

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

US AIRWAYS GROUP, INC. and AMR
CORPORATION,

Defendants,

Case No. 1:13-cv-01236-CKK
(Before Special Master Levie)

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL
PRODUCTION OF FACTUAL MATERIALS AND INFORMATION
REGARDING DOJ'S APPROVALS OF FOUR PRIOR AIRLINE MERGERS**

Plaintiffs are shielding themselves from providing discovery about prior airline mergers that Plaintiffs themselves put at issue in their Complaint and about which Plaintiffs themselves have sought discovery. The cases on which Plaintiffs rely to justify their refusal to produce evidence relevant to this issue are distinguishable. Having made an issue of the prior airline mergers, Plaintiffs cannot conceal facts in their possession concerning those mergers.

Relevance. Plaintiffs half-heartedly assert that the factual assumptions and forecasts on which they approved the prior airline mergers are irrelevant. Opp. 2-3. Their own complaint belies that assertion by putting these facts squarely at issue. (Am. Cmplt. ¶¶ 34-35, 59-67 (alleging that “[d]espite promises to the contrary,” “[i]ncreasing [airline] consolidation ... has hurt consumers” through “capacity discipline”), 72.) Not only are these facts relevant to validate Defendants’ own economic analyses, but they will reveal how the government has changed its position from prior mergers—and this switch in position is itself significant. *See, e.g., United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (government’s past consideration

of ease of entry precludes it from arguing ease of entry irrelevant); *FTC v. Foster*, 2007 WL 1793441, at *49 (D.N.M. May 29, 2007) (finding relevant FTC's prior conclusion that there was no evidence of price manipulation). Plaintiffs' own discovery requests confirm the relevance of these facts by seeking the very same categories of materials from Defendants and from United, a third-party airline. (*See* Ex. 1 hereto (Pltfs' RFP No. 3); Ex. E (Subpoena Request 13) (seeking models and data analyses estimating network benefits of prior airline mergers).)

Deliberative Process Privilege and Work-Product Protection. Plaintiffs cite cases for two propositions not in dispute: that discussion and summary of selected facts as part of deliberative recommendations can be privileged where the factual discussion is "inextricably intertwined" with the recommendations, *see In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); and that factual analyses prepared by consultants can sometimes be protected work product, *see Exxon Corp. v. FTC*, 476 F. Supp. 713, 717-18 (D.D.C. 1979) (consultant reports prepared after complaint filed to assist attorneys in analyzing legal theories).

None of Plaintiffs' cases controls this motion, however, because none involves (1) a civil case brought by a government agency, where (2) the agency attempts to withhold relevant facts it has put at issue through its own claims, and where (3) Defendants cannot independently reproduce those facts.

Several of Plaintiffs' cases involve Freedom of Information Act ("FOIA") requests, *e.g.*, *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504 (D.C. Cir. 2011); *Lone Star Indus. v. FTC*, 1984 WL 21979 (D.D.C. 1984), yet FOIA does not incorporate any case-specific analysis of need or relevance, *McClelland v. Andrus*, 606 F.2d 1278, 1288 n.54 (D.C. Cir. 1979) (the need of party in litigation "makes discovery more compelling ... than it would be if a member of the public sought access to the [document] under FOIA"). In addition, even the

FOIA cases hold that factual material not integrated with agency deliberations is not protected. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

In re Apollo Group, 251 F.R.D. 12 (D.D.C. 2008), involved third-party discovery requests addressed to a government agency relating to post-trial private civil litigation. The Court found that internal agency e-mails discussing strategies and draft documents addressing settlement options were deliberative, that they were only tangentially relevant to the private dispute, and that the movant had failed to show a substantial need. *Id.* at *29-33.

Plaintiffs also rely on a recent decision by Judge Kollar-Kotelly involving an effort by a party to force an agency to supplement the record in an Administrative Procedure Act (“APA”) challenge to the agency’s decision. *Am. Petro. Tankers Parent v. United States*, 2013 WL 3462575 (D.D.C. July 10, 2013). The agency had already disclosed the analyses and factual materials on which its final decision was based—the equivalent of the materials Defendants seek here. *See id.* at *5-7. The privilege battle focused on additional internal communications ancillary to the agency’s deliberative process. *See id.* at *8. The plaintiff did not dispute that the withheld materials were privileged, *id.*, and the Court held that the plaintiff had failed to satisfy the APA’s heavy burden to supplement an administrative record. *Id.* at *9-11.

By contrast, Defendants here are defending a civil action initiated by Plaintiffs, and the *facts* about Plaintiffs’ own decisions to approve the prior airline mergers are directly relevant to the allegations in the complaint. In this context, Defendants’ right to discover the requested materials is closely tied to the relevance of the materials and to the need for this discovery to defend against Plaintiffs’ claims. The burden is on Plaintiffs to show this information is non-discoverable.

In the one FTC civil merger case Plaintiffs cite, *FTC v. Warner Commc'ns*, 742 F.2d 1156 (9th Cir. 1984), the court explained that the information sought by the defendants (an analysis of market structure and competitive effects) could be developed independently through their own expert analysis. *See id.* at 1161-62. The court therefore held the agency need not produce a report containing deliberative analysis and recommendations whose disclosure could chill the decision-making process. *See id.* at 1162. Here, Defendants cannot reconstruct the analyses, models, and forecasts that DOJ relied on in approving the prior mergers. Only Plaintiffs know those facts, and they are keeping them hidden in their files.

Moreover, none of Plaintiffs' cases involves an interrogatory seeking only facts, so none controls with regard to Defendants' Interrogatory 2. Plaintiffs can respond to this request by disclosing the relevant facts or by omitting any truly deliberative portions of their memoranda. They should be compelled to do so.

Other Privileges. Plaintiffs' remaining privilege claims are groundless. The attorney-client privilege is not at issue because Defendants do not seek confidential attorney advice. And the multiple factors required to invoke the law enforcement privilege are not present. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342-43 (D.C. Cir. 1984).

Dated: September 29, 2013

Respectfully submitted,

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Exhibit One

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*

Plaintiffs,

v.

US AIRWAYS GROUP, INC.

and

AMR CORPORATION

Defendants.

Case No. 1:13-cv-01236 (CKK)

**PLAINTIFFS' FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS FROM DEFENDANT US AIRWAYS GROUP, INC.**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Rules 26.2 and 30.4 of the Local Rules of the United States District Court for the District of Columbia, and the Order entered by the Court on August 29, 2013, Plaintiff United States of America (“United States”) and the Plaintiff States (collectively, “Plaintiffs”), by their undersigned counsel, hereby request that Defendant US Airways Group, Inc. (“US Airways”) produce the documents requested herein within 30 days of service of this Request. Plaintiff United States further requests that the documents be produced at the offices of the U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 450 Fifth Street, NW, Suite 8000, Washington, DC 20001, and for the Plaintiff States, at the Office of the Attorney General of Texas, Consumer Protection Division – Antitrust Section, 300 West 15th Street, 7th Floor, Austin, TX 78701.

DOCUMENT REQUESTS

1. Submit documents relating to the service of and competition for corporate customers, by you and other airlines, including:
 - a. all documents discussing competition for corporate customers, including competitive analyses, actual or contemplated discounts offered to corporations, win/loss reports, and contract performance by corporate customers;
 - b. documents sufficient to show the percentage of your total revenue that is attributable to corporate bookings or corporate sales for each airline, separately for each year since 2011;
 - c. documents or data sufficient to show all corporate customer rebates;
 - d. all documents sent to third parties for the purpose of responding to a corporate customer's request for proposal ("RFP");
 - e. one copy of each contract for domestic air service between you and a corporation;
 - f. documents sufficient to show the contents of your corporate contracts, including documents summarizing the performance goals and the discounts included in the contract; and
 - g. documents sufficient to show your company's pricing policies with respect to corporate customers.

2. Submit documents analyzing your frequent flyer program or any other airline's frequent flyer program, including documents analyzing frequent flyer program competition; the costs of maintaining a frequent flyer program; comparisons of customer costs, fees, or charges among frequent flyer programs; future plans for your company's frequent flyer program on a

stand-alone basis or after the Transaction; and comparisons of benefits among frequent flyer programs.

3. Submit documents or data generated, modified, or acquired by you from January 1, 2008, to the present, relating to runs of any model used by the company to estimate or project the market share, passengers, or revenue of existing or additional scheduled air passenger service in a city pair for purposes of evaluating or planning for the Transaction or evaluating or analyzing the effects of any prior airline mergers, including Delta-Northwest, United-Continental, Southwest-AirTran, and US Airways-America West, including:

a. all output files and all documents discussing the results of any such model runs; and

b. documents sufficient to describe inputs to and the methods used by QSI or other models and the implementation of those methods.

4. Submit documents discussing route and airport presence, including the reasons for route or airport presence effects, the strategic importance of such effects, any attempts to quantify such effects, or benefits to consumers from route or airport presence.

5. Submit documents sufficient to show the company's policies, practices, or strategies with respect to airport pairs with Ronald Reagan Washington National Airport, Dulles International Airport, or Baltimore-Washington International Airport as an endpoint in which the company responds or does not respond to fare actions of competitors, or refrains from taking certain fare actions.

6. Submit documents sufficient to show any efforts the company undertakes to ascertain on a regular basis the non-public fares offered by other airlines.

7. Submit all documents relating to your company's decision to begin charging first checked bag fees and second checked bag fees in 2008, including all documents relating to your company's monitoring of the actions or public statements of other airlines regarding first and second checked bag fees.

8. Submit all documents relating to your company's monitoring of other airlines' available fares of other airlines, including all regularly prepared reports of such monitoring.

9. Submit data and documents generated, modified, or acquired by you from January 1, 2012, to the present on corporate customers from any corporate database, including any fields summarizing the terms and discounts in corporate contracts by customer or on an aggregated basis, and the customer profiles of each of your corporate customers.

INSTRUCTIONS

1. These requests are continuing in nature, and you must supplement your responses pursuant to Federal Rule of Civil Procedure 26(e). Plaintiffs specifically reserve the right to seek supplementary responses and additional supplementary production of documents before trial.

2. In addition to the specific instructions set forth below, this Request incorporates the instructions set forth in Fed. R. Civ. P. 26 and 34 and the Local Rules of the United States District Court for the District of Columbia.

3. Unless otherwise specified, these requests seek all responsive documents created, modified, sent, or received during the period from August 1, 2011, to the time of trial.

4. Unless otherwise specified, these requests seek all responsive documents pertaining to domestic air travel and operations.

5. Each request shall apply to documents or materials in your possession, custody, or under your control, regardless of whether such documents or materials are possessed by you or

your present or former parents, subsidiaries, divisions, subdivisions, affiliates; your predecessor and successor entities; or by any of your employees, agents, representatives, officers, directors, consultants, lobbyists, or any other person acting or purporting to act on your behalf, including, unless privileged and such privilege has not been waived, your attorneys, and regardless of where such documents are located.

6. In producing documents, you are requested to produce a legible copy of each document requested together with all non-identical copies and drafts of that document. Subject to any protocol concerning electronically stored information agreed to by the parties or ordered by the Court, all metadata of electronic documents must also be produced. You must retain all of the original documents for inspection or copying throughout the pendency of this case, any appeal(s), and any related proceedings.

7. Any document that has been altered, including by the addition of any marginal notes, handwritten notes, underlining, date stamps, received stamps, or endorsed or filed stamps, as well as any draft, revision, modification or other version of a document is a responsive document in its own right and must be produced.

8. If any portion of any document is responsive to this request, then the entire document must be produced, including all attachments and enclosures.

9. Pursuant to Fed. R. Civ. P. 34(b)(2)(E)(i), documents must be produced either (a) as they are kept in the usual course of business (in which case they must be produced in such fashion as to identify the department, branch, or office in whose possession it was located and, where applicable, the natural person in whose possession it was found or the server or central file in which it was found, and the address of each document's custodian(s)), or (b) identified as

responsive to a specific request enumerated in these requests, with such specific request identified.

10. Subject to any protocols concerning electronically stored information agreed to by the parties or ordered by the Court, electronically stored information and hard copy documents must be produced in the form of production agreed to with the Antitrust Division in relation to the investigation of the Transaction. Do not alter the format from that used during the investigation without first discussing it with the Antitrust Division.

11. All documents must be produced in the file folder, envelope, or other container in which the documents are kept or maintained. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

12. Documents attached to each other should not be separated.

13. In instances where two or more exact duplicates of any document exist from the same custodian, the most legible copy must be produced.

14. If identical copies of a document are in the possession, custody, or control of more than one natural person or other document custodian, a copy of that document must be produced from each such natural person or other document custodian.

15. The fact that a document is in the possession of the United States, or is produced by another person, does not relieve you of the obligation to produce all of your copies of the same document, even if your copies are identical in all respects to a document produced or held by another person. Any documents you already produced to the Antitrust Division during its investigation of the Transaction need not be reproduced unless required to comply with any protocols concerning electronically stored information agreed to by the parties or ordered by the Court.

16. The duty to supplement your production in response to this Request is ongoing.

17. If any document is withheld based on an objection to any request, all documents covered by that request but not subject to the objection must be produced.

18. To the extent the company contends that responsive documents in its possession or custody cannot be produced pursuant to the notice and consent requirements contained in a protective order or agreement, the written response to this request must identify the specific provisions of the protective order or agreement on which you are relying and the efforts that you have and will undertake to provide notice and obtain consents.

19. If you are unable to produce a document that is responsive to a request, describe the document, state why it cannot be produced, and, if applicable, state the whereabouts of such document when last in your possession.

20. Other than redactions of privileged information, documents are to be produced in full. If any requested document cannot be produced in full, or if you withhold production of any document or portion of any document responsive to this request based upon any privilege, produce it to the extent possible, and provide a description in accordance with Fed. R. Civ. P. 26(b)(5)(A).

21. The use of the singular form of any word includes the plural and vice versa.

22. Any reference to a person that is a business entity and is not otherwise defined includes: that person's predecessors (including any pre-existing person that at any time became part of that entity after merger or acquisition), successors, parents, divisions, subsidiaries, affiliates, franchisors and franchisees; each other person, directly or indirectly owned or controlled by any of them; each partnership or joint venture to which any of them is a party; all present and former directors, officers, employees, agents, attorneys, consultants, controlling

shareholders (and any entity owned by any such controlling shareholder) of any of them; and any other person acting for or on behalf of any of them.

DEFINITIONS

The terms defined below and used in this Request should be construed broadly to the fullest extent of their meaning in a good faith effort to comply with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court of the District of Columbia.

1. The terms “you,” “the company,” or “US Airways” mean US Airways Group, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “parent,” “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between the company and any other person.

2. The terms “American” or “American Airlines” mean AMR Corporation, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “parent,” “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between American and any other person.

3. The term “Advantage Pricing” means the practice by US Airways of filing fares for connecting service that are below the fares of airlines offering nonstop service on the same airport pair.

4. The terms “and” and “or” have both conjunctive and disjunctive meanings.

5. The terms “any,” “all,” “each” and “every” shall each be construed as encompassing any and all.
6. The term “airport pair” means the airport departure and arrival points of a flight.
7. The term “city pair” means the city departure and arrival points of a flight.
8. The term “concerning” means relating to, referring to, describing, evidencing or constituting.
9. The term “discussing” when used to refer to documents means analyzing, constituting, summarizing, reporting on, considering, recommending, setting forth, or describing a subject. Documents that contain reports, studies, forecasts, analyses, plans, proposals, evaluations, recommendations, directives, procedures, policies, or guidelines regarding a subject should be treated as documents that discuss the subject. However, documents that merely mention or refer to a subject without further elaboration should not be treated as documents that discuss that subject.
10. The term “document” is defined to be synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.
11. The term “government actor” means any international, national, federal or state governmental official, body or agency, including without limitation the DOJ, the Federal Trade Commission, the Department of Transportation, the Federal Aviation Administration, any state Attorney General, individually or collectively, and the European Commission and the Office of Fair Trading, and their employees, Commissioners, attorneys, accountants, economists, staff,

consultants, experts, agents and representatives, and specifically includes any third-party representative or agent, wherever located, acting or purporting to act on their behalf.

12. The term “identify,” when referring to a person, means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person. When referring to documents, “to identify” means give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Fed. R. Civ. P. 33(d).

13. The term “including” means “including, but not limited to.”

14. The term “investigation” means the Department of Justice’s investigation of the Transaction, or any other investigation, whether formal or informal, by any government actor (as that term is defined above) that relates to the Transaction.

15. The term “person” is defined as any natural person or legal entity, including, without limitation, any business or governmental entity or association.

16. The term “plans” means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

17. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying or stating.

18. The term “Transaction” means the transaction referred to in the Agreement and Plan of Merger among AMR Corporation, AMR Merger Sub, Inc., and US Airways Group, Inc., dated as of February 13, 2013.

Dated: August 29, 2013

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UNITED STATES OF AMERICA

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