. The objectives of Rule 45 and the interests of justice and judicial economy are all furthered by transfer of this motion to the Southern District of New York.[9]

Among the most important objectives of Rule 45 is protecting non-parties who are required to assist the court by providing information and evidence. *See* Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment. As one commentator observed, Rule 45 directs that a motion to quash be made in the court from which the subpoena issued "presumably" because that court is located in a district convenient to the non-party, since it is "of course the nonparty whose convenience Rule 45 is most concerned about protecting." *See* David D. Siegel, Practice Commentaries, Fed. R. Civ. P. 45. Thus, where the nonparty expresses a preference for a forum other than the issuing court, the notes and commentary to the Rule suggest that transfer, in the issuing court's discretion accords with Rule 45's purposes. *See Star Scientific*, 205 F. Supp.2d at 484-85.

Here, the District of Massachusetts was not even selected by US Airways because of its convenience to Google, the non-party. To the contrary, the forum was selected as part of US Airways' litigation strategy targeting Mr. Wertheimer, a resident of Massachusetts, individually for deposition. Google has expressed its preference for resolving this dispute in the Southern District of New York and US Airways concurs. According deference to that request is consistent with the tenets of Rule 45. *See Stanziale*, 2007 WL 473703, at *5.

Fact discovery in the underlying action is scheduled to conclude on August 2, 2013. The

[9] A few courts have held that the court from which a subpoena issues may not transfer a motion to quash, but, nonetheless, may stay its action on the motion and permit the party seeking to quash the subpoena to make a motion for a protective order in the court where the trial is to occur and then defer to the trial court's decision. *See, e.g.*, *Hartz Mountain Corp. v. Chanelle Pharm. Veterinary Prods. Mfg. Ltd.*, 235 F.R.D. 535, 536 (D. Me. 2006); *In re Sealed Case*, 141 F.3d 337, 342 (D.C. Cir. 1998). If the Court determines that transfer of the Motion to Quash is not appropriate, Google respectfully submits that the Court should issue a stay of this action and permit Google to make a motion for a protective order in the Southern District of New York deferring to that court's decision. Google is submitting a copy of these motion papers to Judge Cedarbaum to keep the trial court informed.

Southern District is actively managing discovery in this case, including with regard to third party discovery disputes. Indeed, as discussed, Judge Cedarbaum oversaw a discovery conference related to the earlier document subpoena issued to Google and has reviewed submissions related to both subpoenas. Judge Cedarbaum is therefore well-positioned to resolve this subpoena dispute expeditiously and in parallel with the case discovery deadlines. *See, e.g.*, *Douglas Cnty Bank,* 940 F.2d at 1392 (holding transfer of a subpoena dispute was appropriate to the court where the underlying action was pending because that court "more properly understood the issues of the case and could therefore rule more intelligently on a motion to quash or for a protective order."). Transfer would therefore promote the illuminating principle behind interpretation of the Federal Rules: "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

Finally, this is not a circumstance where numerous subpoena disputes have been litigated in this District. This Court has not acquired any special knowledge regarding this action and need not be burdened with resolving this subpoena dispute. By contrast, Judge Cedarbaum is familiar with the underlying litigation. Google disputes the relevancy of the (unspecified) deposition testimony sought by US Airways. Judge Cedarbaum's experience with this case makes her particularly well-placed to evaluate that issue. *See Smithkline Beecham,* 210 F.R.D. at 169 n.7 ("[Transfer of the third-party subpoena dispute] may be particularly appropriate when relevancy of the discovery is a significant issue. . . The court in which the litigation is pending will be in a better position to decide relevancy issues."). Judge Cedarbaum is likewise positioned to adjudge Google's challenge to the Subpoena on the ground that US Airways intends to seek testimony regarding technology used by Google in current products, which implicates the lengthy protective order negotiated by the parties and endorsed by that court.

Accordingly, this Court should exercise its discretion and transfer Google's Motion to Quash to Judge Cedarbaum's court in the Southern District of New York.

III. THE SUBPOENA SHOULD BE QUASHED

If the Court elects not to transfer the Motion to Quash, it should quash the Subpoena on the following grounds.

A. The Subpoena Is Unnecessary And Threatens To Impose Undue Burden On A Non-Party

The Subpoena is facially overbroad and threatens to impose undue burden on a non-party. It should therefore be quashed. *See* Fed. R. Civ. P. 45(c)(3(A)(iv).

It is evident that US Airways has no interest in discovery regarding Google's institutional knowledge, the only possible rationale for a deposition subpoena in this case. If it did, US Airways would have requested a deposition pursuant to Rule 30(b)(6) of a person (or persons) knowledgeable at the company and described with reasonable particularity the matters on which it sought testimony. Instead, US Airways targeted Mr. Wertheimer, individually, and deliberately omitted a list of topics on which it proposes to elicit testimony from him. Mr. Wertheimer, moreover, does not possess any knowledge regarding US Airways' relationship with Sabre or Sabre's other agreements. What he does have is stature in the travel industry. Thus, the decision to subpoena his testimony could only have been a strategic one. Pursuing non-parties in this fashion is not an appropriate use of Rule 45.

Further, absent a description of the proposed subject matter for the deposition, it is impossible for Google to know whether the testimony sought is relevant, over broad, seeks the disclosure of proprietary information, or is otherwise objectionable. As one example, there is no indication that US Airways intends to limit its examination to the time period relevant to the 1U platform—2005 and 2006. As another, Google cannot know whether US Airways plans to seek

testimony that is beyond the scope of Google's document production.

US Airways' election not to include a list of deposition subjects renders the Subpoena insufficiently particularized and presumptively over broad. *See, e.g.*, *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (declining to authorize deposition of a non-party where subpoena stated only that issuer intended to depose non-party to "explain the contents" of documents produced and to examine the deponent about the documents "including but not limited to" the areas specified). The Motion to Quash should be granted for this reason alone.

The Subpoena, moreover, was issued in a context in which Google has already been subjected to significant time, expense and effort in responding to discovery requests in this litigation. Foisting additional undue burden on a non-party, with no stake in the outcome of the underlying dispute, by subjecting its employee to a potentially boundless inquiry is precisely the harm against which Rule 45 protects. *Cf. Cusumano*, 162 F.3d at 717 ("Although discovery is by definition invasive, parties to a lawsuit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.").

Even setting aside US Airways' tactics, the deposition testimony of Mr. Wertheimer is entirely unnecessary to the prosecution of this action. US Airways concedes that Google is not a competitor of Sabre's in the GDS Market. FAC ¶ 39. Google, likewise, is not a customer of Sabre's or otherwise a member of the Sabre Submarket. *See id.* Google is not a party to and Mr. Wertheimer is not a witness with knowledge regarding any of: (1) Sabre's 2006 agreement with US Airways; (2) Sabre's 2011 agreement with US Airways; or (3) agreements that Sabre has entered into with other GDSs, airlines and/or travel agents. Thus, Mr. Wertheimer has nothing to

offer with regard to the agreements that form the basis of US Airways' antitrust claims.

ITA did develop the 1U platform in the mid-2000s as a potential alternative to GDS, but that product was discontinued in 2006, well before most of the events that are at issue in this litigation occurred. Google has already undertaken the significant burden and expense of responding to US Airways' document subpoena, including the production of documents concerning the 1U platform and ITA's reasons for discontinuing the platform. Testimony related to those documents, which are of, at most, marginal relevance to US Airways' claims is likewise unnecessary and will almost certainly be cumulative of the documents themselves.

Similarly, any contention by US Airways that it should be permitted to test its speculative theory that "Sabre's anticompetitive practices and conduct squelched the 1U new-entrant competitor,"[10] should be disregarded. Nothing in the documents produced by Google lends credence to such a charge.[11] If US Airways is even required to demonstrate the supposed nature Sabre's "practices," such evidence, if it exists, can be more easily obtained through discovery of Sabre, "the GDSs, airlines and/or travel agents" with whom Sabre has agreements, or the non-parties US Airways actually alleges in its pleading were "block[ed]" by Sabre (*see* FAC ¶ 42 (referencing Farelogix and Sabre's alleged efforts to thwart that company in 2009)).

In sum, US Airways has not, because it cannot, justified diverting Mr. Wertheimer from his duties at Google to sit for a deposition concerning a dispute in which he had no involvement and about which he has no knowledge. The Subpoena should, accordingly, be quashed.

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[10] *See* Apr. 22, 2013 Let. to Cedarbaum, J. (Calica Decl., Ex. G).

[11] Indeed, as Google has previously explained, the assumption underlying US Airways' supposition is flawed. As is set forth in documents produced by Google in response to the Subpoena, the reasons for discontinuing the 1U platform were unrelated to "Sabre retaliation," and, Google is not aware of any retaliatory efforts by Sabre. Tellingly, US Airways has never contended that it (or its merger partner American Airlines) was prepared to switch from the GDS to 1U, let alone "but for" Sabre's alleged dilatory practices. US Airways' concerns regarding Sabre's practices vis-à-vis 1U appear to have arisen only after it entered into a 2011 agreement with Sabre, and well after the 1U platform was retired. *See* May 10, 2013 Let. to Cedarbaum, J. (Calica Decl., Ex. E).

B. The Subpoena Improperly Seeks Disclosure Of Google's Proprietary Information

Additionally, because US Airways intentionally omitted from the Subpoena a list of the topics it proposes to address at Mr. Wertheimer's deposition, whether or to what extent US Airways intends to inquire about Google's proprietary technology is unknown. But, US Airways' prior statements and conduct, described further below, strongly suggest that it intends to do just that. Therefore, and to protect against the disclosure of Google's proprietary information, the Subpoena should be quashed. *See* Fed. R. Civ. P. 45(c)(3)(B)(i).

US Airways contends that Sabre's reliance on "antiquated and inefficient technology" demonstrates the anticompetitive effect of Sabre's allegedly unlawful restraints.[12] US Airways sought the production of documents concerning Google technology, purportedly to aid in establishing this contention.[13] US Airways has no need, however, let alone a substantial need, for testimony concerning the technology underlying the 1U product. US Airways' fundamental complaint is that Sabre's GDS is technologically inefficient thus inhibiting US Airways' ability to use more efficient methods of connecting with travel agents. *See, e.g.*, FAC ¶¶ 9, 11. The technology underlying the 1U platform as it existed in **2006**—many lifetimes ago in the world of programming—hardly seems probative of that concern.

The First Amended Complaint supports Google's position. There, US Airways makes repeated references Farelogix's (not 1U's) innovative and low cost "direct connection" aggregators which offer the model alternative to GDS and to Farelogix's resulting rivalry with Sabre beginning in **2009**. *See, e.g., id.* ¶¶ 9, 25, 40-48. Indeed, there is not a single reference to the 1U platform in the First Amended Complaint. The appropriate course for US Airways is to pursue discovery from Sabre or Farelogix (or Universal API, whom it also references) regarding

[12] *See* Apr. 22, 2013 Let. to Cedarbaum, J. (Calica Decl., Ex. E).
[13] *See id.*

the "modernized technology" Farelogix apparently deploys (*id.* ¶ 40), or to retain an industry expert to opine on the state of Sabre's technology.

US Airways likewise has no need for testimony regarding other Google technology. Although Google is not a GDS competitor, it does market or has, as recently as this year, marketed products that are used in the travel industry. These include: (1) QPX, a pricing and shopping engine for airline flights; and (2) an airline reservation system. Google used certain elements of the 1U platform in designing these other products. That proprietary technology is of significant commercial value to Google and should not be subject to disclosure in this action. Courts have held that disclosure to other players and competitors (or potential competitors) in an industry, here US Airways and Sabre (who also offers pricing and shopping services), is presumptively more harmful than disclosure to non-competitors. *See, e.g., Am. Standard Inc. v. Pfizer, Inc.* 828 F.2d 734, 741 (Fed. Cir. 1987). Indeed, disclosure threatens to reduce the value of these assets.

Google anticipates that US Airways will point to the protective order entered in this case as providing the necessary safeguards for any testimony concerning Google technology. But, that agreement was negotiated by and for the benefit of the parties to this dispute. Google, a non-party, should not be required to rely on US Airways' or Sabre's or their counsel's adherence to that agreement for the continued protection of Google's proprietary information. Further, none of the parties has a strong interest in protecting Google's interests when issues of confidentiality regarding Mr. Wertheimer's testimony arise during trial and Google will have no standing to object to the trial court's decisions as to what is or is not confidential or what part of the trial, if any, is conducted *in camera. See, e.g., Allen v. Howmedica Libinger, GmhH*, 190 F.R.D. 518, 526 (W.D. Tenn. 1999). Thus, the presence of a protective order does nothing to

alleviate the risk of harm to Google.

Finally, US Airways previously requested the production from Google of a 1U prototype for the express purpose of "allow[ing] US Airways' experts to test and compare 1U with similar products."[14] To the extent, US Airways' intention is to depose Mr. Wertheimer because he possesses expertise in the technology used in this industry it provides yet another ground for quashing the Subpoena. It is not the role of non-parties, such as Mr. Wertheimer, to subsidize US Airways' expert discovery efforts.

C. The Subpoena Fails To Comply With Fed. R. Civ. P. 45 (b)(1)

Rule 45 provides that if a subpoena commands the attendance of the person, then the issuing party must tender concurrently with the subpoena "the fees for one day's attendance and the mileage allowed by law." Fed. R. Civ. P. 45(b)(1). US Airways did not tender a fee for attendance or mileage with the Subpoena.[15] This alone renders the Subpoena invalid. *See, e.g.*, *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir. 2003) (Rule 45(b)(1) requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of the subpoena. "When the subpoenaing party makes no attempt to calculate and tender at least a reasonably estimated mileage allowance, he plainly violates rule 45(b)(1)"); *In re Hunt*, 238 F.3d 1098, 1100 (9th Cir. 2001) (quashing subpoena because service was not accompanied by witness fee and mileage); *Carey v. Air Cargo Assocs., Inc.*, 18 MS 302/09-2353, 2011 WL 446654 (S.D.N.Y. Feb. 7, 2011) ("The clear language of Rule 45 indicates—and federal courts both inside and outside of the Second Circuit have held—that failure to tender the required witness fee and mileage allowance can serve as an adequate ground for the invalidation of a subpoena."); *Song v. Dreamtouch, Inc.*, 01 Civ. 0386, 2001 WL 487413, at *7 (S.D.N.Y. May 8, 2001)

[14] Letter from US Airways to Google, dated May 23, 2013, attached as Exhibit H to the Calica Decl.
[15] *See* Subpoena (Calica Decl. at Ex. A).

(quashing third-party subpoena because "[w]here no fee is tendered with the service of a subpoena requiring a witness' attendance, the service is invalid").

For this additional reason, the Subpoena should be quashed.

CONCLUSION

For the foregoing reasons, the Court should transfer the Motion to Quash to the United States District Court for the Southern District of New York, where the underlying action is pending. If the Court elects not to transfer this proceeding (or to otherwise stay the proceeding pending a motion for a protective order in the trial court), then, in the alternative, the Court should quash the Subpoena pursuant to Fed. R. Civ. P. 45(c)(3).

Dated: July 26, 2013

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CERTIFICATE OF SERVICE

I, Karen L. Burhans, certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 26th day of July, 2013.

/s/ Karen L. Burhans
Karen L. Burhans