UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BANCO SANTANDER (BRASIL), S.A.,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

No. 20-cv-03098 (RPK) (RER)

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Banco Santander (Brasil), S.A. ("Santander Brasil") seeks a declaratory judgment that a contractual termination event has occurred under the AAdvantage Program Participation Agreement (the "Agreement"). Under the Agreement, Santander Brasil is the exclusive issuer of credit cards tied to the AAdvantage frequent flyer program to residents of Brazil. (Agmt. § 5.2, Compl. Ex. A.) As the well-pled allegations of the Complaint demonstrate, American Airlines, Inc.'s ("American Airlines") cessation of air travel between the United States and Brazil for more than 90 days due to the COVID-19 pandemic and resulting government-imposed public health and safety measures constitutes a "Force Majeure Event" (Agmt. §§ 1, 23) that entitles Santander Brasil to terminate the Agreement pursuant to Section 20.4.5. (Compl. ¶¶ 34-35, 38-40.) Santander Brasil also adequately pleads that American Airlines' cessation of air travel between the United States and Brazil due to the unforeseen COVID-19 pandemic excuses Santander Brasil from continuing to perform under the common law frustration of purpose doctrine. (*Id.* ¶¶ 46-54.)

American Airlines argues that the Complaint should be dismissed because, in its view, the Agreement requires Santander Brasil to continue paying [redacted] to purchase travel reward miles rendered virtually worthless by American Airlines' cessation of air travel between the United States and Brazil for more than 90 days and its operation at significantly reduced capacity for years to come due to the COVID-19 pandemic. The Agreement, however, requires no such thing. More importantly for purposes of this motion, American Airlines cannot demonstrate that the Agreement is "unambiguous in a way that supports only [its] interpretation, as [it] must to prevail on a motion to dismiss." *DK LIPA LLC* v. *SB Energy Holdings, LLC*, 2020 WL 3000383, at *4 (S.D.N.Y. June 4, 2020) (denying motion to dismiss).

The Court should deny American Airlines' motion to dismiss.

First, there is no merit to American Airlines' claim that the force majeure termination provision (Section 20.4.5) does not apply because it has no contractual obligation to fly between the United States and Brazil. An airline co-branded credit card arrangement works only if the bank functions as a bank and the airline functions as an airline. If either party fails to do its part, the partnership fails. The Agreement is replete with provisions making clear that American Airlines would function as an airline and fly—the sole purpose for its existence. Even if the Agreement were silent on American Airlines being an airline, which it is not, "[u]nder 'general principles of contract law,' a failure to locate explicit contractual language *does not mark the end of proper judicial interpretation and construction*," and if the court "can discern from the contract as a whole what the parties 'must have intended,' it should enforce that intention despite a lack of express terminology." *Dobson* v. *Hartford Fin. Servs. Grp., Inc.*, 389 F.3d 386, 399 (2d Cir. 2004) (emphasis added). That is precisely the case here. American Airlines also badly misreads Section 23 of the Agreement. Section 23 is relevant to the force majeure termination provision only in that it provides the definition for "Force Majeure Event." The ability of American Airlines to limit its liability for a Force Majeure Event, also provided for in Section 23, is irrelevant to Santander Brasil's claims.

Second, the Complaint adequately states a claim under the common law frustration of purpose doctrine. American Airlines argues that the frustration of purpose doctrine applies only "where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." (Motion 13.) Santander Brasil agrees. The Complaint's well-pled allegations plausibly establish that an unforeseen global pandemic, the magnitude of which grows daily, led American Airlines to cease all flights between the United States and Brazil for more than 90 days and will have a prolonged

and pronounced negative effect on international air travel for years. (Compl. ¶¶ 15-16, 23-33, 46-49.) The COVID-19 pandemic fits the bill with frightening precision.

American Airlines' argument that the frustration doctrine does not apply because the Agreement "allocate[s]" the risk of the unforeseen event to a party fails. (Motion 13.) Neither provision cited remotely contemplates the occurrence of a global pandemic—or any other event—that brings all air travel to a screeching halt and substantially curtails air travel going forward. Section 6.8 does not give American Airlines *carte blanche* to cease flying to Brazil altogether and Section 20.4.6 permits Santander Brasil to terminate the Agreement if American Airlines' flight activity into Brazil falls below that of its two main competitors. These provisions address, at best, operational choices American Airlines might make in a normal business environment, which is worlds away from what occurred. American Airlines flying between Brazil and the United States on a regular basis at a commercially viable volume was the underlying premise for the parties entering into an exclusive co-branded airline credit card partnership. The COVID-19 pandemic has frustrated this purpose.

BACKGROUND & ALLEGATIONS OF THE COMPLAINT

A. The Economics of Airline Co-Branded Credit Card Arrangements

Co-branded credit cards are "credit cards jointly sponsored by retailers and banks," and "are common in the airline industry." (Compl. ¶ 11.) "Co-branded airline credit cards are marketed to the relevant bank's customers, who can use the credit card for purchases . . . and may earn travel rewards miles to exchange for flights and other products offered by airlines. The more flights the airline has to offer, the more attracted the bank's clients will be to the co-branded credit card." (*Id.* ¶ 12.)

As the Complaint alleges, an airline co-branded credit card arrangement makes sense only if the bank functions as a bank and the airline functions as an airline. Because customers "earn

reward points" by "making purchases using the credit cards," if the bank ceases to issue credit cards or extend credit to current customers, the customers cannot make purchases to earn reward points for airline travel. (*Id.* ¶ 2.) Similarly, because "the primary and overriding purpose of obtaining airline loyalty rewards miles is to use them for purchasing tickets for air travel," if the airline ceases to do "what it is supposed to do—that is, to offer regular and abundant flights and ultimately engage in air travel"—"cardholders will not be willing to use the co-branded credit card, and potential cardholders will not apply for a co-branded credit card, because the loyalty rewards miles would be effectively useless." (*Id.* ¶ 14.)

Moreover, if the airline does not hold up its end of the bargain by offering "regular and abundant flights to multiple jurisdictions," that not only causes cardholders to "lose interest" and "stop or reduce significantly the[ir] use of the co-branded credit card," but also "causes the participating bank to incur substantial losses." (*Id.* ¶ 15.) "This is because, as here, the participating bank must purchase from the airline a minimum amount of airline rewards miles per year irrespective of whether cardholders are using the credit cards and earning rewards miles that the participating bank would otherwise post to cardholder accounts." (*Id.*)

Accordingly, "a central assumption of the Agreement here is that American Airlines continues to engage in air travel between the United States and Brazil." (*Id.* ¶ 16.)

B. Santander Brasil's Agreement with American Airlines

"American Airlines has developed and operates its AAdvantage Program, under which program participants, such as Brazilian Cardholders, can exchange AAdvantage Miles for airline tickets on American Airlines flights or certain other purchases." (*Id.* ¶ 17.) Under the Agreement, "Santander [Brasil] is authorized to issue co-branded airline credit cards, jointly sponsored by

American Airlines, to Brazilian Cardholders." (*Id.* ¶ 17.) The Agreement became effective in 2017 and extends for ten years, unless terminated earlier. (Agmt. §§ 1 (defining "Term"), 20.1.)

Santander Brasil must purchase from American Airlines a minimum quantity of AAdvantage Miles per year at an established rate per mile. (Agmt. §§ 12.1 & 13.1.) American Airlines posts such AAdvantage Miles to Brazilian Cardholder accounts to cover the AAdvantage Miles accrued from Brazilian Cardholder purchases. (Agmt. § 10.1.)

The Agreement includes an "escalator" provision—meaning that the minimum quantity of AAdvantage Miles that Santander Brasil must purchase from American Airlines escalates over the term of the Agreement, ranging from [redacted] in AAdvantage Miles in Year 1 to approximately [redacted] in Year 10, as reflected in the chart below:

[redacted]

(Agmt. §§ 12.1, 13.1.) The AAdvantage Miles purchase obligation ratchets up because the Agreement expects a growing, not evaporating, market; that over time more customers will be attracted to the co-branded credit card, and that Santander Brasil customers will use the co-branded credit card with greater frequency to earn AAdvantage Miles for reward travel on American Airlines. When the value proposition for using a rewards credit card ceases to exist, cardholders will stop using the credit card. (*See* Compl. ¶ 14.) The expectation of increasing card usage and

increased market saturation has been frustrated by American Airlines' failure to fly to Brazil for more than 90 days and at drastically reduced capacity going forward.

The Agreement provides that Santander Brasil may terminate the Agreement in specified circumstances. In particular, as relevant here, Section 20.4.5 provides:

> If pursuant to Section 23 American delays performance or fails to perform due to a Force Majeure Event, and such delay continues for a period of ninety (90) days, then Bank may terminate this Agreement immediately by providing written notice to American.

(Agmt. § 20.4.5 (underline in original).) Section 1, by reference to Section 23, in turn, defines "Force Majeure Event" broadly to include any "delay[] or failure in [American Airlines'] performance hereunder caused by any act of God, war, strike, labor dispute, work stoppage, fire, act of government, act or attempted act of terrorism or any other cause, whether similar or dissimilar, beyond the control of that Party." (Agmt. §§ 1, 23.)

C. The Effects of the COVID-19 Pandemic Have Decimated the Airline Industry and Will Have a Prolonged Impact on International Air Travel

"The World Health Organization declared COVID-19 a pandemic on March 11, 2020." (Compl. ¶ 23.) On March 19, 2020, "the U.S. Department of State issued an unprecedented Global Level 4 Do Not Travel Advisory, . . . 'advis[ing] U.S. citizens to avoid all international travel due to the global impact of COVID-19.'" (*Id.* ¶ 24.) Like the United States, Brazil was particularly hard hit by COVID-19, and on May 24, 2020, President Trump "issu[ed] a Proclamation 'restrict[ing] and suspend[ing] the entry into the United States'" of certain individuals from Brazil. (*Id.* ¶ 28.) By July, the United States and Brazil were "leading the world in confirmed COVID-19 cases according to the World Health Organization's COVID-19 dashboard." (*Id.* ¶ 32.)

As a result of the unprecedented disruptions to "air travel as a consequence of the COVID-19 pandemic, American Airlines has ceased flights between Brazil and the United States for over 90 days." (*Id.* ¶ 3.) When the Complaint was filed on July 10, 2020, American Airlines had not

flown between the United States and Brazil since March 29, 2020. (*Id.* ¶ 29.) As American Airlines recently disclosed in public filings with the Securities & Exchange Commission ("SEC"), the situation is so dire that unless it receives billions of dollars in additional government assistance, it will need to lay off approximately 20,000 employees by October 1, 2020. (American Airlines Form 8-K dated Aug. 25, 2020, tinyurl.com/AA825208K.) These layoffs will be in addition to 5,100 previous reductions and approximately 41,000 employees who opted for early retirement, a reduced work schedule, or partially paid leave. (American Airlines Form 10-Q dated July 23, 2020, at 15, tinyurl.com/AA7232010Q.)[1]

As stated in its Form 10-Q filed with the SEC on July 23, 2020, American Airlines has reduced its 2020 operating and capital expenditures by more than $15 billion, primarily through capacity reductions, and accepted or agreed to accept CARES Act financing (including under Division C – Assistance to Severely Distressed Sectors of the United States Economy) from the U.S. Government in the amount of $5.8 billion (Payroll Support Program) and $4.75 billion (secured loan from U.S. Treasury). (*Id.* at 15.) "As a result of" the COVID-19 pandemic "American [Airlines] has experienced an unprecedented decline in the demand for air travel, which has resulted in a material deterioration of its revenues." (*Id.* at 38.) In the second quarter of 2020, American Airlines experienced an 89.9% decrease in passenger revenue and quarter-over-quarter decrease in revenue passenger miles of 88.5%. (*Id.* at 55.)

Market participants predict that "the effects of the COVID-19 pandemic likely will continue to have a fundamental impact on the desirability of air travel between the United States and Brazil for the foreseeable future" (Compl. ¶ 32), with predictions that "'global passenger

[1] While American Airlines' July 23 and August 25, 2020 SEC filings did not exist when the Complaint was filed on July 10, 2020, "public disclosure documents filed with the SEC" may be considered on a motion to dismiss. *Gamm* v. *Sanderson Farms, Inc.*, 944 F.3d 455, 462 (2d Cir. 2019).

demand' in 2021 would be '24% below 2019 levels,' and that '[i]nternational air travel may not recover [to] 2019 levels until 2023-24.'" (*Id.* ¶ 33 (quoting reports issued by the International Air Transport Association and Organisation for Economic Co-operation and Development).) Indeed, in press releases and public SEC filings, American Airlines has warned that the ongoing COVID-19 pandemic has caused a "severe decline in demand for air travel," affecting the company "to an unprecedented extent," and predicting that "[i]n response to the prolonged downturn in international travel, American expects summer 2021 long-haul international capacity to be down 25% versus 2019." (*Id.* ¶¶ 31, 33.)[2]

Accordingly, the underlying premise of the Agreement—that air travel between the United States and Brazil would not just remain robust, but expand, and do so at levels sufficient to support the *increasing* use of American Airlines/Santander Brasil co-branded credit cards, the *increasing* purchase of AAdvantage Miles by Santander Brasil, and the *increasing* use of AAdvantage Miles by Brazilian Cardholders—is no longer valid.

D. Allegations and Claims

Santander Brasil filed this action seeking a declaratory judgment that American Airlines' cessation of air travel between the United States and Brazil for more than 90 days due to the COVID-19 pandemic constitutes a "Force Majeure Event" as defined in Section 1 (by reference to Section 23) that entitles Santander to terminate the Agreement pursuant to Section 20.4.5. (Compl. ¶¶ 34-35, 38-40.) As an alternative, Santander Brasil alleges that American Airlines' cessation of air travel between the United States and Brazil due to the unforeseen COVID-19

[2] The crisis has only worsened since the filing of the Complaint. By way of example, on Monday, September 21, 2020, Senators Susan Collins and Roger Wicker introduced a bill entitled the Air Carrier Worker Support Extension Act of 2020, which proposes an additional $25 billion in U.S. Government financing for U.S. passenger air carriers. (*See* S. 4634, 116th Cong. (2020), tinyurl.com/y6yrmwyf.)

pandemic excuses Santander Brasil from continuing to perform under the common law frustration of purpose doctrine. (*Id.* ¶¶ 46-54.)

ARGUMENT

In considering a motion to dismiss "[t]he Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Donnenfeld* v. *Petro, Inc.*, 333 F. Supp. 3d 208, 215 (E.D.N.Y. 2018). "This standard does not require 'heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.'" *Id.*

A court may dismiss a contract claim only if the defendant shows "that the Agreement is unambiguous in a way that supports only [its] interpretation." *DK LIPA*, 2020 WL 3000383, at *4. If the contract is ambiguous, the contract claim cannot be dismissed. "[A]n ambiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Gulf Oil Ltd. P'ship* v. *Kanji & Kanji Enters., Inc.*, 2010 WL 4809654, at *3 (E.D.N.Y. Nov. 19, 2010). "Since reasonable minds could disagree as to the meaning of the [] Agreement," the Agreement "is ambiguous as a matter of law." *Id.* at *5.

I. The Complaint Adequately Pleads that the Force Majeure Termination Provision Applies

American Airlines contends that "flying to Brazil without interruption is not one of American's contractual obligations under the Agreement," and therefore the force majeure termination provision cannot apply based on American Airlines' cessation of flights between the United States and Brazil for more than 90 days. (Motion 9.) But the Agreement is not unambiguous on this point, as it must be for the motion to be granted.

A. American Airlines has a Contractual Obligation to Fly Between the United States and Brazil

American Airlines wrongly claims that its performance under the Agreement does not include "flying to Brazil without interruption." (Motion 9.) As the Second Circuit has made clear, "[u]nder 'general principles of contract law,' a failure to locate exact contractual language *does not mark the end of proper judicial interpretation and construction*," and if the court "can discern from the contract as a whole what the parties 'must have intended,' it should enforce that intention despite a lack of express terminology." *Dobson*, 389 F.3d at 399 (emphasis added). Under this rule, "terms are to be implied in contract" where, for example, "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression." *Id.* (quoting 11 Williston on Contracts § 31:7). As Judge Cardozo aptly put it, "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917) (Cardozo, J.).[3]

Accordingly, contrary to American Airlines' claim (Motion 9), "a missing term [may] be 'fairly and reasonably fixed by the surrounding circumstances and the parties' intent.'" *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 123 (2d Cir. 2014). Both circumstances are met here. The parties' intent and the Agreement as a whole demonstrate that the parties intended and agreed that American Airlines is obligated to fly.

[3] Professor Farnsworth similarly explained that "[g]iven man's penchant for elliptical expression, much may be left to 'go without saying.'" E. Allan Farnsworth, *Disputes Over Omission in Contracts*, 68 Colum. L. Rev. 860, 872 (1968). Accordingly, "courts properly try to realize the actual expectations of the parties even when they have not reduced them to contract language," and "[i]f it can be established that they shared a common expectation, that expectation will control the result." *Id.* at 876.

As explained above (at pp. 3-6), the Complaint alleges in great detail, which must be accepted "as true" on this motion, *Donnenfeld*, 333 F. Supp. 3d at 215, that "a central assumption of the Agreement here is that American Airlines continues to engage in air travel between the United States and Brazil." (Compl. ¶ 16.) The parties' partnership works only if Santander Brasil functions as a bank and American Airlines functions as an airline, and thus the Agreement presupposes that American Airlines will fly between the United States and Brazil. That is why American Airlines calls its travel rewards "AAdvantage ***Miles***," not points, or rewards, or some other term: the unmistakable expectation of the parties was that "AAdvantage Miles" would be redeemed by Brazilian Cardholders for air travel on American Airlines. (Agmt. § 1 ("AAdvantage Miles" definition).) The circumstances surrounding the Agreement and the intent of the parties therefore support Santander Brasil's position.

Moreover, the Agreement itself is filled with provisions that presuppose that American Airlines is obligated to fly between the United States and Brazil, beginning with the first sentence of the Agreement (after the identification of the parties) which states that "American has developed the AADVANTAGE Program" to "award[] AADVANTAGE Miles [to Members] *for travel on American* . . . ." (Agmt. at 1 (emphasis added).) Other examples include:

- Section 5.2 precludes Santander Brasil from entering into "cobranded Credit Card" arrangements with other U.S. air carriers. (Agmt. § 5.2 & definition of "US Carrier.")

- Section 5.2 also provides that Santander Brasil "shall include as appropriate in media, advertising and Cardholder communications, language to the effect that 'American Airlines is Santander's *preferred airline partner in Brazil*' or '*the AAdvantage program is Santander's preferred airline frequent flyer program in Brazil*.'" (*Id.* (emphasis added).)

- Section 14.3 grants American Airlines the right to "suspend any direct or indirect marketing or advertising" for the co-branded credit card "[u]pon the occurrence of . . . a 'Significant Event**,**'" which includes any "incident, accident or hijacking . . . involving any aircraft of . . . American or any of its Affiliates." (Agmt. § 14.3.)

- Section 17 governs the use of the parties' respective "data and data assets." (Agmt. § 17 preamble.) "American Data" is defined to include, among other things, AA TCN Data

("ticket information relating to flights either operated or marketed by American [Airlines] . . ."), AA PNR Data ("information contained within or associated with a passenger name record for a past, current or future itinerary that includes at least one flight operated or marketed by American [Airlines]"), and American Transaction Pricing Details ("any flight information (e.g., O/D, class of service, flight number), information identifying the specific American [Airlines] product or service . . . obtained in connection with the transaction.") (Agmt. § 1 "American Data.") Section 17.14.2 restricts Santander Brasil's use of American Data only "as is reasonably required for [Santander Brasil] to provide and operate the Card Program and as is authorized by this Agreement." (Agmt. § 17.14.2.)

- Section 17.1 precludes Santander Brasil from using certain data "in a manner that is intended or known by [Santander Brasil] to be harmful to American," and identifies examples of permitted and prohibited uses of such data in Schedule 17.1. (Agmt. § 17.1.) Schedule 17.1 permits Santander Brasil to use American Airlines data to conduct targeted promotions "for a hotel, car rental company or restaurant," but not for "targeted promotion for another airline." (Ex. 1.)[4] Schedule 17.1 similarly permits Santander Brasil to use American Airlines data to provide advice to "investment banking clients with respect to businesses other than airlines," but not to "provide advice for investment banking clients that are airlines." (*Id.*)

- In Section 18.1.1, American Airlines represents and warrants that it "has full power and authority to own, lease and operate its respective properties and assets . . . and to conduct its business as it has been, is now being and is proposed to be conducted." (Agmt. § 18.1.1.) In Section 18.1.2, American Airlines represents and warrants that it "is licensed and qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its business makes such licensing and qualification necessary or advisable." (Agmt. § 18.1.2.) In Section 18.1.7, American Airlines represents and warrants that "[n]o actions, suits or proceedings exist or are pending against or affecting American before any Competent Authority [defined as to American Airlines to include the U.S. Department of Transportation (Agmt. § 20.3.3)] that would have a material adverse effect on its ability to perform its obligations hereunder." (Agmt. § 18.1.7.) Santander Brasil makes complementary representations and warranties in Section 18.2. (Agmt. §§ 18.2.1, 18.2.2, 18.2.7.) In so doing, American Airlines represents and warrants that it is and will continue to operate as an airline and Santander Brasil represents and warrants that it is and will continue to operate as a bank.

- Section 19.5 provides that "[n]o liability of American or indemnification . . . will extend to include any liability that is governed by American's *conditions of carriage*, as may be amended from time to time, *the Warsaw Convention [relating to victims of air disasters], as amended, the Montreal Convention of 1999 [relating to luggage and similar losses]*, as applicable." (Agmt. § 19.5 (emphasis added).)

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[4] The Schedules are deemed to be "part of th[e] Agreement" (Agmt. § 1 (definition of "Schedule")), and thus may be considered on this Motion together with the Agreement itself, which is "attached to the complaint" and thus "part of the pleading." *Beauvoir* v. *Israel*, 794 F.3d 244, 248 n.4 (2d Cir. 2015).

- Section 20.3.3 provides that in addition to any legislation that "prevent[s] American from engaging in any material activity required under this Agreement"—a termination provision that is symmetrical to a termination provision applicable to Santander Brasil (Section 20.4.3)—American Airlines may terminate the Agreement "if American receives any complaint or other objection from any Competent Authority that this Agreement . . . places American or its Affiliates in breach of any regulatory requirements of the *U.S. Department of Transportation* or of any other Competent Authority that *regulates air transportation*." (Agmt. § 20.3.3 (emphasis added).)

- As American Airlines acknowledges, Section 20.4.6 permits Santander Brasil to terminate the Agreement if American Airlines "falls below a specified level of service between Brazil and the United States, as compared to certain other airlines." (Motion 2.) This provision addressing a reduction in flights presupposes that American Airlines will fly between the United States and Brazil and stands in direct conflict with American Airlines' interpretation of Section 6.8.

- Section 1 defines "Force Majeure Event" by reference to Section 23, which states that "with respect to American [Airlines]" only, such an event includes "any incident, accident or hijacking or attempted hijacking involving any aircraft of American or any of its Affiliates." (Agmt. § 23.)

None of these provisions make any sense if American Airlines has no obligation whatsoever to fly between the United States and Brazil. Thus, as in *World Trade Center*, "[t]hat the Agreement makes [] arrangements" relating to air travel and flight activity by American Airlines "further suggests that the parties may have intended a result not expressly stated." 754 F.3d at 124. At the very least, "in light of the surrounding circumstances, reasonable minds could disagree as to whether" the Agreement unambiguously requires Santander Brasil to continue buying [redacted] virtually worthless AAdvantage Miles from a fundamentally different American Airlines, thus precluding dismissal. *Id.*

B. Section 6.8 of the Agreement Does Not Negate American Airlines' Obligation to Fly Between the United States and Brazil

American Airlines contends that Section 6.8 of the Agreement unambiguously provides that American Airlines has no obligation to fly whatsoever. (Motion 9.) Section 6.8, however, does nothing of the sort. Section 6.8 states in relevant part:

> American shall not be deemed to have made any representation, warranty or covenant or have assumed any obligation or indemnification to Bank under this Agreement with respect to flight activity, including any suspension, reduction or termination of flights by an AA Carrier.

(Agmt. § 6.8.)

When read in context of the entire Agreement, as it must be, *see Fasano* v. *Guoqing Li*, 2020 WL 5096001, at *6 (S.D.N.Y. Aug. 28, 2020), Section 6.8 reflects the common-sense understanding that American Airlines retains the flexibility to change its mix of flight routes over time—that it may add or subtract routes based on customer demand or similar expected business reasons. Section 6.8 thus makes clear, for the avoidance of doubt, that American Airlines will not incur liability if it "suspen[ds], reduc[es] or terminat[es]" particular "flights." (Agmt. § 6.8.) For example, under Section 6.8, Santander Brasil could not sue American Airlines for breach of contract if American Airlines terminates its Miami to Manaus route, while continuing to fly its Miami to Rio de Janeiro route.

What Section 6.8 does not do, however, is provide blanket protection to American Airlines if it ceases to fly between the United States and Brazil altogether, or substantially constricts service for an indeterminate period that may last years. Indeed, American Airlines acknowledges that the Agreement is not "agnostic about whether American flies to Brazil" in trying to square Section 6.8 with Section 20.4.6, which unequivocally recognizes American Airlines' obligation to fly to Brazil. (Motion 2.) Construing Section 6.8 as granting American Airlines *carte blanche* to cease flying altogether, while at the same time requiring Santander Brasil to pay [redacted] to buy virtually worthless AAdvantage Miles nullifies the central purpose of the Agreement—to have a mutually beneficial partnership wherein the bank functions as a bank (by extending credit to Brazilian customers) and the airline functions as an airline (by flying to Brazil). American Airlines' construction of Section 6.8 violates the cardinal rule that a "contract must be interpreted

so as to give effect to, not nullify, its general or primary purpose." *CTS Contracting, Inc.* v. *Town of Cheektowaga*, 148 A.D.3d 1642, 1644 (4th Dep't 2017); *accord* Scalia & Garner, *Reading Law* 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."). At the very least, there is a "reasonable basis for a difference of opinion," which precludes dismissal. *Gulf Oil Ltd. P'ship*, 2010 WL 4809654, at *3.

To be clear, Santander Brasil does not contend that any and all "interruption[s]" of "flights between the United States and Brazil" entitles Santander Brasil to terminate the Agreement, as American Airlines wrongly asserts. (Motion 7, 10.) The Agreement contemplates at least two situations where American Airlines' flight activity gives rise to a termination event. *First*, as American Airlines acknowledges, the "Market Share" (Section 1) termination provision (Section 20.4.6) permits Santander Brasil to terminate the Agreement if American Airlines "falls below a specified level of service between Brazil and the United States, as compared to certain other airlines." (Motion 2.) This provision addresses the level of flight activity vis-à-vis competitors over a calendar year. *Second*, under the force majeure termination provision (Section 20.4.5), Santander Brasil may terminate the agreement if American Airlines ceases to fly continuously for more than 90 days due to a Force Majeure Event, irrespective of whether American Airlines' competitors also cease flying.

A simple example illustrates how Sections 20.4.5 and 20.4.6 address different circumstances and operate harmoniously. *See Spinelli* v. *NFL*, 903 F.3d 185, 200 (2d Cir. 2018) (courts must "give 'effect and meaning . . . to every term of [a] contract' and strive 'to harmonize all of its terms'"). If American Airlines reduces capacity to one flight per month between the United States and Brazil for business reasons while its competitors continue operating at full capacity, the Market Share termination provision would apply, but the force majeure termination

provision might not, unless the reduction of flights was due to a Force Majeure Event. The mere possibility that Section 20.4.5 and Section 20.4.6 might overlap in a narrow set of circumstances is no basis to not enforce Section 20.4.5 when it plainly applies, as here. The Market Share provision looks at the competitive landscape over a one year period in light of operational decisions made by American Airlines, whereas the force majeure provision looks at sudden, unexpected events "beyond the control of" any party that persist for at least 90 days. (Agmt. § 23.)

American Airlines nonetheless persists in arguing that the Market Share termination provision is the "only contract provision" that can apply here. (Motion 2, 10-11.) That is wrong. That Santander Brasil might be entitled to terminate the Agreement at the end of Contract Year 4 under Section 20.4.6 does not mean that Santander Brasil is precluded from terminating the Agreement now under the plainly applicable Section 20.4.5. The principle that "particularized contract language takes precedence over expressions of intent" in "preliminary" or introductory recitals (Motion 11) has no bearing here. Section 20.4.5 is not preliminary, it is not introductory, and it is not a mere expression of intent—it is a specific, separate and substantive provision (one of the nine) under which Santander Brasil may terminate the Agreement.

C. American Airlines' Remaining Arguments are Meritless

American Airlines makes two other arguments in an effort to prevent the force majeure termination provision from applying. Both are red herrings.

First, American Airlines contends that applying Section 20.4.5 "would make no sense in light of the parties' behavior." (Motion 11.) It argues that if "the COVID-19 pandemic" qualified as a Force Majeure Event, "there would have been no reason for American [Airlines] not to invoke Section 23" to preemptively prevent any claim for breach of contract. (*Id.*) Thus, according to American Airlines, its decision not to invoke Section 23 somehow means that the parties did not

intend for Section 20.4.5 to apply. *(Id.)* This makes no sense. Section 23 allows American Airlines to avoid liability for a Force Majeure Event ("[n]o Party shall be liable . . ."). (Agmt. § 23.) That is all Section 23 provides. Section 20.4.5 is entirely separate—its only relation to Section 23 is the incorporation of the definition of Force Majeure Event. The two sections work together, not against each other. It is true, as American Airlines recognizes, that providing notice under Section 23 to avoid liability would have a boomerang effect and give Santander Brasil an indisputable basis to terminate the Agreement. But American Airlines' refusal to provide notice of a Force Majeure Event under Section 23 does not mean that the event has not occurred or is not a ground for termination under Section 20.4.5. American Airlines argues, in effect, that it, not Santander Brasil, has control over whether Section 20.4.5 applies where American Airlines suffers a Force Majeure Event. It is impossible for American Airlines to argue here that the Agreement is unambiguous as a matter of law. Indeed, American Airlines' reliance on a party's unilateral "behavior" as being reflective of the "intent of the parties" (Motion 11) to support its interpretation of the Agreement is fatal.[5]

Second, American Airlines speculates that Santander Brasil must not genuinely believe that American Airlines is contractually obligated to fly to Brazil because Santander Brasil has not "sued for breach of contract." (Motion 11-12.) This argument is a non sequitur. As the "master[] of the[] Complaint," Santander Brasil is "free to choose" whatever claims it wishes to bring. *Purdue Pharma L.P.* v. *Ky.*, 704 F.3d 208, 216 n.7 (2d Cir. 2013); *see Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394-95 (1987) ("It is true that [plaintiffs] could have brought suit under [a federal labor law statute]. As masters of the complaint, however, they chose not to do so."). Santander Brasil chose to file a declaratory judgment action to terminate the Agreement, rather than sue for breach

[5] If the parties' behavior is relevant to giving meaning to the Agreement, particularly if reflective of intent, the Agreement is ambiguous and the Motion must fail. *See DK LIPA*, 2020 WL 3000383, at *4.

of contract. Santander Brasil has not "conceded" anything (Motion 12), and has good reason in doing so. As explained in its termination notice, Santander Brasil chose this path to "cause as little disruption as possible to affected Members and Cardholders." (Compl. Ex. B at 2.)

II. The Complaint Adequately Pleads that Performance is Excused Under the Frustration of Purpose Doctrine

"Under New York law, the doctrine of frustration of purpose discharges a party's duties to perform under a contract where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." *Safeco Ins. Co. of Am.* v. *M.E.S., Inc.*, 2010 WL 11627203, at *11 (E.D.N.Y. May 19, 2010) (quotation omitted).

Here, the primary rationale underlying the Agreement was that Santander Brasil would continue functioning as a bank and that American Airlines would continue functioning as an airline. The primary reason that Brazilian Cardholders would use an airline co-branded credit card is to accumulate AAdvantage Miles for air travel on American Airlines. (Compl. ¶¶ 12-16.) That American Airlines would fly is "so completely the basis of the contract that . . . without it, the transaction would have made little sense." *Arons* v. *Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007) (excusing performance). Santander Brasil would not have entered into an *exclusive* co-branded airline credit card arrangement with an American airline that did not fly from America to Brazil. Nor would Santander Brasil have entered into the Agreement requiring it to pay [redacted] to buy AAdvantage Miles that Brazilian Cardholders do not want to accumulate and cannot use because of COVID-19. (Compl. ¶¶ 28, 32.) This situation is a textbook example of when the frustration doctrine should apply.

A. The Prolonged Cessation of Air Travel to Brazil due to a Global Pandemic was Not Reasonably Foreseeable

American Airlines contends that it does not matter that the decimation of the airline industry brought about by the COVID-19 pandemic was unforeseen, and that the question instead is merely whether a generic reduction of air travel was unforeseeable. (*See* Motion 14 (arguing that the parties "contemplated the possibility" that American Airlines might "reduce" flight activity).) But that is not how courts apply the frustration of purpose of doctrine—they do not assess the situation at such a high level of generality. Take for example the First Department's decision in *Goddard* v. *Ishikawajima-Harima Heavy Industries Co.*, 29 A.D.2d 754 (1st Dep't 1968). The court did not ask whether it was unforeseeable that a boat builder might encounter delays building a boat; instead, the court asked whether it was unforeseeable that the boat builder's factory would burn to the ground, making it effectively impossible for the boat builder to build the boat in question. *Id.* at 754. Framed correctly, the answer was evident: "The destruction of defendant's factory excused such performance on [the builder's] part." *Id.* It is the same here. The decimation of the airline industry due to the COVID-19 pandemic was unforeseeable. As American Airlines admits in its most recent SEC filings, the COVID-19 "pandemic" has brought about "a world none of us could have imagined." (American Airlines 8/25/2020 8-K, *supra*; *see also* Compl. ¶ 31 (quoting American Airlines SEC filing that the COVID-19 pandemic has caused a "severe decline in demand for air travel," affecting the company "to an unprecedented extent")). American Airlines cannot tell the investing public one thing and this Court another.

Or take the classic case of *Alfred Marks Realty Co.* v. *Hotel Hermitage Co.*, 170 A.D. 484 (2d Dep't 1915), which was used as the basis for Illustration 2 in the Restatement (Second) of Contracts § 265 (1981). There, "A contract[ed] with B to print an advertisement in a souvenir program of an international yacht race, which has been scheduled by a yacht club, for a price of

$10,000," but "[t]he yacht club cancel[ed] the race because of the outbreak of [World War I]." Restatement (Second) of Contracts § 265, Illustration 2. Even though "A ha[d] already printed the programs," "B's duty to pay $10,000 [was] discharged." *Id.* As the court explained, "this is not where a promisor has failed to guard himself against a *vis major*. It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise"—namely, "defendant and the publishing company had in view the September cup racing." *Alfred Marks*, 170 A.D. at 485. So too here. Both parties "had in view" the continued normal functioning of the airline industry. *Id.*; *see also Kolodin* v. *Valenti*, 115 A.D.3d 197, 200-03 (1st Dep't 2014) (court order "precluding all contact between" musician and manager excused performance under a management contract); *Jack Kelly Partners LLC* v. *Zegelstein*, 140 A.D.3d 79, 85 (1st Dep't 2016) (lease agreement frustrated because "without the ability to use the premises as an office, the transaction would have made no sense").

But in any event, "non-foreseeability is not an absolute requirement." *Cliffstar Corp.* v. *Riverbend Prod., Inc.*, 750 F. Supp. 81, 84 (W.D.N.Y. 1990). Instead, it is a "relevant, but not dispositive, factor" in the analysis. *United States* v. *Winstar Corp.*, 518 U.S. 839, 905 n.53 (1996); *see* Restatement (Second) of Contracts § 265 Comment A ("The foreseeability of the event is . . . a factor in th[e] determination, but the mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption"). Put another way, "[t]he occurrence . . . must be unexpected but it does not necessarily have to have been unforeseeable. A requirement of absolute non-foreseeability as a condition to the application of the doctrine would be so logically inconsistent that in effect it would nullify the doctrine." *Opera Co. of Boston* v.

Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1100-01 (4th Cir. 1987) (citing *L.N. Jackson & Co.* v. *Royal Norwegian Gov't*, 177 F.2d 694, 699 (2d Cir.1949)).

As Williston explained, the frustration "doctrine is an equitable one to be applied when fair and just." *Id.* at 1099 (discussing Williston on Contracts). At the end of the day, the question is this: "Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a *real possibility* which could affect performance?" *Id.* at 1101; *accord Companhia De Navegacao* v. *C.G. Blake Co.*, 34 F.2d 616, 619 (2d Cir. 1929) (Hand, J.) ("it is in the end a question of how unexpected at the time was the event which prevented performance"). The answer to that question is no, as even American Airlines acknowledges: this is "a world none of us could have imagined." (American Airlines 8/25/2020 8-K, *supra*.)

B. The Risk of a Global Pandemic is Not Allocated to Santander Brasil

To the extent the Court finds that Section 20.4.5 does not apply, nothing in the Agreement "contemplate[s]" and "explicitly takes into account" the possibility that American Airlines would cease all air travel between the United States and Brazil due to the COVID-19 global pandemic. (Motion 13-14.) As discussed above (at pp. 14-15), Section 6.8 absolves American Airlines of liability for adjusting *the amount* of flights, but Section 6.8 does not require Santander Brasil to continue performing its obligations when American Airlines ceases all flights to Brazil. That American Airlines would fly to Brazil was the basic assumption for entering into the Agreement.

The parties also contemplated that over time more and more customers would be attracted to the co-branded credit card, and that Santander Brasil customers would use the co-branded credit card with greater frequency to earn AAdvantage Miles for use on American Airlines flights, as reflected in the escalator provision, under which Santander Brasil's AAdvantage Mile purchase obligation escalates each year. (*See supra* 5.) Thus, it is not just the total cessation of air travel

for a few months that has frustrated the Agreement, but also the fact that the effects of the COVID-19 pandemic will have a prolonged negative impact on international air travel even after American Airlines' resumption of limited flights to Brazil. As American Airlines has reported in its public SEC filings, the ongoing COVID-19 pandemic has caused a "severe decline in demand for air travel," affecting the company "to an unprecedented extent." (Compl. ¶¶ 31, 33 (quoting American Airlines SEC filings).) Indeed, the effects of COVID-19 have only gotten worse. COVID-19 cases are rising, and there are fears of more spikes as cooler fall and winter temperatures set in, which will drive down usage of the co-branded credit cards even further. At the very least, there is a factual dispute about whether the underlying assumption of the Agreement that Brazilian Cardholders would use the co-branded credit card and fly with greater frequency has been frustrated.

To be clear, Santander Brasil is not simply contending that it has become "financially disadvantageous [for it] to perform." (Motion 13.) Instead, the point is that the parties' central assumption and expectation of increasing card usage and increased saturation of the market, which can be achieved only if American Airlines flies between the United States and Brazil on a regular basis at a commercially viable volume, has been frustrated by the COVID-19 pandemic, which has prevented American Airlines from flying altogether for an extended period and will prevent American Airlines from returning to anticipated levels for years. As *Goddard*, *Alfred Marks*, *Kolodin*, and the other authorities cited in this brief make clear, this is the very circumstance where the frustration of purpose doctrine should apply.

For similar reasons, Section 20.4.6, the Market Share termination provision, does not explicitly contemplate the unforeseen effects of the COVID-19 pandemic. (Motion 14.) That provision addresses the altogether different contingency of American Airlines making an

operational decision to decrease the amount of flight activity *vis-à-vis two other airlines* over a calendar-year period. Section 20.4.6 relates to a strategic operational decision by American Airlines to allow its competitors to dominate the Brazil/U.S. market. It has nothing whatsoever to do with a delay or failure to perform caused by "any act of God . . . beyond the control of that Party." (Agmt. § 23.)[6]

American Airlines resists this conclusion by asserting that "[t]he suggestion that the parties labeled" Section 20.4.6 "'Cessation of Services' without contemplating the possibility that services would cease is implausible on its face." (Motion 14.) American Airlines' word play is doubly wrong. *First*, as discussed, the Market Share termination provision addresses the entirely different issue of American Airlines deciding to lower its flight activity vis-à-vis its two principal competitors, and says nothing about the sort of unforeseen event giving rise to Santander Brasil's claims here. *Second*, the Agreement states that section titles "appearing in this Agreement have been inserted as a matter of convenience and in no way define, limit or enlarge the scope of this Agreement or any of the provisions hereof." (Agmt. § 25.7) *See In re Aéropostale, Inc.*, 555 B.R. 369, 402 n.16 (Bankr. S.D.N.Y. 2016) (rejecting argument based on titles of section "headings" where agreement contained analogous provision).

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[6] The cases cited by American Airlines are nothing like the facts here. *See Burke* v. *Steinmann*, 2004 WL 1117891, at *9 (S.D.N.Y. May 18, 2004) (argument that "the death of [a party's] mother and the terrorist attacks of September 11, 2001" frustrated an agreement to sell a brewery was "wholly without merit" because the "mother had no connection to [the party's] performance under the contract and her death is irrelevant to this dispute," and the brewery "was not located in or near the World Trade Center"); *Gander Mountain Co.* v. *Islip U-Slip LLC*, 923 F. Supp. 2d 351, 362 (N.D.N.Y. 2013) (complaining party was "aware of the flood risks associated with the property prior to executing the Lease" and the agreement expressly allocated to that party the risk of loss caused "by fire or other casualty during the Lease term"); *Urban Archaeology Ltd.* v. *207 E. 57th St. LLC*, 68 A.D.3d 562 (1st Dep't 2009) ("parties' lease agreement" could have "foreseen or guarded against" an "economic downturn"); *Drummond Coal Sales, Inc.* v. *Kinder Morgan Operating LP*, 2017 WL 3149442, at *5 (N.D. Ala. July 25, 2017) (frustration doctrine inapplicable where regulatory changes rendered coal supply contract less profitable, because the agreement allocated the risk of loss due to "additional cost or expense" resulting from actions of "regulatory bodies").

CONCLUSION

Santander Brasil respectfully requests that the Court deny American Airlines' motion to dismiss.[7]

Respectfully submitted,

/s/ James L. Bromley

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September 25, 2020

[7] If the Court finds the Complaint deficient in any way, Santander Brasil requests an opportunity to cure any such defect. Dismissal "with prejudice" (Motion 15) would be improper. *See Ronzani* v. *Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990) (abuse of discretion to "dismiss[] the complaint without leave to amend," where plaintiff "had not previously been given leave to amend, and had offered to amend his complaint"); *Adlife Mktg. & Commc'ns Co.* v. *Best Yet Mkt., Inc.*, 2017 WL 4564763, at *4 (E.D.N.Y. Oct. 11, 2017) ("When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BANCO SANTANDER (BRASIL), S.A., Plaintiff, v. AMERICAN AIRLINES, INC., Defendant.	No. 20-cv-03098 (RPK) (RER)

DECLARATION OF JACOB E. COHEN

JACOB E. COHEN hereby declares under penalty of perjury as follows:

1. I am a member of the bar of this Court, and special counsel at the law firm Sullivan & Cromwell LLP, counsel for plaintiff Banco Santander (Brasil), S.A. in the above-captioned case. I respectfully submit this Declaration in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss the Complaint.

2. Attached hereto as Exhibit 1 is a true and correct copy of Schedule 17.1 to the AAdvantage Program Participation Agreement, dated December 9, 2016.

Executed on September 25, 2020 in New York, New York.

/s/ Jacob E. Cohen
Jacob E. Cohen

Exhibit 1

Schedule 17.1

Illustrative Examples of uses of Other American Data that would or would not be harmful to American

"**Restricted Categories**" means alcoholic beverages, tobacco, gambling, drugs (prescription or non-prescription), weight-loss products and services related to accidents (e.g., personal injury attorneys).

"**Travel Intermediary**" means a travel agent, whether online or offline, or metasearch engine (e.g., Google Flights, Kayak, Skyscanner).

"**Aggregated Data**" means a data set created by combining data from multiple sources, and removing or suppressing the identifying characteristics of such data, in a manner sufficient to prevent the identification of American as the source of any individual element of such data. A data set containing Other American Data will not be deemed "Aggregated Data" unless (1) the data set includes data from least five other passenger airlines, (2) Other American Data constitutes no more than 20% of the data in the total data set, and (3) the data set is structured and organized such that Other American Data cannot be filtered out, identified or be made into a sub-group.

Note: The following scenarios are for illustration purposes and are not exhaustive. In all "not harmful" situations Bank would still need to comply with the terms of the Agreement, including restrictions on use of American Marks.

Targeted Promotion of Restricted Categories

Use of Other American Data alone, or in Aggregated Data, to conduct any targeted promotion for Restricted Categories = HARMFUL

Promotion of Airlines

Use of Other American Data alone, or in a data set that is Aggregated Data, to conduct any targeted promotion for another airline = HARMFUL

Use of Other American Data alone, or in a data set that is Aggregated Data, to conduct any targeted promotion for another airline by sending via a Travel Intermediary a discount coupon for bookings on the other airline = HARMFUL

Use of such Aggregated Data to develop a profile that the individual likes to travel and sending a discount coupon on any flights, where the promotion is not linked to specific airlines or specific airports = not harmful

Promotion of Businesses other than Airlines

Use of Other American Data alone, or in a data set that is Aggregated Data, to conduct any targeted promotion for a hotel, car rental company or restaurant = not harmful

Use of Other American Data in Investment Banking Advisory Services

Use of Other American Data alone, or in a data set that is Aggregated Data, to conduct research and provide advice for investment banking clients with respect to businesses other than airlines and Travel Intermediaries = not harmful

Use of Other American Data in a data set that is Aggregated Data to conduct research and provide advice for investment banking clients who are not airlines with respect to travel or airlines in South America= not harmful

Use of Other American Data alone, or in a data set that is Aggregated Data, to conduct research and provide advice for investment banking clients that are airlines = HARMFUL

BANCO SANTANDER (BRASIL) S/A
Luiz Galvão
Gerente Jurídico
DIRETORIA JURÍDICA