THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:23-cv-10511-WGY

UNITED STATES OF AMERICA, et al,
Plaintiffs

vs.

JETBLUE AIRWAYS CORPORATION, et al,
Defendants

****

For Bench Trial Before:
Judge William G. Young

Closing Arguments

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, December 5, 2023

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I N D E X

E X H I B I T S

P R O C E E D I N G S

(Begins, 9:00 a.m.)

THE CLERK: Now hearing Civil Matter 23-10511, the United States of America versus JetBlue, et al.

THE COURT: And good morning to everyone.

I understand there's some issues about exhibits. As Ms. Gaudet explained to me, there are certain exhibits as to which there is no dispute and they may be admitted. I agree they may be admitted. They will have the next numbers.

Which will take us up to what?

MR. SHORES: 912, I believe, your Honor.

THE COURT: All right. So those exhibits are admitted.

MR. SHORES: Thank you, your Honor.

(Exhibit 912, marked.)

THE COURT: I mean maybe this has been resolved, but she said there were three that were at issue before the defense rested?

MR. DUFFY: Before actually the plaintiffs rested, we have submitted a motion to admit three exhibits that were related to Campbell Hill, which is a consulting firm that Spirit had retained. My understanding of defendants' objection to those exhibits is challenging our contention that Campbell Hill was an agent of

Spirit's. So that motion was pending before the Court at the time we rested.

THE COURT: I understand. And I have reviewed those.

On balance I'm going to deny the admission. They may have the exhibit numbers -- the exhibit letters that they had heretofore.

MR. DUFFY: Understood, your Honor.

THE COURT: All right. Now here's how we're going to proceed. An hour for closings. The defense will go first. I'll take a 10-minute break. And I'll hear the government. Mr. Shores is going to argue.

And I should say something, and I say this primarily for the gallery more than for counsel, but counsel will understand this.

I'm prepared for your argument and I'm looking forward to it, but I will have questions. Everyone should understand that those questions do not in any way indicate the inclination of the Court as to any matter under which -- as to which I'm taking things under advisement. What they may indicate is issues I'm thinking about. Nothing more. I think it's appropriate to say that.

All right. And Mr. shores and Mr. Cohen are going to argue and you'll divide up the time as you see fit.

MR. SHORES: Yes, your Honor.

CLOSING ARGUMENT BY MR. SHORES:

May it please the Court. After four weeks of trial there were 900 exhibits and testimony from 22 witnesses, but one fact remains undisputed, the domestic airline industry is dominated by the Big 4 carriers who together account for 80 percent of the market. And looking into the future, as Section 7 of the Clayton Act requires, there is no prospect of that changing. As both the CEOs of JetBlue and Spirit testified, the competitive landscape fundamentally shifted years ago in favor of the dominant carriers, particularly the high-priced high-profit legacy carriers. That is why starting 6 years ago JetBlue began considering a merger with Spirit with one main goal, to create a viable, disruptive, big national challenger to the industry's dominant airlines. That mandate is even more urgent today.

As the evidence showed, the legacies in particular have used their massive scale and broad networks to gain a large part, through mergers blessed by the government, to cement their dominance in a post-covid world. For example, United and Delta together made billions of dollars in profits in the third quarter of this year

alone, while the smaller airlines like JetBlue and Spirit have faced severe financial headwinds post-covid and lost money every year. Now this is not just a problem for the pocketbooks of these small airlines, it is fundamentally a problem for competition and for consumers. As a matter of basic economics and as both JetBlue and Spirit CEOs explain, future growth for the smaller disruptive airlines is not possible without profit. Meanwhile the legacy airlines will continue to pull away.

Just as an example, United has 800 new planes on order, that is 300 planes more than the anticipated fleets of JetBlue and Spirit combined.

THE COURT: Well excuse me. Help me out as to this.

I understand that the Clayton Act is designed to benefit competition, and at bottom to benefit consumers. So, um, who is going to benefit if this merger goes forward? It's not a question of, um, JetBlue's standing with respect to the so-called "legacies," it's whether consumers are going to benefit and more particularly, as I expect the government to argue, what consumers.

Help me out with that.

MR. SHORES: Sure, your Honor, and that's the fundamental point here.

As the government itself recognized in the NEA case, JetBlue is uniquely able to discipline on price and on quality the legacy airlines who carry the most passengers in this country. And that makes sense, your Honor, JetBlue competes across the entire cabin against the legacy airlines, from Basic Economy all the way to first class. So when JetBlue enters routes, what the evidence shows is that prices come down for consumers, most consumers in this country.

Now at the same time we do recognize there are people who have chosen a ULCC-type option. And as the Clayton Act recognizes, if you have entry, the ability to enter the market in a mobile industry, those consumers will be protected. And as I'm going to talk about today, one of the key features of this case that we've heard about was the fact that Frontier, Allegiant, Breeze, Avelo, they're growing, and they're able to quickly move their assets from one market to another, and what that means under the antitrust laws is low barriers to entry will allow them to serve that side of the market.

THE COURT: Well when should I look at the status of competition? That's an inapt question. I'll try it better.

MR. SHORES: If -- sorry.

THE COURT: If the merger goes forward there's going to be some disruption, that's inevitable and expected. When should I expect to see the benefit that you describe? And is that the time at which my forward-looking analysis ought grab hold?

MR. SHORES: Again if we could turn to Slide 12, Mr. McCloud.

It is the fundamental question here, your Honor, what is the relevant timeframe that the Court must conduct the competitive effects analysis? And one of the fundamental principles of Section 7 is that the Court has to look out into the future -- not tomorrow, not next month, not even next year, but years into the future after the market has arrived at it's post-merger competitive equilibrium. The government itself has identified the relevant timeframe for entry to be 2 to 3 years and some courts look out even further. But even focusing on just the government's timeframe, your Honor, and assuming the closing of this transaction in 2024, that means looking all the way out until 2027.

I'd also point out, your Honor, that the cases hold that even if there's some short-term anticompetitive effect from a merger, that doesn't bar the merger if in the long run the merger is good for competition, and that makes sense, your Honor, because

every merger causes some temporary dislocation to competition. And if that were enough to do the merger, then Section 7 would practically doom almost every merger. So the fundamental point is that the Court has to look out into the future again beyond the short term to the long term and ask whether this merger is going to be good for competition in the long run?

THE COURT: But that's -- to me that's one of the key issues here.

If the niche that Spirit occupies and the routes that Spirit presently flies, if that's going to be gone, and it is under this merger -- you say well everyone can come in over time or Frontier and Allegiant can come in, what is my benchmark for balancing the loss to the Spirit consumers against the benefit downstream to consumers -- perhaps a more affluent or business class that all airlines compete for, how do I balance that here?

MR. SHORES: Well, your Honor, I would point to the language of Section 7 which gives a balancing test and what the language of Section 7 says is that a merger has to substantially lessen competition, not just lessen competition, but substantially lessen competition. And what that means is that the Court has to look out into the future and say "What is going to be the competitive

effect of this merger?" And there may be some loss of competition, you know Congress chose not to set the bar at just loss of competition or even possible loss of competition, there has to be a substantial lessening of competition. And what Congress was trying to achieve through the Clayton Act is to say "We don't want mergers that in the long run are bad for competition."

And I think this is important to point out that witnesses, the ULCC witnesses like Mr. Biffle, a witness from Allegiant, a witness from the other ULCCs, they testified that they have the ability to both serve the profitable existing routes as well as acquire new planes, get leases, exercise options -- Allegiant alone has 80 options, and redeploy existing aircraft from unprofitable routes, like they do every day, in order to serve the routes that will be vacated by Spirit.

I'll also point out, your Honor, those were witnesses called by the government and they made clear that they want to grow. I think one important thing about Section 7 cases, particularly in a dynamic industry, is you can't take a snapshot of what the world looks like today, the airline business evolves.

Take Avelo and Breeze, for example, your Honor. Those were two airlines that entered during the height of the pandemic, which is the worst demand environment

that the airline industry has ever seen, and they're now in dozens of cities and many routes. Allegiant already has a new plan called Allegiant 2.0. Yes, historically they serve secondary or proxy airports, that's true, but some of those airports even compete with the primary airports, take Sanford that's competitive with Orlando. But they also said, in a post-merger world particularly, is that the government contends that profits are going to go up, prices are going to go up, and the business models will evolve to meet that, that's what the history of the airline industry shows.

So back to your question, your Honor. I think it's a balancing, but it's also looking at the perspective of what's going to happen in this industry and thinking about what has happened in this industry in the past and what it tells us about competition in the future.

Your Honor, if we could go to Slide 8.

(On screen.)

In the left-hand corner, your Honor, this was the testimony of Mr. Biffle, and what he said was "Airlines have portable assets." It's not like the hotel business, this is not a merger of a widget factory, this is a merger of a mobile asset. And what that means is, for purposes of your analysis in this case, the asset

can move. And when Spirit exits these routes in the long run, there's going to be profitable entry here by other ULCCs.

Now if I could, your Honor, I would like to turn to the ***Baker Hughes*** framework.

And if we could, Mr. McCloud, let go to -- um, sorry. 19. I'm sorry, 15. No, 17. You got me confused here.

(On screen.)

And I think it's important to put the analysis in the context of what the law requires, your Honor.

There's a very well-settled framework for analyzing the competitive effects here and that's the ***Baker Hughes*** framework, and what it provides is, in Step 1, there has to be undue concentration in a relevant market.

THE COURT: But on that point, isn't it clear that it is the routes that JetBlue competes with Spirit? Your own expert emphasized the routes. I recognize that there is competition at a national network level. But isn't it appropriate to consider the routes that we've been talking about during the course of the trial?

MR. SHORES: I do think it's appropriate to consider the routes, your Honor. I think there are two separate questions though.

One question is that at Step 1 of the analysis, what is the relevant market for antitrust purposes? And that question involves whether you should look at competition on a national level for purposes of the relevant antitrust market, and what I mean by that is you get to choose, after hearing all the evidence, what's the best way to think about the market dynamics here. It doesn't mean --

THE COURT: I recognize that, and so let me push back a little bit.

It seems to me, or I'm thinking, that I really have to look at these routes where there's head-to-head competition, and I have these exhibits and I can see who's got them, and also I have to, um, take into account the national competition as well. I have to do both at the same time.

So this business about deciding strictly what's the relevant market, um, I have some problems with that, because if I look just at the routes, the competition that you're talking about, um, I don't know how to value that. On the other hand, if I look just at the national market, then it seems to me I'm not giving due weight to the competition in which Frontier is a -- really is a dominant player.

MR. SHORES: Yes, your Honor. The government has

not alleged --

THE COURT: Yes, but does that make sense, I guess?

MR. SHORES: It does, your Honor.

The question in an antitrust case is what is the starting point for the analysis? And really the starting point is this idea of a market. And sometimes we can get caught up with the labels, but the fundamental question is what is the best way to think about the competition here? And our submission is that you have to think about competition in a market where planes are mobile and people are mobile, as beyond just an individual route level.

So you can consider competition at the route level, but when you choose the right market to conduct the antitrust framework, that framework should be around national competition and this type of dynamic industry. And we'll address this in our brief, your Honor.

But there are many cases, including the ***United Sugar*** case that was recently tried, a merger case, where courts recognize that when you have mobility of supply across different local areas, the courts do not choose those local areas themselves as the relevant market. Why? Because the business itself is mobile. And also, in this particular industry, people are mobile.

Take, for example, somebody who flies on one of the routes that the government claims is going to be harmed. In this world that person is also going to fly on another route where we claim there's going to be benefits. So for the Court to just look at one individual route, as the government contends, and say "You can find a substantial lessening of competition on one of those," we submit is the wrong way to think about it, you have to look at it holistically across the entire nation. And once you've --

THE COURT: Your conclusion that people are going to fly on other routes, some people just fly one route, because of where they are or where their family is, or some businesses fly one route or two routes. Where can I draw the conclusion that people, consumers, are as mobile as the airline industry itself?

MR. SHORES: Well I do think there is a record on that and we can brief that, your Honor, but I'd make a different point too.

If we could turn to Slide 21 of the slide deck.

(On screen.)

And on the left here what we have is we have Judge Easterbrook's opinion in the ***Ball Memorial Hospital*** case, and that case was about insurance in Indiana. And what the Court held there, what Judge Easterbrook held

there, was when you have the ability of other insurance suppliers to come into Indiana, in a case about insurance in Indiana, those suppliers can protect even people who are not mobile in a particular geographic area.

So in that case what Judge Easterbrook was saying is even if you have a consumer set that is not mobile, you have to take into account, in defining the relevant market, which the Court concluded was national or even regional, that those -- that those other suppliers can come in, in his words, "The Blue's rivals whose mobility is not restricted, the suppliers, to protect consumers, whose mobility is restricted."

So, your Honor, the fundamental point is you can't think about these things in isolation, the demand side and the supply side are inextricably intertwined. And again it goes back to the fundamental point here that the nature of this industry is mobile. So when you think about the market, you have to think about those things together.

And I mentioned the ***U.S. Sugar*** case, there's also a ***Dredging*** case, and there's many others where courts have looked at the market definition question and said "I can't just take a snapshot of what individual markets look like with existing competitors when the supply

itself is mobile because that would paint an inaccurate picture of competition going forward."

So that's why, you know you can look at it from a market definition perspective, but I also think it's important, your Honor, that you can look at it from the perspective of even if they have alleged and proven individual routes, in the ***Baker Hughes*** framework the way the steps work is, in Step 1 they can rely on statistics, but at Step 2, one of the well-known ways, one of the well-settled ways to rebut a presumption at Step 2 is to show ease of entry and mobility.

THE COURT: I recognize that. And you mentioned "presumption" here.

Simply tell me how this presumption works? I mean there's the traditional presumption, for instance in discrimination cases. The law uses the word "presumption" in so many different ways. There's the theorian presumption where you put on rebuttal evidence and the bubble is the presumption bursts and it disappears, that's Justice Scalia describing, um, discrimination cases. But the presumption, for instance, of patentability in the patent law is entirely different, it shifts the whole burden of proof to the other side and indeed proof by a fair preponderance of -- by clear and convincing evidence.

And then when I read Justice Breyer speaking about the antitrust laws, he's just talking about balancing the procompetitive effect against the anticompetitive effect. When he was Chief Judge here in this circuit, he came up with something he called "presumptions of the middle ground," which were similar to Massachusetts prima facie evidence. Well there's my lecture on presumptions.

What's this one?

MR. SHORES: Yes, your Honor.

The way that the ***Baker Hughes*** burden-shifting framework is intended to work, and does work, is that it starts with the government showing that there's this undue concentration we've talked about before, and how is that done here?

Well the plaintiff's expert, Dr. Gowrisankaran, he looked at the routes where JetBlue and Spirit compete, which he referred to before, and he said, "How many of those routes?" And then he looked at the then-existing competitors on those routes and he asked "How many of those meet a screen that is in the DOJ's guidelines for a presumption of harm?" A so-called "structural presumption." That's kind of a screen, it's a starting point. And the cases make clear, like the ***Baker Hughes*** case, and this is on Slide 17, that's just a starting

point. So it gets the government -- the way to think about it is it gets the government out of the gate.

And then the burden shifts to us, at Step 2, to say the defendants, those market share statistics, static-market share statistics -- and remember, he calculated them 18 months ago in a dynamic industry, those are not indicative or predictive of future competition.

THE COURT: In other words it shifts to you the burden of going forward in the traditional sense and you may well have borne it here. But that's been the subject that we've been wrestling with. Let's assume for our discussion that you have borne it, then, Step 3, the government bears the burden of proof by proving by a fair preponderance of evidence the substantial impairment of competition.

Have I got that right?

MR. SHORES: That is right, your Honor. And I would just add a couple of things. One is at Step 2, we can rely on a number of different factors to rebut that presumption. I mean ***Baker Hughes*** and other cases say the burden is low. And so what we have relied on is not just the dynamic nature of the market, which shows these static-market shares are really not indicative of future competition, but also other factors, ease of entry, you

know the divestitures, which we haven't talked much about, the benefits to competition from this merger. All of those things, as ***Baker Hughes*** says, go into a big bucket. And what they show is that together these market shares are not telling you a lot about the future of competition.

And then you're right, in Step 3 what happens is, without the benefit of any presumption, the government has to show with facts a substantial lessening of competition is likely -- is likely -- not just possible, it's probable, it's likely in the future.

And so what the -- at Step 3 what they've relied on in this particular case, and I'm happy to address it, are the so-called "coordinated effects" theories as well as the economic evidence of their plaintiffs' expert, Dr. Gowrisankaran.

THE COURT: Well if I have some problem, I'll ask them about this coordinated offense. We find that clearly in the guidelines, but one would imagine that's where the guidelines to government attorneys ought be. Well enough said. You have attempted to deal with that and I have that evidence in mind.

Go ahead.

MR. SHORES: Yes, your Honor. Let me, um, let me turn there real quick though, if I may, just to address

one issue, which is what the government is trying to do with this coordinated effects theory? It's to resuscitate a so-called "ATP code theory" that was part of a Sherman Act price-fixing case from over three decades ago.

Now JetBlue wasn't even in existence during the time this was going on, and the last of the ATP code consent decrees, which again JetBlue had nothing to do with, expired in 2011. Now to our knowledge, since all of this occurred, there's been no investigation of ATPCO, which the government clearly could do under the Sherman Act, instead the government is using a Clayton Act merger challenge of two small airlines to kind of resuscitate this theory.

And I think what's important about this is, particularly at Step 3, we talked about the burden at Step 3, they have to come forward with facts at this point to support this theory -- not just guidelines, you know statements or theories, they have to come forward with facts to support it. And we produced millions of documents in this case and among all those millions of documents all they came up with was a handful of alleged flashing and cross-market initiatives -- your Honor will remember those from trial, we talked about those, in a 4-year period from 2016 to 2020. And our pricing

witnesses got on the stand and they credibly testified that those acts are not part of JetBlue policy and they haven't happened in years.

And as Mr. Hayes said, JetBlue is a maverick, and that was recognized by the Court here last year, it's in JetBlue's DNA, it's part of its 20-year history, and that's not going to change going forward. The far more reasonable inference on this whole coordinated effects idea is that JetBlue is going to continue to be a disrupter of coordination going forward. So that's one of their theories, your Honor.

And the second relies on their economic expert, Dr. Gowrisankaran. And you may recall that he testified, and there was a promise in opening, that he was going to show a billion dollars of net harm.

And if we could turn to those slides Mr. McCloud.

And I think this is important, your Honor, that we're talking about route-level harm. But Dr. Gowrisankaran did not conduct a route-level analysis that reliably provides the Court harm, information about harm at the route level. He testified that he is less sure about what the harm is going to be at the national level -- at the route level as opposed to the national level. And that's critical. If you do look at this on the route level, they've identified 51 routes that they

claim are at the heart of this case and they do not have economic evidence to support that there's harm on those routes.

I would also point out, your Honor, let's talk about the divestitures. Dr. Gowrisankaran did not consider the divestitures in this case. You may recall that you asked Dr. Gowrisankaran, "Did you consider divestitures?" And he punted that question to Dr. Chipty, who gives them no weight. So although Dr. Gowrisankaran did not say it, what is happening with his model is that he is accounting for harm or counting harm in routes where the divestitures are going to eliminate any possibility of harm.

THE COURT: Let me pose this question, and in my own review of the cases I have seen cases, um, sparse, but I have seen cases where a Court has decided that the divestitures were close, but not sufficient, and then has proceeded to go forward to say "But this would pass muster if there were this divestiture or that divestiture." What's your position about that, assuming the Court were to go down that read?

MR. SHORES: Well it's a good question, your Honor, because one of the things that I think is remarkable about this merger challenge is there are 6,000 nonstop routes in this country, 6,000, and the

government has centered its merger challenge to these two small airlines on 51 of them, which is just 1 percent. And we agreed to very significant divestitures in this case. You've heard testimony from Spirit, from Frontier, from JetBlue, from Allegiant about how --

THE COURT: My question is, um, accepting all that, saying, "Oh, these apply, but we need a little more," is that within the Court's province? Should the Court analyze that? Should I hold for -- if I think I need to hold further hearings on remedy, should I go do that?

MR. SHORES: You absolutely can, your Honor, I mean that's in the case law --

THE COURT: I can, but the question is should I?

(Laughter.)

MR. SHORES: Well our position is that as opposed to a full-stop injunction against a merger of these two small airlines, the Court should hold a remedy if it determines there are any harms from this merger. Which we of course deny, I must add.

THE COURT: I understand that.

MR. SHORES: And if I could, your Honor, you know let me cite a case. I'll just read the language from the ***Ford Motor Company*** case, 405 U.S. 562, this was from 1972, "The relief in an antitrust case must be effective

to address the violations and to restore competition. The District Court is clothed with large discretion to fit the decree to the special needs of the individual case." And I would also point the Court to the ***FTC vs. Pepsico*** case, that's 477 F. 2d 24, and that's a Second Circuit case from 1973, where the Court made clear and in fact ordered divestitures that were less than what was sought by the government.

So if the Court has specific concerns about this merger -- and again our position is that the merger completely passes muster, but accepting your question, your Honor --

THE COURT: And that's really one of the reasons I spoke, we're dealing with possibilities.

MR. SHORES: Uh-huh.

THE COURT: Let me give you another one which you won't like, or the government won't like.

MR. SHORES: Oh-oh.

THE COURT: They want a permanent injunction here in what, it seems quite clear to this Court, is a dynamic industry facing unique opportunities and challenges in this post-covid environment. And that's not saying very much, but it's dynamic.

All right. If I were to fashion an injunction, that's what you don't like, what sort of, um,

limitations or, um, steps for further consideration or review should I build into it assuming that the economic picture is not as the Court posits it?

MR. SHORES: Well I think in terms of limitations, if you look at the antitrust remedy cases, what they say is that any remedy should be narrowly-tailored to the concern at issue. So it's difficult for me to speak -- you know to hypotheticals. But I think the underlying principle here is that the Court would have to tailor any remedy to a specific harm, if found, in this particular case. And that should be narrow.

I mean, you know, the whole premise of this merger is that we want to go out and compete broadly across the country, we're a limited airline right now, we want to go out and compete broadly across the country in order to discipline the legacy carriers and bring down prices. If the Court has a concern about any particular issue, it could expose those to the parties, we could have an evidentiary hearing, we could brief the issue. There's a lot of different procedural ways to address that. But, yes, the Court would have the ability to narrowly tailor a remedy to the particular concern that is at issue.

(Pause.)

Now, your Honor, I would like to return, if I

could, to the issue of these other ULCCs that we've talked about a little bit before, um, and the government has said that these other ULCCs will not be able to, quote, "replace Spirit." And one thing that I think is important, your Honor, is a "replace-Spirit" standard is not the law here.

The Court asked instead whether there is a remedy, and here this is what we've done, a divestiture remedy, that would promote competition system-wide after the merger, "system-wide after the merger." And those aren't my words, that's the government's words from the ***American U.S. Airways*** case. And if you look at Slide 35, JetBlue in fact was a beneficiary of those divestitures. And the reason the government promoted those is because they provided JetBlue the ability, the incentive to increase and invest in our business and position JetBlue to be a more meaningful competitor system-wide. So the government's idea that a remedy here has to replace competition on a route-by-route level is simply not the law.

In fact, your Honor, I would point you to a recent decision by Judge Nichols in the ***United Health*** case in the District of Columbia. And in that case the government said the divestiture has to "completely replace the competition lost as a result of the merger."

And what Judge Nichols said there is that that violates the language of Section 7. And instead, what we're looking to do here is to stimulate competition long-term, not ask a question of whether, you know, it's going to completely replace competition, because that's a burden that practically defendants could never meet.

And so what do we see out there in the competitive landscape today? Well we have Frontier, who's grown rapidly in the last several years. You heard Mr. Biffle, he said they want to grow at 15 to 20 percent. He said that they do have the ability to go out and get additional planes. Collectively the ULCCs have 156 planes that they are going to receive just through 2025. He talked about the leases. He talked about the options. And he talked about the ability to redeploy from other routes.

Now the government has really painted this point-in-time view, a snapshot in time of these other ULCCs, and I just want to address that quickly. Because if you look at the other ULCCs, it's important to look in the future to their replacement opportunity, because that goes directly to your core question here. And particularly look at the divestitures at Fort Lauderdale, at Boston, in New York, those are going to turbocharge the ULCCs, Allegiant and Frontier, going

forward, say nothing of the other ULCCs.

Now the other thing the government has said is that we don't yet have regulatory approval for those divestitures. Well that's not surprising, your Honor. I mean typically in these cases it would take some time in order to get approval from the FAA or the local airport authority. And in fact in the American U.S. Air merger, the government supported the divestitures even before there had been any approval by the local airport authorities or the FAA.

And as Mr. Gale testified, regardless if we have to contractually, and we do, give these assets back to the airport authorities, the airport authorities are going to use these assets, they're going to give them to the companies, the airlines that best will promote the community and competition. So again in the long run this is going to benefit competition, these divestitures. And they are -- you know, we would say, even more significant, when you take the relative size of this deal, than other airline mergers, big airline mergers where the government itself has supported these divestitures, your Honor.

Now if I could, your Honor, I would like to talk a little bit about Dr. Chipty because the government relied on her analysis to say that there won't be any

entry. And Dr. Chipty did an analysis that focused on the ordinary course.

And if we could go to Slide 46, your Honor.

So what was the government's answer to all of the testimony on documentary evidence about entry? Well let's turn to Dr. Chipty. And Dr. Chipty did not even ask the right question, your Honor, she focused only on the question of whether there would be entry in the ordinary course? Ignoring that airlines will have even greater incentives in the future if the merger closes and if there is an increase in prices. Although her companion expert, Dr. Gowrisankaran, claims that prices and profits will rise after the merger, she didn't account for that at all.

And I'd also point out, your Honor, if we could go to the next slide.

THE COURT: Well prices are going to rise after the merger, aren't they?

MR. SHORES: Well I think it depends, your Honor. I mean when JetBlue goes into a route, they discipline the prices of the largest carriers typically on these routes.

THE COURT: Well it was an inapt question.

The things as they stand today, there appears to be a spectrum of prices from the premium price down to

at least the Spirit model which -- whose object seems to be to undercut everybody else's prices. If this merger goes through, there will remain a spectrum of prices and competition among the airlines that will go down to Basic Economy and, um -- but it seems that the Spirit model will be lost?

MR. SHORES: Well the model itself will not be lost, your Honor, Spirit itself is going to become part of JetBlue. But far from being lost as a model, you have other ULCCs who are in the market and they're growing. And you mentioned Basic Economy too, your Honor. Basic Economy is growing. And as we heard Mr. Nocella say, United, on their Basic Economy product, attempts to match Spirit on price. And that's a significant piece of this, your Honor.

The government has talked a lot in this case about cost-conscious customers. We've heard a lot of talk about that in this case. But it's very important, the government did not define a market around just cost-conscious customers, much less ones that just fly ULCCs. And what the evidence shows is that the customers choose between Basic Economy, ULCCs, and even JetBlue's own Blue Basic product. So far from the model going away, that model is going to be there in the long run, your Honor.

In fact we've seen a transition in this industry where Spirit was one of the earlier adopters of the ULCC model, but after that time the model is adopted by the legacies, other ULCCs recognized an opportunity and they grew into that model, and now if you look out into the government's timeframe for entry, 2 to 3 years, which is, you know, timely entry according to the government, in 2027 we're going to have at least 8 airlines offering some type of unbundled model.

So the model itself is here to stay. Spirit will not be part of that particular model going forward, it will be part of JetBlue, and we will take the assets and we will retrofit them and we'll use them. But the model itself will be there.

And one other point about timing that I think is important to just keep in mind. As you remember, that JetBlue is going to take time, has to take time to retrofit these planes.

Now you heard the testimony from Ms. Hurley, JetBlue's CFO, and as a practical matter JetBlue has to do things like get a single operating certificate, and it's going to take at least 12 to 18 months -- and this is on Slide 13, your Honor, it's going to take at least 12 to 18 months to retrofit these planes, which means in the meantime the Spirit aircraft are still going to be

flying in the Spirit configuration. 12 to 18 months the retrofit process will begin and in 4 to 5 years the retrofit process will be complete. But overall the Spirit yellow planes are going to continue to be in the market for some period. And that's important because if you look out several years, what that means is they will continue to be there, but also it gives time for these other ULCCs to grow and fill the void.

If we can flip the slide, Mr. McCloud, that's what we see in the next slide here, is the unbundled low-fare offering, something that may have been unique many years ago has now been effectively commoditized. And although there are somewhat differences between the different airlines and in what exactly they do when they unbundle, there's no question that they're all going after the same basic customer here.

And again the government could have had its experts do an analysis, do the work and say "Hey, there are some of these customers, there is a market -- to use the antitrust word, there is a market of people who just fly the ULCCs," but they didn't do that. In fact their theory of the case was completely opposite, they asked witness after witness "Did it, Spirit, in fact spur the unbundled model?" And the answer is "Yes, they did." They were part of that. So where we are today and where

we are going to be in the future, which again is the most important question, is Spirit planes are going to continue to fly and others are going to continue to grow this unbundled offering over time.

THE COURT: You have 15 minutes left. I don't know how you split it with Mr. Cohen, but there's 15 minutes left in the hour, so.

MR. COHEN: I'll give you another 3 minutes, Mr. Shores.

(Laughter.)

MR. SHORES: Mr. Cohen, I thank you.

THE COURT: No, it's entirely up to you. I just want to remind you. That's all.

Go right ahead.

MR. SHORES: Sure, your Honor. I would like to address one more issue and then make some closing remarks.

Which is the government has relied very heavily, and I'm sure you're going to hear it in a moment, on some deal modeling, particularly synergy's modeling from before the merger agreement was signed, but as Eric Friedman from JetBlue explained, this model was an attempt to just value the company, it wasn't a business plan going forward.

Mr. Friedman made clear he didn't even attempt to

account for important things, like the JetBlue Effect, you know, or entry of other airlines going forward, in this pricing study. And even the plaintiffs' own experts, like Dr. Gowrisankaran, recognized that those are part of any pricing analysis.

In effect, your Honor, like the focus on the Spirit flight decks I'm sure you're going to hear about or the deal modeling, those are shortcuts, and the focus here should be on what the evidence will be going forward about future pricing. Those prices that are built into that modeling and the modeling simply is not evidence of what the future will be and what the Court should rely on.

So let me just say in closing, your Honor, that I'd like to return to where I did in my opening. The simple fact and economic reality is that scale matters in this business, and particularly, your Honor, where we sit today, it's very difficult for the small airlines to compete. In fact you may have seen this weekend we had two other small airlines, Hawaiian and Alaska announced that they too are merging. And the reality for the small airlines in this business is that they need the ability, they need the scale, they need the network breathe to be able to compete with the larger airlines.

And Section 7 has a very specific mandate, it

prohibits mergers where and only where the government proves with record evidence there would likely be a substantial lessening of competition in the future. And far from a substantial lessening of competition, the record here demonstrates that JetBlue has been a 20-year maverick in this industry, and this merger will provide the scale to become a viable, disruptive, big national challenger to the industry's dominant airlines for years to come.

Thank you, your Honor. I'm going to yield to Mr. Cohen.

THE COURT: Mr. Cohen.

MR. COHEN: Good morning, your Honor.

CLOSING ARGUMENT BY MR. COHEN:

I'm going to start where the Court started with Mr. Shores in talking about the burden and the framework because much of what I want to say focuses on this 3-part framework, and really the second part, that assuming the government has come forward with enough evidence to have a presumption, how is that presumption erased and how low is the burden? And there are really two principle parts.

One, I want to take from Mr. Shores's deck Slide 9, and this is the question, your Honor, that you raised

of dynamism, and we can start with the government's own evidence, which is Dr. Chipty, who showed that there are, over in this 5-year period -- and this is Slide 9 of the JetBlue deck, 4700 entries just by the ULCCs.

Now the significance of that, your Honor -- and if we just look at Slide 10, which is Dr. Hill's companion piece. The significance of that is that are the government's statistics about market share reliable? How do you have a reliable market share analysis in an industry that is this dynamic? And that is how the government's case, with respect to proving concentration, falls apart in the second step of the ***Baker Hughes*** burden.

The other problem that they have is Spirit-specific, and I'll turn to my deck now --

And if we go to the next slide please.

And, you know, the principal issue here with respect to Spirit is the government's been focused on the past. Their evidence is backward-facing when Section 7 and general dynamics is all forward-looking. They want you to look at projections and performance and a Spirit model, which, yes, it did invent, but which has been widely copied, but those facts and circumstance in that model have been superseded by the economic and competitive realities that Spirit is facing today.

So the question is not was Spirit really successful in 2015 or '16 or '17 when it had very little ULCC competition, Basic Economy was in its infancy, and it had essentially created this model in the United States, the question -- and there's no dispute between us and the government, is what will the competitive realities look like over the next 2 to 3-year period? And what the government promised in its opening and it failed to deliver on is it promised that Spirit's historic growth was the best barometer of how it will compete on a going-forward basis.

But what the evidence shows, your Honor, is that Spirit -- the past is not prologue. At least if what the past is supposed to be a proxy for is a rapidly growing and profitable airline, because unfortunately, because of the competitive involvement, that is not Spirit today.

And, you know, the government's view of Spirit is really -- and the historical view is really best exemplified by their continual repetition of a single statistic. We saw it in the complaint. We heard from Dr. Gowrisankaran. And what they say over and over again is that Spirit has grown so rapidly over the last 13 years, and this is the growing and dynamic airline that JetBlue was trying to take out of the market.

You know it's true, you Honor, beginning in 2010 when Spirit had a few dozen planes, they did grow rapidly from a small airline to a still small airline with 4 percent of revenue but with 200 planes, but it is not sufficient for Spirit to prosper in this competitive environment going forward. And Spirit has recognized this since 2016. Your Honor may remember some version of this slide from the opening and Mr. Christie's testimony, Spirit has been seeking a merger since 2016 for the same reason it ultimately decided to merge with JetBlue, which is that it needs scale and size to compete with the Big 4 airlines, particularly given the change in business model of the Big 4 airlines.

And if we go to the next slide, please.

What the government ignores is there's just been an explosion in ULCC competition. And Spirit has been listing this as a risk factor in its securities filings. And this is the 2022 10K, "Our growth and success of our ULCC business model could stimulate competition in our markets through our competitors' development of their own ULCC strategies." And it goes on to say in the same paragraph, "If these competitors adopt and successfully execute a ULCC business model, we could be materially and adversely affected." That is precisely what's happened.

Mr. Nocella from United testified about the "growing nature that 12 percent of this vast fleet of United planes that it devoted to ULCC competition by way of Basic Economy." There's a huge order book at Frontier "Which is flying on top of," Mr. Christie testified, "Spirit's routes almost 50 percent of the time." We have a growing Avelo. We have new entrants in this space. We will see from the documents that American and Delta similarly have vast Basic Economy and growing Basic Economy competitors to Spirit. And that has left us in a completely different place.

And where it has left us, if we look at Slide 6, please, is that the net margin of Spirit peaked in 2017, the year, probably not coincidentally that United and American interjoined Delta with an introduction of Basic Economy, JetBlue and Alaska followed, and the profit margins required by Spirit to fuel the future growth, which the government says Spirit will undergo, peaked then and declined, and they declined even before covid. And as the Court will recall from the testimony of Mr. Christie, Spirit lost more than $1.3 billion in the period 2019 through 2022, and it's on pace to lose another $475 million. Pretty soon it's real money, almost $2 billion.

Now at trial the government -- and I think we'll

hear it today, they've tried to freeze the facts and in their opening they said "You'll hear evidence from Spirit's Chairman that Spirit has a healthy standalone plan it expects to be profitable." Well the government again didn't meet its promise. What Mr. Gardner and the other Spirit executive said is that Spirit did have a plan to be profitable, of course it did --

THE COURT: 5 more minutes, Mr. Cohen. Go right ahead.

MR. COHEN: Yes.

-- but rapidly changes in Spirit's business over the course of 2023 have left it without a certain path to profitability.

If we go to the next slide, you'll recall Mr. Christie was examined in some length about this budget document in 2022, and as he said, "Virtually every risk to Spirit's business that was identified at the end of 2022 for this year have come to fruition."

And the two issues that have been particularly significant for Spirit is, one -- if we go to the next slide, the Pratt & Whitney engines, which is uniquely a Spirit issue, your Honor. Mr. Christie testified that it is the largest customer for the Pratt engines in the United States. And 45 of -- over 20 percent of Spirit's fleet will be on the ground next year. 72 airplanes by

2025. And there's no easy fix, your Honor, these repairs are time-consuming. And the impact on Spirit's operations and finances will be substantial.

Second, and this got a little less air time at the trial but it is in the record, is what Spirit described as an "acute reduction in demand." And this is why the Spirit model, the historical model, is not today's model.

Now the government, in its examination of various witnesses, it mistakenly pointed to load factor, what percentage of the plane is filled, and they said, "Oh, Spirit, you have a robust load factor, your planes are still full, all must be good." But what that misses is that Spirit can only fill planes at prices that today cannot generate a profit. And this quote in the bottom right of Slide 11, from the third quarter Q of Spirit, is that "Fares have come down 27 percent year-on-year."

Now you cannot continue to grow an airline losing money. The effects of 4 years of massive losses have rippled through the Spirit business. Spirit has unilaterally cut its plan to grow its fleet. It worked out a deal with Airbus to defer delivery of aircraft. And while it did adopt a new 5-year plan only 6 months ago -- only 6 months ago, you know as Mr. Kirby testified, the plan is no longer realistic. It's not

going to happen. And as Mr. Kirby and Mr. Klein testified, "Spirit is cycling in and out of routes. It's dropping unprofitable routes. It's searching for profitable ones. The plan was just a plan. It's not being executed on."

Now the evidence also shows that Spirit is really in unchartered waters and the importance of this is should you rely on historical Spirit statistics? But what Mr. Christie testified -- neither Mr. Christie nor Mr. Gardner was willing to speculate at the trial as to whether Spirit is likely to return to profitability, but Mr. Christie did make one thing crystal clear, that an airline that is unprofitable cannot continue to grow. As a result, as he testified, "Everything is on the table." Mr. Gardner's take was even starker, "Spirit's business model is not sustainable if the losses of the past 4 years continue." And this is not a trivial issue, your Honor. And I know time is very short, but it goes to the heart of the government's case because it undermines all of the market statistics that the government relies upon and its experts rely upon.

And if I can end on this last slide. If we look at Dr. Gowrisankaran and Dr. Chipty, what we see is they assumed that Spirit would grow 16 percent a year, they assumed Spirit would enter 100 routes between 2022 and

2027, they assumed that Spirit was loathe to abandon the routes that it currently flies, none of that, your Honor, is true. None of these statistics work. And which is why that even apart from entry, which in and of itself defeats the government's case in this dynamic industry, the statistics about market share which the government relies upon to show that this merger is anticompetitive simply do not hold up on a going-forward basis.

THE COURT: Thank you.

We'll take a 10-minute recess and return for the government's closing. We'll recess.

THE CLERK: All rise.

(Recess, 10:05 a.m.)

(Resumed, 10:20 a.m.)

THE COURT: Mr. Duffy.

MR. DUFFY: All right, thank you, your Honor. May I proceed?

THE COURT: You may.

CLOSING ARGUMENT BY MR. DUFFY:

Your Honor, Congress passed the Clayton Act to put a stop to mergers exactly like this one. The prohibition in the Clayton Act is simple but compelling, any merger that may have the effect of substantially

lessening competition is unlawful. This means that any merger with a reasonable probability of harming competition in any single market, as this one does across hundreds, should be enjoined.

THE COURT: What's your authority for reasonable probability here?

MR. DUFFY: Your Honor, if we go to slide -- let me see. Slide 3, your Honor.

THE COURT: Yes, got it.

MR. DUFFY: The actual language used here is "appreciable danger." So this is a case from Judge Posner, ***Hospital Corporate America v. FTC***. "All that is necessary is that the merger create an appreciable danger of such consequences, in the future, of harm." And this stems directly from the text of Section 7 of the Clayton Act, your Honor, that it speaks of a transaction that may have the effect of substantially lessening competition.

And here JetBlue and Spirit are asking this Court to bless a deal whose harm would be felt by more than 145 million passengers each year who fly on hundreds of routes. This deal may serve defendants' bottom lines, but it comes at an unacceptable cost to those travelers for whom a destination matters far more than the journey. Those travelers benefit from Spirit's low

fares, it's innovative business model, and the choices it empowers them to make.

THE COURT: But we're not going to get anywhere if you win, I enjoin this merger, and Spirit goes belly up. No, um, immediate prospect of that. But don't I have to look out into the future? Aren't they right about that? We're making predictions.

MR. DUFFY: They're certainly right, your Honor, that it is appropriate to look out into the future, but the simple fact of the matter is that if we go to Slide 17, we've heard testimony from Mr. Christie, from others about Spirit's recent financial problems, but we should look to what Spirit has been telling its investors just in the last few months.

In the second quarter earnings call held just in August, Mr. Christie, anticipating the problems that Spirit would have in the third quarter, said to his investors, "I strongly believe our expected Quarter 3 performance is an anomaly." In every SEC filing, Spirit has continued to tout its ability to return to profitability. Mr. Biffle, when he testified, said that he expects that Frontier will return to profitability.

So the testimony from witnesses who are not party witnesses and what those witnesses have been telling their own investors is clear, there is nothing wrong

with the ULCC business model. Spirit is still projecting to grow 14 percent this quarter, 7 percent next quarter. So there is no evidence to support this notion.

And I will note, your Honor, that there is legal authority as to what defendants would have to show in order to make this argument. It's referred to as a "weakened competitor defense." And the Sixth Circuit has described it, if we turn to the next slide, as "The Hail Mary pass of presumptively doomed mergers." And it is simply the case, your Honor, that there is no evidence that Spirit is in any danger of folding up any time soon, at most its growth is going to slow to some degree. But it is still looking to grow at a faster rate than JetBlue would plan to grow independently or as a combined company should it acquire Spirit.

THE COURT: Suppose -- just to follow out that line, though there's many other issues and I want to hear you develop them. You are asking for a permanent injunction here. Don't you think I ought build in some future review or, um, way to, um, see if whatever determinations I make here, even were you to be successful, can be rethought if, um, my assumptions are incorrect?

MR. DUFFY: Well I think, your Honor, that that

type of injunction obviously requires a finding of liability in the first instance, and I simply think this deal, as it exists now under the market conditions that are likely to persist for the next several years, if not indefinitely, are such that this merger could not be anticompetitive at any time in the foreseeable future.

THE COURT: Could not be procompetitive.

MR. DUFFY: Could not be procompetitive, would be anticompetitive, yes.

THE COURT: Right. Right.

But that doesn't answer my question about what sort of trip wires should I -- I mean this is a softball question, this question jumps to the end and presumes the government prevails here. I'm having trouble with a permanent injunction candidly.

MR. DUFFY: Sure. Why I think just mechanically, your Honor, the terms of the agreement in front of the Court are such that the deal would need to close in July of next year. So under the terms of that proposal --

THE COURT: So this deal falls apart, I appreciate that. I mean obviously if you will obey the Court's order. But then what? Maybe a permanent injunction is too restrictive, that's what I'm suggesting. And I'm asking you to grapple with the idea that I come to think that even were you to win, which is just also another

assumption. But we jump to the end there. What sort of limitations should I put on it?

MR. DUFFY: Well I think, your Honor, that the injunction would be limited to the deal that is presently in front of the Court. So I don't know that at some point --

THE COURT: So another deal is another case?

MR. DUFFY: Another deal would be another case, right, your Honor, I think that's definitely fair to say.

THE COURT: Thank you. Go right ahead.

MR. DUFFY: Sure.

So returning to the evidence of harm, um, the evidence is concrete, your Honor. So Mr. Shores has spoken in terms of possibilities of what could happen in terms of entry by other carriers, the effects of divestitures, efficiencies that JetBlue has put forward, but the Court should keep in mind that the harm that has been demonstrated by the evidence is concrete, it is real, it's certain to happen. This transaction would result in the elimination of half the ultra-low-cost carrier capacity in the country, over 6 million fewer seats in flights each year, 30 percent higher fares market-wide. Those are concrete certainties. And in response, the defendants have offered speculation,

inconsistencies, and misdirection.

JetBlue has both claimed that without this merger it can't grow fast enough to take on the Big 4, and yet at the same time Frontier and Allegiant would have no issue growing fast enough to replace Spirit. JetBlue claims that both entry and the threat of entry are enough to stop price hikes, and that this deal, um, would facilitate 30 percent price increases. So JetBlue's own deal-modeling, which we'll discuss, is premised on the belief and evidence that other ULCC entrants would not be able to enter the affected routes to offset those price increases. JetBlue's attempts to minimize the anticompetitive consequence of this deal are belied by the facts and the law.

THE COURT: Now since you've raised the deal-modeling, how do you respond to the argument that's thought to debunk that, that the deal-modeling was, quote, "different" or for more modest purpose?

MR. DUFFY: Sure. So I think the important thing to remember, your Honor --

If we can go first to Slide 49 here.

The important thing to consider is that the deal-modeling was presented -- 49.

The deal-modeling was presented to JetBlue's board of directors, it was presented to Goldman Sachs, which

issued a fairness opinion, to give comfort to JetBlue's shareholders that the price being paid at a significant premium over Spirit's share value was fair from the standpoint of JetBlue. And so what Mr. Friedman did is he looked at actual events in which Spirit exited routes and the impact on fairness. And what he found was a 30-percent fare increase that persisted over at least a 12-month period. So that fare increase was not sufficient to facilitate the entry of other ULCC carriers that could lower the fares.

And why was that important? That 30 percent fare increase that Mr. Friedman analyzed was the basis for JetBlue's estimation of certain revenue synergies the transaction would create. So the synergy is the additional amount of revenue that JetBlue would earn were it premised on this 30 percent fare increase. And that revenue-synergies modeling was presented to JetBlue's board of directors. The number baked in for the Customer Service Premium, which JetBlue projects remaining at $400 million a year, well into the future, and is strong evidence that JetBlue themselves do not believe ULCC entry will happen at a sufficient scale to offset this harm.

So that is the evidence that shows that JetBlue themselves bet $3.8 billion in the purchase price that

they paid, plus the debt they're taking on, that that entry by ULCCs would not happen and they would have this fare increase that would persist indefinitely into the future.

And, your Honor, if I may turn to the legal standards.

If we go to Slide 2.

There is an important clarification I think to be made in the way the burdens and the analysis that the Court must conduct has been framed. As the Court has recognized, Section 7 is forward-looking and it's looking at the list of anticompetitive effects. I mentioned the Judge Posner case. Another case that I would mention for the reasonable probability standard is ***Brown Shoe***, a U.S. Supreme Court case.

And I want to turn to the burden-shifting framework which has been discussed.

If we go to the two slides forward, please.

And I just want to explain what our prima facie case is, how this structural presumption works. Given the amount and the extent of harm, this case has been presented differently than some cases like ***Baker Hughes***, for instance. In ***Baker Hughes***, the government relied only on a structural presumption of increased shares in particular markets. That structural presumption is part

of our case. There are 51 nonstop markets where the shares aren't that high but the structural presumption applies. But there is also direct evidence, so things like the fare increases that have been projected by ordinary-course documents, the loss of a particular choice that many customers do rely upon, the evidence of coordination, a wide-body of direct evidence that strengthens the prima facie case, and that is in addition to the structural presumption.

The next step is defendants' rebuttal. Now where the structural presumption applies, the defendants have a particular burden, they must come forward with significant evidence that mandates the conclusion that the merger does not threaten a substantial lessening of competition.

THE COURT: And the language that mandates the conclusion comes from?

MR. DUFFY: That is from, I believe, um -- I'll have it for you in a moment, your Honor.

THE COURT: All right.

And then the ultimate question --

MR. DUFFY: Sure. So the ultimate question -- and this is where the burden is particularly important, the standard is particularly important. The government does have the burden of persuasion, but it is not a

preponderance of the evidence standard. Because of the reasonable probability language the Supreme Court used in ***Brown Shoe,*** the "appreciable danger" language Judge Posner discussed in his opinion, and the text of Section 7 itself, because the government is showing an appreciable danger or a reasonable probability, it is not what a preponderance-of-the-evidence standard would be in other cases.

THE COURT: Well wait a minute. This really is important. It's -- I'm familiar with fair preponderance of the evidence, proof beyond a reasonable doubt, clear and convincing evidence. Let me say it back to you having looked at the language of the statute.

If we get to Step 3 -- and now correct me here because I think I'm saying back to you something different than you just said. I do believe it is the government's burden to convince the Court by a fair preponderance of the credible evidence that there is a reasonable probability that the merger -- and you have dropped out the word "substantially," which Mr. Shores was, um, emphasizing, but let that by for the moment. But do you see -- do you see it isn't a difference? I fully accept -- and I'll have to reflect on "substantial" here, but the language in the statute. But I'm telling you, it's your burden to convince the

Court as factfinder that by a fair preponderance of the evidence -- and again that's one of the reasons I'm hesitant about a permanent injunction, but maybe you've answered that because that just destroys this merger not any merger. Do you see where I'm coming from here?

MR. DUFFY: Yes, I understand the Court's articulation and I think that is an entirely fair way to look at it, that the government has the burden to prove by a preponderance a reasonable --

THE COURT: But the standard is as you perhaps -- as you recite it?

MR. DUFFY: Yes.

Now I will point out there are some caveats to that and that the defendants do have production burdens once the presumption has been met structurally to come forward with certain evidence, which is particularly important for some issues that we can discuss.

THE COURT: I fully agree.

MR. DUFFY: Right. Okay. I think we're on the same page, your Honor.

If we go to Slide 8, if we can. Um, and sorry, Slide 7 first.

Briefly on the issue of relevant markets. I think the Court has correctly cut to the core of this issue. And I did want to mention the ***Florvac*** case from the

First Circuit, which notes that it's the consumers' options and the consumers' choices on which the relevant market analysis obtains. So quite obviously a passenger is not going to view a flight from Boston to Las Vegas as a substitute for a flight from Boston to San Juan and what have you. We think the evidence on this issue is quite clear. JetBlue just last year in the ***Northeast Alliance*** case agreed origin and destination pairs are the relevant markets.

I do want to respond though to the Court's concern that defining the markets around origin and destination pairs in no way limits the evidence that the Court can consider. The Court can obviously consider all of the relevant evidence that has come in. The issue is are consumers in these particular markets harmed? So this market definition framework, it guides the Court's analysis as opposed to limiting the evidence.

THE COURT: I've -- you've answered the question I had. And so you agree that it's appropriate for me to consider the national procompetitive and anticompetitive effects as I am persuaded by the evidence?

MR. DUFFY: To the extent that they would affect those markets, absolutely, your Honor. So all the evidence of coordinated effects, which we'll get to, is a good example of something that cuts very much across

markets.

And if we go now to the types of markets that we have defined, there are three general categories.

If we look to Slide 8.

I just want to go through specifically the markets we're talking about. There are 262 routes where JetBlue and Spirit currently fly, where they compete head-to-head, where there would be a loss of head-to-head competition. There's an additional 115 routes that Spirit flies nonstop today where JetBlue is not completing directly head-to-head against Spirit. And there are additional routes that Spirit plans to enter.

If we go to the next slide, just to briefly go through the types of evidence of harm that we see, in all these routes we see harm that will manifest in the loss of the Spirit effects or the significant decline on fares market-wide that would result from the elimination of Spirit, or the loss of the Spirit product itself on which cost-conscious customers depend, the loss of innovation that Spirit has brought to the marketplace, and in the overlap routes we have the additional harm of a loss of head-to-head competition, which results in significant harm that can be estimated which Dr. Gowrisankaran has. And I would just note that --

THE COURT: Now wait a minute. I mean no disrespect to Spirit here, who was a leader in the ultra-low market, but I'm not clear about innovation. Mr. Cohen argued, and with some effect I think, that the model has now reached fruition, others can compete using this model. What innovation are we talking about?

MR. DUFFY: Sure.

THE COURT: Go ahead.

MR. DUFFY: Let me give you an example of that, your Honor.

So you focused correctly on Spirit is trying to cut costs right now in any way it can. Many of the innovations that Spirit has developed have been in response to that pressure to cut costs and they have in fact benefitted the customer experience. So the self-service bag drop is a good example of that where Spirit was able to save on labor costs, it allowed customers to drop off their bag using biometric information and other things, and they have found that customers appreciate that, shorter lines, it's easier to get through the airport more quickly. And the nature of innovation is such that we don't know what the next innovation will be, but there's no basis to conclude that the current environment of difficulty returning to profitability is going to hinder the innovation that Spirit continues to

bring.

If we go to the next slide please.

I want to briefly just touch on how much of the harm is occurring in the nonstop overlap markets. We heard talk of 6,000 routes per year that are at issue across the country in terms of airlines. The nonstop overlaps, there's only 73 of them, but they are big heavily-trafficked routes, routes like Miami to New York, Boston to Orlando, where many millions of passengers fly each year. So 55 million passengers are flying on these routes, $9 billion in revenue are spent on these routes. So although they're a relatively small numeric amount of the total routes in the country, in terms of dollars and passengers, they're quite large.

Go to the next slide please.

We've heard a lot about the issue of fluidity, questions about whether the market shares statistics presented gave a reliable prediction of the head-to-head competition between JetBlue and Spirit. And we heard testimony from Mr. Kirby talking about the stickiness of Spirit on particular routes, that they have been on these routes for a very long time, especially the bigger routes like those that I was just mentioning that they served before Mr. Kirby joined the company.

If we go to Slide 13 please.

One of the things we heard from Mr. Clark was the extent to which this overlap between JetBlue and Spirit has grown over the years. So, yes, there have been a few routes that have dropped out since the merger agreement was signed, but the trend that we see from the data and the ordinary-course documents and the testimony is that JetBlue and Spirit have been increasing the extent to which they are competing head-to-head on these particular routes.

And if we go to Slide 14.

There are 51, um, routes that meet the statutory presumption where the market shares are so high after the transaction that it is presumed illegal in those markets. Now of those there are 35 routes that have met the presumption consistently over the last 3 years. So what the data is showing is sustained competition, sustained high-market shares, between JetBlue and Spirit on these many routes. And again, these are the big heavily-trafficked routes that millions and millions of passengers travel on every year.

And if we go to the next slide please.

You heard some testimony from Mr. Friedman, an exhibit was used, Exhibit 697, talking about various exits and entries supposedly that had happened over a 1-year period, and what we found through the examination

of Mr. Friedman was that the vast majority of those instances were very minor schedule and frequency adjustments, instances like an airline that only flies a a route during the summer and not during the winter. And so what we saw was a substantial exaggeration of the extent to which new carriers are truly entering these routes. And instead what we have seen is sustained competition and presence by JetBlue and Spirit on the presumption routes and very high market shares that have been consistent over the last several years.

The other thing I would point out, your Honor, is that defendants have pointed to divestitures as a simple fix and a basis to cross out, um, many of these 51 routes solely because the divestiture buyer will be flying from that airport to some destination, and we'll get into that later. But there's been no showing whatsoever that any of those entries would happen on any of those routes. And in fact, concrete evidence that it is highly unlikely to happen in many cases as with respect to Allegiant.

If we go to Slide 20 please.

THE COURT: Just a moment.

MR. DUFFY: Yes.

THE COURT: Why is it highly unlikely that Allegiant will not compete effectively on those routes?

MR. DUFFY: So there's two principal reasons I would give, your Honor. The first is that across all routes the testimony from Mr. Wells was quite clear, and Mr. Wells from Allegiant, that Allegiant does not have any airlines competing with it on 75 percent of its routes and that that has been quite consistent over the last 5 years, and there's no expectation to change. So if Allegiant requires gates in Boston, it's not likely to fly Boston to Orlando where there's several other carriers flying, it's going to look at a flight from Boston to perhaps Astro, North Carolina, or someplace that it's going to be less heavily trafficked. So they won't restore the same competitive intensity and they won't fly the same routes that Spirit does today.

THE COURT: Is it not true that in order to preserve competition, it is not required that all the routes be flown at the same frequency as Spirit's network? That's so, isn't it?

MR. DUFFY: Well I would say it's certainly not necessarily the case that the routes would need to be flown at the same frequency, what has to happen is that the competitive intensity has to be restored and it does have to be restored in all the markets that are affected. The Supreme Court has said most clearly. ***Philadelphia National Bank***, the Court again, just

following the text of Section 7, held very clearly that harm in any single market is not just efficient, but a deal must be enjoined.

THE COURT: And any single market here that is a nonstop between Point A and Point B, that is presumptively illegal and has remained so?

MR. DUFFY: Right, presumptively illegal and remain so. So, your Honor, this is not a situation in which there is only one or two routes that the presumption is met and there's no answer. Indeed if there was only 1 or 2, I would expect there may have been a better divestiture proposal that could have restored the harm.

I think the issue here is that because we're dealing with so many markets, there is no divestiture fix that could do that. But the legal principle is as your Honor articulated, that harm in any single market is sufficient and necessary to enjoin the transaction.

And if we can talk just a bit more about the harms at issue. Slide 20, please.

We talked about the Spirit effect and one point that I do think is important and bears mentioning, and I mentioned 135 million passengers flying the routes that Spirit flies each year. Now not all of those passengers fly Spirit, um, a relatively small percentage do, but

they fly other airlines and Spirit anchors the fares in that marketplace. So all those passengers benefit from the Spirit Effect whether they're flying on Spirit or not.

So the harm that this transaction will create is much -- is in excess and disproportionate to Spirit's small size, and that's a reason why fixating on the relatively small share of passengers that Spirit has on a national level is not the right way to think about this transaction. The right way to think about it is how is Spirit's presence in markets today affecting those markets? And the answer is clear, demand is stimulated, fares go down, when Spirit is in these markets.

The second thing I would just point out, um, is it's important to note that the average fares will increase as a result of this transaction --

But if we go to Slide 21 please.

The Court should consider -- we haven't defined a market around only cost-conscious or price-sensitive travelers, the markets we're looking at are all passengers that travel in particular origin and destination pairs. But we do think it is important that the Court consider, and there's a legal basis to consider, the loss of a particular choice that is

available for customers in those markets, and that choice is the unbundled very low-price option that Spirit provides.

The testimony was crystal clear on this point. Spirit doesn't intend to be for everybody, it is there for the cost-conscious travelers that otherwise could not afford to travel at all or want to use the money they saved for other things, whether that be, um, an extra night accommodation on their trip, an activity when they're out, or something completely unrelated to their travel.

THE COURT: But the same question I put to Mr. Shores.

Suppose the Court were to find that if the merger went through, nationwide now there would be more competition and more fares would be lowered at some percentage. At what point does that benefit outweigh the burden that you are now describing? At no point?

MR. DUFFY: Well, your Honor, we would say that you cannot aggregate the harms and benefits across different markets. So comparing a fare increase on the Boston to San Juan passenger with a fare decrease on Los Angeles to San Francisco would not be an appropriate balancing for the Court to consider. The Court can look at the average fares and see if they're going to go up

or down. We think the evidence here is quite clear that they would go up. But I think the question the Court is fixated on is the harms cannot be balanced across markets.

THE COURT: I am not fixated on it.

(Laughter.)

THE COURT: But something I think it --

MR. DUFFY: Focused upon, your Honor.

THE COURT: Right.

MR. DUFFY: All right.

THE COURT: And so that's why I, um, Mr. Shores was arguing so strenuously for a national market.

MR. DUFFY: And I think the answer to that is that defendants have no hope of winning this case if the markets are defined around particular origin and destination pairs. I still think, looking at the harms across markets, that there is harm demonstrated in each one of them.

I would point out that defendants mention incorrectly that Dr. Gowrisankaran didn't quantify harms in particular markets, he did. Those Exhibits 842 and 843 are in evidence. And they show on a market-by-market basis what the amount of estimated harm would be.

He's testified correctly the harm is more accurately measured at the national level only because

you have more data to look at. So you're going to have a more precise number because of that set of data. But he does present reliable well-substantiated estimates of the harm in each of the hundreds of markets that are at issue here.

But this loss of a particular product is something independent and apart of the average fare that the Court absolutely can consider in, um, analyzing whether this transaction will result in harm.

The third harm I would mention, if you go to the next slide, is the loss of seats. This is something that is quite unusual in transactions, your Honor.

Here we have explicit evidence that the transaction is going to reduce the capacity in the market. We have concrete evidence based on JetBlue's publicly-stated plans that there will be 6.1 million fewer seats or more every year from taking Spirit seats out of the aircraft.

Now JetBlue tendered an expert witness, Mr. Scheff, to the Court, he went through an analysis that attempted to offset that 6 million seats and he couldn't do it, and there are numerous issues with that analysis that the Court heard, using a nonapples-to-apples comparison, not taking profitability into account, there were numerous issues. But this is

also getting to a central narrative feature of the case, that the harms in this transaction are very concrete, they're undisputed, and they are put against speculation of things that might happen, things that don't have support in ordinary-course business documents and are instead based in unreliable speculation.

If we go to the next slide please.

I mention the innovation with respect to Spirit. The other thing to point out is Spirit has grown very quickly, an 8 percent growth rate between 2018 and 2023, much of that during the heart of the pandemic, much faster than every other airline at issue. Frontier, the other ULCC, is growing fast as well. Showing that the ULCC business model is robust.

THE COURT: But they rebut that by saying those days are gone.

MR. DUFFY: Well right below that, like a lot of this, we see what they are doing in the next couple quarters. They're still growing 14 percent this quarter. 7 percent next quarter. And this is the change in available seat miles. This is accounting for the fact that they're going to have a significant amount of their fleet grounded because of this NEO engine issue. So even with that, they are still growing year over year.

And the NEO engine issue, Spirit has told its investors it expects to be made whole. At some point in time there's going to be an influx of cash, how much we don't know, the terms of it we don't know, but there will be an ongoing commercial negotiation between Raytheon, Pratt & Whitney, and Spirit with respect to this issue.

I'd like to turn to coordinated effects, if we can.

If we can go to Slide 26.

The Court indicated an interest in this issue when Mr. Shores was speaking.

THE COURT: I did.

MR. DUFFY: Yes, and I am curious if there's any questions.

THE COURT: Yes. Here's my problem.

I understand the role of horizontal merger guidelines here and I understand very wise reasons the government and the defense has played off that model. It makes perfect sense for an enforcement guideline model to include these coordinated effects. Candidly that makes less sense to the Court, which I think appropriately doesn't presume wrongdoing.

Do you see my problem here?

MR. DUFFY: Yes. Yes.

THE COURT: There's some evidence, there is, and one would be warranted, this Court believes it is warranted, in assuming that there is something more, um, to this coordinated business than was demonstrated by the relatively few instances you've come up with because oligarchs operate that way. And I mean no disrespect to anyone, but the term fits here.

You've taken an enforcement manual, which given the broad language of the statute, makes perfect sense for everyone to play off, and you've used one aspect of the enforcement model and said, "Well this is a reason to stop them from becoming bigger." Well I'm skeptical. Go ahead, if that's worth addressing.

MR. DUFFY: I think it is, your Honor.

And if we go to Slide 26.

I would just quickly point out that it's not just the guidelines that are identifying the risk of coordination as grounds to block a transaction, um, ***FTC v. Hines*** is a case that has some similarities to this one in which the ability to compete against a larger competitor was put forward as one of the rationales for the deal, um, involved the merger of the second and third largest company, and their argument was that it would enable them to better compete against the largest. The Court recognized that the tacit coordination is an

issue and it is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.

I think the important thing, your Honor, is that coordination does not require ill intent or wrongdoing, market structures can facilitate it whether companies want to participate in it or not. It is a difficult situation to address in the context of Section 1, in the context of post-merger enforcement actions, because an agreement under Section 1 is required for enforcement and that does make it more difficult. So the structure of markets is absolutely very important to enabling, facilitating this degree of coordination, and the law does permit the Court to take this into account and to enjoin a transaction on this basis.

The Court is well-familiar with the ATPCO flashing and the cross-market initiatives, and I need not address that, I think, but --

THE COURT: All right, you're making the point that it's within the Court's power to take it into account and indeed it's something that perhaps should be taken into account. I -- I'll tell you I remain skeptical under these circumstances.

Go ahead.

MR. DUFFY: Okay.

And I would, your Honor, like to turn to the issue of entry, just if I can, because I do think it's quite important for the Court to consider.

If we can just quickly go to Slide 36.

And we're talking thus far primarily about the government's prima facie case and just this one point I would like to point out that pertains to the legal standards. But if the government's prima facie case is strong in addressing the respondent's rebuttal evidence, as obviously ours did, the prima facie case is very compelling and strengthened. And under those conditions the defendants' burden of production on rebuttal is also heightened.

If we can go now to the next slide.

Before discussing entry, I do think it's important to talk about what the testimony was from the party witnesses. The testimony came in loud and clear, aircraft are in short supply. Mr. Hayes testified that direct orders from Airbus are not available until 2029 at the earliest. He also testified, with respect to leasing, that maybe you could get an aircraft in 2027. So the leasing market is tight as well. Pilots are not as much an issue in the current time period, but they were earlier. And as airlines are trying to grow, being

able to grow pilots, aircraft, presence at airports, are all things that are quite difficult to do.

Ms. Hurley testified that in discussing the competitive rationale of this deal, the difficulty in being able to grow quickly and organically by going out and purchasing aircraft and hiring pilots, so JetBlue's stated reason for needing this transaction to grow is directly at odds with its argument that Frontier, Allegiant, and others, can grow at astronomical rates that have never been seen before in the industry.

If we go to the next slide, the legal standard. I want to talk through the legal requirements of what defendants must show on this issue.

And again, defendants bear the burden of production to show timely, likely, and sufficient evidence. They must come forward with the evidence that would allow the Court to conclude that the competitive intensity of Spirit would be replaced in a timely, likely, and sufficient manner. And I want to talk about what each of these three requirements mean.

Timely. The 2-to-3-year time period was used. And the courts have thrown out a specific number as to what the legal requirement is, 2 to 3 years has been cited in a number of opinions. I would say that --

THE COURT: And you agree?

MR. DUFFY: I agree there are a number of cases that have said that --

THE COURT: No, that you agree that that's the time period that I ought be looking at here?

MR. DUFFY: I would say that that -- to understand whether competition will be restored, we do need to look at what is going to happen when this deal closes? And immediately when this deal closes, Spirit ceases to exist as an independent competitor, the pricing pressure that it brings to bear in head-to-head markets will be gone.

So I think the evidence has shown clearly that entry is not going to happen within the 2 to 3-year window, but if we're looking at is entry going to offset the harm? It really is less than 2 years, based on the fare increases that would happen in the immediate, um, aftermath of this transaction.

The second element is likely. Now likelihood in the context of entry, it's not framed in terms of a numerical probability or something like that, it's what does the evidence have to show? And the evidence has to show that entry is reasonably probable based off of the profitability considerations that would have been involved as well as the operational feasibility. So defendants would need to come forward with specific

evidence about particular routes that these entrants would look at, how they would overcome barriers that are particular on these routes that pose these types of operational barriers, whether they would be sufficiently profitable to attract assets away from other markets.

The other issue is sufficiency. Is the entry sufficient to constrain the harm from the merger? So the entry, it might not need to be 1 to 1 in terms of seat for seat, but it has to be at a scale that is large enough to offset the fare increase that would otherwise occur.

And I'd like to go forward and address the different entrants that defendants have suggested as possibilities.

If we go to the next slide.

I want to briefly talk about Basic Economy, which was suggested as one of the possible options to replace Spirit, and the Basic Economy end with Southwest, it is, um, you know in some sense telling that JetBlue is claiming that this transaction will help it better compete against the Big 4, it is simultaneously holding up legacy Basic Economy and Southwest as a check on the fare increases that would otherwise occur. But as Mr. Nocella testified, Basic Economy exists in a market at a price that is a business decision. The pricing of

Basic Economy is going to depend heavily on whether there is a ULCC in the market. Without Spirit or another ULCC to anchor that Basic Economy price, it will float up and be more or less the same level as Regular Economy with perhaps a very slight reduction.

Southwest is the next entrant.

If we go to Slide 40.

Mr. Biffle testified clearly, Southwest is a mid crossed airline, the data supports that. Dr. Hill acknowledged that, um, and this inconsistency was apparent in defendants' arguments, that Southwest is one of the Big 4, yet simultaneously held up as a likely candidate for entry.

And I want to talk next about Frontier. And Frontier, I think the Court is correct to ask a number of questions about Frontier, about Mr. Biffle's testimony in particular. Now he gave very colorful testimony about scavengers on the carrier and so forth, painting a somewhat vivid picture, but the fact is that ULCCs, as a flock and individually, are too small to make up for that loss of Spirit especially considering Spirit is half of all the ULCC capacity today.

So Frontier is the largest of the remaining ULCCs. But Spirit is still 50 percent bigger than Frontier. Frontier probably could enter some of the more than 200

affected routes, but the relevant question isn't whether Frontier might ultimately decide to enter some of those routes that are found to be profitable, defendants have to show that entry by Frontier will be likely, timely, and sufficient to restore the competition that will be lost across all the routes that Spirit currently flies and would plan to fly in the future.

Now let's talk about specific numbers instead of the colorful language of Mr. Biffle. If we go to Slide 42, this is the language that Mr. Biffle used.

He acknowledged he didn't have the planes or the pilots to replace Spirit. When asked how long it would take to replace Spirit? 7 or 8 years was the answer that he gave based on concrete plans of Frontier's growth. And then he talked a little further and he ventured a guess, not a plan, not an estimate, nothing based on reality, but a guess that he could do it inside of 5 years. Not that he would, but that perhaps it would be possible. And that type of speculation is exactly the type of evidence that is insufficient for defendants to meet even their burden of production that the entry is going to be timely.

And timeliness isn't the only issue here.

Go to the next slide.

Frontier and Spirit are different, they are ULCCs,

they have many similar aspects of their business model, but they do not operate with the same business traction. Mr. Biffle testified very clearly about how the presence of a Big 4 airline on the route affects its plans. He testified that there is an impact that they don't try to overexpose themselves by being too big on a route, they try to conduct asymmetric warfare to make sure that their capacity is not largest. So Frontier does lie on some of the routes that Spirit flies that are nonstop overlap routes, but Mr. Biffle has said his strategy would not be to expand to such a level and replace Spirit such that it would be overexposed to retaliation from the legacies.

If we go to Slide 44.

The other thing is relating to, um -- relating to Frontier's business strategy and its stickiness on routes, so it's ability to stay with a sustained presence at an airport and in a particular market. And the evidence came in that Frontier has exited entire airports, like Newark and LAX, those are good examples of big legacy hub airports. Spirit flies many routes in both of those cities today, touching on big airlines' hubs, bringing those fares to their heavily-trafficked routes. And Frontier simply does not do that to the same extent that Spirit does.

If we go to Slide 45.

And the other thing to just consider is that Mr. Biffle testified he wouldn't go on a quest to replace every Spirit route, some routes he would look at. The only route that came out that was specifically mentioned at all in the testimony of Mr. Biffle was Atlanta City to Myrtle Beach. Defendants could have come forward with evidence about concrete plans or at least robust analyses of what was likely to happen and how Frontier could replace the competitive intensity of Spirit, but they didn't do it, they didn't produce it to the Court.

And we can briefly talk about Allegiant as well, your Honor. Now I think the case with Allegiant is simpler. Allegiant was quite clear, Mr. Wells's testimony, that Allegiant looks to fly on routes that have little competition. The evidence came in that 75 percent of their routes, um, do not have a competitor flying.

Now Allegiant plays an important role in the industry, we're not here to criticize or belittle Allegiant's role, but it's different, they are serving unserved, underserved small cities providing them with destination and connect -- with nonstop service on routes where connections would otherwise be the only

option. They have found that that strategy works for them. They are not the type of airline that is going to come in and fly these heavily-trafficked routes that Spirit frequents.

They also have an entirely different business model, only flying routes a few days a week, they only fly their planes a few hours a day. It's just a different type of airline than Spirit does. And there's no plans for any of that to change.

And if we quickly go through the remaining airlines. There's been a little bit of testimony about Sun Country, Avelo, and Breeze. Just very briefly.

Breeze is not even a ULCC at all. There's been no testimony about what routes they might look to enter. They have a similar business strategy of flying unserved routes.

Avelo is much the same, only has 16 planes today, is growing at a rate of a few planes a year. It's just nowhere near the size to factor significantly in the ability to replace Spirit.

Sun Country is a somewhat unusual ULCC. We haven't heard much about them. They are essentially a Minneapolis-based carrier and nearly the entirety of their route touches on Minneapolis, which really isn't any of the nonstop routes at issue in this case.

So we know for certain that Spirit, in its benefits to competition, would go away if this acquisition went through, but defendants have not come forward with anything remotely concrete or specific to show what would happen. And what the Court would need to believe, with entry to restore the competition would be possible, is, you know, simply staggering. The Court would have to believe that ULCCs would grow faster than they ever have before and then some, that they would take on legacy airlines in a way they never have before, that they would fly in ways and in places fundamentally at odds with their established business strategies, and there simply isn't a rebuttal sufficient to overcome the clear overwhelming harms from the deal.

I want to briefly just talk about what Dr. Hill did or didn't do. He didn't offer any specific economic evidence to show that timely, likely, and sufficient entry would occur in the relevant markets. There were no plans that were pointed to. And that speculation is standing in stark contrast to the clear evidence of concrete harm in that.

And again, we've talked about the deal-modeling.

And if we go to Slide 45.

But again, Mr. Friedman's analysis, that was the basis for JetBlue's expected ability to increase fares,

evaluated actual exit events of Spirit, found that fares on those routes went up by 30 percent, and that entry didn't occur to offset those fare increases within a year.

JetBlue's revenue projections count on that similar absence of price-constraining entry after this deal closes. So there's optimism and then there are hopes and dreams divorced from reality, and that is ultimately what defendants' entry story is showing.

If we can briefly chat about divestitures and go to Slide 50.

Now the divestitures at issue here are airport-specific issues, um, assets at Boston, New York, and Fort Lauderdale, both La Guardia and New York.

THE COURT: Well let me ask you the question that I asked Mr. Shores.

MR. DUFFY: Sure.

THE COURT: Suppose when everything -- as I work through this, I think that what I have before me is insufficient and warrants, um, some restraint on the Court's order, but with some more divestitures it might work. Could I go down that route?

MR. DUFFY: Well again, your Honor, I think that -- I would point to ***United States v. Aetna*** is the case that I would cite on this. It is the case that the

divestitures do have to fully restore what the competition has lost. I think that's an important point to keep in mind. And obviously the divestitures would only be available as a remedy upon a finding of liability.

I would say this. That the Court asked this question of defendants and I don't know I heard an answer as to what other divestitures might be on the table, what other assets could make this deal workable. And I do think looking at the nature of the harm, it is difficult for me to envision substantively what type of remedies could offset this.

I mean we're talking about a significant reduction in capacity, a loss of a large ULCC competitor that is different --

THE COURT: 5 more minutes. But you go right ahead.

MR. DUFFY: So again, the extent of the harm that we've discussed seems to be such that there does not seem to be a remedy other than a full-stop injunction that would restore our competition. Procedurally, of course, if the Court found that there was liability here and the Court wanted to discuss a remedy, that would obviously be at the Court's discretion. But I would just point to you, the harms are concrete, they're real,

and they're multifaceted. They affect a number of different things. And there would be very practical limitations in what divestitures could even hypothetically be put forward. I'm talking about constraints at international airports. Who knows what the Airbus terms and conditions are in terms of aircraft being available? Pilot union issues. There are lots of things that would make it extraordinarily difficult to fashion a remedy that could restore the competition that is lost. And that is why a full-stop injunction is, in the government's view, the only thing that can be done to prevent -- to prevent the harm that is otherwise near certainly to occur.

Yeah, so if I may? The Court should see defendants' arguments for what they are, unsuccessful efforts to overcome a mountain of evidence that this merger violates Section 7 in hundreds of markets. Defendants know the bad facts here. They know that JetBlue planned significant fare hikes and substantial capacity reductions. And they know that their arguments about entry and divestitures are based on speculation. Defendants know all of this. So they try to minimize those harms. They've denigrated a number of routes impacted, thrown up their hands in the face of conditions that affect the entire airline industry, and

most tellingly they've invited the Court to look past the harms caused to passengers who can't pay for JetBlue's richer experience.

What defendants leave unspoken is why? But perhaps they view that harm to those least able to bear it as just the cost of doing business. But the Court should reject their invitation because that's not the law in America.

The Clayton Act protects competition even at the expense of businesses that prefer to merge rather than compete. In doing so, the Clayton Act occupies a unique place in our law where risks and probabilities are dispositive and doubts are to be resolved against a proposed deal, and that makes sense because once this deal is consummated, Spirit is eliminated, and that is cold comfort to those who will bear the very real harms that are apparent today to say "We were too optimistic in how we thought about entry." The defendants, not the American people, should bear the risk of being wrong.

The evidence points to one inescapable conclusion here, this transaction is a bad deal for consumers, it risks substantially lessening competition and so it violates Section 7 of the Clayton Act. We therefore respectfully request the Court enjoin it.

THE COURT: Thank you.

Now a few housekeeping matters and I do have something to say.

First, we're agreed on 8 days for the filing of requested findings and rulings. That would take us to the, um, 13th of December. And I'll be looking for them then. I will accept further briefing at any time, I'm always happy to get whatever help I can. But the matter today I'm taking under advisement and I will commence to work on it.

One last thing, and this does need to be said. I want sincerely to express my thanks to the attorneys in this case, the attorneys for the government and private parties in this case. You have all -- this has been a real trial. Any one of you who has worked on this trial in any capacity ought to be proud of it.

It doesn't say anything about what I'm able to do in my core capacity, but I will discharge my judicial function. But it really needs to be said that this case is an exemplar of how a case should be handled.

Thanks to all of you zealous advocates for your respective positions, we've gotten this case to trial in little over a year. There's been no wasteful really unproductive motion practice. All of the examinations and the arguments have been to the point and have been designed to help the Court, rather than to obfuscate

anything or hide the ball or somehow not truly focus on those matters which ought compel the Court's attention, and frankly I appreciate it.

And as one small part, this case in my practice will stand as an example of how to handle confidential material. This restricting of confidential material to what is actually confidential and notifying the Court of that in a matter that preserves what should be preserved but necessarily allows for a fully public trial is a model that I will follow in the future. And it's fair to say, at least as things look to me now, I see no reason at all to wonder whether I need to reveal anything that's confidential. And I will say further, if I thought I did, I would notify the parties and we would hold a hearing on that. But I don't see any need for that.

So I'm going to recess, but I do so with my sincere thanks to the lawyering that's gone on here. This case is an example of how a case ought be tried. Thank you all.

We'll take the matter under advisement and we'll stand in recess.

THE CLERK: All rise.

(Ends, 11:20 a.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Tuesday, December 5, 2023, to the best of my skill and ability.

/s/ Richard H. Romanow 12-5-23

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RICHARD H. ROMANOW Date