IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case No.-cv-01236 (CKK)**
	)	
US AIRWAYS GROUPS INC. /AMR CORP.	)	
	)	
Defendants	)	

PUBLIC COMMENTS SUBMITTED BY DANIEL MARTIN BELLEMARE IN THE ABOVE-CAPTIONED MATTER PURSUANT TO THE ANTITRUST PROCEDURE AND PENALTIES ACT 15 U.S.C. § 16

INTRODUCTION

On November 27, 2013 the United States, acting through the United States Attorney General, issued a public notice in the Federal Register, announcing a proposed Final Judgment ("PFJ") had been filed before the United States District Court for the District of Columbia ("Court"), in the above-captioned matter, pursuant to the Antitrust Procedures and Penalties Act 15 U.S.C. § 16 et seq ("Tunney Act"). 78 Fed. Reg. 71 378. The public notice invites public comments on the PFJ, a settlement agreement regarding a civil action brought by the United States against U.S. Airways Group Inc. ("U.S. Air") and AMR Corporation ("AMR"), under federal antirust law.

In the Amended Complaint filed on September 5, 2013 the United States sought relief on the ground U.S. Air and AMR planned a stock acquisition in violation of Section 7 of the Clayton Act (15 U.S.C. § 18) ("Section 7"). We submit written comments on the PFJ for the Court's consideration. After having reviewed the Amended Complaint, Competitive Impact Statement, and PFJ, we respectfully submit that the Court should not enter the PFJ, as it is against the public interest, for the reasons more fully set forth below.

ANALYSIS AND COMMENTS

Our analysis and comments of the PFJ contains four parts. The first part outlines the standard of review under the Tunney Act. The second part, discusses the legal standard under section 7 for assessing the legality of stock acquisitions. The third part, provides an overview of the government prima facie case. Lastly, we explain why the PFJ is against the public interest, and should not be entered by the Court.

I. STANDARD OF REVIEW

The Tunney Act provides that a district court enters a proposal for a consent judgment upon a determination, after a hearing and consideration of public comments, that entry thereof is "in the public interest". The court must consider, inter alia: The proposed final judgment's impact on competition within the relevant market defined in the complaint; enforcement provisions and relief sought; alternative remedies; clarity; public benefit of a trial. 15 U.S.C. § 16 (e) (1). A district court has no obligation to hold an evidentiary hearing before making a public interest determination under the Act. 15 U.S.C. § 16 (e) (2).

Judicial review under the Tunney Act focuses, mainly, on a proposed final judgment's "purpose, meaning, and efficacy". *United States v. Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995). Provisions in a proposed final judgment ought to be enforceable, which requires a level of clarity sufficient to allow a court to determine compliance therewith[1] — and effective compliance mechanisms. Ibid., at 1461-62. Next, relief must be "consonant" with antitrust violations alleged and claims made in the complaint. Ibid., at 1461. Relief must address the antitrust wrong

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[1] *United States v. Microsoft Corp.,* 147 F.3d 935, 940 (D.C. Cir. 1998) (Williams, J.) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by clear and convincing evidence that the contemnor has violated a clear and unambiguous provision of the consent decree") (internal quotation marks omitted) citing *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

adequately, though "preferable" or more perfect relief might be available. Ibid., at 1460.

Equally important, the court must perform judicial oversight so as to prevent positive injuries to third parties. Ibid., at 1462. Lastly, within the limits imposed by the doctrine of separation of powers, specifically the attorney general's exclusive prerogative to enforce the law, ibid., a proposed final judgment filed for entry shall not "make a mockery of judicial power". Ibid. In sum, the Tunney Act directs meaningful judicial review, consistent with the Act's main purpose to ensure that a proposed final judgment is enforceable, provides adequate relief, but without encroaching on the Executive Branch's prerogative to initiate, frame, and settle civil antitrust actions.

II. THE LEGAL STANDARD GOVERNING THE LEGALITY OF HORIZONTAL ACQUISITION OF STOCKS UNDER SECTION 7.

The legal standard governing the legality of horizontal acquisition of stocks under section 7 is well settled in antitrust case law. Under the law, acquisition of stocks or assets is prohibited "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly". 15 U.S.C. § 18. The terms "line of commerce" refer to what has become known as "product market" while the terms "section of the country" have been labeled "geographic market". *Brown Shoe Co., Inc. v. United States,* 370 U.S. 294, 324 (1962).

Product market definition centers on elasticity of demand.[2] The geographic market is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and

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[2] See *Brown Shoe Co., Inc.* 370 U.S., at 325. ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors") (case reference, footnotes and internal quotation marks omitted).

immediate. This depends upon the geographic structure of supplier-customer relations" (reference and internal quotation marks omitted). *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 357 (1963). A geographic market may have a local ("four-county Philadelphia metropolitan area", ibid at, 361), national ("entire United States", *Baker Hughes Inc.*, 908 F.2d, at 982 n.2) , even international ("all noncommunist gold mining", *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989)), dimension. What must then be assessed is whether competition would be limited in the relevant market.[3]

A legal standard attaches also respecting rebuttal of a prima facie case. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C Cir. 1990). "[A] defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition") (case references and citations omitted). And, "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully". Ibid. The burden to prove a violation of the law lies on the government, throughout. *Baker Hughes Inc.*, 908 F.2d, at 983. See also *Chicago Bridge & Iron Co. v. Federal Trade Commission*, 534 F.3d 410, 425-426 (5th Cir. 2008).

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[3] See *United States v. Baker Hughes Inc.,* 908 F.2d 981, 983 (D.C. Cir. 1990) (Thomas, C.J). ("The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times") (case citations and footnote omitted). See also *F.T.C.* v. *Whole Foods Market, Inc.,* 533 F.3d 869, 877 (D.C. Cir. 2008) (Brown, C.J.) ("[T]he framework we have developed for a *prima facie* § 7 case rests on defining a market and showing undue concentration in that market ...) (reference omitted); *F.T.C. v. H.J. Heinz Co.* 246 F.3d 708, 715 (D.C. Cir. 2001). HORIZONTAL MERGER GUIDELINES (U.S. Department of Justice and Federal Trade Commission) (August 19, 2010) (§ 5.3 Market Concentration).

Market share and concentration level increases in a predefined market are reliable indicators that a stock acquisition may contravene section 7, prima facie. These two economic indicators supply a convenient analytical tool to detect instances where a stock acquisition could yield monopoly prices through conscious parallelism.[4] *Federal Trade Commission v. PPG Industries Inc.* 798 F.2d 1500, 1503 (D.C. Cir. 1986) (Bork. J.) (Noting "the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels").[5]

Defendants may introduce evidence to rebut the presumption that stock acquisition contravenes the law. For instance, erroneous elasticity of demand or supply analysis can result either in an overly broad or unduly narrow product or geographic market, which misrepresents market concentration.[6] Also, lack of entry barriers is admissible to rebut the presumption. *Baker Hughes Inc.,* 908 F.2d, at 987. Similarly, stocks of a failing firm, or division thereof, may be acquired, despite it may lessen competition substantially, provided strict conditions are met. *Dr*

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[4] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209, 227 (1993). ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions") (references omitted).

[5] See also *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1386 (7th Cir 1986) (Posner, C.J.) ("When an economic approach is taken in a section 7 case, the ultimate issue is whether the challenged acquisition is likely to facilitate collusion. In this perspective the acquisition of a competitor has no economic significance in itself; the worry is that it may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price"). *Accord*, *Federal Trade Commission v. Elders Grain, Inc.,* 868 F.2d 901, 906 (7th Cir. 1989) (Posner, C.J.).

[6] *Whole Foods Market, Inc.* 553 F.3d, at 872 ([T]he district court committed legal error in assuming market definition must depend on marginal consumers; consequently, it underestimated the FTC's likelihood of success on the merits"). See also *Federal Trade Commission v. Staples, Inc.* 970 F.Supp. 1066, 1073-1074 (USDC DC 1997). *State of California v. American Stores Co.* 872 F.2d 837, 841 (9th Cir. 1989) *rev'd on other grounds* 495 U.S. 271 (1990) ("American Stores argues that the district court improperly defined the relevant product market and thus erred in finding that the merger may substantially lessen competition").

Pepper/Seven-Up Companies Inc. v. Federal Trade Commission, 991 F.2d 859, 864-865 (D.C. Cir. 1993). Finally, the existence of efficiencies is another countervailing factor.[7]

Although horizontal merger analysis under section 7 calls for a "totality-of-the-circumstances approach", *Baker Hughes*, 908 F.2d, at 984, an especially important factor is entry barriers. *Baker Hughes*, 908 F.2d, at 987 citing *United States v. Falstaff Brewing Corp.* 410 U.S. 526, 532-533. ("[T]he existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time") (references omitted). See also *H.J. Heinz Co.*, 246 F.3d, at 717, n.13.

Entry barriers are economic or legal impediments preventing would-be competitors from competing with established firms in a specific market, right away. Such barriers insulate incumbents from immediate competition by outsiders. *Chicago Bridge & Iron Co.*, 534 F.3d, at 428 n.8 citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993); *Colorado Interstate gas Co. v. Natural Gas Pipeline Co. Of Am.*, 885 F.2d 683, 696 n. 21 (10th Cir. 1989). A wide range of entry barriers can impede entry into a market.[8]

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[7] *H.J. Heinz Co.,* 246 F.3d, at 720 (Only "proof of extraordinary efficiencies" can rebut "high market concentration levels" presented as prima facie evidence that a merger contravenes section 7).

[8] "An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants". H.M.G., § 9 (Entry). Starting costs ("amount of capital necessary to become a competitor") is another entry barrier. *California v. American Stores Co.,* 872 F.2d 837, 843 (9th Cir. 1989) *rev'd on other grounds* 495 U.S. 271, 296 (1990).

Regulatory barriers deserve particular attention. *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 627 (1974) (Powell, J.) ("application of [potential competition doctrine] to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce"). See also, *Hospital Corp. of America,* 807 F.2d, at 1387. ("[T]he ability of the remaining firms to expand their output should the big four reduce their own output in order to raise the market price (and, by expanding, to offset the leading firms' restriction of their own output), and the ability of outsiders to come in and build completely new hospitals, are reduced by Tennessee's certificate-of-need law. Any addition to hospital capacity must be approved by a state agency").

The entry standard in this jurisdiction, specifically the standard as to entry timing, is somewhat unclear. It seems entry must be assessed under a "likely" entry standard.[9] *Baker Hughes*, 908 F.2d, at 989 ("In sum, we see no error — legal or factual — in the district court's determination that entry into the United States HHUDR would likely avert anticompetitive effect from Tamrock's acquisition of Secoma"). The Federal Trade Commission and the Department of Justice/Antitrust Division assess entry barriers with reference to "timeliness, likelihood, and sufficiency". [10] H.M.G. § 9 (Entry).

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[9] Sister jurisdictions have declined to adopt the "mere threat of entry" standard, judging this standard too lenient. *Chicago Bridge & Iron Co. v. Federal Trade Commission*, 534 F.3d 410, 430 n. 10 (5th Cir. 2008) (case references and citations omitted). The Fifth Circuit has adopted a balancing approach, ruling "[t]he burden of production must provide evidence that the likelihood of entry reaches a threshold ranging from reasonable probability to certainty" (internal quotation marks omitted). Ibid.

[10] The Guidelines define entry timeliness in terms of entry "rapid enough that customers are not significantly harmed by the merger", H.M.G. § 9.1; entry likelihood as "profitable", H.M.G. § 9.2; while entry sufficiency is entry by "a single firm that will replicate at least the scale and strength of one of the merging firm", H.M.G. § 9.3.

III. THE GOVERNMENT HAS MADE A STRONG PRIMA FACIE CASE THAT THE PROPOSED ACQUISITION CONTRAVENES SECTION 7.

The government has made a strong prima facie case in the Amended Complaint that the proposed acquisition of a controlling participation[11] in a new corporate entity would lessen competition substantially, in violation of section 7. There is a "steady trend toward economic concentration", *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966) (Black, J.), in relevant markets defined by the government. These relevant markets are already concentrated, and the proposed acquisition would further entrench an oligopoly shielded by substantial economic and regulatory barriers. No demonstrable efficiencies could rebut the government's overwhelming case. And, neither U.S. Air nor AMR or any division thereof is a failing firm. Am. Compl. ¶¶ 19, 21. *Dr. Pepper/Seven-up Companies Inc.* 991 F.2d, at 864-865.

A.

Initially, the government sought to enjoin the proposed stock acquisition on the ground it may contravene section 7, by lessening competition substantially for the supply of "scheduled passenger airline service", in two distinct geographic markets: (i) "city pairs" across United States territory; and (ii) "slots" for taking off and landing at Washington National Airport. Am. Compl. ¶¶ 25, 28 , 31. The Amended Complaint defines the relevant product market as "scheduled air passenger service". Am. Compl. ¶ 25. Put another way, the product market is scheduled air passenger tickets, the product purchased and paid for by air travelers. City pairs are departures and

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[11] Paragraph 23 in the Amended Complaint describes the transaction in these terms: "US Airways and American agreed to merge on February 13, 2013. US Airways shareholders would own 28 percent of the combined airline, while American shareholders, creditors, labor unions, and employees would own 72 percent. The merged airline would operate under the American brand name, but the new American would be run by US Airways management".

arrivals from one city to another; slots at Washington National Airport and three other airports are regulatory permits for taking and landing.

The airline industry comprises two categories of airlines: "network" or "legacy" airlines and "non-network" airlines. Am. Compl. ¶ 32. Network airlines have "practical indicia", *Brown Shoe Co., Inc.*, 370 U.S., at 325 — "extensive national and international networks, connections to hundreds of destinations, established brand names, and strong flyer reward programs". Am. Compl. ¶ 32. In contrast, non-network airlines' do not offer "hub-and-spoke" service.[12] Ibid. An additional distinction must be made between "air carrier" and "commuter" slots at Washington National Airport: The former accommodate aircraft with any number of seats while the latter accommodate only aircraft with less than 76 seats. C.I.S. at 2 n.2.[13]

U.S. Air and AMR fly million passengers worldwide, Am. Compl. ¶¶18 and 20; both airlines fly passengers nationwide, too. At least two airlines, Hawaiian Airlines and Alaska Air, fly passengers "in a narrow geographic region". C.I.S. at 5 n.3. Besides, there are so-called "low-cost carriers", which have limited networks. C.I.S. at 5. One of them, Southwest Airlines, is said to carry

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[12] *United States v. AMR Corp.*, 335 F.3d 1109, 1111-1112 (10th Cir. 2003) ("Airlines are predominantly organized in a hub-and-spoke system, with traffic routed such that passengers leave their origin city for an intermediate hub airport. Passengers traveling to a concentrated hub tend to pay higher average fares than those traveling on comparable routes that do not include a concentrated hub as an endpoint. This is known as the hub premium and a major airline's hub is often an important profit center") (internal quotation marks omitted).

[13] Car, bus, or train are no substitutes for airlines. Am. Compl. 25. However, lack of demand elasticity for scheduled air passenger service — i.e. the fact that alternative modes of transportation like car, bus, or train are no substitutes for airlines — tells nothing about the existence of submarkets. On the one hand, the Amended Complaint defines the relevant product market as "scheduled air passenger service", Am. Compl., ¶ 25; on the other, the Competitive Impact Statement refers to "*domestic* scheduled air passenger service" as a relevant product market (emphasis added). C.I.S. at 4. Moreover, in a civil antitrust suit the United States Department of Justice (Antitrust Division) claimed AMR had monopolized and attempted to monopolize, through predatory pricing, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2), *airport pair markets* and *airline service* (emphasis added). *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1146 (D. Kan. 2001) *aff'd* 335 F.3d 1109.

"the most domestic passengers of any airline", despite the fact that "its route network is limited compared to the four current legacy carriers". Ibid. Accordingly, geographic markets for scheduled air passenger service may be defined based on air travel distance and duration[14] — namely, regional, national, and international scheduled air passenger services.

Based on allegations in the Amended Complaint, city pairs have regional, national, and international territorial dimensions. We note some city-pairs are within specific regional territories: Northeast, Northwest, Southeast, and Southwest. Others, extend beyond regional territories, having a national dimension.[15] Am. Compl. Annex A. The Amended Complaint refers also to international scheduled air passenger service. Am. Compl. ¶ 8. Regional, national, and international scheduled air passenger services have "peculiar characteristics and uses", *Brown Shoes Co. Inc.*, 370 U.S., at 325, inter alia: flight duration, distance traveled, ticket price, airlines number of seats.[16]

If regional, domestic, and international scheduled air passenger services are submarkets, then it must be determined how the proposed stock acquisition would impact competition in each

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[14] The government alleges in the Amended Complaint, in relevant part: "By further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger of US Airways and American would make it easier for the remaining airlines to cooperate, rather than compete, on price and service. That enhanced cooperation is unlikely to be significantly disrupted by Southwest and JetBlue, which, while offering important competition *on the routes they fly*, have less extensive *domestic and international route networks* than the legacy airlines" (emphasis added). Am. Compl. ¶ 3. Similarly, the government refers to AMR plans "to expand *domestically and internationally*" (emphasis added). Am. Compl. ¶ 8.

[15] Another way to categorize regional and national city pairs listed in Annex A to the Amended Complaint is with reference to distance, or air miles traveled.

[16] For instance, one can legitimately question whether non-network airlines, in particular commuters (airlines with less than 76 seats), can compete effectively with network airlines for national or international scheduled air passenger services at Washington National Airport, or at any other airport, no matter how many slots the PFJ would order U.S. Air and AMR to divest. *Whole Foods Market, Inc.,* 533 F.3d, at 881 (whether premium, natural, and organic supermarkets ("PNOS") distinct product market from broader traditional supermarket chains). *American Stores Co.* 872 F.2d, at 841 (whether "supermarkets" — "full line grocery stores with more than 10,000 square feet" — and "retailers of grocery products, such as convenience stores" should be included in same product market).

of these submarkets. Arguendo non major airlines compete to some extent with major airlines (U.S. Air, AMR, Delta, and United Airlines) for regional scheduled air passenger service. Whether non major airlines provide sustainable competition for national scheduled air passenger service is questionable; and, they probably do not compete with major airlines for international scheduled air passenger service.

To summarize, the definition of the relevant market in the Amended Complaint might be incomplete. The Court should inquiry into the government's approach to market definition, in particular geographic market. City-pairs as well as departures and arrivals at Washington National Airport ("slots") cover regional, national, or international distances, showing three possible submarkets: regional, national, or international scheduled air passenger services. The market defined in the Amended Complaint could underestimate the anticompetitive effect of the proposed stock acquisition, an issue bearing on adequacy of relief in the PFJ.

B.

Over the last eight years the number of airlines in the United States shrunk from nine to five, a decrease of almost fifty percent in less than ten years. Significantly, the decrease in the number of market players is due entirely to mergers. Am. Compl. ¶ 34.[17] Should the Court enter the PFJ, only three network airlines would remain: U.S. Air-AMR combined, Delta Airlines, and United Airlines. The non-network segment would be served by the above trio and a few smaller airlines e.g. Southwest Airlines, Jet Blue Airways, Virgin America, Frontier Airlines, and Spirit Airlines. Am.

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[17] U.S. Air has been an unconditional proponent of a movement toward consolidation in the U.S. airline industry. Am. Compl. ¶¶ 1 ,4, 35, 63 ,67. Furthermore, eventually, U.S. Air would assume the management of U.S. Air-AMR. Am. Compl. ¶ 23. No one would expect U.S. Air penchant for consolidation and cartelization to evaporate after the integration of U.S. Air and AMR, quite the opposite. Entrance of the PFJ would in all likelihood be interpreted by the oligopoly as a green light for price stabilization.

Comp. ¶ 32; C.I.S. at 5. The proposed stock acquisition flies indexes and ratios of concentration in the relevant markets to high altitude. For instance, Charlotte-Dallas city pair Herfindahl-Hirschman Index (H.H.I.) would jump to 9,324 points, post-merger. Am. Compl. ¶ 38. Furthermore, 80% of domestic scheduled passenger service market would become under the dominance of three network airlines, and Southwest. Am. Compl. ¶ 36. U.S. Air-AMR, post-acquisition, would control over 69% of slots at Washington National Airport. Am. Compl. ¶ 10.

In short, the government has made a "compelling prima facie case", *Baker Hughes Inc.* 908 F.2d., at 991, that the stock acquisition contemplated by U.S. Air and AMR would contravene section 7. *H.J. Heinz Co.*, 246 F.3d., at 716 (merger increasing H.H.I. by 510 points in market with premerger index of concentration of 4,775 points prima facie illegal); *Baker Hughes inc.*, 908 F.2d, at 983, n. 3 (prima facie case established by introducing evidence H.H.I. increase from 2,878 to 4,303 points); *American Stores Co*. 872 F.2d, at 842 (two-firm concentration ratio average increases ranging from 51 to 56%; four-firm concentration ratio average increases ranging from 73 to 79% in relevant markets).

C.

Pre-acquisition level of concentration provides friendly market structure for development and growth of conscious parallelism. Although not illegal in itself, *Brown & Williamson Tobacco Corp.*, 509 U.S., at 227, conscious parallelism has serious anticompetitive consequences, depriving consumers of genuine price competition. However, conscious parallelism may contravene the Sherman Act. *See American Tobacco Co. v. United States*, 328 U.S. 781, 804 (1946) ("The following record of price changes is circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition").

Tellingly, the government asserts that it has gathered evidence of past overt communications among competitors in the relevant markets. Apparently, airlines have been using "cross-market initiatives" to stabilize air fares, a practice designed to avoid price wars. Also, apparently the Airline Tariff Publishing Company has been a conduit for conscious parallelism. The government even alleges that US Airways complained directly to competitors about what it considered aggressive price competition.[18] Am. Compl. ¶¶ 41-45. Because market conditions favor coordination in the relevant markets, allowing the acquisition to proceed under the conditions set forth in the PFJ would amount to the issuance of a licence to engage in conscious parallelism.[19]

D.

Regulatory barriers plague entry at Washington National Airport; these barriers are most insidious. The issuance of slots at Washington National Airport by the Federal Aviation Agency ("government-issued rights to take off and land", Am. Compl. ¶ 10)[20] affects directly the supply of scheduled air passenger service there. Furthermore, some aspects of the regulatory regime administered by the FAA are likely immunized from antitrust enforcement. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

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[18] Horizontal price-fixing is a per se offense under Section 1 of the Sherman Act (15 U.S.C. § 1). *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 893 (2007) (Kennedy, J.) citing *Texaco Inc. v. Dagher,* 547 U.S. 1, at 5 (2006).

[19] See *Hospital Corp. of America*, 807 F.2d, at 1387 (" The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act, which forbids price fixing. This would not be very important if the four competitors eliminated by the acquisitions in this case had been insignificant, but they were not; they accounted in the aggregate for 12 percent of the sales of the market. As a result of the acquisitions the four largest firms came to control virtually the whole market, and the problem of coordination was therefore reduced to one of coordination among these four").

[20] Three other airports require "federally-issued slots". C.S.I. at 5.

At paragraph 86 of the Amended Complaint, the government alleges that U.S. Air engaged in preemptive acquisition of slots, a "predatory or anticompetitive conduct". *Spectrum Sports, Inc. v. McQuillan* 506 U.S. 447, 456 (1993). Preemptive acquisition of slots "is something more than an intent to compete vigorously", ibid. at 459; it is "conduct which unfairly tends to destroy competition itself". Ibid., at 458. U.S. Air also launched a failed hostile takeover bid on Delta Airlines in 2006, Am. Compl. ¶ 63. Now, U.S. Air proposes to integrate AMR. So, it appears that U.S. Air attempts to monopolize[21] scheduled air passenger service in both geographic markets defined in the Amended Complaint.[22]

Importantly, there is another impediment to entry in the relevant markets: Starting costs. Costs associated with starting a networked airline business are very substantial: ordering aircraft; setting up ground facilities to serve customers as well as route networks. These are a few investments which require a huge amount of capital. *American Stores* 872 F.2d, at 843. Arguably, capital requirement to set up a regional airline is less significant; however, regulatory barriers at Washington National Airport and at three other airports, compounded by economic barriers, impede new entry respecting national and international scheduled air passenger services.

Regulatory and non-regulatory barriers in the relevant markets make it unlikely that newcomers could— even less would — defeat an attempt by an integrated U.S. Air-AMR to exert

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[21] There are two elements to the offense of attempt to monopolize: First, a "dangerous probability" of monopolizing "a particular market"; second, "specific intent to monopolize". *Spectrum Sports, Inc.*, 506 U.S., at 459. Intent to monopolize may be proved by evidence of "unfair" or "predatory" conduct. Ibid.

[22] We make no argument that the Amended Complaint should contain a claim U.S. Air has attempted to monopolize, as a district judge shall not "redraft the complaint", thereby assuming prosecutorial function. *Microsoft Corp.* 56 F.3d, at 1459. However, since the proposed stock acquisition might be the final step in a strategic attempt to monopolize, this is certainly an issue that must be weighed in a public interest inquiry conducted under the Tunney Act, especially as regards adequacy of relief in the PFJ.

market power. Am. Compl. ¶¶ 10, 85-87; 91-93. We do not know the extent of past entry by providers of regional, national or international scheduled air passenger services, a key indicator of entry barriers. ("Substantial weight" accorded to "actual history of entry in the relevant market") H.M.G. § 9 (Entry) . Moreover, the government does not anticipate new entry in the relevant markets as a result of divestiture ordered in the PFJ. C.I.S. at 8. Instead, the PFJ would merely " impede the industry's evolution toward a *tighter* oligopoly" (emphasis added). Ibid. [23]

IV. THE PROPOSED CONSENT JUDGMENT SUBMITTED FOR APPROVAL IS NOT IN THE PUBLIC INTEREST AND CONSEQUENTLY SHALL NOT BE ENTERED BY THE COURT.

The PFJ would compel divestiture or transfer of 138 air carrier slots at two airports: Washington National (D.C.) and LaGuardia International (New York). In addition, rights and interests in gates or other grounds facilities associated with the above 138 slots would have to be transferred. C.I.S., at 2-3. Rights and interests in ten gates, and other grounds facilities at five airports — Chicago O'Hare International Airport, Los Angeles International Airport, Boston Longan International Airport, Miami International Airport, and Dallas Love Field — complete the divestiture package. C.I.S. III. A and B.

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[23] A dominant entity (U.S. Air-AMR) with unlimited financial resources, capable of sustaining substantial financial losses in response to aggressive price competition by new entrants, will undoubtedly discourage entry. See *AMR Corp.*, 335 F.3d, at 1112. ("During the period between 1995 and1997, a number of LCCs [low costs carriers], including Vanguard, Western Pacific, and Sunjet, began to take advantage of these lower costs by entering certain city-pair routes serving DFW [Dallas-Forth Worth] and charging lower fares than American. The instant case primarily involves DFW-Kansas City, DFW-Wichita, DFW-Colorado Springs, and DFW-Long Beach. American responded to lower LCC fares on these routes with changes in: (1) pricing (matching LCC prices); (2) capacity (adding flights or switching to larger planes); and (3) yield management (making more seats available at the new, lower prices). By increasing capacity, American overrode its own internal capacity-planning models for each route, which had previously indicated that such increases would be unprofitable. In each instance, American's response produced the same result: the competing LCC failed to establish a presence, moved its operations, or ceased its separate existence entirely. Once the LCC ceased or moved its operations, American generally resumed its prior marketing strategy, reducing flights and raising prices to levels roughly comparable to those prior to the period of low-fare competition. Capacity was reduced after LCC exit, but usually remained higher than prior to the alleged episode of predatory activity").

Admittedly, divestiture, under terms and conditions stipulated in the PFJ, is enforceable relief. *United States v. E.I. du Pont de Nemours and Co.*, 366 U.S. 316, 330-331(1961) (Brennan, J.) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure"). Moreover, enforcement mechanisms in the PFJ are adequate. P.F.J. IV-VII. *Microsoft* 56 F.3d, at 1461-1462. Nevertheless, the prospective anticompetitive effect of the proposed stock acquisition is such that relief in the PFJ is "so inconsonant with the allegations charged as to fall outside of the reaches of the public interest" (internal quotation marks omitted) *Microsoft* 56 F.3d, at 1461.

The government contends "the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger". C.I.S. at 8. However, the record shows, overall, that litigation is the only effective and economic relief to prevent the ongoing erosion of competition in the relevant markets defined in the Amended Complaint. Since regulatory barriers play a major role in maintaining an anticompetitive environment, a preliminary injunction would preserve the status quo, allowing the government to call for the repeal of regulatory barriers at Washington National Airport and three other airports subjected to slot permits.[24]

We have no information about what caused the government to change course. The settlement in the above-captioned matter hardly "reflect[s] weaknesses in the government's case". *Microsoft*, 56 F.3d, at 1461. The government would probably succeed on the merits, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (Roberts, C.J.); indeed, there is a strong likelihood of success on the merits. And, the government could prove irreparable harm, ibid

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[24] "Although today operations at Love Filed are severely restricted under [the Wright Amendment], those restrictions are due to expire in October 2014". C.I.S. at 10, n.6.

at 22, as lessening competition amounts to such harm. *American Stores* 872 F.2d, at 844. Hence, a preliminary injunction blocking the proposed acquisition would likely issue — the prima facie case set out in the Amended Complaint is overwhelming.

Once the government files a civil action to enforce antitrust laws, terms of settlement must be reviewed by a district court to ensure they are in the public interest. A district judge shall not refuse to enter a proposal for a consent judgment solely because a "preferable" remedy could redress the alleged harm to competition. *Microsoft*, at 1460. Nevertheless, U.S. Air-AMR proposed stock acquisition would effect a deep structural market change, such that no divestiture requirement can possibly bring the PFJ within the "reaches" of the public interest. Microsoft, 56 F.3d, at 1461.

CONCLUSION

For the foregoing reasons we respectfully submit the Court should not enter the Proposed Final Judgment.

Signed this February 6, 2014

Daniel Martin Bellemare

DANIEL MARTIN BELLEMARE
ATTORNEY AT LAW
Vermont Bar (#3979)
Québec Bar (#184129-7)
1980 Sherbrooke Street West Suite 450
Montréal, Québec, Canada H3H 3E8
Tel: (514) 384-1898
[redacted]

TO: William H. Stallings
Chief, Transportation, Energy & Agriculture Section
United States Department of Justice/Antitrust Division
450 Fifth Street, N.W., Suite 8000
Washington D.C. 20530
william.stallings@usdoj.gov.