IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

DEFENDANTS' POST-TRIAL ANSWERING BRIEF

REDACTED PUBLIC VERSION

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Plaintiff's Post-Trial Brief ("PPTB") confirms that the Court should deny DOJ's request for a permanent injunction and enter judgment for Defendants. As explained in Defendants' Post-Trial Brief ("DPTB"), DOJ cannot overcome its failure to define and prove any proper relevant product or geographic market; DOJ mistakenly focuses on the past (GDS bypass), while the record unambiguously supports a future of GDS integration; DOJ ignores the many present competitive alternatives to FLX OC active in the market today, clinging to the argument that FLX OC is somehow unique; and DOJ does not consider the many procompetitive benefits of the deal. Finally, even at this late date, DOJ continues to misuse cherry-picked statements in Defendants' documents, despite the fact that DOJ's mischaracterizations are obvious when the documents are placed in context and are viewed against the trial record. Defendants respectfully submit that DOJ has utterly failed to prove its case.

I. DOJ's Failure to Define a Cognizable Relevant Market Is Dispositive

DOJ cannot avoid the Supreme Court's holding that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) ("*AmEx*"). Nor can DOJ avoid the Second Circuit's application of that precedent in *U.S. Airways, Inc. v. Sabre Holdings Corp.*, which held that Sabre's GDS "is a transaction platform" and that "the relevant market for such a platform must as a matter of law include both sides." 938 F.3d 43, 58 (2d Cir. 2019).[1]

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[1] DOJ asserts that there is "some question" as to whether Sabre's GDS "even meet[s] the criteria for [a] 'two-sided transaction platform[].'" (PPTB at 14 n.3.) But the Second Circuit squarely resolved this issue and found that Sabre's GDS is a two-sided platform. Nor can DOJ avoid *AmEx* and *U.S. Airways* because those cases were not merger challenges. (*Id.* at 12 n.2, 13-14.) The same principles apply to market definition under both the Sherman Act and the Clayton Act. (DPTB at 6 n.5, 11-12.)

DOJ now attempts to circumvent this precedent with its late-breaking claim as to the existence of supposed "submarkets." (PPTB at 12 (urging the Court to "find[] booking services submarkets smaller than the broader GDS bundle"); *see also id.* at 7-8.) But DOJ's latest efforts to once again reinvent its relevant markets fail because "submarkets" must be "economically significant" to be cognizable, as DOJ concedes. (*Id.* at 8.) DOJ's mere invocation of the label "submarket" does not obviate its obligation to show that the markets are commercially meaningful and concordant with marketplace realities. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) ("[D]efining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes."). DOJ's persistence in defining its "booking services" markets around slices of functionality that are not sold on a standalone basis and that have no independent economic significance is fatal to its market definition.[2] As Defendants have explained, courts routinely reject such attempts to disaggregate components of one product to create a separate "product."[3] (DPTB at 12-13.)

Further, DOJ's Post-Trial Brief relies on case law that undermines its argument that Sabre's GDS and FLX OC can be sliced into components to create the impression of horizontal competition in "booking services." DOJ cites *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965 (N.D. Cal. 1979), where the court found that suppliers of complete

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[2] The only examples DOJ cites of supposed separate booking services are NDC API offers. (PPTB at 15.) That is Defendants' point: NDC APIs, unlike booking services, are a product in the real world. But Sabre's share of NDC API sales is zero. (DFOF ¶ 164.)

[3] The Court should reject DOJ's misguided suggestion that it should find new, unpled markets. (PPTB at 30 n.6; *see also* DPTB at 18-19.) Neither case that DOJ cites supports its position. Defendants already distinguished *Energy Solutions* (DPTB at 19), and *Continental Can* is similarly inapposite; like the *Energy Solutions* court, there the Supreme Court combined two alleged product markets into a single product market. *United States v. Cont'l Can Co.*, 378 U.S. 441, 457 (1964). The Supreme Court did not craft an entirely new market as DOJ suggests this Court should.

computer systems competed with suppliers of parts of those systems. *Id.* at 977. Critically, unlike the services comprising Sabre's GDS here, in *IBM*, there was demand for the individual parts comprising the computer systems. While IBM sold the complete computer systems, it "did not charge the user one price for an entire computer system, [but] rather . . . priced each component of the[] systems individually." *Id.* at 978. This meant that parts suppliers "could offer the user a better price on that part and the user was still free to acquire the rest of the system from IBM." *Id.* Thus, the individual parts had economic significance, which is not the case for the "booking services" that DOJ claims are available through Sabre's GDS. DOJ's other case law is similarly inapposite.[4]

Moreover, DOJ's Post-Trial Brief confirms its "heads-I-win, tails-you-lose" approach to market definition. *First*, DOJ takes inconsistent positions on whether downstream factors are relevant, depending on whether it is arguing product market or geographic market. DOJ's *geographic* market focuses not on FLX OC's actual customers in the upstream market (i.e., the airlines), but rather those customers' customers in the downstream market (i.e., the travel agencies or travelers). (PPTB at 19-20.) This contortion is designed to avoid the reality that FLX OC competes globally to sell its NDC API services to airlines, and airlines have numerous

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[4] *See, e.g.*, *United States v. Philipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360 (1970) (suggesting markets could be defined around overlapping services between a commercial bank and a financial institution where services referenced by court were actually sold to consumers, e.g., consumer loans, real estate loans and mortgages); *Cont'l Can*, 378 U.S. at 457 (finding that glass and metal containers, sold as standalone products, were part of the same product market because they competed head-to-head in certain use cases); *United States v. Microsoft*, 253 F.3d 34, 86-92 (D.C. Cir. 2001) (acknowledging that district court found that Windows operating system and Internet Explorer browser were separate products in considering tying claim); *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 438-39 (D. Del. 2017) (finding that disposal of high- and low-level radioactive waste existed in same relevant product market where merging companies offered such disposal services on standalone basis).

global alternatives to which they can turn post-merger.[5] (DPTB at 20-21.) Yet, at the same time, DOJ's *product* market focuses solely on the response of airline customers in the upstream bookings "market," not on whether the travel agents or travelers (i.e., the customers' customers) would switch distribution channels. (PPTB at 17.) *Second*, DOJ also excludes from its market definition major constraints on Sabre's GDS that undermine its case. For example, even though "booking services," as DOJ defines them, are being used on airline websites, DOJ persists in excluding the very same "booking services"—including FLX OC's—used in airline.com from its relevant product markets. (Defs.' Proposed Findings of Fact ("DFOF") ¶ 42.)[6] In fact, while DOJ asserts that Delta is still "considering" using FLX OC for "booking services" (PPTB at 37-38), Delta is considering using FLX OC to "clean up" internal processes on its *website and mobile app*, neither of which is included in DOJ's alleged markets. (DFOF ¶ 42.) DOJ simply cannot have it both ways.

II. DOJ Ignores the Uncontroverted Record That the Likely Future Is GDS Integration

DOJ's persistent focus on GDS *bypass* ignores that merger analysis "focus[es] on the future" and requires the Court to "[p]redict[] future competitive conditions" in the industry.

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[5] DOJ argues that there is no contradiction in its mixing of an upstream focus with a downstream focus because "courts frequently define geographic markets for hospital mergers based on where patients receive care." (PPTB at 21.) This, of course, ignores the unique dynamics in the health care context, where, as DOJ's cited case notes, there is "a two-stage model of competition" in which hospitals compete to be included in an insurance plan's network and then compete to attract individual plan members. *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3d Cir. 2016). There are no such dynamics here, nor has DOJ alleged any.

[6] DOJ argues that airline.com should not be included in its OTA market, citing American's removal from Expedia in 2011. (PPTB at 18.) But Corey Garner, DOJ's own witness from American, testified that American found OTA revenues "replaceable," and materials from other airlines confirm that sentiment. (DFOF ¶ 116.)

United States v. Baker Hughes, 908 F.2d 981, 988, 991 (D.C. Cir. 1990). In doing so, the Court should recognize the resounding testimony from industry participants that GDS *integration* is the future of the industry.[7] The evidence shows that the agency side of the platform uniformly believes that direct connections introduce excessive costs and inefficiency, and that the agents do not want to do business that way. (DFOF ¶¶ 184-190.) The agency testimony proves that the industry is moving toward integrating NDC content into the GDS.[8] Even the airlines recognize that agencies prefer consuming NDC content through the GDS. (DPTB at 29-30.) Likewise, Sabre executives testified that they do not view direct connections as a significant competitive threat because the industry does not want them. (Tr. 737:18-738:7 (Menke); Tr. 545:17-546:2 (Boyle).) And Farelogix has clearly shifted its focus to GDS integration. (DPTB at 30; DFOF ¶¶ 73-76.) Ultimately, the reality is that stagnating volumes render direct connections an insignificant threat in negotiations. (Tr. 1572:6-25 (Murphy).)

In an effort to sidestep these market realities, DOJ grasps at global projections of FLX OC's future sales contained in Sabre's deal valuation model, while ignoring key contextualizing information. *First*, although the deal model predicted that direct connection tickets would grow

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[7] The Court need not decide whether GDS integration will completely displace GDS bypass because bypass will continue to be available to airlines that would like to pursue that strategy: Sabre has committed to continue to offer FLX OC for GDS bypass, and there are many alternative NDC API providers. (DFOF ¶ 199.) In any event, airlines' use of GDS bypass is *de minimis* (DFOF ¶¶ 75-76, 185), and it is—and will remain—an insignificant constraint on each GDS relative to the other GDSs or airline.com. (DFOF ¶¶ 24-31, 61-62, 66, 75-77, 193-198.)

[8] One reason GDS integration is growing is that agencies prefer to consume NDC content through the GDS to remedy the dilution of price transparency that NDC and direct connections create. (Tr. 1268:5-1269:2 (Stratford).) In contrast, content fragmentation through direct connections decreases price transparency and makes comparison shopping more difficult. (PX 214 at DL_FLXSUB_0000018; Tr. 109:19-24 (Garner).)

globally from 2018 to 2020, in fact, these tickets comprise a small percentage of the total tickets sold globally (*cf.* Murphy Demonstrative at 7), proof that DOJ's claims of FLX OC as a disruptor are unfounded.[9] *Second*, the GDS integration ticket volumes and revenues [redacted] than direct connections. (PX-15 at 59.) Contrary to DOJ's assertions (PPTB at 3), these projections are entirely consistent with Tim Reiz's testimony that direct connections are stagnating and growth is shifting to GDS integration. (DFOF ¶ 76.) *Third*, the deal model also undermines DOJ's fantastical "killer acquisition" theory, as Sabre's synergy model for a combined company had the same projected unit sales and prices for both direct connections and GDS integration as the Farelogix standalone case. (PX-15 at 59.) Most importantly, as GDS integration grows, FLX OC—as a complementary input—will actually *increase* the value of the GDS rather than threaten it. (DPTB at 30.)

III. Many Competitive Alternatives to FLX OC Exist Today

Defendants proved that many alternatives to FLX OC exist today in both the United States and the rest of the world. (DPTB at 27-29; DFOF ¶¶ 135-138.) Indeed, the record reflects the following active competitors in the United States alone: Amadeus (Spirit Airlines), Datalex (JetBlue), Delta (self-build) and ATPCO (Southwest). (DFOF § V.A.) Other competitors are also serving other airlines. (*Id.*) While DOJ argues that there are technological, reputational and scaling barriers, the bid data undercuts those threadbare assertions because actual alternatives have steadily been adding customers at Farelogix's expense, and the evidence indicates that they

[9] In fact, using Dr. Nevo's estimates, the 2020 bypass numbers for FLX OC only amount to [redacted] U.S. tickets, which is approximately [redacted] of total U.S. volume using Dr. Murphy's calculations. (*See* Nevo Expert Report App'x 7; Nevo Demonstrative at 32; Murphy Rebuttal Expert Report ¶¶ 56-61; Murphy Demonstrative at 7.)

will continue to do so. (DFOF ¶¶ 46-47.)[10] Moreover, at least Delta, British Air, KLM and Air France have self-built (*id.*), [redacted] With its myopic focus on FLX OC's 2018 market shares (and inflating only Farelogix's sales for 2020 based on "projections"), DOJ completely ignores the existing alternatives that have won against Farelogix, not to mention their continued expansion. (DPTB at 22-24; DFOF ¶¶ 138-145.)

Critically, the present competition and possibility for future entry undermine any theory of harm premised on the fear that airlines might lose bargaining leverage post-merger. DOJ's own expert explained that the focus of the bargaining analysis is on what alternatives the airlines will have in the *next* negotiation. (Tr. 1018:23-1019:10 (Nevo).) Here, the vast majority of airlines will be unaffected because Farelogix only has 15 FLX OC customers total, a mere two of which are based in the United States. (DFOF ¶ 124.) And in any event, airlines do now and will in the future be able to turn to other NDC API providers for leverage in GDS negotiations, and, should the airlines wish, to threaten to build their own direct connections. (DPTB at 36-37.)[11]

IV. The Transaction's Benefits Further Undermine DOJ's Case

Contrary to DOJ's erroneous characterization (*cf.* PPTB at 38), and as confirmed by two recent merger decisions, consideration of the transaction's benefits is not an efficiencies "defense," but rather is integral to analyzing the transaction's competitive effects. (Tr. 1900:2-

[10] DOJ claims that there were "no contemporaneous documents corroborating" that Farelogix was concerned about other competitors. (PPTB at 4.) This is wrong. For example, in June 2018, Farelogix wrote that "[t]here are really no barriers now as all GDSs have openly adopted NDC." (PX 72 at 100; Tr. 465:4-11 (Davidson); *see also* DX 210.)

[11] Moreover, airlines will continue to have more significant negotiating levers like rival GDSs and airline.com. (DPTB § I.A.3.)

22; DPTB at 32-35); *see also New York v. Deutsche Telekom AG*, No. 19-cv-5434, 2020 WL 635499, at *19 (S.D.N.Y. Feb. 11, 2020) (explaining "trend" among courts recognizing that procompetitive benefits "may rebut the presumption that a merger's effects will be anticompetitive, even if such evidence could not be used as a defense to an actually anticompetitive merger"); *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 191, 194 (D.D.C. 2018) (reflecting analysis of whether DOJ had "met its burden of proof of establishing . . . that the merger . . . [was] likely to substantially lessen competition" notwithstanding the merger's demonstrated "procompetitive effects"). The Court should therefore credit the significant procompetitive benefits that will result from the combination of Sabre's vast commercial network and Farelogix's technical know-how. (DPTB at 32-34.) This transaction will spur competition between Sabre and Amadeus by accelerating GDS integration, and it will drive innovation more broadly across the travel industry by combining complementary portfolios.

V. DOJ Continues to Misconstrue and Misuse Documents

DOJ's continues to mischaracterize Defendants' "ordinary course" documents. (*See* PPTB at 25; *see also* Pl.'s Proposed Findings of Fact ("PFOF") V.G.) DOJ intentionally omits the actual context of these documents and apparently made a strategic decision to avoid eliciting testimony concerning their real meaning. (*See* DPTB at 38-39 (citing rejection of similar evidence in *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018)).)

DOJ boldly asserts that "Defendants' executives expect[ed] this merger to lessen competition," but then relies on mere snippets of only a handful of documents from individuals with no responsibility for managing Sabre's GDS business, and blatantly mischaracterizes the documents' content. (PPTB at 1.) For example, as purported "proof" that Sabre intends to increase GDS fees, DOJ points to statements made during the deal negotiation by Mike Marocco—Farelogix's Board member from Sandler Capital—in seeking to raise the purchase

price Sabre would pay for Farelogix. (PFOF ¶ 214.) But tellingly, DOJ omits the full context surrounding those statements, including Chris Boyle's recounting that he told Mr. Marocco that suggestions of increased GDS fees as a deal rationale were "not constructive." (PX-6; PX-117; Tr. 550:14-551:18, 577:20-578:4 (Boyle).)[12] In addition, DOJ disregards the undisputed fact that the Sabre Board approved the deal on the assumption [redacted]. (DFOF ¶ 91.) Similarly, DOJ claims Theo Kruijssen believed the deal would lead to reduced "pric[ing] pressure" (PPTB at 1), but Mr. Kruijssen testified that this language was *not* related to FLX OC, but rather to Farelogix's Merchandising and Shopping & Availability products. (DFOF ¶ 217.)

With respect to Sabre's motive, DOJ points to a statement by Vinit Doshi, a technologist focused on creating product management solutions, about "arresting the decline of Sabre's booking fees." (*See* Tr. 489:3-5 (Boyle); PPTB at 1; PFOF ¶ 214.) But as Mr. Boyle testified, the document only reflected Mr. Doshi's opinion; Mr. Boyle contemporaneously told Mr. Doshi that the opinion was mistaken; and the opinion was never part of the deal rationale or the deal model. (Tr. 489:23-491:18; 576:19-578:4 (Boyle), PX-7; PX-117.) Of course, if DOJ truly believed that Mr. Doshi's views were reflective of Sabre's intent, DOJ could have called him to testify or played his deposition at trial, yet it declined to do so. DOJ also continues to mischaracterize text messages sent by Greg Gilchrest. (PPTB at 1.) But Mr. Gilchrest testified that the text messages merely reflected what he believed an American Airlines employee's reaction would be to the deal, and in no way represented Sabre's plans. (DFOF ¶ 214.)

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[12] Sabre recognized that as a private equity owner, Mr. Marocco's singular aim in making these suggestions was to get the highest possible purchase price for Farelogix, a fact that Mr. Boyle also communicated contemporaneously to his superiors. (PX-7; Tr. 575:23-576:15 (Boyle).)

DOJ continues to distort other ordinary-course documents. For example, DOJ completely mischaracterizes the competitive dynamics surrounding the [redacted] opportunity.[13] (*Compare* PPTB at 25 and PFOF ¶ 215 *with* DFOF ¶ 228). DOJ fails to acknowledge that the opportunity involved [redacted] (Tr. 826:16-827:3 (Wilding).) [redacted] (DFOF ¶ 228.) And as it did at trial, DOJ incorrectly claims that Sabre was concerned about "over-enabling Farelogix" (PFOF ¶ 192), when the record is clear that Dave Shirk's concern, as the then-President of Airline Solutions, was [redacted] (*See* Tr. 1630:20-25 (Shirk); PX 308, at SABR-001489982 ("It is also critical that the AS work be GDS agnostic. . . . This would also put us in line with Farelogix.").)

DOJ relies on such out-of-context statements because it cannot overcome the overwhelming evidence that this transaction will accelerate NDC development, to the benefit of the travel industry. (DFOF ¶¶ 93-97.) The Court should recognize DOJ's diversionary tactics for what they are and reject them.

CONCLUSION

For all of the foregoing reasons, and those stated in Defendants' Post-Trial Brief, Defendants respectfully request that the Court deny DOJ's request for a permanent injunction and enter judgment for Defendants.

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[13] DOJ relies on this proposal even though it relates to a [redacted] yet another example of DOJ straying from [redacted] when it serves its case.

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