UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **UNITED CONTINENTAL HOLDINGS, INC., DELTA AIR LINES, INC.** **Defendants.**	**Case No.: 2:15-cv-07992-WHW** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNITED CONTINENTAL HOLDINGS, INC.'S MOTION TO DISMISS PLAINTIFF'S CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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Defendant United Continental Holdings, Inc. ("United") respectfully submits this memorandum of law in support of its motion to dismiss with prejudice Plaintiff's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION[1]

Plaintiff fails to state a claim under either Section 1 or Section 2 of the Sherman Act because the alleged anticompetitive harm articulated in the Complaint is based entirely on speculation about future events that have not occurred. The Sherman Act does not deal in speculation. It proscribes agreements and acts of monopolization that result in actual anticompetitive effects and that have actually caused demonstrable injury to competition. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) ("[A] complaint's allegation of a practice that may or may not injure competition is insufficient to state a claim to relief that is plausible on its face.") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 322 (3d Cir. 2007) ("Hypothetical anticompetitive conduct, speculative monopoly power, and remote injuries" are insufficient to state a Sherman Act section 2 monopolization claim).

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[1] Defendant Delta Air Lines, Inc. ("Delta") is concurrently filing a motion to dismiss. United supports and agrees with the arguments presented by Delta in its motion to dismiss.

Here, Plaintiff's Sherman Act Complaint predicts a world in which United's future use of certain take-off and landing "slots" at Newark Liberty International Airport ("Newark" or "EWR") that it seeks to acquire from Delta:

- "[L]ikely would . . . result in reduced service at Newark" (Compl. ¶ 43);
- "[W]ould . . . reduce the likelihood of entry or expansion by other airlines at Newark" (*Id*. ¶ 41);
- Would result in "passengers at Newark [having] higher fares and fewer choices" (*Id*. ¶ 4); and
- Would cause Delta to "cut back service" and/or "reschedule flights at less convenient times" (*Id*. ¶ 40).

Plaintiff concedes, however, that it does not actually know what will happen with regard to United's use of these slots, since they have not yet been acquired, and United has not yet been given an opportunity to use them to enhance its service and competitiveness at EWR. Plaintiff acknowledges that "the impact of a slot transaction on particular routes will differ depending upon how the slots acquired will be used, which can and does change over time." Compl. ¶ 32. Plaintiff likewise acknowledges that United's own plan is to use these slots "to provide service to a handful of new destinations and add frequencies to existing routes." *Id.* ¶ 24. Such use, of course, would be procompetitive.

By speculating about the anticompetitive harm that it believes <u>may</u> result from the slots transaction, Plaintiff relies on a standard of proof reserved for claims brought under the Clayton Act – a statute that deals with acquisitions that do not have current, actual anticompetitive effects, but that are likely to have some future adverse impact on competition. Under the Clayton Act, a plaintiff can predict non-speculative future injury and seek to enjoin an acquisition. Not so under the Sherman Act. Legislative history makes this clear:

> Section 7 of the Clayton Act was originally written to reach effects beyond those prohibited by the Sherman Act . . . . The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

S. Rep. No. 81-1775, 81 Cong., 2d Sess. 1950, *as reprinted in* 1950 U.S.C.C.A.N. 4293, 4296-97 (1950) (emphasis added). Plaintiff's attempt to predict harm as a way to prove its Sherman Act claims is insufficient as a matter of law.

Plaintiff's Sherman Act claims allege that United is a "monopolist" in a "relevant market" limited solely to EWR, both with regard to its usage of Federal Aviation Administration ("FAA")-regulated take-off and landing slots, and with regard to EWR air passenger service. These allegations are legally deficient, because they fail to adequately allege that EWR doesn't compete with at least the other major airports in the New York metropolitan area, LaGuardia Airport ("LGA") and John F. Kennedy International Airport ("JFK").

The Department of Justice ("DOJ") repeatedly has taken the position that cities and metropolitan areas, rather than specific airports, form the basis for determining "relevant markets" in the airline industry. And the courts have agreed.

See, *e.g.*, *Malaney v. UAL Corp.*, No. 10-cv-02858, 2010 WL 3790296, at *7 (N.D. Cal. Sept. 27, 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011) (cities, rather than particular airports, have "been endorsed as the most appropriate market for antitrust analysis by all academics and government agencies in the record, including the Department of Justice and the Government Accountability Office."); *Skyline Travel, Inc. v. Emirates*, No. 09-cv-8007, 2011 WL 1239783, at *3 (S.D.N.Y. Mar. 28, 2011) (dismissing antitrust claims under Rule 12(b)(6) based on legally deficient relevant market limited to JFK: "Plaintiffs fail to demonstrate why other airlines' flights from the New York metropolitan area" are not in the relevant market), *aff'd*, 476 F. App'x 480 (2d Cir. 2012). For these reasons, Plaintiff's Complaint should be dismissed.

BACKGROUND

A. The Slot Management System at EWR, LGA, and JFK

For an airline to serve EWR, it must possess the right to use "slots," which are operating authorizations issued to air carriers by the FAA to take off or land during a 30-minute window. Compl. ¶ 13. At EWR, the FAA has authorized 81 slots per hour during the slot-controlled hours of 6:00 A.M. to 10:59 P.M. *Id.* Significantly, this hourly usage level assumes ideal weather conditions and the absence of events adversely affecting operating conditions.

1. History of the EWR Slot Regime

The vast majority of U.S. airports are not slot-controlled. In fact, the current slot regime came about as a result of the FAA's and the Department of Transportation's ("DOT") long-running interest in addressing: (a) congestion in the New York City area airspace and (b) the resulting delays from such congestion. In 1968, the FAA first adopted the High Density Rule ("HDR"), which limited take-offs and landings at EWR, JFK, and LGA due to the FAA's concern that "congestion will again reach serious proportions unless additional restraints are placed on aircraft demand for the use of airport facilities." High Density Traffic Airports, 33 Fed. Reg. 17896, 17897 (Dec. 3, 1968).[2]

Due to continuing concerns about congestion in the New York metropolitan area airspace, the FAA issued a series of orders beginning in 2006 limiting operations at EWR, LGA, and JFK.[3] The orders established slot limitations, and imposed an 80% minimum slot usage requirement at all three airports. *See* EWR

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[2] The HDR was ultimately phased out in 2000 by the Wendell H. Ford Aviation and Investment Reform Act of the 21st Century ("AIR-21"), but AIR-21 directed the Secretary of Transportation to continue the "current examination of slot regulations and [to] ensure that the examination includes consideration of . . . competition in the air transportation system." 49 U.S.C. § 41714(e)(1)(B)(iii) (emphasis added).

[3] *See* Order Limiting Scheduled Operations at Newark Liberty International Airport, 73 Fed. Reg. 29550 (May 21, 2008) ("EWR Order"); Operating Limitations at New York LaGuardia Airport, 71 Fed. Reg. 77854 (Dec. 27, 2006) ("LGA Order"); Order Limiting Scheduled Operations at John F. Kennedy International Airport, 73 Fed. Reg. 3510 (Jan. 18, 2008) ("JFK Order").

Order at 29554; LGA Order at 77858; JFK Order at 3515.[4] In the preamble to the most recent (and currently effective) EWR Order, the FAA noted:

> The reasons for issuing the Order have not changed appreciably since it was implemented. Without the operational limitations imposed by this Order, the FAA expects severe congestion-related delays would occur at EWR and at other airports throughout the National Airspace System (NAS).

Operating Limitations at Newark Liberty International Airport; Notice of Extension to Order, 79 Fed. Reg. 16857, 16858 (Mar. 26, 2014) ("2014 EWR Order") (amending and extending the effectiveness of the original EWR Order). The current orders are set to expire on October 29, 2016, or upon the effective date of the Final Rule, whichever is earlier. *See, e.g.*, *id*. at 16857.

2. The Pending DOT/FAA Proposed Rulemaking

The DOT/FAA are in the process of finalizing a rulemaking that seeks to alter drastically the regulatory landscape with regard to slot usage at the New York metropolitan airports. *See* Notice of Proposed Rulemaking ("NPRM"), "Slot Management and Transparency for LaGuardia Airport, John F. Kennedy

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[4] The 80% usage requirement was an increase from the 65% usage requirement that was first included in the HDR. In justifying the increase, the FAA stated that the slot usage minimum was intended to "achieve a balance that would not jeopardize the viability of the smaller carriers while still promoting the efficient use of slots" and that the higher percentage "should encourage carriers to hold no more slots than their markets demand, potentially freeing up underutilized slots for use by other carriers without imposing impractically stringent use requirements." High Density Traffic Airports; Slot Allocation and Transfer Methods, 57 Fed. Reg. 37308, 37310 (Aug. 18, 1992).

International Airport and Newark Liberty International Airport," 80 Fed. Reg. 1274 (Jan. 8, 2015). For example, under the EWR Order, airlines "must use [an] allocated slot 80% of the time . . . ," but a slot can be used for any particular flight to any destination. *Id.* at 1276.[5] In contrast, the proposed rule would require airlines to "use [an] allocated slot 80% of the time *for the same flight or series of flights* . . . ." *Id.* (emphasis added). In other words, a slot used for a flight from EWR to San Francisco would have to be used for the same flight to the same destination, at least 80% of the time. And perhaps most significantly, under the proposed rule, the DOT would review slot transactions—including existing slot leases—under its competitive and public interest authority for potential anticompetitive effects. *See id.* at 1290-93.

B. United's Acquisition of Delta Slots

On June 16, 2015, United and Delta entered into an agreement relating to the airlines' slot holdings at two New York City airports: EWR and JFK. Pursuant to the agreement, United leased 24 of its slots at JFK to Delta, for a payment of $14 million. In return, Delta agreed to lease 24 slots to United at EWR, in exchange for a payment of $14 million (the "Slots Transaction"). Compl. ¶¶ 7-8. The DOJ

[5] Assuming *arguendo* that the Complaint is accurate in accusing United of "grounding" up to 82 slots a day at EWR (*see* Compl. ¶ 3), that constitutes approximately 9.1% of United's 902 slot holdings at EWR. United thus is using its slots at least 90.9% of the time, well above the current minimum set by the FAA.

permitted Delta to close its side of the transaction with United at JFK, and, following FAA approval of the transaction, Delta is now actively using the slots that United has leased to it. *Id.* at 8. The DOJ has only challenged United's acquisition of EWR slots from Delta.

Apart from this transaction, United's slot holdings have remained largely at the same level that the FAA originally allocated to Continental Airlines when the FAA slotted EWR in 2008. *Id*. ¶¶ 2, 19. In fact, United has only acquired eight slots at EWR in the past five years (*Id*. ¶ 2), and, with the transfer of other slots to the FAA and other carriers, has essentially the same number and share of slots that Continental held before its merger with United in 2010.

"To serve Newark, the FAA requires that an airline have slots." *Id.* ¶ 12. With its current slot portfolio at EWR, United provides air service to scores of destinations—including 139 that are unserved by other carriers out of EWR. *Id*. While United's service offerings out of EWR are broad, carriers at LGA and JFK offer service to many of the same cities that United serves out of EWR. *Id*. ¶ 33. And while the Plaintiff contends that "many passengers" in the Northern New Jersey and Manhattan areas do not consider JFK and LGA as meaningful alternatives to EWR, that contention implicitly acknowledges that there are many passengers who do. *See id*. Thus, United is continually competing with other carriers for passengers into and out of the New York metropolitan area. Offering service to new destinations and adding frequencies to current routes is one way that United intends to further compete against its rival air carriers. *See id*. ¶ 47.

Plaintiff acknowledges that EWR is an airport characterized by significant delays owing to its limited capacity, and that as a result, airlines serving EWR are subject to limitations on their service based on the FAA's slot management requirements:

> The FAA uses slot restraints to manage congestion and delay caused by the fact that demand for service exceeds the airport's capacity during certain times of day.

Id.¶ 12. United requires additional EWR slots to enhance its service offerings at EWR, to increase connectivity to other destinations,[6] and to compete with other carriers in the New York metropolitan area.

C. The DOJ's Antitrust Claims

Despite acknowledging that United may in fact use the slots it seeks to lease to serve "new destinations and add frequencies to existing routes," (*Id.* ¶ 47), the Plaintiff alleges that the Slots Transaction violates both Sections 1 and 2 of the Sherman Act. The thrust of Plaintiff's Complaint is that United is "fail[ing] to use the slots it already controls . . . " (*Id.* ¶ 3), and that, if consummated, the Slots Transaction would result in anticompetitive effects in the purported market for take-off and landing slots at EWR and in the purported market for air passenger

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[6] EWR is a United hub through which it offers connecting service on numerous city-pairs (*e.g.*, Pittsburgh-Newark-Paris).

service between EWR and other unidentified destinations. *Id.* ¶¶ 29-32. Plaintiff, however, does not allege that any of the purported anticompetitive effects have occurred—nor can it, because the Slots Transaction is not finalized. Nor does Plaintiff allege any facts suggesting, with the requisite specificity, that any of the purported anticompetitive effects will actually occur.

Plaintiff theorizes that the transaction would require Delta "to cut back service" or "reschedule flights at less convenient times" on the four "overlapping" routes served by both Delta and United from EWR. *Id*. ¶ 40. Plaintiff also posits that the transaction "likely would . . . result in reduced service at Newark." *Id*. ¶ 43. But there are no allegations that Delta or any other carrier has actually cut back service. Any allegations regarding the carriers' intentions are pure speculation, as the Complaint is completely devoid of any allegations regarding the service offerings and intentions of other carriers at EWR as a result of the Slots Transaction. Indeed, the only verifiable statements in the Complaint regarding any carrier's intentions at EWR are from United—that it intends to <u>increase service</u> at EWR post-transaction. *Id.* ¶ 47.

Plaintiff also alleges that the transaction "would . . . reduce the likelihood of entry or expansion by other airlines at Newark." *Id*. ¶ 41. There are no allegations that any other carrier would have, or could have, expanded its service offerings absent the Slots Transaction. Nor are there any allegations that any airline other than United was prepared to enter into a transaction with Delta to lease the Delta slots at issue, at the price—both monetarily and through the exchange of slots at JFK—that Delta set for those slots. Nor are there any allegations that Delta was willing to part with those slots absent the compensation provided by United. The Complaint relies solely on purported representations by Virgin America, Inc. regarding previous attempts to acquire EWR slots "from the FAA" (*Id*. ¶ 16), but there are no allegations that Virgin America, Inc. (or any other carrier) sought to acquire the slots at issue here.

ARGUMENT

A. Plaintiff's Sherman Act claims are legally defective.

Plaintiff's allegations regarding (1) the competitive harm resulting from the Slots Transaction and (2) market definition are insufficient to state a claim under either Section 1 or Section 2 of the Sherman Act, and should therefore be dismissed. To survive a motion to dismiss, a complaint must contain factual allegations that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, an antitrust complaint can survive a motion to dismiss only where it "state[s] a claim to relief that is plausible on its face," which requires a plaintiff to demonstrate more than just "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Twombly*, 550 U.S. at 570).

Indeed, this Court has held that "[p]lausibility requires more than mere speculation: '[a] motion for judgment on the pleadings, like a motion to dismiss, will be granted if the plaintiff has not articulated enough facts to raise a right to relief above the speculative level.'" *Smith v. Conseco Life Ins. Co.*, No. 13-cv-5253, 2014 WL 3345592, at *2 (D.N.J. July 8, 2014) (Walls, J.) (citing *Bangura v. City of Philadelphia*, 338 Fed. App'x 261, 264 (3d Cir. 2009)). Plaintiff fails to meet this standard, notwithstanding its possession of an enormous amount of pre-Complaint discovery.

1. Plaintiff's allegations of "anticompetitive effects" are speculative and are insufficient to state a claim under Sherman Act Section 2.

To state a claim under Section 2 of the Sherman Act, a Plaintiff must allege that a defendant: (1) possesses monopoly power; and (2) acquired, enhanced, or maintained that power by use of exclusionary conduct.[7] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). As the court held in *United States v. Microsoft*:

> From a century of case law on monopolization under Section 2, . . . several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." . . . Second, the plaintiff, on whom the burden of proof of course rests,

[7] The text of Sherman Act Section 2 reads "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2.

> must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.

253 F.3d 34, 58-59 (D.C. Cir. 2001) (emphasis added).

Plaintiff here presents no allegations of actual, actionable exclusionary conduct.[8] More than just "conclusory or bare-bones allegations" of potential or future harm are required; plausible allegations of actual exclusionary conduct require specific, factually grounded claims that "competition . . . has been harmed." *United States v. Dentsply*, 399 F.3d 181, 187 (3d Cir. 2005). A complaint must contain factual allegations that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The Sherman Act does not prohibit the "mere possession of monopoly power," which courts have held to be "an important element of the free-market system." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Instead, the Sherman Act prohibits a monopolist from acting in ways that abuse its power and actually "harm competition." *Id.* ("the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct"). Thus, an antitrust court must "distinguish[] between exclusionary acts, which reduce social welfare, and

[8] As described above, United used its allocated slots—the acquisition of which were approved by the DOJ when United merged with Continental—more than 90% of the time, far beyond the 80% minimum threshold set and approved by the FAA.

competitive acts, which increase it." *Microsoft*, 253 F.3d at 58. This is accomplished through a showing of "anticompetitive effect." *Id*.

For this reason, cases brought under Sherman Act Section 2 involve conduct that already has occurred and where the harm is readily apparent. For example, in *Dentsply*, the DOJ brought a Section 2 claim against Dentsply International, Inc., a supplier of products to dental laboratories. The court held that Dentsply's conduct actually "foreclosed competitors from a substantial percentage of the available opportunities," and that Dentsply had succeeded in using its monopoly power to "exclude competitors from the dealers' network." *Dentsply*, 399 F.3d at 190. There were no speculative anticompetitive effects—actual competition had been harmed, and the harm resulted from the use of monopoly power.[9]

Likewise, in *LePage's Inc. v. 3M*, 324 F.3d 141, 144 (3d Cir. 2003), LePage brought Sherman Act Section 2 claims against 3M. The court found that 3M had utilized multi-tiered, bundled rebates and other exclusive arrangements with its customers to "strengthen[ ] its monopoly position by destroying competition by LePage's" in the related market. *Id*. at 162. The court, armed with years of data

[9] Even *Dentsply*, a case often criticized for stretching the bounds of Section 2 precedent, recognizes that a monopoly claim must involve anticompetitive harm that has already occurred.

regarding the actual anticompetitive impact of 3M's exclusive arrangements, affirmed the lower court's decision that 3M violated the Sherman Act.[10]

The common thread among these and other monopolization cases is that to state a claim, allegations of <u>actual, non-speculative</u> harm resulting from a monopolist's exclusionary conduct are required. "Hypothetical anticompetitive conduct, speculative monopoly power, and remote injuries" are insufficient to state a Sherman Act Section 2 monopolization claim. *Broadcom*, 501 F.3d at 322; *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 267 (3d Cir. 1998) (affirming dismissal of antitrust claims based on allegations that plaintiff "would have benefitted from competition it hoped would occur.").

Plaintiff here is engaged in precisely that sort of "speculative exercise." *West Penn Power*, 147 F.3d at 268. Plaintiff can allege no actual harm in either the purported market for air passenger service between EWR and other destinations, or in the supposed market for take-off and landing slots at EWR. Plaintiff can only speculate about United's potential future use of the slots; that is legally insufficient. As the Third Circuit ruled in *Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*:

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[10] *LePage's* is another example of a case criticized for stretching the bounds of Section 2. Even in *LePage's*, however, anticompetitive harm must have already occurred in order to bring a Section 2 case.

> In a nutshell, the various examples of alleged injury the Plaintiffs have brought to our attention are purely speculative and thus are insufficient to justify an award of injunctive relief.

602 F.3d 237, 251 (3d Cir. 2010) (rejecting "[p]laintiffs' prognosis of [defendants'] future conduct" as a basis for a Sherman Act Section 2 claim).

In its Complaint, Plaintiff does not make a single allegation that the (not-yet consummated) Slots Transaction has caused any actual, non-speculative anticompetitive harm. Instead, Plaintiff can only guess what United, Delta, and any other airlines will do at EWR once the transaction closes. Plaintiff might "hope" that if it succeeds in blocking United's lease of these slots, some other airline might make better use of them. But such hope is legally insufficient to state a Sherman Act claim. Only United has stated its future intentions at EWR – to "provide service to a handful of new destinations and add frequencies to existing routes." Compl. ¶ 24. Indeed, United's planned procompetitive usage of these slots underscores why courts have steadfastly held that "purely speculative" allegations of harm "are insufficient to justify an award of injunctive relief" under Sherman Act Section 2. *Howard Hess*, 602 F.3d at 251. The post-Slots Transaction world could well result in significant procompetitive benefits that would not warrant Sherman Act enforcement, and enjoining the Slots Transaction now thus would be premature and potentially injurious to competition and consumers.

By seeking to enjoin the Slots Transaction based on allegations of possible anticompetitive conduct that has not yet occurred—and may in fact never occur—the Plaintiff is asking the Court to apply a standard of proof reserved for claims brought under Section 7 of the Clayton Act, a separate antitrust statute that focuses on preventing mergers or acquisitions that may "substantially . . . lessen competition" or "tend to create a monopoly." 15 U.S.C. § 18. The legislative history makes clear that the Clayton Act was designed to "reach effects beyond those prohibited by the Sherman Act" and to "cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. No. 81-1755, 81 Cong., 2d Sess. 1950, *as reprinted in* 1950 U.S.C.C.A.N. 4293-4296-97 (1950) (emphasis added); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 124-25 (1986) (Stevens, J., dissenting) ("The Clayton Act, unlike the Sherman Act, proscribes certain combinations of competitors that do not produce any actual injury . . . . [A] merger may violate § 7 of the Clayton Act . . . even though the evidence falls short of proving the kind of actual restraint that violates the Sherman Act[.]") (emphasis added).[11] Plaintiff's attempt to base its case on its own speculative predictions

[11] In *Monfort*, the DOJ filed an *amicus* brief urging the Court to rule against the Plaintiff. DOJ criticized the antitrust claims about the future potential harm of a merger as "necessarily speculative." 479 U.S. at 121. The DOJ is guilty of precisely the same "necessarily speculative" overreaching here.

about future harm would fail even under the Clayton Act's more lenient standards, which Plaintiff chose not to allege; but such speculation clearly is legally insufficient to support a Sherman Act Section 2 claim.

2. Plaintiff's allegations are also insufficient to state a claim under Sherman Act Section 1.

Section 1 of the Sherman Act prohibits agreements that are "unreasonably restrictive of competitive conditions."[12] *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). To demonstrate such an unreasonable restraint of trade, a plaintiff "bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic market." *Id.*; *see also United States v. Apple, Inc.*, 791 F.3d 290, 349 (2d Cir. 2015) (under Section 1, plaintiff must demonstrate "an actual adverse effect on competition" under the Rule of Reason); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (same). Here, Plaintiff's Complaint fails to include any Section 1 allegations or discussion, and appears to be tacked on to the Complaint in a perfunctory manner. In any event, it fails as a matter of law.

[12] The text of Sherman Act Section 1 reads "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1.

As with claims arising under Sherman Act Section 2, "[s]peculation about anticompetitive effects is not enough" to prove a claim under Sherman Act Section 1. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994); *see also Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (allegations of "potentially higher prices" without proof that "prices were actually higher" were insufficient to show an adverse effect on competition); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 619 F. Supp. 441, 460–61 (N.D. Cal. 1985) (rejecting Section 1 claim of actual effects where plaintiff relied on "academic suppositions" and "a theoretical hypothesis" and "provided no evidence . . . to support this theory of price effect"), *aff'd*, 890 F.2d 139 (9th Cir. 1989). As the court held in *Roy B. Taylor*, the failure to show that conduct "'as it actually operate[d] in the market' harmed competition" is fatal to Sherman Act Section 1 claims. 28 F.3d at 1385.

Unable to allege any actual anticompetitive harm resulting from a Slots Transaction that has not yet occurred, Plaintiff instead likely will urge the Court to find that United's purported "market power" is sufficient to create a "presumption" that the Slots Transaction will harm competition at EWR. Compl. ¶ 37. But no such "presumption" is available to Plaintiff here, because "[m]arket power, while necessary to show adverse effect indirectly, alone is insufficient." *Tops Mkts.*, 142 F.3d at 97. In addition to market power, Plaintiff must allege "some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market." *Id*.

In those situations, courts have held the anticompetitive harm resulting from a transaction is appropriately non-speculative where "the contours of the market . . . are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis [that] the challenged practice impairs competition." *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004). In other words, the court can predict—with sufficient certainty—the harm that may result from a transaction. *See Procaps S.A. v. Patheon Inc.*, No 12-cv-24356, 2015 WL 6555433, at *12 (S.D. Fla. Oct. 29, 2015). Importantly, courts have limited such a market power-based presumption to agreements among competitors that raise obvious anticompetitive effects, such as price-fixing or market allocation. In such cases, courts have held a "*quick look*" may be sufficient to determine the likelihood of anticompetitive effects. *See Brown Univ.*, 5 F.3d at 669 (holding that the "*quick look*" applies to cases "where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint."); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (holding the "quick-look" appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”).

The Slots Transaction is not the type of transaction that a court could predict—due to a “sufficiently well-known” understanding of the market—would have an “anticompetitive effect on consumers and markets.” *Brown Univ.*, 5 F.3d at 669. To the contrary, the Slots Transaction is expressly contemplated under the terms of the EWR Order, complies with all applicable FAA/DOT requirements, and is intended to produce significant procompetitive effects. The Slots Transaction thus is not inherently suspect, and the “*quick look*” analysis is not appropriate in this case.

The Slots Transaction instead warrants evaluation under the traditional Rule of Reason analysis, which holds Plaintiff to its full burden of alleging and proving actual anticompetitive harm. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 222 (3d Cir. 2011). And as the court determined in *Procaps*:

> [A]ctual detrimental effect must be a result which has in fact <u>already happened</u>, as opposed to a result which is speculative, hypothetical, likely, inherent or one having potential to create damage.

2015 WL 6555433, at *16 (dismissing Sherman Act section 1 case, finding that “prediction and general theories are insufficient,” and that “speculation about anticompetitive effects is not enough”). Plaintiff’s Sherman Act Section 1 allegations fail that test and, as a matter of law, should be dismissed.

3. Plaintiff's allegations regarding the "relevant market" are legally insufficient.

Wholly apart from Plaintiff's speculative allegations of actual anticompetitive effects, which are fatal to its Sherman Act Sections 1 and 2 claims, both claims likewise must be dismissed because Plaintiff has failed to adequately allege a "relevant market" for purposes of antitrust analysis. An antitrust plaintiff must adequately plead both a relevant geographic market and a relevant product market. Failure to do so warrants dismissal. *See Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 331 (D.N.J. 1999); *see also Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997).

Plaintiff claims that the "market" within which United's Slots Transaction should be analyzed is the purported market for air passenger service into and out of EWR alone. Compl. ¶¶ 31, 34. Plaintiff also adds an alternative market definition, claiming that there is a market for "slots" used to provide such air transportation service, also limited to EWR. *Id.* ¶¶ 29-30. However, Plaintiff's own allegations, as well as the governing law associated with pleading relevant markets, make clear that these allegations are legally defective and require dismissal of the Complaint.

a. Plaintiff's "Newark-only" relevant market is impermissibly narrow.

When alleging a geographic market, a plaintiff must consider all areas where a potential customer may rationally and practically look for a substitute if the "hypothetical monopolist" raised the prices of its product. *Grinnell*, 384 U.S. at 588; *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also* Horizontal Merger Guidelines § 4.2.1 (Aug. 19, 2010). When alleging a product market, a plaintiff must include the allegedly monopolized product and all competing substitutes that consumers find reasonably interchangeable for the consumer's purposes. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see also SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978) (market determination considers "those groups of producers which, because of the similarity of their products, have the ability–actual or potential–to take significant amounts of business away from each other").

With respect to air passenger service, the product and geographic markets typically converge such that the relevant market consists of "scheduled passenger airline service between a point of origin and a point of destination, generally referred to as city pairs." *See* James O'Connell, Deputy Asst. Atty. Gen. Antitrust Div., U.S. Dep't of Justice, Statement Before the Subcommittee on Aviation, at 7 (May 14, 2008); *see also* Compl. ¶ 31. Here, Plaintiff fails to adequately allege a relevant market because it limits its market definition to air passenger service to and from a single airport – EWR – and fails to consider air passenger service to and from the other New York metropolitan airports.

In confining its alleged relevant market to EWR, Plaintiff broadly alleges that "Newark is the most convenient airport for passengers traveling to or from locations in Northern New Jersey and portions of Manhattan," and that "[m]any passengers who live or work in these areas have a strong preference for Newark over LaGuardia and JFK . . ." Compl. ¶ 33 (emphasis added). But customer "convenience" and "preference" are insufficient bases on which to rely when defining either a product or geographic market. *See Queen City Pizza*, 124 F.3d at 437 ("Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively."); *Concord Assocs., L.P. v. Entm't Props. Trust*, No. 12-cv-01667, 2014 WL 1396524, at *17-19 (S.D.N.Y. Apr. 9, 2014) (holding the geographic market definition insufficient where plaintiffs did not allege a plausible reason why consumers could only go to defendant's casino, and not to "reasonably accessible" alternatives within the New York metropolitan area).

As the court held in *Skyline Travel:*

> Plaintiffs' market definition is [f]atally narrow, consisting only of the one-stop flights of a single airline from a single airport in a busy metropolitan area served by countless airlines and several airports . . .

2011 WL 1239783, at *3-4, *aff'd*, 476 F. App'x 480 (2d Cir. 2012) (dismissing antitrust complaint based on a JFK-only market, where "plaintiffs fail[ed] to demonstrate why other airlines' flights from the New York metropolitan area are not acceptable substitutes").

Despite conceding that "Newark serves the New York-New Jersey metropolitan area" (Compl. ¶ 1), that travelers to or from "portions of Manhattan" (*i.e.* locations east of the Hudson River) prefer Newark (*Id.* ¶ 33), and that "LaGuardia and JFK offer service to many of the same cities served out of Newark," (*Id*.) Plaintiff alleges a Newark-only market based on the alleged preferences of <u>some</u> customers. That is a legally insufficient basis for alleging a relevant market. *See, e.g.*, *Malaney*, 2010 WL 3790296, at *10-11 (rejecting airport-limited market and holding that "[a] price increase on a flight from San Francisco to Newark could be defeated by the threat of travelers switching to a flight from Oakland to LaGuardia."), *aff'd*, 434 F. App'x 620 (9th Cir. 2011). Plaintiff's Complaint should be dismissed on this basis alone.

b. Plaintiff's "air passenger service" market is legally defective.

Plaintiff's alleged market for "air passenger service" is deficient for yet another reason. Plaintiff attempts to define the relevant market as "air passenger service" from EWR to <u>any</u> destination, but this relevant market definition fails because it assumes that every route from EWR to <u>any other destination</u> is interchangeable, and is thus in the same relevant market. That is wrong as a matter of law. As the court noted in *Rodney v. Northwest Airlines, Inc.*, 146 F. App'x

783, 787-88 (6th Cir. 2005), the substitutability of competing airlines' products turns on route-specific factors such as "the nature of the trip and the nature of the traveler." In other words, two routes may be very different from one another, and are not necessarily interchangeable solely because they originate at the same airport. *Id*. (rejecting proposed market of "all non-stop scheduled flights into and out of each of Northwest's hubs" because market definition requires cross-elasticity analysis "specific to each of the 74 routes" served by an airline). For example, if a carrier raised its price on a flight from EWR to San Francisco, a customer would not then book a flight from EWR to Houston as a substitute. *Malaney*, 434 F. App'x at 621. But this is precisely what Plaintiff's alleged relevant market suggests. Plaintiff must allege, at a minimum, specific routes affected by the Slots Transaction and the substitutability of alternative service available to the consumer.[13]

Plaintiff acknowledges that it typically "analyze[s] competition at the route level" to determine "on which route harm is likely to occur."[14] Compl. ¶ 31; *see*

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[13] Further highlighting the deficiency in its relevant market definition, Plaintiff fails to explain "whether bus or train travel is a reasonable substitute" for shorter flights to destinations such as Boston or Washington, D.C. *Rodney*, 146 F. App'x at 788.

[14] In fact, Plaintiff has never successfully alleged such an open-ended relevant market as the one it has alleged in its Complaint. As noted above, Plaintiff only identifies four potential overlap routes that could be impacted as a result of the

also U.S. Gov't Accountability Office, GAO-10-778T, Airline Mergers: Issues Raised by the Proposed Merger of United and Continental Airlines at 16 n.22 (May 27, 2010) ("DOJ generally considers the relevant market to be a city-pair combination."); Department of Justice, Comments on Jt. Application of Air Canada, *et al*. at 8 n.17 (June 26, 2009) (travel between city pairs is "the appropriate relevant market"). Its sole reason for now abandoning this approach is that the impact "on particular routes . . . will differ depending on how the slots acquired will be used." Compl. ¶ 32. In other words, because the transaction has yet to occur, Plaintiff cannot identify any route-specific harm, and thus wants to consider all routes interchangeable and in the same relevant market. Such an untethered, open-ended approach has been soundly rejected. *Rodney*, 146 F. App'x at 787-88; *Malaney*, 2010 WL 3790296, at *12. Without identifying specific routes, Plaintiff fails to plausibly allege a market for air travel from EWR to other destinations.

c. There is no distinct product market for "airport slots" separate from air passenger service.

Plaintiff alleges that take-off and landing slots at EWR constitute a relevant product market. But slots have no legal significance separate and apart from the market for commercial airline travel, so as a matter of law, there can be no separate

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Slots Transaction, yet it seeks to expand the relevant market definition far beyond those routes.

slots market. *See Virginia Vermiculite, Ltd. v. W. R. Grace & Co.-Conn.*, 108 F. Supp. 2d 549 (W.D. Va. 2000). As a result, Plaintiff's allegations regarding a "slots market" are deficient and should be dismissed.

In *Virginia Vermiculite*, the parties competed in mining, processing, and selling vermiculite. *Id.* at 554. In support of its Sherman Act claims, the plaintiff alleged that "the buying and selling of the intangible rights to mine vermiculite constitute a distinct market, independent of any downstream market for vermiculite concentrates or expanded vermiculite." *Id.* at 577. The court rejected the proposed "mining rights market," finding that "[n]one of the parties are solely in the business of buying and selling mining rights" and that "the only reason [the parties] buy vermiculite mining rights is to mine and sell vermiculite." *Id.* at 578. The court found that vermiculite "mining rights" lacked "significance independent of the downstream vermiculite market," that "downstream competition for vermiculite . . . constrain[ed] the price of upstream vermiculite mining rights," and, as a result, vermiculite "mining rights" could not constitute its own relevant market. *Id.* at 577–78.

These principles apply with equal force in this case. The FAA controls the establishment, duration, and function of slots, and it holds the authority to allocate slots to carriers. *See* Compl. ¶¶ 12-13; *see also generally* EWR Order. The FAA also has the absolute authority to withdraw slots from carriers pursuant to its regulations. *See* NPRM at 1283, 1286. Slots are simply FAA-created "units of capacity," the sole purpose of which is to permit and facilitate air travel to and from the New York metropolitan airports. Compl. ¶¶ 32, 36. Slots thus are the same type of intangible asset that the court rightfully refused to consider a relevant product market in *Virginia Vermiculite*. Indeed, slots only exist because the FAA created them, and they are inextricably intertwined with a carrier's true business—commercial airline travel.[15]

Plaintiff's defective "relevant market" allegations are more than simply a technical pleading deficiency. Plaintiff's assertion of a EWR-only market (for either air transportation or slots) is entirely result-oriented. It allows Plaintiff to claim that United would have "75%" of EWR slots if it leases the slots at issue from Delta. *Id.* ¶ 37. Plaintiff wants to use that to bootstrap a presumption of market power and anticompetitive effects. Put differently, Plaintiff tries to circumvent the problem with its wholly speculative Complaint by artificially truncating the relevant market down to a single airport, notwithstanding its own allegations elsewhere in the Complaint suggesting that the other New York City area airports offer service to many of the same locations, and implying that some

[15] Even if there was such a thing as a "slots market," Plaintiff has improperly limited it to EWR. The correct geographic component should include all slots at EWR, JFK and LGA. Indeed, Plaintiff concedes that United and other airlines have traded, and expressed interest in trading, slots among the New York City airports. *See* Compl. ¶¶ 8, 21.

passengers may view LGA and JFK as alternatives. *Id*. ¶ 33; *see Ferguson Med. Grp., L.P. v. Mo. Delta Med. Ctr.*, No. 06-cv-0008, 2006 WL 2225454, at *3, 5 (E.D. Mo. Aug. 2, 2006) (granting a Rule 12(b)(6) motion to dismiss holding that proposed geographic market was "nothing more than an exercise in gerrymandering designed to artificially inflate [defendant's] market power"); *cf. Concord Assocs.*, 2014 WL 1396524, at *17 (granting a Rule 12(b)(6) motion to dismiss holding that proposed market "arbitrarily excis[ed]" reasonable alternatives in attempt to "absolve [plaintiffs] of the obligation to explain why 90% of their target population would not consider" reasonably accessible alternatives).

If EWR, LGA, and JFK were considered part of the same relevant market, United's share of air passenger service or even slots would be far lower, and would more accurately reflect the intense competition United faces with other air carriers in the New York metropolitan area marketplace. United holds only 8% of LGA slots and held 4% of JFK slots.[16] Overall, at its peak, United leased less than approximately 30% of the slots in the New York City metropolitan area.[17] Such a small market share is well below the threshold for finding monopoly power. *See*

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[16] After leasing its slots to Delta under the terms of the agreement, United no longer leases slots at JFK, so its overall market share is even lower.

[17] Federal Aviation Administration, Office of Aviation Policy and Plans, Initial Regulatory Evaluation: Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport at 43 (April 1, 2012).

Dentsply, 399 F.3d at 187 ("Absent other pertinent factors, a share significantly larger than 55% has been required to established prima facie market power."); *cf. Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) ("A market share at or less than 50% is inadequate as a matter of law to constitute monopoly power."). At this stage, the Court need not determine market shares; rather, the discussion of market shares provides context for why Plaintiff alleged relevant markets in such a convoluted way. But Plaintiff nonetheless must make sufficiently specific factual allegations about the relevant market to pass muster under *Twombly*. Plaintiff's convenient assertion of a single airport market falls far short of meeting that threshold pleading burden.

B. Delta And United Should Be Permitted To Complete The Slots Transaction Now.

This case should be dismissed given these fatal defects in Plaintiff's Sherman Act claims. But even if the Court chooses to stay the case pending the outcome of the ongoing FAA Rulemaking (as discussed in detail in Delta's Motion to Dismiss), the Court should permit Defendants to close their transaction now. There is no legal support for preventing United from leasing the slots at issue from Delta. The slots at issue can be easily and wholly divested by United at any point in the future if either (1) the FAA so determines, or (2) the Plaintiff prevails in a subsequent lawsuit. There is absolutely no prejudice to the Plaintiff associated with United being permitted to lease and use these slots in the interim.

To the contrary, holding these slots in limbo for any additional period is by definition bad for competition and consumers. United has leased its slots at JFK to Delta, which is actively using those slots in its operations. It is manifestly unfair to not permit United to use the slots it has leased from Delta to likewise improve its service offerings for customers at EWR.

Plaintiff seeks to permanently enjoin United from acquiring any slots from Delta at EWR. Compl. ¶ 51(a). An injunction is an extraordinary remedy, reserved only for those cases where a plaintiff can prove both a "definite factual showing of illegality" and a showing of "irreparable harm." *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 292 (D.N.J.), *aff'd*, 159 F.3d 1351 (3d Cir. 1998). Plaintiff's allegations in this case fall short on both requirements; its request for injunctive relief therefore should be denied.

1. Plaintiff fails to allege "a definite factual showing" of illegality.

> The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be a "definite factual showing of illegality."

Appalachian Coals v. United States, 288 U.S. 344, 377 (1933) (reversing grant of injunction against a transaction that had not yet occurred) (quoting *Standard Oil Co.*, 283 U.S. at 179), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). An antitrust plaintiff must allege that the underlying conduct resulted in actual anticompetitive effects; without such a showing, by definition, the Plaintiff's allegations of illegality can be neither definite nor factual.

In *United States v. Ward Baking Co.*, 243 F. Supp. 713, 718 (E.D. Pa. 1965), the court refused to issue a permanent injunction on the grounds that the DOJ failed to present a "definite factual showing of illegality." There, the DOJ relied on affidavits as proof of illegal conduct, but the affidavits were merely "circumstantial evidence" and failed to establish any illegality with the requisite level of certainty and specificity—in essence they were no more than speculation. *Id.* at 717-18. Similarly, in this case, Plaintiff does not allege that United has engaged in any actual illegal conduct—since the Slots Transaction has not even occurred yet—nor can it allege with any level of certainty that any definite illegal conduct will result from the Slots Transaction. The only harm that Plaintiff alleges is speculative, which is insufficient for proving a "definite factual showing of illegality." As a result, Plaintiff's request for an injunction must fail.

2. The slots transaction will not result in "irreparable harm" if consummated.

Under traditional equity principles, an injunction is proper only when a plaintiff establishes that he is "likely to suffer irreparable harm" without that injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (applying this standard to preliminary injunctions); *see also Broad. Music, Inc. v.*

Publick House Partners, LLC, No. 13-cv-03326, 2015 WL 3396804, at *5 (D.N.J. May 26, 2015) (Walls, J.) (denying relief because the plaintiff failed to establish "the irreparable injury required for a permanent injunction") (citation omitted). The standard is no different for Sherman Act cases. *See, e.g., De Beers Consol. Mines v. United States*, 325 U.S. 212, 218-19 (1945) ("Since [Section 4 of the Sherman Act] confers no new or different power than those traditionally exercised by courts of equity, we are remitted to examination of the practice of such courts") (emphasis added);[18] *Appalachian Coals*, 288 U.S. at 377 ("The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief.").

Courts have uniformly held that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989); *see also Sampson v. Murray*, 415 U.S. 61, 91-92 (1974) (same). And the availability of "corrective relief" in this situation is precisely why irreparable harm will not result absent an injunction.

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[18] Contrast this with claims for injunctive relief brought pursuant to the Clayton Act. Some courts have interpreted the standard for injunctive relief under the Clayton Act to require a lesser showing of "irreparable harm" than traditional equity courts would require. *See United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544 (W.D. Pa.) *aff'd*, 320 F.2d 509 (3d Cir. 1963) (arguing that prosecutors enforcing the Clayton Act need only show "that it is being violated or threatened with violation" to satisfy the "irreparable harm" requirement).

Slots are easily transferable, and remain easy to identify, segregate, and divest, if necessary. The acquisition can be entirely undone. *See Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 306 (D. Del. 1981) (finding no irreparable injury because the defendant could be forced to later sell stock if plaintiff later proved certain violations); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) ("The word irreparable connotes 'that which cannot be repaired, retrieved, put down again, [or] atoned for.'").

Indeed, the FAA has consistently treated slots as easily transferable by ordering slot sales or divestitures in several cases. For example, in 2011, the agency ordered two airlines involved in a proposed slot sale to divest dozens of slots "through a blind, cash-only sale through an FAA-managed Web site." Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 76 Fed. Reg. 63702, 63711 (Oct. 13, 2011). The same outcome is possible if United's acquisition of the slots results in actual, non-speculative anticompetitive harm in the future. *See Appalachian Coals*, 288 U.S. at 377-78 (holding that if in the future, plaintiff proves that defendant's actions are "used to the impairment of fair competitive opportunities . . . the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts.").

Plaintiff cannot allege any harm, much less irreparable harm, associated with United's use of the slots now, pending the outcome of the NPRM and a possible future antitrust claim by Plaintiff; thus, its request for injunctive relief should fail.

CONCLUSION

For the foregoing reasons, Defendant United respectfully requests that the Court grant its Motion to Dismiss.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January, 2016, a true and correct copy of the foregoing Memorandum of Law In Support of Defendant United Continental Holdings, Inc.'s Motion to Dismiss Plaintiff's Claims Pursuant to Fed. R. Civ. P. 12(b)(6) was served via the Court's CM/ECF system and via email on the following parties:

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