UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

US AIRWAYS, INC.,

Plaintiff,

v.

SABRE HOLDINGS CORP.,
SABRE GLBL INC., and
SABRE TRAVEL INT'L LTD.,

Defendants.

Civil Action No. 1:11-cv-02725-LGS-JLC

ECF Case

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO US AIRWAYS' MOTION FOR AN ORDER ON ENTITLEMENT TO COSTS, INCLUDING A REASONABLE ATTORNEY'S FEE UNDER 15 U.S.C. § 15

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Sabre respectfully submits this memorandum in opposition to US Airways' ("USAir") motion for an order to entitlement to costs, including a reasonable attorney's fee (ECF No. 1266; ECF No. 1267 ("Mem.")), and in response to the Court's order to "brief the threshold issue of whether [USAir] is entitled to fees (and the degree of recovery)." (ECF No. 1264.)

I. INTRODUCTION

Throughout its motion, USAir conflates two distinct questions: whether a plaintiff who obtains a nominal recovery is a "prevailing party" that may seek attorney's fees, and whether the "reasonable attorney's fee" for such a plaintiff is anything other than zero. While USAir's brief is tilting at the windmills of the first question, its fee application is foreclosed by the second. In *Farrar v. Hobby*, the United States Supreme Court held that when a "plaintiff recovers only nominal damages . . . the ***only reasonable [attorney's] fee is usually no fee at all***." 506 U.S. 103, 115-16 (1992) (emphasis added). Concurring in the judgment, Justice O'Connor remarked that "[i]f ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff is Joseph Farrar," who, after "10 years of litigation . . . got one dollar" despite proving a civil rights violation. *Id.* at 116. These pronouncements apply even more forcefully here, where USAir asserted antitrust claims, not Constitutional ones, based on stale contracts and conduct from over a decade ago. Following more than eleven years of litigation, two jury trials, and damages claims exceeding $1 billion, USAir lost or abandoned all of its claims except a portion of one, for which it obtained $1 (trebled to $3) and no prospective relief. After such staggering failure, the only reasonable fee here is no fee at all.

First, the Clayton Act's plain language and binding precedent on the interpretation of fee-shifting statutes dictate that *Farrar*'s reasoning governs what amount constitutes a

"reasonable attorney's fee" for USAir's post-trebled $3 recovery. That is because the statute at issue in *Farrar* and the statute at issue here, the Clayton Act, both provide for "a reasonable attorney's fee." And as the Supreme Court has held, what is a "reasonable attorney's fee" applies uniformly to all federal fee statutes. Tellingly, the lone post-*Farrar* nominal damages antitrust case that either party identified held that awarding attorneys' fees was unreasonable under *Farrar* because the plaintiff, like USAir, recovered a single dollar.

With no authority supporting its astronomical fee request, USAir tries to brush *Farrar* under the rug, claiming that (i) *Farrar*'s facts involved a statute that permits an award of a reasonable fee, whereas the Clayton Act requires an award of a reasonable fee; and (ii) the *Farrar* plaintiff was vindicating a Constitutional violation, which, in USAir's view, is less important than USAir's antitrust claims. Neither contention holds water. The first is a misdirection: whether a statute mandates or permits an award of a reasonable fee does not alter what amount is reasonable, which is the issue here. For that reason, courts have applied *Farrar* to deny fees under mandatory fee-shifting statutes, including the Clayton Act. If, as here, the reasonable attorney's fee is zero, then the Clayton Act mandates that zero be awarded.

USAir's other argument is exactly backwards. Neither *Farrar* nor any other authority suggests that, while a civil rights plaintiff should be denied an attorney's fee for a failed litigation, a commercial litigant like USAir can obtain a windfall for a similar failure, or as in this case, a greater failure. There is no hint in *Farrar* that the Court perversely elevated business disputes over Constitutional ones.

Second, under *Farrar*, USAir's failure to obtain more than nominal damages means its only reasonable fee is $0. The Second Circuit has held that exceptions to *Farrar* are rare, and for

USAir to recover any fees, Second Circuit law requires it to show that its suit relied on a new rule of liability that serves a significant public purpose. But USAir's motion fails to address this standard at all, and should be denied for this reason alone. In any event, USAir cannot make such a showing, as it did not rely on or establish any new rule of liability, and the only potentially novel legal theory USAir pursued that was decided as a matter of law—how to properly apply the Supreme Court's decision in *Ohio v. American Express* to Sabre—was decided in favor of Sabre. Indeed, the Second Circuit's decision on this point reversed the only portion of the first jury's verdict that favored USAir. The Court's inquiry should thus end with a $0 fee award after applying *Farrar*.

Third, even if a "reasonable" fee here exceeded $0 (which it should not), then USAir's fee must be reduced almost entirely to reflect its lack of success. USAir lost three out of four of its claims, and on the one portion of the one claim it did "win," it sought nearly $1 billion, but obtained only $1 in pre-trebled damages. In other words, USAir obtained about .0000003% of its claimed damages, but seeks 100% of its fees. As in other cases with such a near-total failure, USAir should get, at most, a minute fraction of its fees to account for its miniscule recovery.

Fourth, USAir's argument that it can recover all fees incurred pursuing failed claims simply by labeling them "intertwined" is premature and wrong as a matter of law. Plaintiffs are not entitled to recover fees for failed claims when, as here, they are segregable from fees for successful ones. In any event, as USAir itself acknowledges, this parsing of fees is premature—especially as USAir has still failed to produce any of its legal bills. Sabre and the Court thus have no ability to test USAir's assertion that, somehow, all the time it spent on its manifold failed claims and theories was—at every twist of this lengthy litigation—fully "intertwined" with

the effort directed at its ultimately miniscule success.

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The issue before the Court is straightforward: the Supreme Court has instructed that the "only reasonable fee" for a plaintiff that obtains nominal damages is usually zero. This case is not the rare exception to this rule, and $0 is the only reasonable attorney's fee USAir earned.

II. BACKGROUND

A. The Parties and USAir's Claims

Sabre operates an electronic platform ("GDS") that connects travel buyers (like travel agencies) with travel suppliers, such as airlines. USAir was a large airline now owned by American Airlines. (Mem. 6.) In 2006 and 2011, Sabre and USAir entered contracts setting the terms by which USAir would provide flight and fare information to Sabre's GDS. (ECF No. 1.)

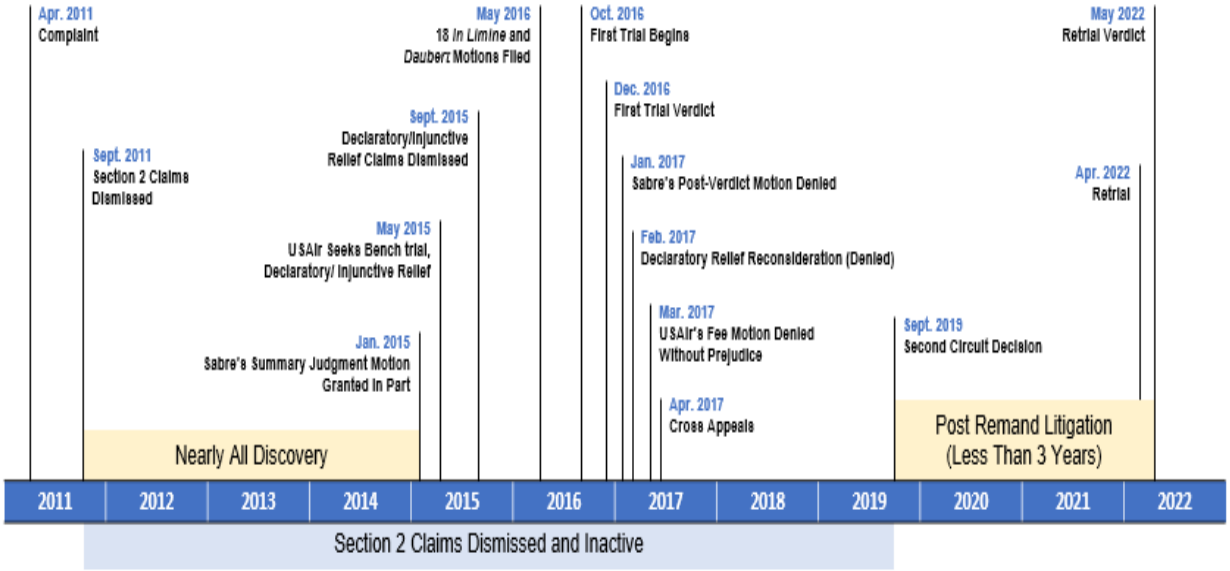
In April 2011, USAir asserted four antitrust claims against Sabre for damages and injunctive and declaratory relief. (*Id.*) Two claims were under Sherman Act Section 2: that Sabre (i) monopolized a market of travel agencies subscribing to Sabre's GDS; and (ii) conspired with travel agencies to monopolize that market. (*Id.*) USAir also asserted two claims under Sherman Act Section 1 based on: (i) the 2006 and 2011 contracts ("Section 1 contract claim"); and (ii) a conspiracy with other GDSs ("Section 1 conspiracy claim"). (*Id.*)

From April 2011 to May 2022, the parties litigated USAir's claims through two trials and an appeal (which overturned the sole part of the jury's verdict from the first trial that was in USAir's favor), with USAir losing all of its claims, except a portion of one of its Section 2 claims, which was not at issue in the first trial. But even on that sole portion of the verdict in USAir's favor, the jury awarded it $1 in damages (trebled to $3) and no declaratory or injunctive

relief. (ECF No. 1208.)

B. Litigation Through the First Trial

In September 2011, the court dismissed both of USAir's Section 2 claims (ECF No. 59), and discovery commenced on its Section 1 claims. Because its Section 2 claims were "dismissed before discovery began in earnest," USAir has acknowledged that it "spent comparatively little" (ECF No. 859 at 15) or "de minimis" time on them during discovery (ECF No. 900 at 3). Instead, USAir stated that during the nearly six years that followed (until it appealed the dismissal of its Section 2 claims in April 2017), it incurred "virtually all of [its] fees" while "focus[ing] its time and resources on its Section 1" claims. (*Id.* at 2-3.) The timeline below highlights certain key events between the September 2011 dismissal of USAir's Section 2 claims and the April 2017 appellate filings following the first trial in this case:



After discovery and motion practice on multiple issues—including USAir's failed attempt to drop its damages claims and force a bench trial—an eight-week jury trial on USAir's Section 1 claims commenced on October 24, 2016. Ultimately, the jury found for Sabre on

USAir's Section 1 conspiracy claim, and for USAir on the Section 1 contract claim. (ECF No. 720.) Although USAir initially sought $1.28 billion in damages for its two Section 1 claims, the jury awarded $5,098,142 (pre-trebling) for the Section 1 contract claim. (*Id*.) On March 3, 2017, USAir moved for about $125 million in fees and costs given the Section 1 contract verdict. (ECF No. 858.) Judge Schofield denied USAir's motion pending appeal. (ECF No. 919.)

C. Appellate Proceedings and Litigation Following Remand

On April 5, 2017, Sabre appealed the jury's verdict on USAir's Section 1 contract claim. (ECF No. 893.) On April 6, 2017, USAir cross-appealed, arguing that Judge Schofield improperly limited its Section 1 damages, and that its Section 2 claims were incorrectly dismissed. (ECF No. 896.)

Appellate practice on USAir's Section 2 claims was far less resource-intensive than on USAir's Section 1 contract claim, which involved analysis of a lengthy trial record. Indeed, of the ***71 pages*** in USAir's opening appellate brief, just under ***four pages*** focused on the Section 2 dismissal. *See* Brief for Plaintiff-Appellee-Cross-Appellant, *US Airways, Inc. v. Sabre Holdings Corp.*, No. 17-960 (2d Cir. Oct. 18, 2017), ECF No. 110.

In September 2019, the Second Circuit vacated the Section 1 contract verdict for USAir because its antitrust theory was "wrong as a matter of law" under the Supreme Court's intervening decision on two-sided platforms in *Ohio v. American Express* ("*Amex*"). *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 59-60 (2d Cir. 2019). The Second Circuit also reinstated USAir's Section 2 claims. *Id.* at 64-67.

Following remand, USAir filed an amended complaint, which added a new aspect to its monopolization claims: that Sabre monopolized and conspired to monopolize a market

consisting of all GDSs, in addition to the Sabre-only market as pled in USAir's initial complaint. (ECF No. 952.) The case proceeded to an additional expert discovery phase, where the parties entirely replaced reports for six experts and conducted new depositions with respect to the six experts who issued replacement reports. (ECF No. 990.)

After this second round of expert discovery, USAir abandoned its Section 2 conspiracy to monopolize claim (ECF No. 1037), as well as the newly added claim that Sabre monopolized an all-GDS market (ECF Nos. 952, 1159), and the case proceeded to a trial on USAir's two remaining claims: (i) the Section 1 contract claim; and (ii) the Section 2 monopolization claim. The parties' agreed that, subject to narrow exceptions, only pre-2013 conduct would be presented at the retrial. (ECF No. 1078.)

Following a four-week trial, the jury found for Sabre on USAir's Section 1 contract claim. (ECF No. 1208.) While the jury also held that USAir had proven Sabre liable for its Section 2 monopolization claim, the jury awarded just $1 in damages, which, after trebling to $3, is about .0000003% of the $897.9 million USAir requested for that claim. (*Id.*) In effect, USAir filed a massive antitrust case, litigated for 11 years, and obtained virtually nothing:

USAir Claim	USAir's Result	Damages Sought	Damages Obtained	Prospective Relief
Declaratory/ Injunctive Relief	LOSS	N/A	N/A	NONE
Section 1 Contract (2006 and 2011 Contract)	LOSS	$425.3 million (trebled to $1.28 billion)	$0	NONE
Section 1 Conspiracy	LOSS	$425.3 million (trebled to $1.28 billion)	$0	NONE
Section 2 Conspiracy to Monopolize	ABANDONED	$299.3 million (trebled to $897.9 million)	$0	NONE
Section 2 Monopolization (All-GDS Market)	ABANDONED	$299.3 million (trebled to $897.9 million)	$0	NONE
Section 2 Monopolization (Sabre-Only Market)	Judgment	$299.3 million (trebled to $897.9 million)	$1 (trebled to $3)	NONE

Judge Schofield referred any motion for fees to this Court (ECF No. 1253), which held a hearing on July 7, 2022 (ECF No. 1255). During that hearing, USAir's counsel stated that USAir would submit a "very, very substantial . . . fees claim" for at least "$150 million." (ECF No. 1256, Hr'g Tr. 5:22-24, 12:4.) This Court then ordered the instant briefing on whether USAir "is entitled to fees (and the degree of recovery)." (ECF No. 1264.)

III. ARGUMENT

Directly applicable Supreme Court precedent precludes USAir's fee application under the Clayton Act, which provides a plaintiff who proves an antitrust "injur[y]" with "a reasonable attorney's fee." 15 U.S.C. § 15(a). In "determining the reasonableness of a fee award," the "most critical factor" is the "degree of success" a plaintiff obtained. *Farrar*, 506 U.S. at 114 (citation omitted). Accordingly, in *Farrar*, the Supreme Court held that when, as here, a movant obtains nominal damages, "the ***only reasonable fee is usually no fee at all***." *Id.* at 115-16 (emphasis added). "Under [the Second Circuit's] precedents" interpreting *Farrar*, an "award of fees" for nominal recovery is "rare," and "appropriate ***only when*** a plaintiff's success relies on a 'new rule of liability that serve[s] a significant public purpose.'" *McGrath v. Toys "R" Us, Inc.*, 409 F.3d 513, 518 (2d Cir. 2005) (citing *Pino v. Locascio*, 101 F.3d 235, 238-39 (2d Cir. 1996)) (emphasis added).

Here, USAir cannot claim (and has not claimed) credit for such a "new rule of liability," and controlling law directs a zero fee. Even had *Farrar* not compelled the no-fee result, any fee would need to be commensurate with the outcome achieved. USAir claimed more than $1 billion in damages and sought declaratory and injunctive relief. It "won" $1 (trebled to $3), no declarative relief, and no injunctive relief. That cannot justify any fees, much less the more than

$150,000,000 USAir demands.

A. The Supreme Court's Decision in *Farrar* Precludes USAir's Fee Request

1. *Farrar* Applies to USAir's Request for a "Reasonable Attorney's Fee"

In *Farrar*, the Supreme Court announced a generally applicable rule that resolves how the "reasonableness . . . inquiry plays out when"—as here—"the plaintiff has won only nominal damages." *Pino*, 101 F.3d at 237-38. There, the plaintiff sought $17 million for civil rights violations, and "[a]fter 10 years of litigation . . . got one dollar." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring). Agreeing that the district court abused its discretion in awarding $280,000 as a "reasonable attorney's fee" under the civil rights fee-shifting statute, *see* 42 U.S.C. § 1988, the Supreme Court held that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the ***only*** reasonable [attorney's] fee is usually no fee at all." *Id.* at 114-16 (majority op.) (emphasis added). As Justice O'Connor further explained in her concurrence, "[w]hen the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Id.* at 117 (O'Connor, J., concurring).

The plain terms of the civil rights fee-shifting statute and the Clayton Act, as well as binding Supreme Court precedent on the interpretation of fee-shifting statutes, dictate that *Farrar* controls here. Like the statute in *Farrar*, the Clayton Act provides for "a reasonable attorney's fee." 15 U.S.C. § 15(a); 42 U.S.C. § 1988. "[T]he word 'reasonable' is a term of art frequently used by Congress in fee-shifting statutes." *Doe v. Chao*, 435 F.3d 492, 504 (4th Cir. 2006). And because "fee-shifting statutes' similar language is 'a strong indication' that they are

to be interpreted alike," *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 n.2 (1989) (citation omitted), the Supreme Court has held that its "case law construing what is a 'reasonable' fee ***applies uniformly to all***" federal fee-shifting statutes. *Burlington v. Dague*, 505 U.S. 557, 562 (1992) (emphasis added) (citation omitted). Thus, *Farrar*'s holding that a nominal recovery warrants a "reasonable attorney's fee" of $0 applies to civil rights cases and antitrust cases alike.

The lone post-*Farrar*, nominal damages antitrust case the parties identified reached the same conclusion. (Mem. 9 n.8 (citing *Concord Boat Corp. v. Brunswick Corp.*, 34 F. Supp. 2d 1125, 1133-34 (E.D. Ark. 1998), *rev'd on other grounds*, 207 F.3d 1039 (8th Cir. 2000)).) In *Concord Boat*, the court undertook "a *Farrar* analysis," holding that because the movant "obtained three dollars in [post-trebled] damages on a claim that originally sought over $14 Million," its "victory" under the Sherman Act "was *de minimis*" and the only "reasonable attorney's fee" was zero. 34 F. Supp. 2d at 1133-34. *Concord Boat* is directly on point, and while USAir conspicuously hedges that it found "no Court of Appeals" decision applying *Farrar* to preclude fees under the antitrust laws (Mem. 9), it has identified ***no case***—appellate or otherwise—that undermines *Concord Boat*'s holding. *See infra* n.3.

As a substitute for authority, USAir asks this Court to ignore *Farrar* in the service of nonsensical "policy" arguments. ***First***, USAir incorrectly contends that the mandatory nature of the Clayton Act's fee-shifting provision—i.e., that the injured party in antitrust disputes "***shall*** recover . . . a reasonable attorney's fee," 15 U.S.C. § 15(a) (emphasis added)—renders *Farrar* inapposite because *Farrar* involved a discretionary fee-shifting statute. (*See* Mem. 1, 8-14.)

USAir misreads *Farrar*. The issue in *Farrar* was not whether the plaintiff was eligible

(or, as in antitrust cases, entitled) to receive a fee, but rather what amount "constitutes a reasonable fee" for the plaintiff. *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring). Indeed, courts have rejected the very distinction USAir concocts here because "*Farrar* appl[ies] to all cases," *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 337-38 (5th Cir. 1995) (Garza, J., concurring in part), and a contrary interpretation "confuse[s] determination of the ***right*** to recover fees with determination of the ***reasonable amount*** of that fee." *Id.* at 330 (majority op.). For example, before being elevated to the Third Circuit, Judge Vanaskie applied *Farrar* to deny fees under another mandatory fee statute, explaining that being "***eligible*** for an award" of "***reasonable*** fee[s]" under the statute does not resolve how the "nature of a nominal damage award . . . bears directly on the size, if any, of a fee award." *Petrunich v. Sun Bldg. Sys., Inc.*, 625 F. Supp. 2d 199, 205 (M.D. Pa. 2008) (quoting 29 U.S.C. § 216(b)). Other courts applying mandatory fee-shifting statutes,[1] including the Clayton Act,[2] agree that *Farrar* governs.

The cases USAir cites for its contention that *Farrar* does not apply to mandatory fee-shifting statutes say nothing of the sort. Instead, they (i) involve plaintiff verdicts that were not "purely technical or *de minimis*" because the plaintiff received injunctive relief and/or non-nominal damages awards, including damage awards that were offset by prior settlements;

[1] *See, e.g.*, *Doe*, 435 F.3d at 503-07 & n.19 (applying *Dague* and *Farrar* in mandatory fee-shifting case and holding that the "district court erred in its reasonableness analysis by failing to 'give primary consideration to the amount of damages awarded as compared to the amount sought,'" and in a subsequent opinion, holding that "no fee award was appropriate," 511 F.3d 461, 468 (4th Cir. 2007)); *William Inglis & Sons Baking Co. v. Cont'l Baking Co.*, 1993 WL 424235, at *2 (N.D. Cal. July 30, 1993) (rejecting that "*Farrar* [was] inapposite" as involving a statute "under which fees are discretionary, not mandatory," because *Farrar* reflects "the latest word on . . . determining reasonable attorneys' fees," and "the means by which to determine what fees are reasonable is essentially the same"), *aff'd in relevant part*, 82 F.3d 424 (9th Cir. 1996).

[2] *See, e.g.*, *Kellstrom*, 50 F.3d at 330 & n.23 (discussed above); *Concord Boat*, 34 F. Supp. 2d at 1134 (plaintiff obtaining nominal damages may "move for attorney's fees," but "*Farrar* analysis" applies to amount of the fee).

(ii) pre-date *Farrar* (and thus did not have the benefit of its holding); and/or (iii) concern issues not relevant here.[3] For example, USAir's chief Second Circuit authority, *U.S. Football League v. Nat'l Football League*, 887 F.2d 408 (2d Cir. 1989) ("*USFL*"), was decided years before *Farrar*. It also addresses a question not at issue here—what an antitrust plaintiff must show to establish that it is "***entitled*** to" a reasonable fee under the Clayton Act. *USFL*, 887 F.2d at 412 (emphasis added). On the relevant question—the amount of a reasonable fee (i.e., the degree of recovery)—*USFL* is at odds with USAir's position that there is a difference between the Clayton Act and the statute at issue in *Farrar*. The Second Circuit reasoned that "Congress 'intended that the ***amount of fees*** awarded under" the civil rights fee-shifting statute must "be governed by the same standards which prevail in other types of equally complex Federal litigation, ***such as***

[3] *See, e.g., Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 337 (5th Cir. 2012) (non-nominal damage case addressing irrelevant issue of whether "the plaintiffs have standing to seek costs and reasonable attorneys' fees from the remaining defendants" after a settlement provided more than the $22,000 they sought in the lawsuit); *MCA Television Ltd. v. Pub. Int. Corp.*, 171 F.3d 1265, 1281 n.21 (11th Cir. 1999) (non-nominal damage case reversing finding of no antitrust injury and remanding case, including for potential determination of a reasonable fee); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 414, 418-19 (3d Cir. 1993) (non-nominal damage case involving an "almost $3 million" award and the inapposite issue of whether an "offset by prior settlements" impacted the movant's entitlement to recover a reasonable fee); *Sciambra v. Graham News*, 892 F.2d 411, 413-14 (5th Cir. 1990) (non-nominal damage case involving "an injunction" and inapposite issue of how offset from settlement impacted the movant's entitlement to recover a reasonable fee); *Auwood v. Harry Brandt Booking Off., Inc.*, 850 F.2d 884, 893 (2d Cir. 1988) (pre-*Farrar*, involving $75,000 in damages and inapposite issue of whether amounts received in settlement with other defendants could be offset against non-settling defendants' liability for attorney fees); *Home Placement Serv., Inc. v. Providence J. Co.*, 819 F.2d 1199, 1202 (1st Cir. 1987) (pre-*Farrar*, involving injunctive relief and whether hours post-dating injunction were compensable); *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, Inc.*, 635 F.2d 118, 128 (2d Cir. 1980) (pre-*Farrar*, involving "a verdict of $3.3 million," where court believed "such a large judgment" rendered "fees . . . not necessary" and inapposite issue of what "consideration should be given to any amounts that may have been paid to [movant's] counsel from the settlement money or by the settling parties"); *Morning Pioneer, Inc. v. Bismarck Trib. Co.*, 493 F.2d 383, 390 (8th Cir. 1974) (pre-*Farrar*, involving no analysis and only $7,350 in fees; not viewed by *Concord Boat* court as permitting fees in nominal damages antitrust case); *Advance Bus. Sys. v. SCM Corp.*, 415 F.2d 55, 70 (4th Cir. 1969) (pre-*Farrar*, involving "damages of $50,142 and injunctive relief"); *Dippin' Dots, Inc. v. Mosey*, 2005 WL 1866839, at *2 (N.D. Tex. Aug. 4, 2005) (non-nominal damage case considering fees for party who "establish[ed] patent invalidity," without analyzing *Farrar*), *vacated*, 476 F.3d 1337 (Fed. Cir. 2007); *Sheet Metal Div. v. Loc. Union 38 of Sheet Metal Workers Int'l Ass'n*, 63 F. Supp. 2d 211, 213-14 (N.D.N.Y. 1999) (non-nominal damage case awarding fees because the court "permanently enjoin[ed] defendants" from engaging in conduct, while denying fees for another claim on which the plaintiff "did not . . . obtain . . . damages").

antitrust cases.'" *Id.* (emphasis added) (quoting Congressional record). Thus, and for the reasons above, if *USFL* had been presented with the question here and had the benefit of *Farrar*'s guidance, the outcome—an award of about 50% of the fees incurred—would surely have been different.[4]

Tellingly, post-*Farrar* antitrust authority has read *USFL* consistently with the rule that the civil rights "standard regarding [the] amount of reasonable fee[s] applies to all fee-shifting statutes, including mandatory ones" like the Clayton Act. *Kellstrom*, 50 F.3d at 330 & n.23 (explaining that *USFL* does not "mandate[] an opposite conclusion"). That authority includes *Gulfstream*, on which USAir heavily relies. (Mem. 10.) When the Third Circuit cited *USFL* in *Gulfstream*, it was addressing the question—not at issue here—of whether a plaintiff who obtains nominal damages "is still ***entitled to seek*** attorneys' fees." 995 F.2d at 418 & n.5 (emphasis added). But when it comes to the amount of a reasonable fee—the dispositive issue in *Farrar* and here—*Gulfstream* dooms USAir's position: In a passage USAir fails to mention, *Gulfstream* concludes that the "standards for ***calculating*** attorneys' fees in antitrust and civil rights cases . . . may be ***interchangeable***." *Id.* at 418 (emphasis added).

Second, USAir wrongly asserts that, unlike in civil rights cases awarding nominal damages, USAir did not "fail[] to prove an essential element of [its] claim for monetary relief." (Mem. 10-11.) This argument is illogical because injury and causation (which USAir did prove for one claim) and "measurable damages" (which USAir did not prove for any claim) are

[4] Obviously, 50% of the requested fees (under pre-*Farrar* analysis) is significantly less than the 100% USAir demands here. In addition, the over $150 million in fees that USAir demands is nowhere even near the same ballpark as the $5,515,290.87 in fees awarded in *USFL*, *see infra* n.11, and would bestow upon USAir an impermissible windfall for its glaring failures.

distinct, required "elements [of private] antitrust claims" for monetary relief. *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 550 (S.D.N.Y. 2021) ("There are three elements for all antitrust claims: (1) a violation of the antitrust laws; (2) injury caused by that violation; and (3) measurable damages."). Indeed, Judge Schofield so instructed the jury:

> If you find that Sabre violated the antitrust laws . . . and that this violation caused injury to US Airways [i.e., the first two elements of an antitrust claim], then you must determine the amount of damages, if any, US Airways is entitled to recover. . . . If you find that US Airways has provided a reasonable basis for determining damages, then you may award damages based on a reasonable estimate supported by the evidence. If you find that ***US Airways has failed to carry its burden*** of providing a reasonable basis for determining damages, then you may award no damages or ***nominal damages not to exceed one dollar***.

(ECF No. 1207-9, Instruction XIV.B; *see also* Instruction XIV.C (emphasis added).)

Thus, like a civil rights plaintiff that obtained only nominal damages, an antitrust plaintiff that obtained only nominal damages has failed to prove an essential element of a damages claim—a reasonable basis for determining damages—and has "obtained only a Pyrrhic victory for which the reasonable fee is zero." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring); *see also Concord Boat*, 34 F. Supp. 2d at 1134 (antitrust movant "recovered only nominal damages due to its 'failure to prove an essential element of its claim for relief'"(citation omitted)).

Finally, USAir makes a puzzling (and manifestly unfounded) policy argument that private antitrust claims should be treated more favorably than claims to vindicate rights under the United States Constitution. (Mem. 11-13.) USAir's argument rests on the false premise that antitrust claimants—but not civil rights litigants—serve as "private attorneys general" whose suits would "vindicate societal interests as well as their own." (Mem. 12.) But in reality, "[w]hen a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Fox v.*

Vice, 563 U.S. 826, 833 (2011). Moreover, "civil rights laws depend heavily upon private enforcement," and "often benefit a large number of persons, many of them not involved in the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 445 & n.5 (1983) (Brennan, J., concurring).[5]

Ultimately, USAir's attempt to limit *Farrar* to civil rights cases would not only misread its holding, but also lead to a perverse and unsupportable conclusion: that Congress intended for courts to award fees to antitrust plaintiffs who obtained nominal damages, but not to civil rights plaintiffs who did the same, even though "the policy underlying . . . the Sherman Act is certainly no more significant than the rights guaranteed by the United States Constitution." *Concord Boat*, 34 F. Supp. 2d at 1133.[6] The Court should thus hold that *Farrar* applies to USAir's motion.

2. Under *Farrar*, the Only "Reasonable Attorney's Fee" Is No Fee At All

Under *Farrar*, USAir's fee application fails "as a matter of law" because USAir sought "a non-nominal remedy," received "only nominal damages," and cannot make the "necessary" showing that its suit established "some 'groundbreaking' legal principle." *Alvarez v. City of New York*, 2017 WL 6033425, at *4 (S.D.N.Y. Dec. 5, 2017) (citing *Pino*, 101 F.3d at 239, and *McGrath*, 409 F.3d at 518). Indeed, "[t]he only way [USAir] could have been less successful is if [it] had lost altogether." *Pino*, 101 F.3d at 238.

First, *Farrar* forecloses any fees because USAir initiated suit for over $1 billion and

[5] Similarly baseless is USAir's disparagement of civil rights actions as mere "personal injury actions." (Mem. 12 (quoting *Morse v. Univ. of Vermont*, 973 F.2d 122, 126 (2d Cir. 1992).) USAir omits the context in which *Morse* drew this irrelevant comparison—"selecting the governing statute of limitations." 973 F.2d at 126.

[6] Contrary to USAir's contention, the policy considerations for awarding "a reasonable attorney's fee" are similar for the Clayton Act and civil rights statutes. *Compare USFL*, 887 F.2d at 412 ("[T]he purpose behind mandatory attorney's fees in antitrust cases is 'to encourage private prosecution of antitrust violations by insulating plaintiffs' treble damage recoveries from the expense of legal fees.'" (citation omitted)), *with Ortiz v. Regan*, 980 F.2d 138, 140 (2d Cir. 1992) (fees in civil rights cases allow "individuals a meaningful opportunity to vindicate civil rights violations," and to "recover what it costs them to vindicate these rights in court" (citation omitted)).

injunctive relief, and lost or abandoned every claim but a portion of one, for which it received $1 (trebled to $3) and obtained no prospective relief. Measured only against the $897.9 million sought at the retrial (rather than the $1.28 billion previously demanded), USAir received about .0000003% of its purported damages. That token recovery renders USAir's claim to fees far weaker than those of plaintiffs who were denied fees under *Farrar*, despite recovery of ***higher*** percentages of their claimed damages.[7] As the Second Circuit observed of one such action: "If this is not a case in which *Farrar* precludes a fee award it is hard to construct one." *Pino*, 101 F.3d at 238.

Second, USAir is not the rare exception to the zero-fee rule for nominal recovery, as its ill-founded lawsuit established no "new rule of liability," much less one that "serves a significant public purpose." *McGrath*, 409 F.3d at 518 (citation omitted). Although USAir baldly asserts that it "presented legal issues never before litigated," it concedes this litigation merely applied the standards that "the Supreme Court set forth" in *Amex* for "analyz[ing] two-sided platform claims." (Mem. 1.) That concession is fatal, for cases "involv[ing] the application of settled law to the facts of the case" do not justify fees under *Farrar*. *Alvarez*, 2017 WL 6033425, at *4. If anything, USAir's reference to *Amex* exposes its overreach: Even before *Amex* announced standards for antitrust claims involving two-sided platforms (like Sabre's GDS), it was ***Sabre***

[7] *See, e.g.*, *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring) (obtaining "one seventeen millionth" of claimed damages insufficient for fees in Constitutional context); *Pino*, 101 F.3d at 238 (obtaining .000005% of claimed damages insufficient for fees in discrimination case); *Concord Boat*, 34 F. Supp. 2d at 1134 (obtaining .000021% of claimed damages insufficient for fees in antitrust case); *Petrunich*, 625 F. Supp. 2d at 207 (obtaining "1/150,000 or 0.00066%" of claimed damages insufficient for fees under another mandatory fee-shifting statute). While USAir asserts that its billion dollar case "was not . . . merely about individual damages" (Mem. 13), it disregards that "*Farrar* simply requires courts to consider the relief that was ***sought*** by the plaintiff, not the relief that was [purportedly] ***most important*** to the plaintiff." *Mercer v. Duke Univ.*, 401 F.3d 199, 205 (4th Cir. 2005) (emphasis in original). Regardless, USAir failed to achieve what it previously proclaimed its case ***was*** about—invalidating terms of Sabre's airline contracts. (*See* ECF No. 859 at 1, 3; ECF No. 900 at 1-2, 4.)

that correctly asked the court to analyze its GDS as two-sided. *US Airways*, 938 F.3d at 58. USAir, in contrast, demanded that the court analyze Sabre's GDS as one-sided—an approach that turned out to be "wrong as a matter of law" and precipitated the reversal of the initial jury verdict for USAir. *Id.* at 58-59.

USAir cannot rescue its claim for fees by speculating that a $1 verdict brings "attention" to competition for air travel distribution, "incentivizes future plaintiffs to bring" suit, or deters future unlawful conduct. (Mem. 13-14.) These self-serving hypotheses—which USAir fails to support with a single legal authority—are irrelevant under *Farrar*, and for good reason. Otherwise, the exception would swallow the rule, as it would justify awarding fees to nearly every plaintiff who obtains nominal damages (especially ones that prove Constitutional violations). *See Rothman v. City of New York*, 2020 WL 7022502, at *6 (S.D.N.Y. Nov. 30, 2020) ("[I]f Rothman were correct that civil rights cases like this one can never be 'incidental to the public interest,' then the 'no damages–no fee' cases discussed above would not exist."); *see also Alvarez*, 2017 WL 6033425, at *4 (noting that the relevant inquiry is not whether a case generally "involve[s] issues of significant local and national importance," but whether "the ***actual result*** of [a] case—an award of $1—is insignificant" (emphasis in original)).[8] In any event, "a $1 damage award has virtually no deterrent effect" and does not incentivize future plaintiffs. *Haywood v. Koehler*, 885 F. Supp. 624, 629 (S.D.N.Y. 1995), *aff'd* 78 F.3d 101 (2d Cir. 1996).

Nor does the record support USAir's say-so that the nominal award in this case has

[8] In fact, the $3 recovery in *Concord Boat* was held to serve "no public goal or purpose" 34 F. Supp. 2d at 1133-34, despite the movant's success in proving an illicit conspiracy, which is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

altered Sabre's way of doing business. Rather, "the record is barren," *Pino*, 101 F.3d at 238, of any evidence connecting the $1 verdict about events that ended in 2013 to Sabre's decision to commence an unrelated breach of contract suit in 2022. In addition, it is not even "apparent from the verdict" that the aspects of Sabre's business that USAir takes credit for allegedly deterring were found unlawful. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). And tellingly, the real world does not share USAir's inflated view of its achievement. To the contrary, industry participants agree that the verdict "doesn't make Sabre change, well, anything. Except maybe a smaller tip for a barista." (Decl. of E. Kreiner ("Decl."), Ex. B.)[9] That is because, as observers "broadly" recognize, "Sabre, along with the GDS model was . . . . the nominal victor in th[is] 11-year old feud" (Decl. Ex. C) and thus, "the status quo prevails." (Decl. Ex. A.)

At bottom, none of USAir's imaginative portrayals of its claimed "victory" can change the result *Farrar* directs—that USAir's failure to obtain more than nominal damages compels a $0 fee award. While $150 million in legal fees may have been USAir's to waste, *Farrar* leaves USAir to foot that bill—not Sabre.

B. If a "Reasonable Attorney's Fee" Exceeds $0, at Least a 99 Percent Reduction Is Warranted Due to USAir's Indisputable Lack of Success

If (despite *Farrar*'s contrary direction) the Court were to hold that USAir can obtain a non-zero fee, then it should still administer a near-total reduction of at least 99% to USAir's fee request to reflect its lack of success—the "most critical factor" in assessing a fee request.

[9] *See also* Decl. Ex. A (similar industry analysis acknowledging the "token damages award suggests that it will not lead to significant change"); Decl. Ex. C (additional analysis from travel industry news site recognizing the $1 verdict "is unlikely to bring about significant change in airline distribution," or "prevent [Sabre] from continuing on with some of the practices that the airlines are experiencing").

Farrar, 506 U.S. at 114. USAir conspicuously ignores this factor, making no attempt to explain why its request should not be slashed for its widespread failures.

Courts have applied huge reductions for lack of success even where plaintiffs have been far more successful than USAir. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, for example, the Ninth Circuit affirmed an 80% lack of success reduction where the antitrust plaintiff sought "$800 million in damages," but obtained "only $7.47 million" before trebling and offsets. 637 F. App'x 981, 985 (9th Cir. 2016). That plaintiff was over 7.47 million times more successful than USAir. Similarly, in *Orson, Inc. v. Miramax Film, Corp.*, 14 F. Supp. 2d 721 (E.D. Pa. 1998), the district court applied a 75% lack-of-success reduction where one portion of one count yielded the antitrust plaintiff $159,780, despite an initial request for $1 million in damages. *Id*. at 727. That result exceeded by many orders of magnitude what USAir accomplished here. The Second Circuit has also affirmed massive reductions (as much as 96%) where, unlike USAir, plaintiffs achieved "more than strictly nominal relief" through litigation that resulted in injunctions. *Carroll v. Blinken*, 105 F.3d 79, 81-82 (2d Cir. 1997) (96 percent reduction); *see also Husain* v. *Springer*, 579 F. App'x 3, 5-7 (2d Cir. 2014) (vacating 35% lack of success reduction as inadequate and remanding for further proceedings, which resulted in a 75% reduction that the Second Circuit then affirmed, 622 F. App'x 13 (2d Cir. 2015), even though plaintiffs achieved "more than nominal" success, including a "primary goal of their suit").

USAir cannot disclaim this reduction: in obtaining .0000003% of its alleged damages at the retrial and no injunctive relief, USAir achieved less than what Judge Preska found "indisputably an insignificant degree of success." *Vaccariello v. XM Satellite Radio, Inc.*, 2014

WL 12799792, at *2 (S.D.N.Y. Sept. 29, 2014). If, as Judge Preska held, recovering $50, i.e., ".001% of the original damages sought," was a "very low" recovery for which a request of $145,000 in fees was "not presumptively reasonable or even remotely reasonable," *id.*, then USAir's demand for fees ***at least 50 million times greater*** than its trebled recovery is patently absurd. *See also Richardson v. City of Chicago, Ill.*, 740 F.3d 1099, 1101-04 (7th Cir. 2014) (Easterbrook, J.) (affirming 80%, reduction for lack of success, which was "generous" where plaintiff "flop[ped]" by losing all but one claim, because even though the jury awarded $1 in nominal damages and $3,000 in punitive damages, the amount was "1.5% of what [plaintiff] sought at trial," a "dismal outcome" that "[n]o one could think . . . reflects a significant victory"); *Scott v. City & Cnty. of Denver*, 2014 WL 287558, at *1 (D. Colo. Jan. 27, 2014) (reasoning that if seeking $50,000 in fees for a $6,500 recovery raises a "red flag," then seeking $427,000 in fees for a $15,000 recovery raises a "stadium-sized banner"); *Castillo v. Time Warner Cable of New York City*, 2013 WL 1759558, at *1, 5, 7 (S.D.N.Y. Apr. 24, 2013) (reducing fee request totaling "about sixty times the size" of a $5,000 recovery to about "eight times the recovery," i.e., an 85% reduction, to account for "overwhelming lack of success and the de minimis award").

Thus, because USAir sought "million[s] in damages" and "other injunctive relief" but "receive[d] only a pittance," it is "entitled ***only to a fraction*** of [its] attorney's fees"—assuming for argument's sake that USAir were entitled to anything above $0. *Hetzel v. Cnty. of Prince William*, 89 F.3d 169, 173-74 (4th Cir. 1996) (emphasis added).[10] Indeed, to Sabre's knowledge,

[10] *See also McCardle v. Haddad*, 131 F.3d 43, 55 (2d Cir. 1997) (affirming "a nominal fee of 33 cents" where plaintiff "did not succeed in establishing her entitlement to more than nominal damages," failed to secure "injunctive relief or declaratory relief," and "did not create a new rule"); *Ibarra v. HSCS Corp.*, 2012 WL 3964735, at *4 *(cont'd)*

USAir's claim that it can recover a "very, very substantial" fee around $150 million (ECF No. 1256, Hr'g Tr. 5:22-24) is unprecedented—in seeking fees after the first trial, USAir cited ***no case*** in which an hourly billed party like USAir recovered a fee anywhere near its earlier request for $125 million in the face of limited damages and no prospective relief. (*See* ECF No. 890 at 4-5 (distinguishing inapposite contingency fee cases involving fee awards of small fractions of judgments in the billions).)[11] Since that initial fee request, USAir's recovery fell to $1, but its fees grew by the millions. A nine-figure fee for a so-called $1 "win" is plainly unsupportable, and any recoverable fees should be slashed by at least 99%. After all, "fees awards should not provide a windfall to plaintiffs." *Kellstrom*, 50 F.3d at 328.

C. USAir Cannot Salvage Its Outlandish Fee Request By Asserting <u>That Its Failed Claims Are Intertwined With Its Monopolization Claim</u>

If it awards any fees, the Court should reject USAir's unfounded and premature assertion that all the work on its failed claims is somehow "intertwined" with its monopolization claim. (Mem. 14-24.) ***First***, the rationale for allowing a plaintiff to recover fees when an unsuccessful claim is interrelated with a separate, successful claim is inapplicable here. That line of doctrine evolved because, when claims are interrelated, counsel's time may be "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. at 435. Recognizing this difficulty, courts developed the principle of

(S.D.N.Y. Sept. 10, 2012) (explaining that a "jury award[ing] . . . only 4.1 percent of the amount [of damages] demanded . . . can be barely called a success" and "would justify only nominal fees"); *accord McAfee v. Boczar*, 738 F.3d 81, 93 (4th Cir. 2013) (vacating fee award of $322,340.50 and ordering further reduction of about two-thirds, where, "in the face of [movant's] effort to secure a damages verdict of $500,000 or even something more, the jury awarded only $2,943.60," i.e., a "puritanically modest" amount, and the fee award "fail[ed] to reflect that reality").

[11] USAir's reliance on *USFL* ignores that the fees requested and awarded were miniscule compared to those sought here, and resulted from legal analysis that did not—because it could not—account for *Farrar*'s subsequent holding. *USFL*, 887 F.2d at 410 (only $7,662.709.13 in fees requested, and only $5,515,290.87 awarded after reductions).

relatedness to assess fee requests in "more unitary cases." *Kassim v. City of Schenectady*, 415 F.3d 246, 253 (2d Cir. 2005). But where, as here, cases are not unitary, and proceed instead in "distinct phases" that make time spent on claims inherently separable, "no such practical difficulty exists"—and the rationale for parsing "intertwined" claims disappears. *Doulin v. White*, 549 F. Supp. 152, 156-57 (E.D. Ark. 1982). Even among the cases USAir cites are those dividing a case into various "phase[s] relating to a different aspect of the litigation" as a "useful" system for "analyzing requests for attorney's fees" in "protracted litigation." (Mem. 21 (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 549 (1986)).)

Thus, in *Auto. Prod., plc v. Tilton Eng'g*, the court refused to apply the "interrelated" rule to award the majority of fees for a patent claim, even though the "act of willfully infringing the patent was part and parcel of the anti-competitive scheme found by the jury" under Section 2 of the Sherman Act. 1993 WL 660164, at *6 (C.D. Cal. Sept. 16, 1993). The court reasoned that the fees incurred on the patent claim were largely "separa[ble] from and independent" of the Section 2 claim, including because the movant sought fees for: (i) a "time period" when the Section 2 claim did not exist; (ii) the "first phase" of a trial involving only "patent issues"; and (iii) a "second phase of the trial, and preparation therefore, which were purely attributable" to patent issues. *Id.*

Here, because distinct phases of this case related only to USAir's many failed claims, the Court should likewise reject USAir's argument that all of its fees are recoverable.[12] For instance, during the nearly six years when USAir's monopolization claim was inactive and not on appeal,

[12] USAir's other "interrelatedness" cases are thus inapposite (Mem. 14-15), including because unlike here, they involve situations where a party "concede[d]" the issue of interrelatedness, *Lunday*, 42 F.3d at 135, or where it was "impossible to isolate" one claim from another claim, *Abshire v. Walls*, 830 F.2d 1277, 1283 (4th Cir. 1987).

the litigation focused only on USAir's failed or abandoned: (i) Section 1 contract claim; (ii) Section 1 conspiracy claim; and (iii) declaratory/injunctive relief claims. During this nearly six-year period, USAir spent millions of dollars on activities dedicated to its unsuccessful claims. It cannot recover those fees here.

Second, if the interrelated rule applied here, which it does not, USAir overlooks that "even where the plaintiff's claims were interrelated," legal fees should be slashed significantly where they "achieved only partial or limited success." *Hensley*, 461 U.S. at 436 (emphasis added). As explained in detail above, USAir should thus receive—if, contrary to *Farrar*, it receives anything at all—only a minute fraction of its fees commensurate with its striking failures in this case.[13]

Third, in any event, the intertwined issue is premature, as USAir itself acknowledges (Mem. 17.) USAir is transparently capitalizing on its own ongoing failure to produce ***any*** of its billing records, depriving Sabre of a fair opportunity to test the remarkable assertion that all of USAir's work on Section 1 claims "overlapped with that done" for Section 2 claims. (Mem. 14.)[14] USAir cites no case where a court deemed certain activities "intertwined" before reviewing (or even receiving) a record of those activities—and, indeed, cites ample cases to the contrary.[15] To issue a generalized ruling without a "conscientious and detailed inquiry into the

[13] *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 613 F. Supp. 824 (S.D.N.Y. 1985), is thus inapposite because "[n]o one . . . c[ould] deny that [the plaintiff] achieved excellent results," so its failure to "identify which hours were spent on issues it clearly won and which hours were spent on issues it did not" was "not fatal" to the fee request. *Id*. at 830-31.

[14] In fact, despite ample discussion about the production of USAir's billing records at the November 1, 2022 hearing with this Court, USAir ***still*** has yet to produce a single billing record.

[15] *See, e.g., Abner v. Kansas City S. Ry. Co*., 541 F.3d 372, 383 (5th Cir. 2008) ("***identif[ying] the amounts charged*** for the claims on which plaintiffs did not prevail prior to the first trial and subtract[ing] these amounts from the *(cont'd)*

validity of [USAir's] representations" would repeat the same error that required vacating a fee award in *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994), on which USAir itself relies. (Mem. 14.) Until Sabre and this Court have the opportunity to scrutinize USAir's billing records, there is no credible basis to hold that all of USAir's fees are recoverable.[16] Indeed, USAir is entitled to "no fee at all." *Farrar*, 506 U.S. at 115-16.

CONCLUSION

For the foregoing reasons, USAir's motion should be denied.

lodestar figure" (emphasis added)); *Gierlinger v. Gleason*, 160 F.3d 858, 877-78 (2d Cir. 1998) (assessing whether ***specific amounts*** of hours were compensable, including to determine whether specified hours were "duplicative, unreasonable, or unnecessary"); *Gulfstream*, 995 F.2d at 420 (requiring movant to "***prove*** that the fees and expenses incurred in [another] litigation resulted in work product that was ***actually utilized***" and that "***the time spent on other litigation was 'inextricably linked'*** to the issues raised in the present litigation") (emphasis added).

[16] USAir's own reliance on *Abner*, 541 F.3d at 383 (5th Cir. 2008), confirms this. *Abner* reasoned that "the hours billed must have been for time reasonably spent on work in furtherance of claims on which the plaintiffs prevailed," and "cut out the fees charged" for "unsuccessful claims" on which the plaintiff "did not prevail." *Id.* (citation omitted). *Abner* even cites authority in which a "court declined to award fees for [a first] trial that was reversed for error"—which is what happened here and likely accounts for much of USAir's fee request. *Id.* at 384.

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