UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff*, v. SABRE CORP., SABRE GLBL INC., FARELOGIX INC., and SANDLER CAPITAL PARTNERS V, L.P., *Defendants*.	Civil Action No. 1:19-cv-01548-LPS

PLAINTIFF'S POST-TRIAL BRIEF

REDACTED PUBLIC VERSION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on two main factual disputes between the parties: (1) Do Sabre and Farelogix compete? (2) Does Farelogix offer an important alternative to Sabre that no other provider is likely to replace in the near future? The trial record establishes that the answer to both of these questions is "yes."

As to the first key dispute, Defendants would have the Court believe that Sabre's GDS does not compete *at all* with Farelogix's Open Connect. This position conflicts with Defendants' own business documents, the testimony and ordinary course documents of Defendants' customers, the testimony of Defendants' former executives, Sabre's positions in prior antitrust litigation, Farelogix's prior statements to regulators, and the economic evidence of Farelogix's effect on the GDSs' booking fees. *See* PFOF § V. And the position conflicts with clear evidence that Defendants' executives expect this merger to lessen competition: reducing "price pressure in [the] market," PX187 at -960, "[REDACTED]" of Sabre's booking fees, PX008 at -480, and causing Farelogix's prices to "go[] up big time," PX140 at -626.

Faced with a mountain of evidence that the merger would eliminate competition between Sabre and Farelogix, Defendants resort to two strategies to attempt to confuse the issues. First, Defendants contort the law on market definition to contend that the Court is required by *Ohio v. American Express* and *US Airways v. Sabre* to find the same two-sided relevant market here that the Second Circuit found in *US Airways*. They do this despite the factual record that emerged at trial, and despite the fact that those other cases involved entirely different conduct. By insisting on a "formal, legalistic" approach to market definition rather than the "pragmatic, factual approach" prescribed by Congress, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962), Defendants suggest that the Court must conclude that Sabre and Farelogix do not compete, even if actual market participants say otherwise. In essence, Defendants set up a

Catch-22: unless a rival is two-sided and competes with the *entire* GDS platform, it is not in the same market and thus the competitive threat it poses can be eliminated with impunity. Defendants have it exactly backward: the relevant market does not determine whether the Defendants compete; rather, evidence of competition identifies the relevant market. *See id.* at 326 ("[T]he boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists."). With the focus properly on competition where it in fact exists between Sabre and Farelogix, the United States' proof of market definition and competitive effects follows and is backed by the factual record.

Second, Defendants attempt to sweep away the factual record of real competition with implausible rationalizations for the consistent and voluminous evidence presented at trial. Defendants dismiss their own documents and prior statements as "ancient history," even though that evidence is consistent with documents and statements all the way up until just a few months ago. Defendants dismiss more recent evidence as "unfortunate error," Tr. 506:13–19 (Boyle/Sabre), or as supposedly focused on competition in "retailing," even where the documents explicitly reference distribution, *e.g.*, Tr. 682:9–683:24 (Menke/Sabre); PFOF ¶ 143. Defendants dismiss the testimony of knowledgeable executives at American Airlines and United Airlines as motivated by those airlines' supposed plot to purchase Farelogix themselves if the deal is blocked, even though their testimony is corroborated by their contemporaneous documents and is consistent with testimony from Delta Airlines and Hawaiian Airlines.

Defendants advance one final argument in an attempt to sidestep the evidentiary record of competition. When pressed by the Court for a direct answer, Sabre's CEO finally, reluctantly, admitted that GDS bypass "impacts" Sabre's business. Tr. 736:24–739:24. But Defendants

insisted that this is irrelevant because bypass "is never going to work," Tr. 1799:4–6, and the future will be dominated by GDS pass-through. As recently as a few months ago, however, Sabre was still identifying the expected growth of GDS bypass as a threat, PX343 at -188; *see also* PFOF ¶¶ 146, 182, 195, and when considering whether to buy Farelogix and how much to pay for it, Sabre executives projected that Farelogix's GDS bypass bookings would continue to grow, Tr. 539:3–23 (Boyle/Sabre); *see also* PFOF §§ V.F.1, V.F.2.

In any event, the Court need not predict which distribution model will prevail but for the transaction. If this transaction is blocked, airlines and travel agents can continue to choose among the traditional GDS model, GDS pass-through, or GDS bypass. The market will decide if one model prevails, or if some combination of these models will continue to exist side by side, as Mr. Davidson predicted. *See* PX094 at -569–70. Even if GDS pass-through becomes the predominant means of distribution, Sabre and Farelogix still would be competing. Before using Farelogix for GDS pass-through, an airline must first choose between the competing booking services of Sabre and Farelogix. By insisting that Sabre and Farelogix are merely complements in pass-through, Defendants ignore the competition that occurs when an airline chooses a distribution model. As Farelogix grows as a pass-through provider, it will take revenues away from Sabre. *See* PFOF § V.F.3. Moreover, even if pass-through predominates, airlines still would retain the option—and the threat—of using Farelogix to bypass Sabre and "shift [market] share to direct connect[s]." PX343 at -188. If this transaction is approved, however, this critical choice for airlines would be eliminated.

With respect to the second key factual dispute, Defendants would have the Court believe that other providers offer a similarly robust alternative to Farelogix's Open Connect product. The evidence shows otherwise. Airline witnesses and Farelogix executives testified that

Farelogix's Open Connect product offers much more than a simple set of APIs or the NDC schema that Farelogix donated to the public domain. PFOF §§ II.C.1 & VI.C.1. The airlines testified, and Defendants' ordinary course documents confirm, that Farelogix is well ahead of other putative booking services providers in developing the expertise necessary to integrate NDC solutions into the complex and varied airline IT systems, and in establishing the track record necessary to win the business of major airlines. PX025; PX072. Airline witnesses testified that they could not turn to fringe suppliers as an alternative to Farelogix. PFOF § VI.C.3. As it sought board approval for the acquisition, Sabre itself recognized that "there is not a better solution [in] in the marketplace for Farelogix's customers." PX436 at -875; Tr. 542:7–543:3 (Boyle/Sabre). There is no evidence that any of the alternative providers identified by Defendants have to date facilitated *any* bookings in the United States (or, for that matter, any meaningful volume of bookings outside of the United States). At trial, the United States also presented evidence of high barriers to entry and expansion—barriers that Farelogix has fought for a decade to surmount, and which would similarly impede the ability of smaller rivals to take Farelogix's place. PFOF §§ VI.A–B.

In the face of this evidence, Defendants ask the Court to conclude that other firms can replace Open Connect based only on the testimony of Farelogix's executives. Defendants offered no contemporaneous documents corroborating that executives were in fact concerned about competition from these other entities. Farelogix presented no documents warning its board of directors or majority owner about this supposed wave of new competition, and no evidence that the company had cut prices of Open Connect to respond to competition from fringe players like Datalex, OpenJaw, or TPConnects. Defendants did not present the testimony of any supposed competitor (save Mr. Gregorson of ATPCO, who specifically testified that ATPCO and

its NDC Exchange product do *not* compete with Farelogix), nor did they present the testimony of any airline using any of these other supposed GDS alternatives. At closing, counsel suggested that it was in fact the *United States'* burden to bring in the twenty-odd supposed competitors that Defendants displayed in their opening to explain their limitations. Tr. 1827:11–17. But where the government has established a prima facie case of harm, the "defendants carry the burden to show" that expansion of existing competitors, or entry of new competitors, would be "timely, likely, and sufficient in its magnitude, character, and scope" to "fill the competitive void" left by the acquisition. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (citations omitted). Simply showing logos of putative competitors cannot suffice to rebut the testimony of customers, Defendants' own ordinary course documents, and the actual sales data showing that Farelogix is far ahead of other would-be alternatives.

In short, the record at trial establishes that Sabre and Farelogix do compete, and that Farelogix represents an important check on Sabre's market power. By eliminating that check, the transaction is likely to substantially lessen competition in violation of Section 7 and should be permanently enjoined.

II. SECTION 7 STANDARD FOR EVALUATING THE PROPOSED ACQUISITION

Section 7 of the Clayton Act prohibits an acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18. Congress designed the Clayton Act to address "incipient" harms. *Brown Shoe*, 370 U.S. at 318 n.32. As the statutory text indicates, merger review is concerned with "probabilities, not certainties." *Id.* at 323. Thus, the government need only "show a 'reasonable probability' that the merger will result in anticompetitive effects." *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 435–36 (D. Del. 2017) (quoting *Brown Shoe*, 370 U.S. at 325).

Courts evaluate Section 7 claims under a burden-shifting framework. *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016). First, the government must establish a prima facie case that the transaction is anticompetitive. *See id.* at 337–38. To establish a prima facie case, the government may simply show that the merger would increase concentration in a highly concentrated market. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363, 365 n.42 (1963); *Penn State*, 838 F.3d at 347. Such evidence creates a "presumption" that the merger is anticompetitive. Alternatively, even without establishing such a presumption, the government can establish a prima facie case with other evidence such as "customer testimony, history of the market, and . . . internal documents" showing that the merger will result in increased prices, reduced output, diminished innovation, or reduced variety and quality. *Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm'n*, 534 F.3d 410, 433 (5th Cir. 2008); *see also Polypore Int'l, Inc. v. Fed. Trade Comm'n*, 686 F.3d 1208, 1216 (11th Cir. 2012) (blocking a merger even where one of the merging parties had no sales in the relevant market).

When assessing this evidence, courts often give substantial weight to the merging firms' ordinary course of business documents, which "reveal the contours of competition from the perspective of the parties, who . . . may be presumed to have accurate perceptions of economic realities." *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017) (citation omitted); *see also United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 U.S. Dist. LEXIS 3284, at *15–16 (N.D. Cal. Jan. 8, 2014) (finding that the merging firms' "defenses were often undermined by pre-acquisition statements," and their portrayal at trial of the acquired firm "as a weak and unworthy competitor was belied by the plethora of documents" to the contrary). By contrast, "self-serving testimony by officials of the acquiring firm regarding its intentions must be viewed with skepticism." *United States v. Siemens Corp.*, 621 F.2d 499, 508 (2d Cir. 1980).

Once the government has established its prima facie case, the burden shifts to defendants to rebut it. *See Penn State*, 838 F.3d at 337. To satisfy this burden, defendants must "sufficiently discredit" the evidence underlying the prima facie case, or prove that the prima facie case "inaccurately predicts" the merger's likely effect on competition. *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017). If defendants rebut the government's prima facie case, the burden shifts back, as "the ultimate burden of persuasion . . . is incumbent on the Government at all times." *Penn State*, 838 F.3d at 337 (citation omitted).

III. SABRE AND FARELOGIX ARE HORIZONTAL COMPETITORS IN TWO RELEVANT ANTITRUST MARKETS

A. Market Definition for this Case Must Reflect the Commercial Reality that Sabre and Farelogix Compete

The relevant market is the "locus of competition[] within which the anti-competitive effects of a merger [are] to be judged." *Brown Shoe*, 370 U.S. at 320–21. Market definition is a tool for illuminating the competitive effects of the particular transaction, "not an end in itself." Dep't of Justice and Fed. Trade Comm'n Horizontal Merger Guidelines ("Guidelines") § 4 (2010). Defining a market is "highly factual," *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 199 (3d Cir. 1992), and must reflect "commercial realities," *Brown Shoe*, 370 U.S. at 336–37. Critically, in a merger case, "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Id.* at 326; *see also Phila. Nat'l Bank*, 374 U.S. at 357 (market should reflect "area of competitive overlap").

Defendants insist that Sabre and Farelogix cannot compete in the same market because Sabre sells more than just booking services through its GDS platform. The relevant market, however, must focus on that subset of services where, in fact, competition exists between Defendants. While a broad bundle of services can be a product market in appropriate cases, that

does not preclude a smaller market covering a subset of those services (sometimes referred to as a "submarket") in other cases. "[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325. "Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." *Id.*

The Supreme Court has made clear that merging firms can be in the same market even if their offerings are not "identical" and there are "some end uses for which [each of their products] do not and could not compete." *United States v. Cont'l Can Co.*, 378 U.S. 441, 452, 457 (1964). Following *Continental Can*, Judge Robinson held in *Energy Solutions*, "[t]he fact that [Energy Solutions] may offer more comprehensive services than [WCS] does not change the fact that, with respect to the type of services offered by [WCS], [Energy Solutions'] services overlap with those of [WCS] and are reasonable substitutes." 265 F. Supp. 3d at 439 (citation and quotation omitted). Judge Robinson noted that, "[m]ost important, 'complete interindustry competitive overlap need not be shown' for the court to conclude that companies offer reasonably interchangeable products. It is sufficient that there is some overlap, even if that overlap is (as defendants claim) 'small.'" *Id.* (citation omitted); *see also United States v. Philipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360 (1970) (explaining that the relevant market for purposes of a merger between two commercial banks is different than one for a "merger between a commercial bank and another type of financial institution" and that, in the latter case, submarkets could be defined around the overlapping services).

Indeed, where individual components compete with larger bundles, courts define the markets to recognize the competition provided by firms that sell standalone components of the bundle. *See United States v. Microsoft Corp.*, 253 F.3d 34, 52–54 (D.C. Cir. 2001) (recognizing a separate product market for Intel-compatible operating systems, which did not include web browsers, even though Microsoft sold its browser bundled with the operating system and integrated the code for the two products); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 977–78 (N.D. Cal. 1979) (defining a relevant market recognizing the commercial reality that components of computer systems can compete with complete systems), *aff'd sub nom. Transamerica Comput. Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983).

B. OTA and TTA Booking Services Are Relevant Product Markets

Following these principles, the United States has proven that booking services for airline tickets sold through OTAs in the United States ("OTA booking services market") and booking services for airline tickets sold through TTAs in the United States ("TTA booking services market") constitute relevant antitrust markets. These markets encompass the nexus of competition that exists between Sabre and Farelogix and are the appropriate focus for analyzing the competitive effects of this merger.

Product market definition is an inquiry into "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (citation omitted). Market definition "focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." Guidelines §4; *see also H&R Block*, 833 F. Supp. 2d at 51.

Courts look to two general types of evidence in defining the relevant market: "the 'practical indicia' set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics." *Fed. Trade Comm'n v. Sysco Corp*., 113 F. Supp. 3d 1, 27 (D.D.C. 2015). Under *Brown Shoe*, the contours of a market can be determined by examining such factors as "industry or public recognition of the [market] as a separate economic entity . . . distinct customers, [and] specialized vendors." 370 U.S. at 325. With respect to economic evidence, a "common method employed by courts" to determine the relevant market is the hypothetical monopolist test. *Penn State*, 838 F.3d at 338. This test asks whether a profit-maximizing monopolist of all products within a proposed market likely would apply a "small but significant and non-transitory increase in price" ("SSNIP") on at least one product sold by the merging firms. Guidelines § 4.1. If a hypothetical monopolist would impose a SSNIP, the proposed market is a relevant antitrust market.

As the Supreme Court has explained, "[f]or every product, substitutes exist. But a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn . . . ." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). Thus, "properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers." Guidelines § 4.

The product market in this case has two aspects: the service (booking services) and the channel (OTAs or TTAs). Booking services are products that enable airlines to transmit offers to travel agencies, receive or process orders or bookings, and receive or process changes to bookings. PFOF ¶ 69. Sabre provides booking services to airlines as part of its traditional GDS

bundle and has begun offering standalone booking services; Farelogix sells booking services to airlines through its Open Connect product. PFOF ¶ 78, 79. Airlines view Defendants' booking services as substitutes, choosing between them when selecting a distribution option. *See* PFOF § III.A.1.b.

The United States proved that booking services for airline tickets sold through OTAs and TTAs are separate product markets because these distribution channels are not reasonably interchangeable for airlines. PFOF § III.A.2. For example, it would be costly for airlines to induce corporate travelers to switch from booking tickets through a TTA to booking through an OTA or on the airline's own website. Tr. 906:1–909:8; *see also* PFOF ¶ 111. Similarly, OTAs are sufficiently distinct from TTAs and airline.com such that airlines would not forgo distribution through OTAs in sufficient volumes to defeat a price increase. PFOF § III.A.2.d. Airlines believe it is essential to distribute through all three channels—TTAs, OTAs, and airline.com—to reach the widest range of potential travelers. PFOF § III.A.2. Professor Nevo confirmed the validity of the OTA and TTA booking services markets by conducting hypothetical monopolist tests for each market.[1] PFOF § III.C.

C. Defendants' Criticisms of These Product Markets Are Incorrect

1. *American Express* Does Not Dictate a "Two-Sided Market" Here

Defendants argue that the United States' market definition is foreclosed by *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*") and *US Airways, Inc. v. Sabre Holdings*

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[1] Defendants criticize Professor Nevo's hypothetical monopolist test because he did not estimate a price for the booking services portion of the Sabre GDS booking fee to calculate the SSNIP. But rather than try to estimate the imputed price of booking services within the Sabre GDS bundle, Professor Nevo included the entire Sabre booking fee to calculate the SSNIP. This approach is not only consistent with the Guidelines, it is conservative. *See* PFOF § III.C.3; Guidelines § 4.1.2 & Examples 8–10 (discussing possible approaches to calculating a SSNIP where candidate product is sold as part of a bundle containing multiple components).

Corp., 938 F.3d 43 (2d Cir. 2019), and that those decisions require a GDS platform market in this case "as a matter of law." Defs. Pretrial Br. 16–17. Nothing in either case compels this Court to disregard the competition that plainly exists between Sabre and Farelogix.

Amex's holding is narrow, and it does not preclude finding booking services submarkets smaller than the broader GDS bundle. *Amex* involved a challenge to vertical restraints under Section 1 of the Sherman Act. 138 S. Ct. at 2284. In *Amex*, the Supreme Court concluded that it was wrong to treat the credit-card market "as two separate markets—one for merchants and one for cardholders," because Amex in fact sold a "single" product—a "simultaneous transaction between participants" on both sides of the platform. *Id.* at 2283, 2286–87. The Court distinguished other types of two-sided platforms, explaining that "it is not always necessary to consider both sides of a two-sided platform" and define a two-sided market. *Id.* at 2286–87. The Court did not directly address whether or how its analysis would apply to merger challenges under Section 7 of the Clayton Act, which are governed by a different statutory standard than Section 1 claims.[2]

To the extent that *Amex* addressed merger cases at all, it indicated that the same established principles for defining markets and submarkets still apply. *Amex* cites *Brown Shoe* for the notion that "the definition of the relevant market must correspond to the commercial realities of the industry." 138 S. Ct. at 2285 (internal quotation marks omitted). Thus, as Defendants admit, *Brown Shoe* is "still good law," Tr. 1794:20–23, and its factual approach to market definition governs this case. In fact, *Amex* reinforces that "the relevant market is defined

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[2] Unlike Section 1, Section 7 is "a prophylactic measure." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977). "Congress rejected . . . the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act." *Brown Shoe* 370 U.S. at 318; *see also id.* at 317 n.30.

as 'the area of effective competition.'" 138 S. Ct. at 2285. In a merger case, that is "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat'l Bank*, 374 U.S. at 357. Focusing on the breadth of Sabre's entire bundle of GDS products, as Defendants would have the Court do, ignores this central principle of market definition for merger cases.

Instead, in defining the relevant market in a merger case, the court must analyze *both* of the merging firms' products to determine the areas of competitive overlap. *Brown Shoe*, 370 U.S. at 326. Here, that is booking services for airline tickets sold through TTAs and OTAs—not all of the services in the GDS bundle. Just as before *Amex*, courts can draw submarkets around these overlapping services to analyze the effect of the merger. Because the area of competitive overlap between Defendants is not platform-wide, analyzing the effect of the merger in a GDS platform market makes little sense.

In arguing to the contrary, Defendants present a false paradox. On the one hand, they claim that because Sabre is a GDS, the relevant market must be the GDS platform. Defs. Pretrial Br. 17. On the other hand, they claim that because Farelogix is not a GDS, it is not a participant in the relevant market at all. *Id.* at 15–16. They claim this despite the fact that, as Professor Murphy acknowledged, GDSs can face competition from one-sided competitors. Tr. 1521:11–1522:4; *see also* PFOF § V.B. The implication of this position would be that the operator of any GDS has carte blanche to buy any one-sided competitor, free from scrutiny under Section 7. In reality, there is no such paradox because the Court can define submarkets around the booking services offered by both Defendants where the effect of the merger can be properly analyzed.

Sabre argues that defining markets around booking services fails to account for all the competition it faces as a GDS platform. Sabre's argument cannot be squared with the statutory

standard under Section 7 of the Clayton Act, which prohibits mergers whose effect may be to substantially lessen competition "in *any* line of commerce or in *any* activity affecting commerce." 15 U.S.C. § 18 (emphasis added). Congress specifically rejected tests that "judged the effect of a merger on the industry as a whole." *Brown Shoe*, 370 U.S. at 317 n.30.

US Airways is not to the contrary. *US Airways* involved a challenge to vertical restraints (Sabre's full-content provisions in its contracts with airlines) under Section 1 of the Sherman Act, just as in *Amex*. Because it was not a merger case involving the acquisition of a firm selling a disintermediating direct connect product, the record in *US Airways* was materially different from here. In *US Airways*, both parties agreed that the relevant market for analyzing the full-content provisions was the full GDS bundle; the dispute was whether the agreed-upon market was "one" or "two" sided under *Amex*. The Second Circuit concluded that "the Sabre GDS is a transaction platform, and [thus] the relevant market for such a platform must as a matter of law include both sides." *US Airways*, 938 F.3d at 58. Because no party in *US Airways* was arguing for a one-sided market for booking services separate from the platform, the court had no need or occasion to consider whether it was appropriate to define submarkets around those services. As a result, the record in *US Airways* did not contain the extensive evidence of competition between Sabre and Farelogix for booking services developed here.[3]

When the market is properly defined around these overlapping services, *Amex* and *US Airways* do not apply because booking services are one-sided. Not every service in the

[3] Although not necessary for the Court to resolve, this evidence calls into some question whether GDSs even meet the criteria for "two-sided transaction platforms" under *Amex*. *Amex* said that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions," while "[n]ontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform." 138 S. Ct. at 2287 & n.9. The record evidence in this case shows competition between the GDSs and a one-sided competitor (Farelogix). Moreover, Professor Murphy testified that GDSs can compete with one-sided competitors. Tr. 1521:11–1522:4.

traditional GDS bundle is two-sided. For instance, offer creation is a one-sided service provided only to airlines. Booking services are likewise one-sided services provided to airlines. Indeed, both sides agree that booking services are one-sided. At trial, Professor Murphy explained that Open Connect is a one-sided product, and he further acknowledged that the Sabre GDS provides the same "booking services" functionality as Open Connect, among other services. PFOF ¶¶ 87–88, 93. His testimony explained that booking services is a "stage" of the supply chain that can be separated from the rest of the GDS (including aggregation) *without* changing the fact that the rest of the GDS is a two-sided platform. PFOF ¶ 93. As Professor Nevo explained, it is the *aggregation* function, where GDS brings many airlines and many travel agents together, that is properly classified as a two-sided service. PFOF ¶ 92.

While GDSs have traditionally performed both booking and aggregation functions, each function can be performed separately—*e.g.*, Farelogix only sells booking services, while Travelfusion only sells aggregation services. Indeed, Sabre has sold booking services separately in Brazil, Tr. 935:25–937:18, and recently offered to sell separate booking services (its new NDC API) to [REDACTED] and [REDACTED] PFOF ¶ 194. Likewise, under GDS pass-through, the GDS aggregation function is sold without including booking services. PFOF ¶ 92. Thus, booking services is a separate product from aggregation, and markets for booking services are properly classified and defined as one-sided.

2. Defendants' Argument That the Transaction Is Vertical Is Incorrect

Defendants also claim that the merger should be characterized as vertical, not horizontal. They are wrong, because the proposed acquisition is a merger "between companies performing similar functions in the production or sale of comparable goods or services." *Brown Shoe*, 370 U.S. at 334. Even if the merger did present some vertical issues, that would not preclude it from also presenting horizontal concerns. *See id.* at 323–46 (separately discussing vertical and

horizontal aspects of the merger). Sabre and Farelogix compete to provide booking services to airlines, so the merger is horizontal. *See United States v. Gen. Dynamics Corp.*, 258 F. Supp. 36, 56 (S.D.N.Y. 1966) ("The merger of competitors constitutes a horizontal merger, while the union of a firm with a customer or supplier is termed a vertical merger.").

Defendants attempt to confuse this simple truism of antitrust law by arguing that in the context of GDS bypass, Farelogix is merely an "input" to the airline, and it is the *airline* that competes with Sabre's booking services. But Sabre also could be described as an "input" into the airline's distribution strategy. *See* Tr. 973:3–22. This label does not alter the underlying competitive dynamic between Sabre and Farelogix—both firms have airline customers, and for those airlines, Sabre and Farelogix are substitutes for a particular function (booking services). Nor does Defendants' argument square with the many documents and testimony describing bypass as a competitive threat to the Sabre GDS. PFOF §§ V.B.1, V.B.3. At best, this is irrelevant semantics—even if the airline were viewed as Sabre's competitor, the conclusion would not change. It is Farelogix that has enabled that competition, and the elimination of the competitive alternative Farelogix provides airlines is an appropriate focus of Section 7 analysis.

Moreover, Sabre and Farelogix are horizontal competitors even if an airline ultimately choses to distribute using GDS pass-through. Defendants contend that Farelogix does not compete with Sabre when providing GDS pass-through services, but rather provides a complementary service to Sabre's aggregation and other GDS services. But this ignores the competition that occurs between Sabre and Farelogix when the airline selects GDS pass-through over the traditional GDS model. The fact that airlines expect to pay lower booking fees to Sabre if they switch to using Farelogix for GDS pass-through demonstrates that Defendants' booking services compete. *See* PFOF § V.F.3. In addition, Sabre has begun offering its own standalone

product to compete directly with Farelogix to provide NDC-enabled booking services for GDS pass-through, and it already has competed head-to-head against Farelogix to provide such services. PFOF ¶ 194.

3. The Relevant Markets Properly Exclude Airline.com

The United States properly excluded airline.com and other direct distribution channels from the relevant markets because those channels are not close enough substitutes for airlines. Where a relevant market is defined around a particular distribution channel, courts exclude other distribution channels where, as here, the evidence shows that those channels are not close enough substitutes for customers to prevent a hypothetical monopolist from imposing a price increase. In *FTC v. Cardinal Health*, for example, the district court accepted the proposed market of prescription drugs sold through wholesale distribution, rejecting the defendants' argument that direct distribution and mail order should be included. 12 F. Supp. 2d 34, 45–46 (D.D.C. 1998); *see also Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997) (accepting FTC's proposed market of "the sale of consumable office supplies through office superstores," which excluded mail order, contract stationers, and other channels) (citation omitted).

Airlines certainly rely extensively on distribution through their own websites, but the fact that airlines sell many tickets through airline.com does not mean that airlines view their websites as particularly close competitors to the OTA or TTA channels or that airline.com should be included within the relevant markets. The evidence strongly supports TTAs being a distinct distribution channel from airline.com. PFOF § III.A.2.e. Professor Murphy contends that some business travelers book on airline.com, but he offers no evidence or analysis showing that an airline would be able to induce a sufficient number of business travelers to switch to airline.com to make rejecting a SSNIP imposed by a hypothetical monopolist of all distribution through TTAs profitable. He also offers no basis to determine which portion of direct distribution should

be allocated to the TTA booking services market. Notably, he did not assign any airline.com bookings to the TTA market as part of his critique of Professor Nevo's market share and concentration calculations. Tr. 1484:15–1485:10.

Defendants more strenuously argue that airline.com should be included within the OTA booking services market.[4] But apart from repeatedly invoking the mantra that airlines' own websites are "only a mouse click away," Professor Murphy again offered no analysis showing that sufficient travelers would substitute to airline.com for an airline to reject a SSNIP on all OTA booking services. To the contrary, airline witnesses testified to the importance of the OTA channel and their inability to replace enough of their OTA bookings with airline.com to make forgoing OTA distribution economically feasible. PFOF ¶¶ 105–08. Defendants also point to no actual evidence of an airline successfully shifting distribution away from OTAs in response to a price increase. In contrast, when American Airlines did not sell tickets on Expedia and Orbitz for several months in 2011, American was unable to replace the lost sales without incurring significant costs. PFOF ¶ 120.

Lastly, markets are not defined in a vacuum: "Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects." Guidelines § 4. Here, the evidence that Farelogix's competitive pressure provides U.S. airlines with bargaining leverage in negotiations with Sabre notwithstanding the existence of airline.com buttresses the conclusion that a hypothetical monopolist of OTA and TTA booking services could profitably increase prices and that airline.com should not be included in the

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[4] Even if the Court were to conclude that the United States should have included airline.com in the OTA booking services market, the United States would have proven a violation of Section 7 in the TTA booking services market. Harm in a single market is "a sufficient basis for enjoining the merger." *Anthem*, 855 F.3d at 368.

relevant markets. *See Penn State*, 838 F.3d at 345–46 (holding government met its burden of proving relevant market based on evidence "showing that [customers] would have no choice but to accept a price increase" from merged firm); *Staples*, 970 F. Supp. at 1075–77 (considering price effects evidence in analyzing relevant product market).

D. U.S. Point of Sale Is the Relevant Geographic Market

"The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market," including looking at practical indicia to identify geographic submarkets as distinct areas of competition. *Brown Shoe*, 370 U.S. at 336. Here, the evidence confirms that U.S. point of sale is a relevant geographic market. The United States defines U.S. point of sale as that term is used in the normal course of business by Sabre and airlines. The point of sale is the country where the travel agency is located (or in the case of OTAs, the location of the OTA's IP address). Tr. 836:16–22, 853:4–11, 897:5–13; PFOF ¶ 112. Sabre's contracts with airlines typically set different prices for bookings in the airline's home market and the rest of the world. Tr. 854:15–18; PFOF ¶ 114. For U.S. carriers, this means that the airlines pay different fees for bookings with a U.S. point of sale. Sabre identifies the point of sale for bookings made by the Sabre GDS as part of its daily operations for purposes of billing the airlines. *See* Tr. 836:16–22, 853:4–11; PFOF ¶ 114.

The delineation of geographic markets, like product markets, depends on demand substitution factors, such as customers' willingness and ability to substitute to products outside the candidate geographic market. Guidelines § 4.2. Airlines are the purchasers of booking services, so the focus for purposes of determining the geographic market is whether airlines can substitute bookings with a U.S. point of sale for bookings made outside the United States. It would be costly and impractical for airlines wanting to sell tickets to U.S. travelers to shift bookings away from travel agencies in the United States. PFOF ¶ 113. Airlines would not do so

in sufficient volumes to defeat a SSNIP by a hypothetical monopolist of booking services for airline tickets sold through OTAs in the United States or booking services for airline tickets sold through TTAs in the United States. PFOF ¶¶ 113, 116, 122, 126.

Defendants' two criticisms of the geographic market are both inapt. First, they contend that a geographic market defined around U.S. point of sale is too narrow given that Farelogix sells its product globally. But "[t]he proper question to be asked . . . is not where the parties to the merger do business." *Phila. Nat'l Bank*, 374 U.S. at 357; *see also Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *93 (adopting U.S. market despite defendant's "conten[tion] at trial that technology knows no borders and that the geographic market for [the product] should be worldwide"); Guidelines § 4.2.1 ("A single firm may operate in a number of different geographic markets, even for a single product."). Defendants fail to focus on the fact that *airlines*—the customers—cannot substitute to booking services outside the United States in response to a price increase on U.S. point of sale.[5]

Second, Defendants claim the United States made a "fundamental contradiction" by defining the geographic market around locations of the parties' "customers' customers" (i.e., travelers) instead of the locations of their customers (i.e., airlines). Tr. 1806:18–1807:6. This argument also misses the mark. The geographic market here is not defined based on the location of travelers or travel agencies, but based on the ability of the *airline* to substitute to buying

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[5] The United States has chosen to focus on the U.S. point-of-sale geographic market because strong evidence indicates that competitive effects are particularly likely in this market where Farelogix and Sabre are particularly strong competitors. Even if a larger global market could also be defined, that would not preclude the existence of a U.S. submarket. *See, e.g.*, *Brown Shoe*, 370 U.S. at 336 (explaining that geographic "submarkets" may be contained within larger markets); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 548–49 (1966) (holding that Wisconsin, a three-state area including Wisconsin, and the U.S. as a whole could all constitute relevant geographic markets).

booking services outside the United States in response to a price increase on booking services for sales within the United States. PFOF § III.B. This market definition properly focuses on demand substitution by the airlines. It is not unusual for the location of downstream customers (here, the travelers) to be relevant to geographic market definition. For example, courts frequently define geographic markets for hospital mergers based on where patients receive their care, even though the immediate customers of hospitals are insurance companies. *See Penn State*, 838 F.3d at 342 ("Patients are relevant to the analysis" but "[i]nsurers . . . are the ones who negotiate directly with the hospitals to determine both reimbursement rates and the hospitals that will be included in their networks."). Thus, there is no "contradiction" at all.

IV. THE PROPOSED MERGER IS LIKELY TO HARM COMPETITION IN BOTH RELEVANT MARKETS

A. The Proposed Acquisition Is Presumptively Unlawful in Both Relevant Markets Based on Market Concentration

The proposed transaction is presumptively anticompetitive because it would create a firm with an undue market share in two highly concentrated markets. *See Penn State*, 838 F.3d at 346–47. Such a merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Phila. Nat'l Bank*, 374 U.S. at 363. Courts, agencies, and economists commonly use the Herfindahl-Hirschman Index ("HHI") to assess whether an acquisition would result in harmful market concentration. *Penn State*, 838 F.3d at 346–47.

Professor Nevo calculated market shares and concentration levels using 2018 actual sales and using Sabre's projections for a standalone Farelogix, which Sabre used as part of its deal model for valuing Farelogix. *See* Tr. 916:15–917:17, 921:4–16; PFOF §§ IV.A–B. Sabre projected "robust" growth for both bypass and pass-through for a standalone Farelogix through 2020. *See* Tr. 537:7–540:15; PFOF ¶ 135. Mr. Boyle, the Sabre executive responsible for the

deal model, testified that Sabre's projections are "reasonable" and "realistic." *See* Tr. 565:24–566:10; PFOF ¶ 135. Mr. Menke affirmed that these projections reflected his view of Farelogix's value. *See* Tr. 717:17–718:1.

As Professor Nevo explained, given that *all parties*—including Sabre and Farelogix—anticipate that a standalone Farelogix will grow significantly in the near term, projected shares best reflect the competitive dynamic for purposes of evaluating the proposed merger. *See* Tr. 918:4–919:6, 922:8–16; PFOF ¶ 133-135; *see also* PFOF § V.F.1. Professor Nevo conservatively relied on Sabre's projections for Farelogix, rather than Farelogix's own, somewhat more optimistic, projections. *See* Tr. 918:4–919:20, 922:8–923:7; PFOF ¶ 135. This approach is consistent with the Supreme Court's admonition that a party's "probable future ability to compete" is what matters for Section 7 purposes. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 503 (1974); *see also Polypore*, 686 F.3d at 1216 n.9 (relying on the buyer's projection of seller's revenues to determine competitive effects where the seller currently did not have any sales in the market). Using projections is also consistent with the Guidelines, which explain that "[t]he Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data." Guidelines § 5.2.

Both the OTA and TTA booking services markets are highly concentrated today even before the proposed merger. In 2018, Sabre alone had a 48% share of the OTA booking services market and more than a 50% share of the TTA booking services market. PFOF § IV.A. "[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Gen. Dynamics*, 415 U.S. at 497 (citations omitted). Professor Nevo's analysis shows that the proposed merger is presumptively harmful in the OTA booking services market using

either 2018 market shares or Sabre's 2020 projections for a standalone Farelogix. *See* PFOF § IV.A. In the TTA booking services market, Farelogix's 2018 share is small, but Sabre is projecting a large increase in pass-through bookings for a standalone Farelogix, and most of these bookings will be made through TTAs. *See* Tr. 441:18–442:10; PX072 at -241; PFOF § V.F.3. Using Sabre's "reasonable" and "realistic" projections for 2020, the concentration levels for the TTA booking services market greatly exceed the thresholds above which the merger is presumed to harm competition.

The market concentration levels that would result from the proposed merger establish the United States' prima facie case. This evidence alone triggers a presumption of illegality and shifts the burden to Defendants to show that the market concentration evidence presents an "inaccurate account of the [merger's] probable effects on competition." *See Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (citation omitted).

Even these concentration figures understate the likely harm that would result from the proposed merger. Farelogix is expected to continue to grow going forward. PFOF § V.F.1. Further, Farelogix provides airlines with bargaining leverage in negotiations with Sabre, allowing airlines to obtain lower prices and other favorable terms. In return, however, airlines have agreed to contract terms that inhibited Farelogix's growth and use of its booking services. *See* PFOF ¶ 138. As discussed further in Section IV.B.2. *infra*, the merger would eliminate this important competitive constraint on Sabre that is not reflected in Farelogix's market share. Farelogix's market share also does not reflect its importance in driving innovation in the airline distribution industry. *See* Section IV.B.3 *infra*.

B. The Elimination of Direct Competition Between Sabre and Farelogix Is Likely to Lead to Higher Prices, Reduced Quality, and Less Innovation

In addition to this concentration evidence, the United States has produced independent evidence that, once Sabre has eliminated competition from Farelogix, it would have the incentive to raise prices, lower quality, and reduce innovation. *See Chi. Bridge*, 534 F.3d at 433 ("Even excluding the HHIs, the Government's other evidence independently suffices to establish a *prima facie* case . . . ."). A merger is especially likely to lessen competition where, as here, it "would result in the elimination of a particularly aggressive competitor in a highly concentrated market." *Staples*, 970 F. Supp. at 1083; *see also H&R Block*, 833 F. Supp. 2d at 80. "The Agencies consider whether a merger may lessen competition by eliminating a 'maverick' firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers." Guidelines § 2.1.5; *see generally* IV Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 927 (4th ed. 2019). Here, the acquisition of disruptive innovator Farelogix by entrenched incumbent Sabre is likely to cause at least three types of competitive harm, described further below.

1. The Proposed Acquisition Would Give the Merged Firm the Incentive and Ability to Raise Prices

The United States has shown that eliminating direct competition between Sabre and Farelogix is likely to harm competition in the booking services markets. Farelogix provides airlines what one senior Sabre executive called a "real alternative to the GDSs." PX367 at -277. Competition from Farelogix poses a competitive threat to Sabre in both GDS bypass and pass-through. *See* PFOF §§ V.F.2–3. This head-to-head competition is expected to intensify as industry adoption of NDC fuels Farelogix's growth. Sabre projects that Farelogix's bypass bookings will grow from [redacted] in 2018 to [redacted] in 2020 and that Farelogix's pass-through bookings will grow from [redacted] in 2018 to [redacted] in 2020. PX011 at 8; PX012 at 9; *see also* PFOF § V.F.1. Meanwhile, another form of direct competition between Sabre and

Farelogix for booking services is just beginning: as Sabre continues to develop its own NDC solutions, Farelogix increasingly will compete with Sabre to provide standalone, NDC-enabled booking services solutions to airlines. *See* PFOF § V.F.4.

Standard economic analysis teaches that the elimination of this growing head-to-head competition between Sabre and Farelogix will create an incentive to raise prices. Before the merger, if Sabre or Farelogix were to raise prices, they would lose some sales to the other firm. Following the merger, however, some of the sales that previously would be lost to the other merging party will no longer be lost, and a price increase may now be profitable. Tr. 928:9–930:3; *see also, e.g.*, *Anthem*, 855 F.3d at 356 ("the merger would immediately give rise to upward pricing pressure by eliminating a competitor").

The record supports the conclusion that the merged firm would have the incentive and ability to raise prices. First, focusing on Farelogix's products, the evidence shows that the merged firm will have an incentive to increase the fees for Farelogix's Open Connect to minimize taking sales from the more lucrative Sabre GDS. Tr. 929:19–931:19; PFOF § V.G. For example, Sabre quoted a price nearly times higher than current Farelogix pricing because Sabre was concerned that low Open Connect prices post-merger would cannibalize its GDS business. PFOF § V.G.3. This evidence is consistent with Sabre's economic incentive to raise prices for Farelogix products that would disintermediate or threaten Sabre's GDS. As Mr. Gilchrist gloated after the merger was announced, American's Farelogix "bill is going up big time." PX140 at 1; *see also* PFOF § V.G.3.

Second, the record also establishes that the merged firm would have the incentive and ability to raise prices for Sabre's GDS. Notably, some at Sabre saw the acquisition as an opportunity to "[m]itigate risk from potential GDS bypass," PX011 at 3, and " "

[REDACTED], PX008 at -480. And Farelogix also concluded that the acquisition would enable Sabre to increase its GDS fees. PFOF § V.G.3.

2. The Proposed Acquisition Would Give Sabre Greater Leverage in Negotiations with Airlines

Without an independent Farelogix, Sabre will have greater bargaining leverage to demand higher booking fees and less favorable contract terms from airlines. The Guidelines explain that "[a] merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations" and that "[t]his alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer . . . ." Guidelines § 6.2. Courts recognize that a reduction in competition in the form of increased bargaining leverage can violate Section 7. In *Penn State*, for example, the court discussed "extensive evidence showing that insurers would have no choice but to accept a price increase" from the merged firm, including that "the combined entity would have more bargaining leverage." 838 F.3d at 345; *see also Saint Alphonsus Med. Ctr.-Nampa Inc. v. Saint Luke's Health Sys., Ltd.*, 778 F.3d 775, 786–87 (9th Cir. 2015) (blocking a merger that would give the merging physician practices "increased bargaining power to raise prices").

Ever since Farelogix began offering airlines an alternative to distribution through the GDSs, airlines have used Farelogix as leverage in negotiations with Sabre. Professor Nevo explained that the intuition underlying the economics of bargaining is that a firm's negotiating position "depends on what [its] next best alternative is." Tr. 933:13–934:17. The negotiating dynamic between airlines and Sabre is consistent with the standard bargaining framework. The record shows that airlines have relied on the availability of Farelogix as an alternative to the GDSs to obtain more favorable contract terms in bargaining with Sabre. PFOF §§ V.B.3, V.C, V.D. American, for example, estimated that it has saved more than $100 million per year in

GDS fees as a result of its direct connect strategy. PX453 at -970; *see also* PFOF § V.G.2. Testimony and documentary evidence from the airlines strongly support the conclusion that the proposed merger would affect this bargaining dynamic, giving Sabre greater power to demand high prices. *See* PFOF § V.G.

Defendants ask the Court to disregard this evidence, claiming that even if Farelogix helped airlines obtain lower prices in the past, Farelogix is no longer a competitive constraint today. This claim is belied by the testimony and documents from airlines about Farelogix's continued importance in their negotiations with Sabre. *See* PFOF §§ V.D, V.E, V.G.2.

Defendants also argue that any effect that Farelogix might have on airlines' bargaining leverage is dwarfed by the impact of airline.com, but this claim misapprehends the focus of Section 7 analysis. The United States does not contend that airline.com is irrelevant to airlines' bargaining leverage, but rather that Farelogix has a significant, additional effect on bargaining. All else equal, airlines would prefer to move as many sales as possible to their own websites. The merger does nothing to change that dynamic. But if airlines could easily move more sales to airline.com, they already would be doing so. *See* PFOF §§ III.A.2, III.C.3. As Professor Nevo explained, his bargaining analysis did not leave out airline.com, but rather focused on what would *change* with the merger, i.e., the elimination of an independent Farelogix as a bargaining lever for airlines. Tr. 937:19–938:12. Evaluating the impact of that merger-specific outcome is the proper focus of Section 7 analysis. In *Penn State*, for instance, the merging hospitals argued that their transaction would not harm competition because insurance companies had other sources of bargaining leverage. The Third Circuit rejected this, noting "[t]he question here, however, is whether the merger will cause such a significant increase in the [merging parties'] bargaining leverage that they will be able to profitably impose a SSNIP and, in the face of

demand for the SSNIP, whether the payors will be forced to accept it. In other words, whatever leverage the payors will have after the merger, they have that leverage now." *Penn State*, 838 F.3d at 346.

3. The Merger Would Stifle Innovation by Eliminating a Disruptive Competitor that Has Spurred Sabre to Modernize its Products

The elimination of an independent Farelogix also would reduce competition to innovate. "That threat to innovation is anticompetitive in its own right." *Anthem*, 855 F.3d at 361. The Guidelines explain that "curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products." Guidelines § 6.4. Both of the concerns identified in the Guidelines are present here. Tr. 945:5–946:10; PFOF § V.H.3. As a maverick trying to break through the GDSs' stranglehold on the booking services markets, Farelogix has a strong incentive to innovate and disrupt the established business models to win new business from airlines. Tr. 946:11–947:10; PFOF § V.H.4. In contrast, Sabre has an incentive to maintain the status quo to protect its market share and to delay innovation that threatens its lucrative GDS business. Tr. 947:11–948:1; PFOF §§ V.H.4-5.

Farelogix's and Sabre's conduct has been consistent with these incentives. To win business from airlines, Farelogix has offered true alternatives to the booking services provided by GDSs, including NDC booking services that allow airlines to distribute richer content through travel agencies. Customers and competitors alike recognize Farelogix's importance as an innovator. *See* PFOF § V.H. Sabre, in contrast, opposed NDC as a threat to its business model until, finally, "under pressure from key airline carriers," PX241 at -318; PFOF § V.H.2, it began to develop its own NDC strategy. As Farelogix explained to the European Commission in 2018, Sabre and other GDSs continued to "undermine and delay NDC even if embracing it on the

surface." PX096 at -109; *see* PFOF § V.H.1. Indeed, Sabre's "[REDACTED]

[REDACTED]

[REDACTED]." PX005 at -044; PX241 at -322; PFOF § V.H.2.

Notwithstanding this evidence, Defendants deny that the merger will lessen innovation competition for two reasons. First, they contend that Farelogix's innovation is all behind it and that it would no longer play a disruptive role in the industry. While conceding that Farelogix was an innovator in the past, Defendants contend that after Farelogix donated its NDC schema to IATA, and IATA introduced version 17.2 of the NDC standard, Farelogix's days as a disruptive innovator were over. This argument is impossible to square with the fact that Sabre plans to spend $360 million to buy a small firm whose products and skills—if Defendants' argument were credited—easily could be replicated. *See also* PFOF § II.E.

Even assuming that version 17.2 is in fact what finally made NDC viable, this would make Farelogix *more* of a competitive threat to Sabre today, not less of one. Farelogix has actively promoted NDC, including donating the basic schema to IATA, not out of generosity, but because Farelogix is best poised to succeed if NDC is widely accepted. Farelogix is the leader in NDC, and is the only provider with the proven ability to deliver NDC solutions at scale. PFOF § VI.C.1. So it is no surprise that Sabre itself projected Farelogix would continue to grow.

Second, Defendants contend that competition from the other GDSs will prevent any lessening of innovation competition in the relevant markets. But this argument ignores the fact that the GDSs have a shared incentive to maintain their "cozy equilibrium" built around the legacy GDS model. Tr. 890:24–892:3, Tr. 948:2–950:11; PFOF ¶¶ 231–32. Until it agreed to sell itself to Sabre at "the right valuation," PX112 at -763, Farelogix recognized and complained about this fact for years, *see, e.g.*, PX090, PX092, PX102, PX104; PFOF § VI.B. Farelogix's

chief technology officer concluded that, "[a]s a result of their dominance in both PSSs and GDSs, Amadeus and Sabre have little incentive to innovate their legacy technology to meet changing airline requirements." PX306 at -613; PFOF ¶¶ 232, 249. The merger does nothing to change the GDSs' incentive to preserve their profitable legacy business. In short, the merger will lessen competition for innovation by eliminating a small, disruptive firm and strengthening an entrenched dominant firm wedded to the status quo.

C. The Merger Would Harm Competition Even if Sabre and Farelogix Competed in a Two-Sided Market

For the reasons discussed above, the Court should evaluate the proposed merger based on the effects of competition in the (one-sided) markets for OTA and TTA booking services. Nonetheless, even if the Court concludes that the relevant market is the two-sided GDS platform market suggested by Defendants, the evidence at trial shows that the merger would still harm competition in that market, taking into account both sides of the GDS platform.[6]

If the merger is permitted, the evidence shows that Sabre is likely to charge airlines higher booking fees. PFOF § V.G. Professor Nevo testified that the price increases that the merged firm is likely to impose on airlines will not be fully offset by increases in the incentives Sabre pays travel agencies. Tr. 940:23–941:6; PFOF § V.I. In other words, there likely will be an increase in net prices—booking fees less incentives. Professor Murphy's testimony was in accord: he testified that GDS net fees declined when GDS alternatives, including Farelogix, first arose. Tr. 1434:12–1436:25. That net fee decline can be expected to reverse course if Farelogix is eliminated as a competitor. Tr. 1041:8–25; PFOF § V.I. Also, Sabre's ordinary course of

[6] The Court is not limited to considering the markets that the Government alleged; if the Court finds harm in any relevant market based on the evidence presented, the Court may find a Section 7 violation. *See Cont'l Can Co.*, 378 U.S. at 457 (finding harm in market "not pressed upon the District Court"); *Energy Sols.*, 265 F. Supp. 3d at 436–37.

business documents show that reductions in booking fees due to the adoption of NDC will not be fully offset by reductions in travel agency incentives. PX245 at -288; PFOF ¶¶ 242–43. This deal jeopardizes that reduction in net fees by removing a competitive constraint on Sabre.

The record also establishes that airlines, travel agencies, and travelers would be harmed by the loss of innovation that would result from the merger. Airlines and travelers all benefit from innovation in distribution technology, including further advances in NDC. PFOF ¶¶ 59–60. While some travel agents have expressed a preference for obtaining NDC content through GDS pass-through (i.e., through the GDSs), other agencies like Priceline, Expedia, AmTrav, and TripActions are open to accessing content through GDS bypass. PFOF ¶¶ 183–86. Thanks to Farelogix, agencies have the option of receiving NDC content through GDS pass-through or GDS bypass, and this choice drives the GDSs to innovate to stay relevant. PFOF § V.H.

V. DEFENDANTS HAVE NOT PRESENTED SUFFICIENT EVIDENCE REGARDING ENTRY OR EXPANSION TO REBUT THE UNITED STATES' PRIMA FACIE CASE

Defendants bear the burden of proving that expansion of existing firms, entry by new firms, or customer self-supply will be "timely, likely and sufficient in its magnitude, character, and scope" to counteract the anticompetitive effects of the merger. *Energy Sols.*, 265 F. Supp. 3d at 443 (citation omitted). To meet this burden, Defendants must do more than simply identify other purported competitors; they must demonstrate that entry or expansion will "fill the competitive void" created by the acquisition. *Fed. Trade Comm'n v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000); *see also Fed. Trade Comm'n v. CCC Holdings*, 605 F. Supp. 2d 26, 59 (D.D.C. 2009). Defendants' burden is particularly steep where, as here, the government has shown that the market exhibits high barriers to entry. *See Energy Sols.*, 265 F. Supp. 3d at 443.

Defendants fail to carry this burden. First, the record at trial shows that Sabre and the

other GDSs' market position is protected by substantial entry barriers, and Farelogix alone has managed to achieve some commercial success in spite of those barriers. PFOF §§ VI.A–B. Second, in the face of this evidence, Defendants were required to do more than merely point to the existence of other alleged NDC API providers; they needed to show that one or a combination of these firms would surmount these barriers and expand sufficiently to be "on the same playing field" as the merged company. *H&R Block*, 833 F. Supp. 2d at 74 (citation omitted). Defendants failed to do this. Finally, the record likewise demonstrates that expansion of airline own-build solutions cannot fully prevent anticompetitive effects from this transaction. PFOF § VI.C.5.

A. Entry Barriers Make Replicating Farelogix's Success Difficult and Time-Consuming

There are several significant barriers to entry and expansion, including: the difficulty of building an NDC booking services solution; the need to establish a good reputation and track record serving major airlines; and the impact of GDS contract provisions that disincentivize airlines and travel agencies from shifting booking volumes from the GDSs to new entrants.

Technological obstacles can create barriers to entry and expansion. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007); *CCC Holdings*, 605 F. Supp. 2d at 50. Building a basic set of NDC APIs that can meet IATA standards may not be particularly difficult, but simply meeting those standards does not position a provider to be a meaningful GDS alternative for large, complex airlines that need the ability to process millions of transactions annually. *See* Tr. 230:7–15; Tr. 121:22–122:17; PFOF § VI.C.3. As a 2018 document shared between Farelogix's CEO and CFO explained, "NDC requires proven technology expertly integrated with the airline's systems and with functionality required for agency adoption." PX085 at -593; PFOF VI.A.1.

To replace the competitive significance of Farelogix, a firm would need to offer a product to match Farelogix's robust technological capabilities. Farelogix offers unique capabilities far beyond basic NDC API functionality that make the Open Connect product appealing to airlines. Tr. 1721:8–20; Tr. 246:13–248:10; PX025 at -951; PFOF § VI.C.1. Farelogix has "supplement[ed] gaps" in the basic NDC standard and "is the only company that does this at scale." Tr. 411:5–14; PFOF § VI.C.1.

A competitor also would need to offer proven technology capable of handling the large volumes and demanding operations of a global airline, which Farelogix is uniquely situated to do. As Mr. Garner of American explained, "Farelogix deals with that complexity by offering technology that is more nimble, more flexible, and they have partnered with us for a very long number of—very long number of years to gradually build that complexity into the Farelogix and NDC connection that we use today." Tr. 121:6–12; PFOF § VI.C.3.

Reputational barriers, including a lack of a track record of success, will also inhibit the expansion of fringe players and the entry of new firms. *See, e.g.*, *Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *242 (recognizing reputation as a barrier to expansion of fringe players in a software market); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1078 (D. Del. 1991) (finding lack of performance record with large, sophisticated customers constituted barrier to entry). [REDACTED] . Tr. 953:2–954:11; Tr. 313:20–314:11, 316:25–317:17; *see also* PFOF § VI.A.2. Among GDS alternatives, no firm matches Farelogix's reputation, as it is the acknowledged market leader in NDC. PX072 at -223; Tr. 731:14–732:15 (Sabre's CEO not aware of any other NDC provider with "any significant role" with airlines in North America);

see also PFOF § VI.C.1. [REDACTED]

[REDACTED]

[REDACTED]. Tr. 340:15–25; *see also* PFOF § VI.C.1.

Finally, GDS contracts with airlines and travel agencies also create substantial barriers to entry and expansion. *See United States v. Dentsply, Int'l, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005) (finding manufacturer's contractual relationships with dealers impeded entry). Indeed, for years, many of these contracts prevented entry outright by prohibiting airlines from connecting directly to travel agencies. Over time these provisions have evolved but they continue to disincentivize airlines and travel agencies from shifting booking volumes from the GDSs to alternative distribution channels offered by new entrants. Tr. 954:19–25; *see also* PFOF § VI.A.3. While "Farelogix's innovative technology and strategic flexibility has allowed it to survive targeted attempts by GDSs to put it out of business," the GDSs' "restrictive practices . . . have historically affected Farelogix's ability to sell, implement, and scale its overall business model." Tr. 392:22–393:19; PX102 at -964. To replace Farelogix and attain scale, another firm would have to replicate Farelogix's hard work fighting through these barriers.

B. Existing Alternative Booking Services Providers Will Not Expand to Constrain Sabre

At trial, Defendants pointed to a number of firms they assert could be a sufficient replacement for Farelogix. But they did not show that there is a single company, or combination of companies, that is likely to fully replace Farelogix as a credible alternative to the GDSs. PFOF § VI.C.3. To the contrary, knowledgeable executives of American, United, and Delta each testified that there is no booking services provider that offers comparable NDC capabilities to Farelogix. PFOF § VI.C.1–3. As it contemplated the Farelogix acquisition, Sabre likewise recognized "there is not a better solution [in] the marketplace" for Farelogix's customers. Tr.

542:7–543:3; PX436 at -875; *see also* PFOF § VI.C.1.

The law is clear that simply identifying other firms that participate in the market is insufficient to rebut the government's prima facie case. In *H&R Block*, the defendants identified 18 other firms competing in the relevant market. 833 F. Supp. 2d at 73–74. The court concluded that the defendants had failed to show that any of those firms were likely to expand sufficiently to be "on the same playing field" as the merged firm. *Id.* at 73–76. "[T]he mere fact that new entrants and fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition." *In re Chi. Bridge & Iron Co*., 138 F.T.C. 1024, 1071 (2005); *see also CCC Holdings*, 605 F. Supp. 2d at 47–49.

Defendants failed to adduce any evidence that other NDC API providers are capable of expanding to replace Farelogix's competitive force in the market. *Cf. Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *148 ("If [putative rival] was more than a minor US competitor, the Court assumes that more evidence would have been provided by [defendant] about it."). Tellingly, Defendants declined to offer testimony from all but one of these purported competitors. The one witness that Defendants presented testified unequivocally that his company, ATPCO, does not compete directly with either Sabre or Farelogix. Tr. 1691:12–24; *see also* PFOF § VI.C.4. Defendants also did not present the testimony of any airlines that use any of these other firms.

Nor did Defendants substantiate the alleged threat posed by these competitors with ordinary course documents, such as documents expressing concern about growing competition from these other putative rivals. In fact, as part of the due diligence process with a potential buyer in June 2018 (after Mr. Davidson alleges the competitive landscape shifted), Farelogix disclosed *only* Sabre and Amadeus as competitors in "Order Delivery" (i.e., booking services), and *not any* of the other providers that Defense counsel highlighted at trial. PX072 at -219.

Defendants also did not show any evidence that they had lowered their prices to avoid losing business to these rivals. *See United Tote*, 768 F. Supp. at 1082 (citing absence of evidence that merging firms lowered prices to respond to a new rival to conclude the rival likely would not prevent anticompetitive harm from the merger).

Instead of real-world evidence, Defendants relied only on rhetoric and trial graphics. Defendants' primary support for the contention that other rivals could expand was an incomplete and misleading trial demonstrative depicting Farelogix's supposed recent wins and losses in RFPs for NDC APIs. *See* Davidson Demonstrative Ex. 1; PFOF ¶ 282. Even on its face, the demonstrative shows that [REDACTED]. Tr. 648:22–25; PFOF ¶ 282. But even this fact dramatically understates how far ahead Farelogix is. Farelogix's wins include many of the largest airlines in the world, yet the losses on the demonstrative include tiny airlines like [REDACTED] and [REDACTED], which do not serve the United States and likely have vastly different distribution needs and strategies than large airlines that do. A competitor that is not able to win the business of large airlines poses little competitive threat to Sabre's revenues. Several other details on the demonstrative are misleading. *See* PFOF ¶ 282. Not reflected on the demonstrative at all are contract renewals with major carriers like [REDACTED] it also does not show that Farelogix is close to winning the business of [REDACTED] Tr. 649:8–10, 655:19–656:2; PFOF § VI.C.3. In short, the only facts that Defendants offered on entry actually support the conclusion that Farelogix is in a class by itself.

Defendants also did not present any evidence that any of these alleged competitors have succeeded or could succeed in attaining meaningful scale. *See Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *248 ("While a few companies have entered the market recently, their entry is of such a minimal scale that it is not close today, and is unlikely to be close in the next two years, to

replacing [the acquired firm].”). Defendants never contested that Professor Nevo’s market share calculations showed that *none* of these putative competitors had any bookings in the United States in 2018. Although Defendants’ executives testified that they were aware of a few airlines who had signed contracts with some of these providers, there is no evidence in the record of what those airlines’ plans are, including whether they expect to use these providers to facilitate bookings in the indirect channel.

C. Airline Self-Build Will Not Constrain Sabre

Defendants also argue that airline self-build will constrain Sabre if the merger is allowed to proceed, but here too, they declined to offer the testimony of any airline that is using a self-built solution for indirect distribution. It is not sufficient for Defendants to show that some airlines have built their own technology to connect directly with travel agencies. *See Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *148–149, 260 (finding a merger of two software providers illegal even though companies that use their own in-house solutions represented the second-largest market share). Defendants have offered no evidence that airline self-build solutions have actually constrained pricing for booking services or would do so in the future.

Moreover, self-build is not a preferred—or in some cases, even possible—option for many airlines, as executives of American, United, and [REDACTED] testified at trial. PFOF § VI.C.5; *cf. Bazaarvoice*, at 2014 U.S. Dist. LEXIS 3284, at *150 (recognizing that “developing an in-house [] platform was generally not a good use of a potential customer’s limited internal technical resources.”).

Most important, Defendants failed to rebut, or even respond to, the evidence at trial that an airline’s own solution would not provide the airline with the same leverage as Farelogix in their GDS negotiations. By providing the connections for many airlines, Farelogix enjoys greater scale advantages than an airline’s in-house solution could offer. As a result, travel

agencies are much more likely to invest in connecting to a Farelogix NDC API. PFOF § VI.C.5. Farelogix also has a greater ability to innovate with Open Connect than an airline would with its own booking services solution because the cost of investments in technology can be spread out over a larger installed base of customers. Tr. 1067:24–1068:12; Tr. 343:18–344:1. Most telling of all, even Delta Air Lines, which Defendants pointed to as a prime example of an airline pursuing an internal solution, testified that it is still actively considering using Farelogix's Open Connect. Tr. 1720:8–1722:13. In other words, even *after* spending time and money on a self-built solution, Delta is considering paying more money for Farelogix's superior product, and Delta believes that Farelogix's presence in the market continues to give Delta greater protection in negotiation with the GDSs. PFOF § V.F.2, n.2.

VI. DEFENDANTS' CLAIMED EFFICIENCIES DO NOT OUTWEIGH THE MERGER'S LIKELY ANTICOMPETITIVE EFFECTS

At closing, Defense counsel explicitly disclaimed any efficiencies defense, Tr. 1900:2–22, and then proceeded to repeat an argument that sounded a lot like an efficiencies defense, *e.g.*, Tr. 1898:16 (claiming merger will allow Sabre to build a "better mousetrap"). *Cf. Heinz*, 246 F.3d at 721–22 (analyzing as an efficiencies defense a claim that a merger of two baby food manufacturers would lead to better recipes); Guidelines § 10 (efficiencies defense includes claims that a merger would form "a more effective competitor" or enable development of "new or improved products"). If Defendants were trying to make an efficiencies defense, they would have the burden of showing that anticompetitive effects of the merger would be offset by "extraordinary efficiencies" resulting from the merger. *Penn State*, 838 F.3d at 347. Perhaps recognizing that they could not clear this high bar, Defendants claimed they were merely "arguing competitive effects." Tr. 1900:7–8. This verbal gymnastics has no support in the law.

Efficiencies must be merger-specific, verifiable, and "must not arise from anticompetitive reductions in output or service." *Penn State*, 838 F.3d at 348–49. Here, Defendants failed to produce any specific, verifiable evidence of efficiencies from this transaction. And any benefits Sabre has claimed from the merger could be achieved without the merger; Sabre has the resources and personnel to pursue NDC technology without acquiring Farelogix. PFOF § VII.C.1–2. Likewise, Farelogix does not need Sabre to improve its scale and stability. PFOF § VII.C.3. Farelogix's CEO also testified that Farelogix turned down another offer that would have accomplished those same benefits. Tr. 469:24–470:3; PX110 at -083. This paltry showing cannot offset the likely harm to competition from the merger.

VII. DEFENDANTS' PROMISES AND REPRESENTATIONS TO AIRLINES WOULD NOT MITIGATE THE COMPETITIVE HARM OF THE MERGER

While under investigation for its proposed acquisition of Farelogix, Sabre wrote letters promising to extend airlines' current contracts for three years. *E.g.*, DX225. These letters, "undertaken with the aim of persuading a court or the government" of the merger's legality, do not protect the competition that would be lost due to the merger. *See Aetna*, 240 F. Supp. 3d at 80; *id.* at 60 (requiring remedy to be "sufficiently non-speculative for the court to evaluate its effects on future competition"). No airlines have accepted this offer and signed a contract. Tr. 730:11–25. With or without the letters, the primary catalyst for innovation in the industry, Farelogix, will have been swallowed up by a firm whose incentives are to preserve the status quo. *See H&R Block*, 833 F. Supp. 2d at 82 (finding that, despite defendants' pledge not to raise prices, the merged firm "could accomplish what amounts to a price increase through other means," such as by reducing product quality).

Sabre's assurances cannot replace the bargaining leverage that airlines would lose in their negotiations with Sabre, either now or after the proposed contract extensions. *See* Tr. 923:16–

23; PFOF § V.B.3. At closing, counsel explained that the letter offered "an extension of three years on the same or better terms, better terms not defined . . . and welcome to the negotiation." Tr. 1897:4–9. With Farelogix under Sabre's control, Sabre would be welcoming airlines to a negotiation where "the GDS would have all the leverage." Tr. 182:1–4; PFOF § V.D.

More broadly, Sabre has promised a culture shift, claiming that with Mr. Menke came a "new Sabre" that embraced innovation and competition. Regardless of whether Mr. Menke has ushered in a friendlier era at Sabre, the antitrust laws protect competition, not benevolent CEOs. After all, CEOs do not last forever, but mergers do. *See* Tr. 699:13–18. While there, Mr. Menke has a fiduciary duty to Sabre's shareholders. Tr. 664:23–25. Sabre told those shareholders that "direct connect initiatives" are a "Risk Factor[]" to Sabre's business. Tr. 666:15–667:21; *see also Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86, 95 (E.D.N.Y.) (discounting CEO testimony inconsistent with profit maximization), *aff'd*, 665 F.2d 10 (2d Cir. 1981).

The Court need not decide whether to trust Mr. Menke's promises; the law requires that Defendants demonstrate that their proposed remedy "would counteract the anticompetitive effects of the merger," and Defendants have not done so. *Aetna*, 240 F. Supp. 3d at 73; *cf. United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1235, 1239 (C.D. Cal. 1973) ("Subjective evidence," including "testimony by corporate officers," "while relevant and entitled to consideration, cannot be determinative in evaluating the legality of the acquisition under § 7."). Unenforceable promises of good behavior—especially promises that run counter to economic incentives—cannot replace the competition lost by Sabre's acquisition of Farelogix.

VIII. CONCLUSION

The Court should find that the effect of the proposed transaction may be to substantially lessen competition in the OTA and TTA booking services markets. The Court therefore should enjoin Sabre from acquiring Farelogix.

Respectfully submitted,

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