EXHIBIT 3B

<u>Defendants' Statement of Issues of Law Which Remain to be Litigated</u>

Pursuant to Local Rule 16.3(c)(5), Defendants Sabre Corporation, Sabre GLBL Inc. (with Sabre Corporation, "Sabre"), Farelogix, Inc. ("Farelogix"), and Sandler Capital Partners V, L.P. ("Sandler") respectfully submit the following issues of law which remain to be litigated:

1. Whether Plaintiff ("DOJ") has failed to establish that the proposed transaction is likely to substantially lessen competition in any properly defined relevant market under the Clayton Act is an issue which remains to be litigated.

    (a) Section 7 of the Clayton Act does not prohibit acquisitions unless "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18 (2012). The Section 7 inquiry is necessarily "forward-looking," *Crane Co. v. Harsco Corp.*, 509 F. Supp. 115, 125 (D. Del. 1981), meaning the court must assess an acquisition's impact "to the market and its probable future." *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2004).

    (b) The "mere possibility" of harm to competition is not enough; rather, DOJ must prove that the challenged transaction is "likely to lessen competition substantially." *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 189 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

    (c) DOJ cannot prevail on a Section 7 claim unless it proves two elements: (1) a relevant market within which the transaction's probable impact on competition is to be assessed, and (2) that the acquisition likely will substantially reduce competition in that market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Defining the relevant market and proving likely anticompetitive effects require a rigorous, fact-intensive inquiry grounded in commercial realities. *See, e.g.*, *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999) (explaining that "proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers").

    (d) When DOJ fails to establish these elements, its Section 7 claim must fail. *See Arch Coal*, 329 F. Supp. 2d at 116 ("[A] failure of proof in any respect will mean the transaction should not be enjoined.").

2. Whether DOJ has failed to establish that Sabre and Farelogix compete with one another in any relevant geographic and product market is an issue which remains to be litigated.

    (a) A relevant antitrust market consists of both a product market and a geographic market. In defining these markets, courts apply the same principles of market definition to claims brought under Section 7 of the Clayton Act as those brought under Sections 1 and 2 of the Sherman Act. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966) ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."); *United States v. Syufy Enters.*, 712 F. Supp.

1386, 1404 (N.D. Cal. 1989) ("The relevant market is generally the same for cases brought under either Section 2 of the Sherman Act or Section 7 of the Clayton Act.").

(b) A relevant product market "defines the product boundaries within which competition meaningfully exists." *F.T.C. v. Lab. Corp. of Am.*, No. 10-cv-1873, 2011 WL 3100372, at *17-18 (C.D. Cal. Feb. 22, 2011).

(c) Products are in the same product market when they are "reasonabl[y] interchangeabl[e]," meaning that "consumers can substitute the use of one for the other," and when demand between them is "cross-elastic," meaning that "a slight decrease in the price" of one product "causes a considerable number of customers" to switch to a substitute. *Arch Coal*, 329 F. Supp. 2d at 119–20.

(d) In determining whether products or services are within the same product market, courts have considered several "practical indicia" of substitutability such as "industry or public recognition . . . the product's peculiar characteristics and uses . . . distinct consumers, distinct prices, sensitivity to price changes, and specialized vendors." *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 182 (D.D.C. 2001) (citing *Brown Shoe*, 370 U.S. at 325).

(e) Product markets are impermissibly underinclusive if they fail to include all reasonably interchangeable products that constrain a defendant's pricing. *See AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999) ("If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market"). Product markets are also underinclusive when they fail to include a customer that can replace a defendant's product with an internally created alternative. *See Sungard Data Sys., Inc.*, 172 F. Supp. 2d at 186 ("As a matter of law, '[c]ourts have generally recognized that when a customer can replace the services of [an external product] with an internally-created [ ] system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market.'").

(f) Merely because products may have some functional similarity does not mean they are in the same product market. *F.T.C. v. Lundbeck, Inc.*, 650 F.3d 1236, 1241 (8th Cir. 2011) (rejecting FTC challenge to acquisition and stating "the FTC asserts that functionally similar products must be in the same product market. To the contrary, functionally similar products may be in separate product markets, depending on the facts of the case."); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (bioequivalent, functionally-interchangeable branded and generic drugs were in separate product markets).

(g) Certain products, like Sabre's GDS, are "two-sided transaction platforms," meaning they connect two different sets of customers in simultaneous transactions, and competitive effects of a challenged practice must be assessed as to each set of customers. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d

43, 58 (2d Cir. 2019) (holding that the Sabre GDS is a two-sided transaction platform "as a matter of law"). In *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), the Supreme Court explained that two-sided platforms differ from single-sided products because "the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Id.* at 2281. Accordingly, two-sided platforms must be sensitive to the prices that they charge each side of the platform to avoid "indirect network effects," i.e., "a feedback loop of declining demand" when a price increase on side A leads to decreased participation on side A, which in turn risks decreased participation on side B. *Id.* And two-sided transaction platforms "exhibit more pronounced indirect network effects" because "they cannot make a sale unless both sides of the platform simultaneously agree to use their services." *Id.* Thus, the Supreme Court held that "[e]valuating *both sides* of a two-sided transaction platform is . . . *necessary* to accurately assess competition." *Id.* at 2286-87 (emphasis added).

(h) Like the relevant product market, DOJ has the burden to prove a properly defined relevant geographic market, which consists of "the area in which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Tenet Health*, 186 F.3d at 1052. DOJ cannot meet that burden when the proffered relevant geographic market does not "correspond to the commercial realities of the industry" so as to describe where, geographically speaking, the parties actually compete and where competition may be affected. *Lab. Corp. of Am.*, 2011 WL 3100372, at *19.

3. Whether DOJ has failed to establish that the transaction is likely to result in a substantial lessening of competition in any relevant market is an issue which remains to be litigated.

(a) In addition to defining a proper relevant market, DOJ must also establish that the merger is "likely to substantially lessen competition" in that market. *AT & T, Inc.*, 916 F.3d at 1032. Even when a merger may "result in some lessening of competition," it still is "not forbidden" by Section 7, which "deals only with such acquisitions as probably will result in lessening competition to a *substantial degree*." *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 298 (1930) (emphasis added).

(b) In cases involving *horizontal* transactions—unlike this vertical one between firms that do not operate in the same market—DOJ may seek to make this showing by relying on a legal "short cut" to establish a presumption of anticompetitive effects based on alleged changes in market share statistics. *AT & T, Inc.*, 916 F.3d at 1032. "Market concentration, or the lack thereof, is often measured by the Herfindahl-Hirschman Index (HHI)," which is calculated by summing the squares of the market shares of the market participants. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 & n.9 (D.C. Cir. 2001). But even when market concentration statistics are proffered, DOJ is not entitled to any presumption of illegality; rather, DOJ has the burden to prove that the merger will result in "undue concentration" in the relevant market. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

(c) Because unlike a horizontal merger, a vertical merger such as this one does not eliminate any competitors, it cannot result in the "undue concentration" that creates a presumption of harm and shifts a burden of production to the defendants. *AT & T, Inc.*, 916 F.3d at 1032. Indeed, vertical mergers "are less likely than horizontal mergers to create competitive problems," DOJ, Non-Horizontal Merger Guidelines § 4 (1984), and "merit a stronger presumption of being efficient than do horizontal mergers." Statement of the U.S. Delegation to the OECD, Competition Comm. 2 (Feb. 21-22, 2007), https://www.ftc.gov/policy/reports/us-submissions-oecd-other-international-competition-fora.

(d) Accordingly, to successfully challenge a vertical transaction, "the government must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'" *AT & T*, 916 F.3d at 1032. And the government cannot make that showing when it fails to properly define relevant markets for both merging parties and prove market power in both upstream and downstream markets because, "[w]here substantial market power is absent at any one product or distribution level, vertical integration will not have an anticompetitive effect." *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981).

(e) Indeed, when DOJ has erroneously defined the relevant market, its data regarding market concentration is meaningless, and cannot satisfy DOJ's burden to show that the challenged acquisition is likely to have any anticompetitive effect in a properly defined relevant market. *See Lab. Corp. of Am.*, 2011 WL 3100372, at *19, 21 (finding that "[t]he FTC fail[ed] to establish its prima facie case" and noting that "[m]arket shares must be measured in a proper relevant product and geographic market; alleging market shares in some other market is inadequate").

(f) Unlike here, in previous cases involving a substantial lessening of competition on the ground that the merged firm's bargaining power will increase following a transaction, the parties to the challenged transaction have been competitors in the same relevant market. *See, e.g., Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342-46 (3d Cir. 2016) (assessing increased bargaining leverage in a merger involving hospitals, which "compete to be included in an insurance plan's hospital network" and "compete to attract individual members of an insurer's plan"); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, Ltd., 778 F.3d 775, 786 (9th Cir. 2015) (assessing bargaining power of merged firm, consisting of two health care providers that "had been each other's closest substitutes"); *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 564 (6th Cir. 2014) ("[T]he merger would eliminate competition between ProMedica and St. Luke's, thereby increasing ProMedica's bargaining power with MCOs."); *accord Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 62 (D.D.C. 2015) (discussing increased bargaining power that might result from a transaction "[i]f two competitors merge") (citing Horizontal Merger Guidelines § 6.2 (discussing ability and incentives of a merged firm to "obtain a result more favorable to it" in negotiations when "[a] merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations")); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 220 (D.D.C. 2017) (same).

(g) Unlike here, the same has been true in cases involving purported substantial lessening of competition through the elimination of innovation in the relevant market. *See, e.g., id.* at 229-30 (discussing alleged diminished innovation where transacting parties were competing insurance carriers) (citing *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011) (assessing impact to competition when transaction would remove “a particularly aggressive competitor” in the market with a “history of innovation”)); *accord F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1082 (D.D.C. 1997) (assessing impact to competition where merger would eliminating one firm’s “most significant, and in many markets only, rival”).

(h) If, however, DOJ shows that a transaction is likely to result in a substantial lessening of competition in the relevant market, a defendant can successfully rebut that *prima facie* case by showing that it “inaccurately predicts the relevant transaction’s probable effect on future competition,” or by “sufficiently discredit[ing] the evidence underlying the prima facie case.” *AT&T, Inc.*, 916 F.3d at 1032 (citations omitted).

(i) Such evidence may include showing that a competitor or other firm could replace a merging firm in the relevant market. *See F.T.C. v. Foster*, No. 07-cv-352, 2007 WL 1793441, at *56 (D.N.M. May 29, 2007) (“The Defendants have rebutted any presumption of anti-competitive effect based on market concentration by showing that the existing suppliers are able to, and likely will, constrain the Defendants.”).

(j) Such evidence may also include commitments the acquiring firm has made concerning its post-closing conduct that mitigate purported anticompetitive harm. *See AT & T*, 310 F. Supp. 3d at 241 n.51 (finding “reasons to be skeptical of DOJ’s increased-leverage theory of competitive harm” when, shortly after DOJ filed suit, AT & T promised to “honor Turner’s commitment to arbitrate” with certain counterparties to mitigate concerns about post-closing conduct).