February 7, 2014

William H. Stallings, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530

Re: *United States v. US Airways Group, Inc. and AMR Corp.*, No. 1:13-cv-01236 (CKK), Comments of the American Antitrust Institute, AirlinePassengers.org, Association for Airline Passenger Rights, Business Travel Coalition, Consumer Travel Alliance, and FlyersRights.org.

Dear Mr. Stallings:

The American Antitrust Institute is a non-profit research, education and advocacy organization devoted to the strong and sensible enforcement of the antitrust laws. It submits these comments on behalf of itself and several consumer groups pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (the Tunney Act), to object to the settlement in this case because it is not in the public interest. That settlement allowed the merger to go forward, subject only to the divestiture of 104 air carrier slots at Reagan National Airport in Washington, D.C., 34 slots at LaGuardia Airport in New York, and two gates at each of five other airports. The settlement is not in the public interest because it does not prevent or even address the bulk of the anticompetitive harms described in the complaint. Unlike the great majority of antitrust settlements where the proposed final judgment and the complaint are filed simultaneously and there is little difference between the two, in this case, a yawning gap exists between the complaint and the remedy.[1]

As the Department noted when it brought the suit, "The merger would create the largest airline in the world and result in four airlines controlling more than 80 percent of

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[1] In light of the gap between the complaint and the remedy, the settlement's acquiescence to the consummation of the merger prior to Tunney Act review, without any hold-separate agreement, is itself not in the public interest insofar as it subverts judicial review and makes restoration of the status quo ante more difficult and costly. Nonetheless, the merging parties have proceeded at their own risk, and we urge the Department to exercise its right under the Asset Preservation Order and Stipulation to withdraw its consent to the proposed Final Judgment "at any time" before it is entered, and to renegotiate the settlement or proceed to trial.

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the United States commercial air travel market." Press Release, Dept. of Justice, Aug. 13, 2013, at 2; *see* Compl. ¶ 36. The settlement will not change that. Nor will it change the fact that the "merger will leave three very similar legacy airlines—Delta, United, and the new American—that past experience shows increasingly prefer tacit coordination over full-throated competition," Compl. ¶ 3, and that while they will continue to "compete with Southwest and JetBlue, . . . the product is different and the customer base is also different," *id.* ¶47 (internal quotation marks omitted).

The government contends "the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger." Competitive Impact Statement ("CIS") at 8; *see also* Remarks as Prepared for Delivery by Ass't Attorney General Bill Baer at the Conf. Call Regarding the Justice Department's Settlement with US Airways and American Airlines, Nov. 12, 2013, at 1-2 ("Baer Settlement Remarks") (stating, "This is a game changer," and "[i]n important ways this outcome is better than a full stop injunction").[2] In fact, however, the government has failed to establish "a reasonable basis upon which to conclude that the divestitures in the proposed final judgment will adequately remedy the competitive harms alleged in the government's complaint," as the Tunney Act requires. *United States v. Republic Servs*., 723 F. Supp. 2d 157, 161 (D.D.C. 2010); *see also* Antitrust Div. Policy Guide to Merger Remedies 3 (June 2011) ("Merger Remedies Policy Guide") ("the relief must effectively address each of the Division's competitive concerns").

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[2] The Attorney General maintains that the settlement "has the potential to shift the landscape of the airline industry" for the benefit of consumers. Press Release, Dept. of Justice, Nov. 12, 2013, at 1. However, the CEO of US Airways (and of the merged airline) said that the settlement does not "make[] the competitive landscape dramatically different," and that it would not have a "material impact" on the merged firm. *AMR Corp. and US Airways Conf. Call to Discuss Settlement with U.S. Dept. of Justice and State Attorneys General–Final*, FD (Fair Disclosure) Wire, Nov. 12, 2013 ("*Investor Settlement Call*"); *see also* Motion of Debtors for Entry of Order Pursuant to Bankruptcy Rule 9019(a) Approving Settlement Between Debtors, US Airways Group, Inc., and United States Department of Justice, et al., *In re AMR Corporation*, at ¶ 35, No. 11-15463 (Bankr. S.D.N.Y. 2013) ("All of the required divestitures are expected to impact less than 3% of the total daily flights to be operated by the merged entity."). The CEO also noted that "the comments that DOJ was making on the day that they filed the lawsuit versus what they're saying today are dramatically different." *Investor Settlement Call, supra; cf.* Susan Carey et al., *U.S. Moves to Block US Airways-American Airlines Merger*, Wall St. J., Aug. 13, 2013 ("[A]ntitrust chief Bill Baer said . . . 'We think the right solution here is a full-stop injunction' to block the proposed merger.").

I. THE SETTLEMENT IS NOT IN THE PUBLIC INTEREST BECAUSE IT DOES NOT PREVENT OR EVEN ADDRESS THE BULK OF THE ANTI-COMPETITIVE EFFECTS ALLEGED IN THE COMPLAINT

The complaint alleges that the combination of AMC Corp. ("American") and US Airways Group, Inc. ("US Airways"), by "reduc[ing] the number of major domestic airlines from five to four, and the number of 'legacy' airlines . . . from four to three . . . . threatens substantial harm to consumers," including higher airfares and ancillary fees, and reduced service. Compl. ¶¶ 1, 41-81. In particular, the complaint alleges anticompetitive effects arising from: (1) entrenchment of US Airways' dominance at Reagan National Airport, (2) increased concentration in over 1,000 highly concentrated city-pair markets,[3] (3) loss of head-to-head competition between US Airways and American on 17 nonstop routes,[4] (4) increased likelihood of coordinated behavior among the remaining network airlines, (5) elimination of US Airways' Advantage Fares and their disruptive effect,[5] (6) likely reductions in capacity and growth, (7) increases in baggage and ancillary fees and reductions in the quality and variety of ancillary services,[6] and (8) thwarting American's aggressive standalone expansion plans.

The Department does not back away from these likely harms; on the contrary, it largely repeats them in the competitive impact statement. And it concedes that the divestitures do not directly address many of the harms:

> The proposed remedy will not create a new independent competitor, nor does it purport to replicate American's capacity expansion plans, or create Advantage Fares where they might otherwise be

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[3] The complaint alleges a loss of competition in other city pairs, which presumably includes routes on which JetBlue and Southwest compete with nonstop service against US Airways using slots leased from American. *See* CIS at 8-9 & n. 4; Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conf. Call Regarding the Justice Department's Settlement with US Airways and American Airlines, Nov. 12, 2013, at 3 ("Baer Complaint Remarks") (noting that JetBlue nonstop service competing with US Airways between Reagan National and Boston, and between Reagan National and Tampa, had saved consumers millions of dollars and was threatened by merger because half of JetBlue's slots at Reagan National were leased from American and could be terminated post-merger).

[4] On one route alone (between Charlotte and Dallas-Ft. Worth), the Department predicted that consumers would likely pay more than $3 million more per year for travel. *See* Baer Complaint Remarks at 2-3. The complaint also alleges a loss of future head-to-head competition on other routes. *See* Compl. ¶ 89.

[5] "[T]he merged airline would likely abandon Advantage Fares, eliminating significant competition and causing consumers to pay hundreds of millions of dollars more." *Id.* ¶ 7.

[6] The complaint alleges that the parties' "fee harmonization" plans alone would cost consumers $280 million annually. *Id.* ¶ 79.

> eliminated. Instead, it promises to impede the industry's evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares. In this way, the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger.

CIS at 8.

The Department's suggestion that the settlement is a "better deal" for consumers than blocking the merger outright is speculative and does not withstand scrutiny. On the contrary, while the proposed remedy is no doubt well intentioned, it is implausible that the modest divestitures at a few airports will offset the adverse national impact of the merger as described in the complaint. The divestitures maintain competition in the relevant market for slots at Reagan National Airport, and potentially increase competition in some local markets the acquiring carriers choose to serve, but they fail to ameliorate the harms in the hundreds of city-pair markets identified in the complaint, and will cause additional harms in still other markets. By failing to show a "close, logical nexus between the proposed remedy and the alleged violation," or "how the proposed relief will remedy [the] particular competitive harm[s]" alleged in the complaint, Merger Remedies Policy Guide at 4, the proposed remedy is inconsistent not only with the Department's own remedies policy, but also with the well-established rule that "out of market" benefits cannot justify anticompetitive effects in a relevant market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962) (§ 7 of the Clayton Act "speaks of 'any . . . section of the country,' and if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed").

A. The Divestitures Will Not Come Close to Replicating the Competition Lost From the Merger

The settlement resolves the narrow competitive harm in the local market for *slots* at Reagan National Airport, but it does little to resolve the broad competitive harm to the city-pair *routes* set forth as relevant markets in the complaint. The complaint describes harms in at least 1,000 city pair markets in which American and US Airways compete with each other by either both offering nonstop service (17 routes) or by one or the other offering nonstop service and its counterpart offering connecting service. Compl. ¶ 38. The increase in concentration in these markets exceeds the threshold for being presumptively anticompetitive, generally by a wide margin. *Id.*, App. A. Nationwide, the complaint alleges harm from the increased likelihood of coordinated behavior among the remaining legacy carriers, causing higher fares and fees, and more limited service.

The settlement does not directly address the concentration and coordination concerns, but rather opts for entry or expansion as a solution. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) ("entry or expansion must be 'timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern'" (quoting Horizontal Merger Guidelines, § 9)). However,

the complaint explains why new entry or expansion by non-legacy carriers is *not* likely to offset the competitive effects of concern:[7]

> New entrants into a particular market face significant barriers to success, including [1] difficulty in obtaining access to slots and gate facilities; [2] the effects of corporate discount programs offered by dominant incumbents; [3] loyalty to existing frequent flyer programs; [4] an unknown brand; and [5] the risk of aggressive responses to new entry by the dominant incumbent carrier.[8] In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

Compl. ¶91. And the complaint specifically alleges that expansion by Southwest and JetBlue would not compensate for the loss of competition from a legacy carrier:

> The remaining airlines in the United States, including Southwest and JetBlue, have networks and business models that are significantly different from the legacy airlines. In particular, most do not have hub-and-spoke networks. In many relevant markets, these airlines do not offer any service at all, and in other markets, many passengers view them as a less preferred alternative to the legacy carriers. **Therefore, competition from Southwest, JetBlue, or other airlines would not be sufficient to prevent the anticompetitive consequences of the merger.**

Id. ¶ 93 (emphasis added).

The competitive impact statement recognizes that "[n]ew entry, or expansion by existing competitors, would be unlikely to prevent or remedy the merger's likely anticompetitive effects absent the proposed divestitures." CIS at 6. Yet, notwithstanding the several barriers to expansion cited in the complaint, the government insists, "The

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[7] Moreover the entry is not correlated with the 1,000 city-pair markets identified in the complaint. For example, in the 100 most concentrated city-pair markets, only 18 are city pairs that involve one of the seven airports subject to the proposed remedy and thus are even *potentially* affected by the divestitures. *See* Compl., App. A at 1-2. To be sure, it is possible that the acquiring firms will add connecting flights on some of these city pairs, but the settlement certainly does not depend on it.

[8] It is worth noting that although the Department's complaint emphasizes the risk of an aggressive response by the incumbent as a deterrent to entry, and although the settlement is predicated on entry, the remedy does nothing to strengthen the government's hand in preventing predatory behavior, which, by all accounts, is already a weak hand. *See, e.g.,* Herbert Hovenkamp, *Federal Antitrust Policy* 380 (4th ed. 2011) ("Under the Tenth Circuit's *AMR* ruling the antitrust laws would simply be impotent against predatory pricing by hub dominant carriers.")

access to key airports made possible by the divestitures will create network opportunities for the purchasing carriers that would otherwise have been out of reach for the foreseeable future. Those opportunities will provide increased incentives for those carriers to invest in new capacity and expand into additional markets." *Id.* at 8. "Through the remedy, Southwest and JetBlue will have the opportunity to obtain permanent access to the slots they are currently leasing from American, and those LCCs and others will have the opportunity to acquire more slots at DCA and at LGA as well. This will allow them to provide greatly expanded service on numerous routes, including new nonstop and connecting service to points throughout the country." *Id.* at 9.[9]

B. The Newark Example Provides No Basis to Believe That Entry Will Resolve the Competitive Concerns From the Merger

The key support for the Department's contentions is the "Newark example." The competitive impact statement explains:

> In 2010, in response to the United States' concerns regarding competitive effects of the proposed United/Continental merger, United and Continental transferred 36 slots, three gates and other facilities at Newark to Southwest. Southwest used those assets to establish service on six nonstop routes from Newark, resulting in substantially lower fares to consumers. For example, average fares for travel between Newark and St. Louis dropped 27% and fares for travel between Newark and Houston dropped 15%. In addition, Southwest established connecting service to approximately 60 additional cities throughout the United States.
>
> The proposed remedy will require the divestiture of almost four times as many slots as were divested at the time of the United/Continental merger, plus gates and additional facilities at key airports throughout the country. In total, the divestitures will significantly strengthen the purchasing carriers, provide the incentive and ability for those carriers to invest in new capacity, and position them to provide more meaningful competition system-wide.

CIS at 10. However, the Newark example does not withstand scrutiny.

Even taken at face value, replication and multiplication of the Newark example would fall far short of addressing the scope or magnitude of the competitive concerns described in the complaint. The Department says that 36 slots allowed Southwest to

[9] News reports indicate that of the 112 "new" slots to be made available, *see infra* note 10, slots provisionally have been awarded to Southwest (66), JetBlue (24), and Virgin America (12), and ten remain to be awarded to other LCCs. *See* Jack Nicas, *Southwest, JetBlue Win Most of Slots at Reagan National Airport*, Wall St. J., Jan. 30, 2014; Karen Jacobs & Diane Bartz, *Southwest, Virgin Win Waiver to Purchase LaGuardia Slots*, Reuters, Dec. 5, 2013.

enter six new markets with nonstops and to add connecting service to over 60 cities, and that since the divestitures here are almost four times as much, the impact should be four times as great. As an initial matter, the incremental competitive impact of the divestitures is more accurately viewed as *three* times as much as the Newark example because nearly one fifth of the divested slots merely preserve existing competition from JetBlue and Southwest.[10] The Department does not explain the basis of its assumption that the acquirers of the slots at Reagan National and LaGuardia will use them as effectively as Southwest used the slots in Newark. But even if they did, one might expect entry into roughly 205 city pairs (19 non-stop routes and 186 connecting routes).[11] That is a far cry from the more than 1,000 highly concentrated city pairs adversely affected by the merger.[12]

Moreover, while LCCs tend to lower fares on particular routes in which they enter on a significant scale,[13] there is reason to doubt the extent to which Southwest's entry in Newark led to "dramatic reductions in average fares," as the Department claims. The Department has created a chart showing that on five (of the six) new routes added by

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[10] While the settlement calls for a divestiture of 138 slots, 26 of those slots are currently leased to JetBlue at DCA and Southwest at LGA, leaving 112 available to provide LCC competition that would not otherwise have occurred. CIS at 9 n.4. Indeed, the number of incremental slots is smaller because but for the merger, JetBlue was likely to acquire another ten DCA slots from American. *See* Compl. ¶ 87. Moreover, competitive effects of the remedy at DCA must be further discounted to account for the fact that but for the merger, US Airways had planned to start nonstop service from DCA to Miami and St. Louis, which would have competed directly with American's existing service. *Id.* ¶ 89.

[11] Calculated on the basis of dividing 112 slots by 36 and multiplying times 6 nonstops and 60 connecting flights.

[12] That the divestitures will not make up for the loss of an airline can be seen numerically by comparing the number of flights the divestitures will facilitate versus the number of domestic flights operated by American and US Airways pre-merger. Using the figure of 112 slot divestitures or flights, *see supra* note 10, and the Department's assumption that the divestiture of 10 gates at five airports will support 160-200 daily flights, *see* CIS at 9 n.5; *but see infra* note 13, the divestitures would put 272-312 daily flights into the hands of LCCs, as compared to American's pre-merger average of more than 1470 daily domestic flights and US Airways' total of more than 1125 daily domestic flights.

[13] The Department indicates that the two gate divestitures at each of five airports are sufficient to "provide for commercially viable and competitive patterns of service for the recipients of the divested gates," CIS at 9 n.5, but offers no evidence to suggest that any LCC is likely to enter one of these airports on a scale sufficient to have a material competitive impact, particularly on high-density routes. The gate divestiture at Dallas Love Field is also problematic because Southwest is already a virtual monopolist there, so any divestitures of gates at Love Field to Southwest would be anticompetitive, and Southwest's dominance poses a barrier to entry to other LCCs that might acquire the gates.

Southwest in Newark, fares declined in an amount ranging from 27% (to Houston) to 5% (to Denver).[14] But it fails to show whether these fare decreases were sustained,[15] and whether Southwest withdrew from, or reduced service on, other routes in order to add service in Newark. Recent empirical studies suggest that the "Southwest effect" has significantly petered out.[16] And while the Department points to the 60 connecting routes that Southwest added, it says nothing about the fares on those routes and whether Southwest tends to underprice nonstop service of the legacy carriers, as US Airways did with its Advantage Fares. Furthermore, the extent of any "multiplier effect" from the six new destinations seems limited.[17]

Rather than a proof of concept, the Newark example should be viewed as a cautionary tale. Although the divestitures created some new competition and undoubtedly benefitted consumers flying on the routes that Southwest entered, the overall impact of the United/Continental merger on consumers was negative. As the complaint notes, "The combined firm has reduced capacity at nearly all of its major hubs (including Cleveland) and at many other airports where the two airlines previously competed." Compl. ¶ 65; *see also* Wittman & Swelbar, *supra*, at 13 (showing that United increased real fares by 10% between 2007 and 2012). The complaint predicts that similar capacity reductions are likely from the American and US Airways merger, whereas an independent American would have pursued an aggressive growth strategy. *See* Compl. ¶¶ 67-70.[18]

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[14] The Department does not explain how these figures were calculated, what dataset was used, or what the "year-over-year" time period is.

[15] On some Southwest routes with Newark as the origin or destination, it appears that in the second and/or third year after entry, average fares increased, Southwest raised fares, and/or Southwest cutback service. Some of these routes are included in DOJ's chart. *See* DOT RITA Transtats, Origin and Destination Survey: DB1B Market, http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=247&DB_Short_Name=Origin%20and%20Destination%20Survey.

[16] *See* Michael D. Wittman & William S. Swelbar, *Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers* 13-14 (MIT Int'l Ctr. for Air Transp. August 2013) (finding that Southwest's average fares increased by 25% from 2007 to 2012); Sakib bin Salam & B. Starr McMullen, *Is There Still a Southwest Effect?* 2325 Transp. Res. Rec. 1 (2013) (finding that Southwest increased fares significantly in merger-affected markets in the absence of other low-cost carriers).

[17] While adding the six new nonstop destinations from Newark created new connecting service, the number of departures from those six destinations increased only minimally in 2011 (1.3%) and declined slightly in 2012 (.5%). *See* DOT RITA Transtats, Air Carriers: T-100 Domestic Segment (U.S. Carriers), http://www.transtats.bts.gov/DL_SelectFields.asp?Table_ID=259&DB_Short_Name=Air%20Carriers.

[18] Coordinated cutbacks in capacity are already evident. At its first earnings conference call following the merger, American executives stated that "until the industry gets back to

C. The Settlement Does Not Meaningfully Address the Coordinated Effects Likely to Result from the Merger

The competitive impact statement fails to explain how the divestitures to LCCs like Southwest and JetBlue address the problem of the increased coordinated effects caused by the elimination of a legacy carrier—which is likely to raise fares and fees nationwide—when the complaint makes clear that LCCs will not disrupt that behavior, and the proposed divestitures will be split among the LCCs. The complaint states:

> By further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger . . . would make it easier for the remaining airlines to cooperate, rather than compete, on price and service. **That enhanced cooperation is unlikely to be significantly disrupted by Southwest and JetBlue**, which, while offering important competition on the routes they fly, have less extensive domestic and international route networks than the legacy airlines.

Compl. ¶ 3 (emphasis added).

The likelihood of increased coordinated interaction is a major focus of the complaint. It states:

> Coordination becomes easier as the number of major airlines dwindles and their business models converge. If not stopped, the merger would likely substantially enhance the ability of the industry to coordinate on fares, ancillary fees, and service reductions by creating, in the words of US Airways executives, a 'Level Big 3' of network carriers, each with similar sizes, costs, and structures.

Compl. ¶ 46.

The complaint further predicts, "Post-merger, the new American would likely lead new fee increases." *Id.* ¶ 77. "The merged firm would be the world's largest airline, giving it sufficient size to lead industry fee and price increases across the board." *Id.* ¶ 78. Moreover, the new American would likely eliminate Advantage Fares, *id.* ¶ 7, which "have proven highly disruptive to the industry's overall coordinated pricing dynamic," *id.*

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margins that are reasonable . . . the growth rate should be sub GDP," and made clear that its projected 3.5% capacity growth "isn't capacity growth of going and buying airplanes and adding a bunch of new markets," and that its "aircraft order, as well as the orders in place at our competitors[], are designed to replace aging aircraft." *Q4 2013 American Airlines Group Inc Earnings Conf. Call—Final*, FD (Fair Disclosure) Wire, Jan. 28, 2014.

¶ 54. Advantage Fares have not only lowered fares on US Airways' one-stop service, but also lowered legacy carriers' one-stop fares on US Airways' nonstop routes. *Id.* ¶ 52.

"If the planned merger is enjoined," however, the complaint explains, "Both American and US Airways will have to compete against two larger legacy rivals, and against each other. The four legacy airlines will not look exactly the same. As the smallest of the legacy airlines, American and US Airways will have greater incentives to grow and compete aggressively through lower ancillary fees, new services, and lower fares." *Id.* ¶ 81.

The competitive impact statement reiterates these points. It states that "by further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger would make it easier for the remaining legacy airlines to cooperate, rather than compete, on price and service. Absent the merger, US Airways and American, as independent competitors, would have unique incentives to disrupt coordination that already occurs to some degree among the legacy carriers." CIS at 6.

Yet the government claims the settlement "promises to impede the industry's evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares." *Id.* at 8; *see also* Baer Settlement Remarks at 1 (settlement "will disrupt today's cozy relationships among the incumbent legacy carriers and provide consumers with more choices and more competitive airfares"). However, the government does not explain how Southwest's (or JetBlue's) entry into a small number of additional markets could conceivably disrupt coordinated behavior on fees or system-wide fare increases, when it hasn't had such an effect so far,[19] and its increase in size increases its incentive to mimic the legacy carriers. *See, e.g.*, Jack Nicas & Susan Carey, *Southwest CEO Opens Door to Baggage Fees*, Wall St. J., Oct. 24, 2013 (reporting that Southwest would consider charging bag fees if consumers come to accept the fees that other airlines charge). Moreover, divestitures to smaller LCCs will have no system-wide impact, and indeed arguably reduce the likelihood that Southwest or JetBlue could conceivably discipline the oligopoly behavior of the "Big 3."

The Department's own language as to the likely impact of the divestitures is appropriately couched in highly uncertain terms, such as "create network opportunities," "promises to impede . . . tighter oligopoly," "position them to provide more meaningful competition," and the like. However, as the complaint and the competitive impact statement's discussion of the anticompetitive effects of the merger make clear, the settlement is much more likely to *facilitate* tighter oligopoly than impede it, because the settlement is certain to eliminate a major competitor. Any positive new market dynamics

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[19] "Traditionally, Southwest and other smaller carriers have been less likely to participate in coordinated pricing or service reductions. For example, Southwest does not charge customers for a first checked bag or ticket change fees. Yet that has not deterred the legacy carriers from continuing, and even increasing, those fees." Compl. ¶ 47.

flowing from the divestitures, on the other hand, are speculative and limited in scope. *See* Compl. ¶¶ 41-47. There is no reasonable basis to conclude that the settlement will live up to this aspect of its "promise."

D. The Settlement Violates the "Out-of-Market Benefits" Rule

Besides failing to address the system-wide anticompetitive effects from the merger, and offering no real basis for believing that the competitive benefits of the proposed remedy could offset those effects, the proposed remedy violates the rule that "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another." *Philadelphia Nat'l Bank*, 374 U.S. at 370; *see Kottaras v. Whole Foods Market, Inc*., 281 F.R.D. 16, 25 (D.D.C. 2012) ("a merger that substantially decreases competition in one place—injuring consumers there—is not saved because it benefits a separate group of consumers by creating competition elsewhere").

Here, the divestitures will provide benefits (perhaps significant) for some consumers who fly to or from Reagan National Airport, slight benefits for some consumers who fly to and from LaGuardia, and perhaps marginal benefits for some consumers who use the five additional airports where gates are to be divested. Yet consumers on the routes where American and US Airways competed with nonstop service will be harmed (such as those flying between Charlotte and Dallas-Ft. Worth), as will the "[m]illions of consumers [who] have benefitted" from Advantage Fares,[20] and as will the millions of consumers nationwide who will face higher fares and fees from the remaining legacy carriers. Moreover, the remedy itself will result in spillover competitive harm to the consumers on routes from Reagan National Airport to smaller cities that the merged firm will abandon. *See* Ashley Halsey III, *American Airlines Ends Direct Service to 17 Cities from Reagan National Under Merger Deal*, Washington Post, Jan. 15, 2014 (reporting that the merged firm was ending service to small and midsized cities, and that the LCCs acquiring the slots would likely not pick up this service).

[20] Compl. ¶ 50. The Department elaborated: "Last year, more than 2.5 million round-trip passengers—including more than 250,000 passengers from the greater Washington, DC area; another 250,000 passengers in the Dallas-Fort Worth area; half a million passengers in the greater New York City area; and 175,000 passengers from Detroit—bought an Advantage Fare ticket. Hundreds of thousands of other passengers flying nonstop on US Airways, particularly from their hubs in Phoenix, Charlotte, and Philadelphia, benefited from responsive fares offered by the legacy airlines." *Id.* ¶ 58.

Conclusion

There is no doubt that "the proposed Final Judgment avoids the time, expense, and uncertainty of a full trial on the merits." CIS at 16. However, the Department was "confident in the evidence [it] would have presented at trial." Baer Settlement Remarks at 3. We take the Department at its word that it believes that the settlement is better for consumers overall than a full-stop injunction. But it has offered no reasonable basis for this conclusion, even if its reckoning were permitted by the out-of-market benefits rule, which it is not. At bottom, the Department's settlement does not adequately remedy the harms alleged in the government's complaint. The settlement sacrifices ever-dwindling *national* legacy-airline competition—with the benefits of disruptive Advantage Fares and the expected growth plans of American Airlines' emergence from bankruptcy—in favor of improved LCC *local* competition on routes at a handful of airports, a tradeoff that on its face makes no sense for consumers overall, let alone for those who benefitted from the head-to-head competition between American and US Airways, or those who will lose service out of Reagan National Airport. Apparently, the Department envisions that the LCCs acquiring the divested assets will "change the dynamic" in the airline industry, and one or another will flower into a full-fledged national competitor against the remaining three legacy airlines, which will be more disruptive than either American or US Airways would be if the merger were stopped. If the Department has evidence to support this theory, it has not shared it so far. The Tunney Act does not permit public interest judgments to be made merely on the basis of a wing and a prayer.

Respectfully submitted,

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