UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LEE WARD, JAMES SAUNDERS, and WILLIAM HOLLOWAY, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN AIRLINES, INC., Defendant.	No. 4:20-cv-00371-O

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY DISCOVERY

Allen R. Vaught
TX Bar No. 24004966
VAUGHT FIRM, LLC
1910 Pacific Ave., Suite 9150
Dallas, TX 75201
(214) 675-8603 | (214) 261-5159 (fax)
allen@vaughtfirm.com

Steve W. Berman (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292 | (206) 623-0594 (fax)
steve@hbsslaw.com

Daniel J. Kurowski (*Pro Hac Vice*)
Whitney K. Siehl (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
455 N. Cityfront Plaza Dr., Suite 2410
Chicago, IL 60611
(708) 628-4949 | (708) 628-4950 (fax)
dank@hbsslaw.com
whitneys@hbsslaw.com

E. Adam Webb (*Pro Hac Vice*)
G. Franklin Lemond, Jr. (*Pro Hac Vice*)
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339
(770) 444-9325 | (770) 217-9950 (fax)
Adam@WebbLLC.com
Franklin@WebbLLC.com

Attorneys for Plaintiffs

I. INTRODUCTION

Plaintiffs Lee Ward, James Saunders, and William Holloway oppose the motion to stay discovery (Dkt. 43) filed by Defendant American Airlines, Inc. ("American"). A stay of discovery is not warranted because Defendant has grossly overstated the strength of its threshold motion and the discovery sought by Plaintiffs is absolutely necessary in order to for Plaintiffs to move for class certification under the deadline established in the Court's Scheduling Order (Dkt. 38). As a result, a stay of discovery will operate to *prejudice* Plaintiffs given the current deadline set by the Court for the filing of Plaintiff's opening motion for class certification. Defendant has now used its pending motion to serve as a shield to discovery and is stonewalling Plaintiffs' efforts to obtain discovery by completely objecting to all of Plaintiff's document requests. *See* Ex. 1 (attaching a true and correct copy of Defendant's Responses and Objections to Plaintiffs' First Requests for Production of Documents). Defendant's request for a stay should be denied.

II. STANDARD OF REVIEW

District courts may stay discovery but only "for good cause shown." *Von Drake v. Nat'l Broadcasting Co.*, No. 3:04-CV-0652R, 2004 WL 1144142, at *1 (N.D. Tex. May 20, 2004) (citing Fed. R. Civ. P. 26(c)). Although discovery can be stayed pending the outcome of a motion to dismiss, this Court has repeatedly emphasized that "a stay is not, however, automatically granted whenever a motion to dismiss is pending." *Griffin v. Am. Zurich Ins. Co.*, No. 3:14-CV-2470-P2015 WL 11019132, at *2 (N.D. Tex. Mar. 18, 2015) (citing *Stanissis v. Dyncorp Int'l, LLC*, No. 3:14-C2736-D2014 WL 7183942, at *1 (N.D. Tex. Dec. 17, 2014)); *also Glazer's Wholesale Drug Co. v. Klein Foods, Inc.*, No. 3:08-CV-0774-L, 2008 WL 2930482, at *1 (N.D. Tex. July 23, 2008); *Von Drake*, 2004 WL 1144142, at *1. "In fact, such a stay is the ***exception rather than the rule***." *Glazer's Wholesale*, 2008 WL 2930482, at *1 (citing *Ford Motor Co. v. U.S. Auto Club, Motoring Division, Inc.*, No. 3:07-CV-2182-L, 2008 WL

2038887 at *1 (N.D. Tex. Apr. 24, 2008)) (emphasis added). As Judge Kaplan noted in *Glazer's Wholesale*: "Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect." 2008 WL 2930482, at *1 (quoting *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (internal quotations omitted)). Moreover, "[n]or is a stay of discovery permitted merely because defendant believes it will prevail on its motion to dismiss." *Griffin*, 2015 WL 11019132, at *2. Some of the factors to be considered by courts when considering whether to grant a stay are: "(1) the breadth of discovery sought; (2) the burden of responding to such discovery; and (3) the strength of the dispositive motion filed by the party seeking a stay." *Id.* Applying these factors here, Defendant cannot establish the good cause necessary to invoke a stay.

III. ARGUMENT

A. American's Motion to Dismiss does not support a stay.

While American contends that it has submitted a strong dispositive motion, in reality that is not the case.[1] As Plaintiffs demonstrate in their opposition to the motion to compel arbitration, filed simultaneously with this opposition, Defendant's attempt to rely upon the non-party Hotwire and Expedia arbitration clauses suffers from several fatal defects. First, American failed to present admissible evidence regarding any agreement to arbitrate between the parties because its declarant, Mr. Berg, lacks the personal knowledge necessary to establish that the Terms of Use and screenshots he has presented to the Court were the terms or websites that Plaintiffs used

[1] American did not move to arbitrate Mr. Ward's claims. This further supports the denial of a stay because his claims would move forward even if the Court were to find the other Plaintiffs subject to arbitration. *See U.S. ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850, 863 (S.D. Tex. 2008) ("If some claims are non-arbitrable, then we will sever those claims subject to arbitration from those adjudicable only in court") (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995)).

to make their online reservations. Second, even if the Court disregarded the significant threshold evidentiary issue raised by Plaintiffs, the alleged strength of American's motion is also undermined by the fact that American identifies ***no*** language in either Hotwire's or Expedia's Terms of Use that allows American to invoke arbitration as a non-party to those Terms of Use. This same defect resulted in the recent denial of a rental car company's attempt to rely on an online travel agency's arbitration clause in *Calderon v. Sixt Rent a Car, L.L.C.*, No.: 19-cv-62408-SINGHAL, 2020 WL 700381, at *1 (S.D. Fla. Feb. 12, 2020). Additionally, Defendant's arbitration argument is undermined by its own "Conditions of Carriage," which represents to its customers that "[t]hese conditions cover ***all of your rights and responsibilities*** as a passenger on flights operated by American Airlines." (emphasis added). Despite this clear language, American now claims that the Conditions of Carriage does not cover all of a customer's rights and responsibilities, and that certain third-party contracts must also be considered. *See* Dkt. 41 at 11.[2] Defendant greatly exaggerates the strength of its arbitration motion.

The same can be said regarding American's motion to dismiss. American's attempt to prevail on its Rule 12(b)(6) motion is based exclusively on outside materials far beyond the four corners of the Amended Complaint. Defendant admits as much, but erroneously contends these outside materials can be considered at this stage. *See* Dkt. 41 at 22 n.11. Not so for two key reasons. First, just as with the materials it submits in support of its arbitration attempt, these materials have not been presented to the Court in an admissible fashion. Mr. Berg's affidavit is not based on his personal knowledge, but rather solely based on his role as an attorney for American. Therefore, it is inadmissible. *See, e.g.*, *Snapt, Inc. v. Ellipse Communications, Inc.*,

[2] Additional arguments against arbitration are set forth in Plaintiffs' opposition brief and Plaintiffs incorporate them here by reference.

No. 3:09-cv-0661-O, 2010 WL 11542004, at *4 (N.D. Tex. Sept. 28, 2010) (O'Connor, J.) (finding inadmissible proffered facts that were not based on personal knowledge). Second, the materials upon which American are not central to Plaintiffs' claims as they must be in order to be considered. *E.g.*, *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 662 (N.D. Tex. 2011); *Dawes v. City of Dallas*, No. 3:17-CV-01424-X-BX, 2020 WL 3603090, at *3 (N.D. Tex. July 2, 2020).

While the Fifth Circuit has not articulated a test for determining when a document is central to a plaintiff's claims, case law from this Court suggests that documents are central when they are necessary to establish an element of one of the plaintiff's claims. *Kaye*, 453 B.R. at 662. For example, when a plaintiff's claim is based on the terms of a contract, the documents constituting the contract are central to the claim. *Id.* (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007), and *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000)). In *Collins*, where the Fifth Circuit first approved of this exception, the court held that the District Court properly considered a contract and an investment bank's fairness opinion of a potential merger between two companies in order to determine whether the plaintiff stock-option holders were third-party beneficiaries of the contract. *Collins*, 224 F.3d at 499. Similarly, in *Katrina Canal*, the Fifth Circuit upheld the consideration of an insurance contract that formed the basis of the plaintiffs' claims on a motion to dismiss. *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205. The Fifth Circuit has made it clear, however, that, if a document referenced in the plaintiff's complaint is merely evidence of an element of the plaintiff's claim, then the court may ***not*** incorporate it into the complaint and consider it on a motion to dismiss. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536–37 (5th Cir. 2003).

Internal Passenger Name Record documents maintained by American Airlines are not only never referenced in the Amended Complaint, but are certainly not documents that form the basis of Plaintiffs' claims in this case. Therefore, they are inadmissible on a motion to dismiss. *Kaye*, 453 B.R. at 662; *Dawes*, 2020 WL 3603090, at *3 (refusing to consider body camera footage submitted by defendants merely because it was referenced in the complaint because it was not central to plaintiff's claims). The same is true with respect to the Interline Agreement and Multilateral Interline Traffic Agreement between American Airlines and LATAM Airlines—neither are referenced in the Amended Complaint and neither form the basis of Plaintiffs' claims.[3] This document is also inadmissible. Without these inadmissible, external documents, American has no basis to dismiss Plaintiffs' claims.

Under the facts of this case, American's arbitration motion and Rule 12(b)(6) motion do not justify granting a stay.

B. The discovery sought by Plaintiffs is necessary for class certification.

Because the "strength" of Defendant's dispositive motions is greatly exaggerated, American's contention that the Requests for Production served on July 22, 2020 are disproportionate is unpersuasive. In the parties' Joint Report (Dkt. 25), counsel for Plaintiffs indicated that the subjects of discovery would include, but not be limited to: "Defendant's policies, representations and statements regarding passenger refunds; Defendant's policies, representations and statements regarding COVID-19; ticketing and passenger data; data regarding Defendant's flight delays and/or cancellations." *Id.* at 7. Consistent with that

[3] American attempts to obfuscate the fact that the external documents that it relies upon are not admissible to support a 12(b)(6) motion by describing these documents as "ticket records." *See* Dkt. 41 at 22 n.11. A cursory review of these internal airline documents quickly reveals that they are not merely "ticket records" but much more complex documents Plaintiffs have never even seen before.

representation, Plaintiffs promptly served discovery so they could prepare to move for class certification by the September 14, 2020 deadline established by the Court. *See* Dkt. 38 at 1. Defendant also represented to the Court that it anticipated discovery would be needed on "Plaintiff's travel history, knowledge of policies pertaining to refunds, efforts to obtain refunds with respect to airline tickets, and dealings with OneTravel.com and LATAM Airlines." *See* Dkt. 25 at 7. Importantly, at no point did Defendant articulate in the Joint Report that it was contemplating seeking a stay of discovery while it filed its motion to dismiss. *Id.*

American's failure to request a stay of discovery pending the disposition of a dispositive motion in the parties' Joint Report supports the denial of its request for one now. *See, e.g.*, *Glazer's Wholesale*, 2008 WL 2930482, at *1. According to the court in *Glazer's Wholesale*, the proper way for the court to handle a defendant's belated objection to discovery is not through a stay, but rather by having the plaintiffs challenge any objections asserted by defendant to written discovery, or for the defendant to seek a protective order on grounds other than a blanket stay of all discovery. *Id.* Similar findings are certainly warranted here.

Furthermore, a stay of discovery will completely prejudice Plaintiffs' class certification presentation should the Court grant the stay without striking the class certification deadline. Ordinarily, class certification comes after discovery and document production because "a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification." *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005). Plaintiffs must be afforded an adequate period of time to develop discovery, and with a stay of discovery, Plaintiffs' motion will include no relevant documents from Defendant's files. *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 724 (E.D. La. 2009) ("Further, the record is not sufficiently developed to support class certification. Little discovery has been

conducted in the matter, and plaintiff's motion for class certification does not attach any evidence to support the motion. The parties are ordered to present the Court a schedule for refiling their motion for class certification which incorporates a period for discovery on the class issues."); *Shipes v. Trinity Indus., Inc*., No. CIV.A. TY-80-462-CA, 1981 WL 65, at *2 (E.D. Tex. Nov. 24, 1981) (noting that the Rule 23 "determination typically should be made on the basis of more information concerning the claim than is provided in the complaint"). Plaintiffs have diligently pursued discovery, serving a request for production of documents shortly after the parties scheduling conference.

IV. CONCLUSION

American's threshold motions will not dispose of this case. Moreover, the discovery requested by Plaintiffs is necessary to move for class certification by the deadline imposed by the Court and Plaintiffs will be prejudiced should a stay issue with the striking of the class certification deadline. A stay of discovery is unwarranted.

Dated: August 21, 2020

Respectfully submitted,

/s/ Daniel J. Kurowski

Allen R. Vaught
TX Bar No. 24004966
VAUGHT FIRM, LLC
1910 Pacific Ave., Suite 9150
Dallas, TX 75201
(214) 675-8603 | (214) 261-5159 (fax)
allen@vaughtfirm.com

Steve W. Berman (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292 | (206) 623-0594 (fax)
steve@hbsslaw.com

Daniel J. Kurowski (*Pro Hac Vice*)
Whitney K. Siehl (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
455 N. Cityfront Plaza Dr., Suite 2410
Chicago, IL 60611
(708) 628-4949 | (708) 628-4950 (fax)
dank@hbsslaw.com
whitneys@hbsslaw.com

E. Adam Webb (*Pro Hac Vice*)
G. Franklin Lemond, Jr. (*Pro Hac Vice*)
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339
(770) 444-9325 | (770) 217-9950 (fax)
Adam@WebbLLC.com
Franklin@WebbLLC.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on August 21, 2020, a true and correct copy of the foregoing was filed electronically via CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Daniel J. Kurowski