UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

UNITED STATES OF AMERICA'S OPPOSITION TO DEFENDANT UNITED CONTINENTAL HOLDINGS, INC.'S MOTION TO DISMISS

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INTRODUCTION

The United States' case to enjoin United Continental Holdings' Proposed Acquisition of 24 takeoff and landing slots at Newark Liberty International Airport ("Newark") is based on a straightforward application of antitrust principles. Today, United has monopoly power over takeoff and landing slots at Newark, where it controls 902 (or 73%) of the 1,233 slots the Federal Aviation Administration ("FAA") has allocated to airlines at the airport – over ten times more slots than any other airline competing at Newark. United's control of an overwhelming number of Newark slots has afforded it monopoly power over air passenger service in and out of Newark, as such service cannot be provided without slots. Through the Proposed Acquisition, United seeks to acquire 24 additional slots from its direct competitor, Delta Air Lines.

United's effort to enhance its existing monopoly power through an agreement with its head-to-head competitor would harm consumers and further suppress competition at Newark. The question before the Court on this motion is whether, taking all of the allegations of fact as true and construing them in the light most favorable to the United States, the Complaint sufficiently alleges that the Proposed Acquisition constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and unlawful monopolization in violation of

Section 2 of the Sherman Act. The Complaint easily satisfies the applicable pleading standards.

United argues that the United States cannot assert a claim until United's acquisition of Delta's slots actually harms consumers. That notion is impossible to square with the plain language of Section 4 of the Sherman Act, 15 U.S.C. § 4, which invests this Court "with jurisdiction to prevent and restrain violations" of the Sherman Act, and makes it "the duty" of the United States to "institute proceedings in equity to prevent and restrain such violations." Judge Posner, writing for the Seventh Circuit, rejected the very same argument advanced by United here that, while Section 7 of the Clayton Act "prevents *probable* restraints," the Sherman Act prevents only "*actual* ones." *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990) (emphasis in original). To the contrary, Judge Posner explained that "[b]oth statutes as currently understood prevent transactions likely to reduce competition substantially." *Id.*

The harm that would result from United's acquisition of Delta's Newark slots is neither hypothetical nor speculative. The United States has alleged numerous facts showing that the Proposed Acquisition would violate Sections 1 and 2 of the Sherman Act by, among other things, strengthening an already formidable barrier to entry and expansion at Newark, reducing Delta's competitive

significance at Newark, and entrenching United's already dominant position at Newark.

United also attacks the United States' relevant market allegations. But market definition is an inherently factual inquiry that does not provide an appropriate basis for dismissal. Here, the Complaint sufficiently alleges that Newark constitutes the relevant geographic market, particularly as this case concerns the transfer of slots that can be used only at Newark. The Complaint also adequately alleges that Newark slots constitute a relevant product market where airlines must have slots to operate flights at Newark. The Complaint further alleges that flights to and from Newark constitute a second relevant product market. This market reflects the business reality that United may use the slots it seeks to acquire to fly to any destination it chooses. United offers no legal support for rejecting these alleged relevant markets as a matter of law.

Finally, United asks the Court to permit Defendants to close the Proposed Acquisition now. United never explains why the Court should grant this request when United already has committed not to close the transaction pending resolution of this case. United's position appears to be that the United States will be unable to offer sufficient evidence to support a claim for injunctive relief, but that argument necessarily fails on a Rule 12(b)(6) motion because the Complaint

adequately alleges violations of Sections 1 and 2 of the Sherman Act. United should not be allowed to evade its commitment not to close the transaction until this case is resolved.

The United States' Complaint

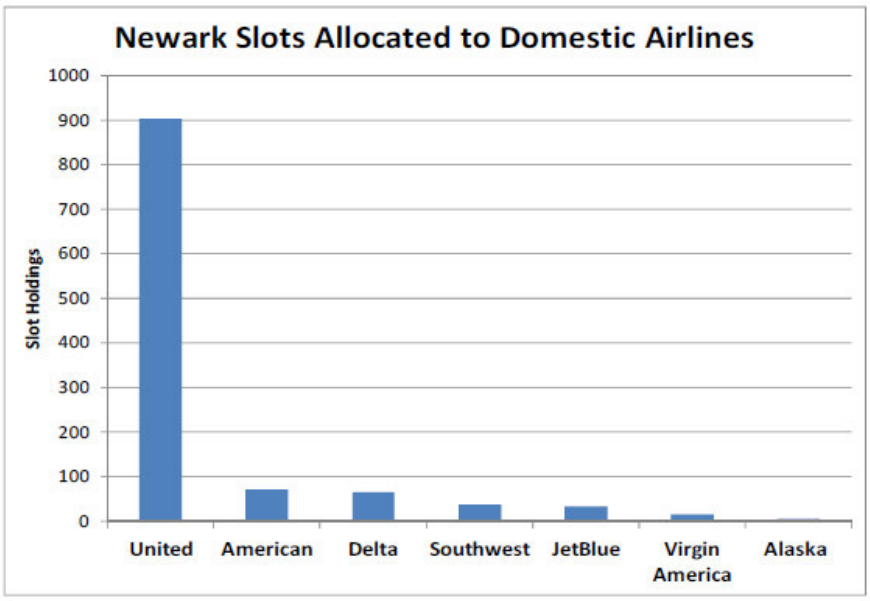
United incorrectly argues that "[t]he thrust of Plaintiff's Complaint" is that United is failing to use the slots it already controls. United Airlines Mem. Supp. Mot. To Dismiss 9, ECF No. 26-1 ("UA MTD"). This argument misunderstands the United States' Complaint. The "thrust" of the Complaint is that, by virtue of its control over 902 (or 73%) of the 1,233 slots allocated to carriers at Newark, United today possesses and exercises monopoly power over (i) the market for Newark slots and (ii) the market for scheduled air passenger service to and from Newark. Through the Proposed Acquisition, United's acquisition of an additional 24 Newark slots would allow United to maintain and enhance its existing monopoly power at the airport, resulting in anticompetitive harm. Because United is a monopolist at Newark, and it seeks to maintain and enhance its monopoly power through an agreement with a competing carrier, both Sections 1 and 2 of the Sherman Act condemn the acquisition. And neither of these claims is dependent upon United's failure to use the slots it has. Even if United were using all of its slots to offer service to Newark passengers, a proposed acquisition increasing its

monopoly share of slots to 75% still would violate both Sections 1 and 2 of the Sherman Act.

That is not to say that United's slot usage is irrelevant to the United States' claims. United leaves 82 or more slots at Newark unscheduled each day, Compl. ¶¶ 2-3, yet it proposes to acquire 24 more from a competitor that currently uses them to compete against United on several routes. These facts clearly undermine United's purported business justification for the transaction: that United "requires" Delta's slots in order to grow at Newark. UA MTD 9. United can provide this added service today with the slots it already controls and does not use. The facts alleged in the Complaint in support of the United States' claims can be briefly summarized as follows:

Since 2008, the FAA has imposed slot controls at Newark to address congestion and delays at peak hours. An airline cannot take off or land during most hours (from 6:00 A.M. to 10:59 P.M) at Newark without first obtaining the slots authorizing it to do so. Compl. ¶ 13. An airline's ability to offer service at Newark is therefore dependent upon its access to slots. *Id*. ¶ 36. An airline's lack of slots constitutes a barrier to its entry or expansion at the airport. *Id*. Carriers can use their Newark slots to serve any destination with any sized aircraft. *Id*. ¶ 14.

Defendant United is by far the dominant carrier at Newark, controlling roughly 73%, or 902, of the 1,233 FAA-allocated slots at the airport. *Id*. ¶ 2. United's massive slot portfolio is reflected in its share of air passenger service out of Newark. United operates roughly 386 daily flights to approximately 189 destinations on a nonstop basis using those slots, and is the monopoly carrier on 139 of those routes. *Id*. ¶¶ 18, 43. The next largest carrier, American Airlines, holds just 70 slots (6%). *Id*. ¶ 18. Delta, the seller here, is the third largest carrier at Newark, with 64 slots (5.2%), which would drop to 40 (3.2%) were this transaction permitted to close. *Id*. The next two carriers, Southwest and JetBlue, have 36 and 33 slots respectively. *Id*. No remaining airline has more than 25 slots, or 2%. *Id*. The relative holdings of Newark slots by domestic carriers is shown in this chart (*id*. ¶ 2):



Smaller airlines, including low cost carriers, have great difficulty securing slots. *Id.* ¶¶ 16, 17. Carriers such as Alaska Airlines and JetBlue would like to expand their Newark operations but are not able to secure the necessary slots. *Id.* ¶ 16. United, by contrast, acquired its Newark slots through its merger with Continental in 2010. *Id.* ¶ 19. At the time of the merger, United held 36 slots and Continental held 894 slots. *Id.* United agreed to divest operating rights to all 36 of its slots to Southwest to allay some of the Department of Justice's competitive concerns regarding the merger. *Id.* ¶ 20.

Despite its already dominant control of Newark slots, United has attempted three times to reverse the benefits to consumers of that divestiture by increasing its slot holdings at Newark. *Id.* ¶ 21. First, in July 2014, United tried to reacquire

from Southwest the very same 36 slots that United and Continental divested to alleviate competitive concerns arising from their merger, but abandoned the transaction after the Department of Justice objected. *Id*. Next, in March 2015, United returned with a proposal to acquire 18 slots from American, but when the Department of Justice again voiced competitive concerns, negotiations between United and American broke down. *Id*. And, finally, the proposed transaction with Delta represents United's latest attempt to bolster its dominance at Newark by increasing the number of Newark takeoff and landing slots under its control. *Id*. ¶ 22. If permitted to proceed, this transfer would increase United's slot share to roughly 75% and reduce Delta's share to just 3%, dropping its slot holdings by more than one-third (from 64 to 40). *Id*. ¶¶ 37, 40.

ARGUMENT

As this Court explained in *Harnish v. Widener University School of Law*, "[i]n deciding Defendants' motion to dismiss, the Court must look to the face of the complaint and decide, taking all of the allegations of fact as true and construing them in the light most favorable to Plaintiffs, whether the Amended Complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." 931 F. Supp. 2d 641, 646-47 (D.N.J. 2013) (Walls, J.) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)) (internal quotation marks omitted). "A plaintiff is obligated to provide the grounds of his entitlement to relief, which requires more than labels and conclusions, but he is not required to lay out detailed factual allegations." *Id*. at 647 (citations and internal quotation marks omitted).

"A complaint must contain facially plausible claims, that is, a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Iqbal*, 556 U.S. at 663; *Twombly*, 550 U.S. at 556) (internal quotation marks omitted). The plausibility standard "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). In *West Penn Allegheny Health System, Inc. v. UPMC*, the Third Circuit made clear that "it is inappropriate to apply *Twombly*'s plausibility standard with extra bite in antitrust and other complex cases." 627 F.3d 85, 98 (3d Cir. 2010) (reversing the dismissal of Sherman Act Section 1 and 2 claims).

The United States' Complaint adequately pleads violations of Sections 1 and 2 of the Sherman Act under these standards. In Part I below, we set out the

standards for pleading violations of Sections 1 and 2 under well-established Supreme Court and Third Circuit precedent, identify the specific allegations from the Complaint that satisfy those standards, and explain why the alleged harm is neither hypothetical nor speculative. In Part II, we address United's attacks on the Complaint's market definition allegations. In Part III, we explain that the United States need not wait for actual harm to occur to challenge this transaction under the Sherman Act. And, in Part IV, we address United's agreement not to close the Proposed Acquisition during the pendency of this litigation.

I. The United States Has Adequately Pled Violations of Sections 1 and 2 of the Sherman Act – Including Harm to Competition.

A. The Complaint States a Claim under Section 1 of the Sherman Act.

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of [domestic or international] trade . . . is declared to be illegal." 15 U.S.C. § 1. A plaintiff asserting a Section 1 claim must allege that the defendant entered into an agreement that unreasonably restrains trade. *See, e.g.*, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010). The United States has satisfied this pleading burden here.

The Complaint alleges that United and Delta have entered into a contract under which United will acquire 24 additional Newark slots from Delta. Compl. ¶ 7. The Proposed Acquisition would increase United's existing 73% share of the already concentrated Newark slots market to 75%. *Id.* ¶¶ 37, 49. As the Complaint alleges, United's agreement with Delta would "further entrench United's dominance at Newark and foreclose competition that is already in critically short supply," which, in turn, would leave "passengers at Newark . . . fac[ing] even higher prices and fewer choices." *Id.* ¶ 4.

These allegations are sufficient to allege an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Under Section 1, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). Courts have held that agreements causing even relatively small increases in concentration in already concentrated markets can harm competition. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 365 n.42 (1963) ("[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly

great."); *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 27-28 (2d Cir. 1973) ("even slight aggregations are viewed with suspicion in a highly concentrated market").[1]

United argues that the United States cannot state a Section 1 claim at all where the agreement has not yet taken effect and any harm is therefore speculative. *See* UA MTD 19. The argument that the United States must wait until after an unlawful agreement is consummated to sue for injunctive relief fails for the reasons discussed below in Section III. Moreover, the Complaint alleges numerous facts showing that the agreement between United and Delta is likely to restrain trade and harm consumers by:

- eliminating the competition that currently exists between Delta and United on routes served by Delta through these slots, Compl. ¶ 40;
- "diminish[ing] Delta's ability to compete on routes served by United out of Newark" and preventing Delta from being able to "launch new service or reinstate service to markets it once served in response to changes in consumer demand" or "initiatives by United," *id.*;

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[1] *See also FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 45-46 (D.D.C. 2009) (FTC established *prima facie* violation where merger would have combined firms with 60.7% and 4.5% market shares); *United States v. Standard Oil Co. (N.J.)*, 253 F. Supp. 196, 225 (D.N.J. 1966) ("Concentration is great and the margin of existing competition is narrow. Slight change in the structure of this market would probably produce substantial anticompetitive effect."). Many of the cases discussing harm from small increases in concentration to already concentrated markets involve the application of Section 7 of the Clayton Act. The same principles apply when analyzing an acquisition under Section 1 of the Sherman Act. *Rockford Mem'l*, 898 F.2d at 1282-83.

- "[permitting] United [to] strengthen[] an already formidable barrier to competition at Newark" and, thereby, "substantially reduc[ing] the likelihood of entry or expansion by other airlines at Newark," *id*. ¶¶ 4, 41;

- precluding other airlines from using these slots to force United to compete on price and service quality, which has occurred in the limited instances when other airlines have been able to obtain Newark slots, *id.* ¶¶ 25-27;

- "entrench[ing] United's dominance at Newark" by "giv[ing] United a market share of approximately 75% in the already highly concentrated Newark slots market, and a correspondingly high share in the Newark air passenger service market," *id.* ¶¶ 4, 37;

- providing United a greater incentive and ability to raise Newark airfares – which already are among the highest in the nation – by reducing flight options at Newark, *id.* ¶¶ 43-44; and

- allowing United to undermine the competitive and consumer benefits that resulted when United was required to divest 36 slots as part of its merger with Continental (an objective that United has tried to accomplish twice before), *id.* ¶¶ 20-22.

These allegations state a claim for violation of Section 1 of the Sherman Act.

B. The Complaint States a Claim under Section 2 of the Sherman Act.

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part [of domestic or international] trade or commerce." 15 U.S.C. § 2. To state a Section 2 monopolization claim, a plaintiff must allege "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior

product, business acumen, or historic accident.'" *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

"Monopoly power is the ability to control prices and exclude competition in a given market." *Id.* (citing *Grinnell*, 384 U.S. at 571). It is well-settled that a plaintiff plausibly pleads the existence of monopoly power by alleging that a defendant "has a dominant share in [the] relevant market, and that significant 'entry barriers' protect that market." *Id.* (citing cases). The Complaint alleges with specificity that United has a dominant 73% share of both the market for Newark slots and the market for scheduled air passenger service at Newark. *See, e.g.*, Compl. ¶¶ 2, 15, 18, 37, 42, 44. Such a high market share is strong evidence that United has monopoly power in these markets. *See, e.g.*, *United States v. Dentsply*, 399 F.3d 181, 188 (3d Cir. 2005) (holding that a company's 75% to 80% market share is "more than adequate to establish a prima facie case of [monopoly] power"); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 451 (4th Cir. 2011) (holding that defendant's market share of "over 70 percent" supported the district court's presumption of monopoly power); *Maxon Hyundai Mazda v. Carfax, Inc.*, No. 13-cv-2680, 2014 WL 4988268, at *15 (S.D.N.Y. Sept. 29, 2014) (holding that complaint "plausibly state[d] that monopoly power

exist[ed]" because "a market share over 70% is usually 'strong evidence' of market power" (quoting *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981)).

The Complaint also alleges with specificity that the FAA's requirement that airlines obtain takeoff and landing slots before serving Newark is a significant barrier to entry and expansion. Without slots, airlines already operating at Newark cannot increase service and new airlines cannot enter this market. In a section entitled "Slots Are a Barrier to Entry and Expansion at Newark," the Complaint details how the slots requirement restricts new competition to United at Newark and recounts the real world experiences of airlines that have faced significant challenges in obtaining slots at Newark. *See* Compl. ¶¶ 12-17; *see also id.* ¶¶ 27, 29-30, 36, 39-42, 46. These allegations demonstrate that United has monopoly power in the relevant markets.[2]

The allegations that United has (i) limited the flight options for Newark passengers by failing to use as many as 82 of its slots per day without any fear of a

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[2] *See, e.g.*, *Broadcom*, 501 F.3d at 307 (stating that "[b]arriers to entry" include "regulatory requirements" that "prevent new competition from entering a market in response to a monopolist's supracompetitive prices"); *Kolon*, 637 F.3d at 444, 451 (holding that monopoly power was properly pled where there were allegations of "legal barriers" to entry); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 499 (2d Cir. 2004) (holding that "regulatory requirements to sell generic[ ] [drugs]" were a significant entry barrier).

competitive response, and (ii) used its dominant 73% market share to extract a "Newark premium" from Newark passengers, who pay among the highest airfares in the country, *see, e.g.*, *id*. ¶¶ 2-3, 23-24, 43, 44, provide still more support for an inference that United has monopoly power. *See, e.g.*, *Broadcom*, 501 F.3d at 307 (stating that monopoly power can be proven through direct evidence of "supracompetitive prices and restricted output"); *IHS Dialysis Inc. v. Davita, Inc.*, No. 12 Civ. 2468, 2013 WL 1309737, at *4 (S.D.N.Y. Mar. 31, 2013) (stating that monopoly power can be pled through "allegations of control over prices or the exclusion of competition").

The second element of a Section 2 monopolization claim, willful acquisition or maintenance of monopoly power, requires a plaintiff to plead "some anticompetitive conduct on the part of the [monopolist]." *Broadcom*, 501 F.3d at 308; *see also LePage's Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir. 2003) (same). This pleading burden is satisfied through allegations of "[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Broadcom*, 501 F.3d at 308 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05 n.32 (1985)); *see also W. Penn Allegheny Health Sys.*, 627 F.3d at 108 ("Broadly speaking, a firm engages in anticompetitive conduct when it attempts to 'exclude rivals on

some basis other than efficiency' or when it competes 'on some basis other than the merits.'") (citations and internal quotation marks omitted).

Here, the Complaint alleges that United intends to maintain and enhance its monopoly power at Newark through the anticompetitive act of acquiring 24 additional slots, which would harm competition and passengers at Newark for the same reasons discussed above that make the United-Delta agreement an unreasonable restraint of trade. These allegations are sufficient to state a violation of Section 2 of the Sherman Act. *See, e.g.*, *Grinnell*, 384 U.S. at 576 ("unlawful and exclusionary practices" used to achieve monopoly included acquisitions of competitors); *see also* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 701a (4th ed. 2015) ("[A] monopolist's acquisition of the productive assets or stock of an actual or likely potential competitor is properly classified as anticompetitive, for it tends to augment or reinforce the monopoly by means other than competition on the merits.").

Unable to attack the sufficiency of these allegations, United again argues that the United States has failed to state a claim because United has not yet acquired the slots and therefore any anticompetitive effect is necessarily speculative. This argument fails for Section 2 of the Sherman Act just as it does for Section 1.

II. The United States Has Adequately Alleged Relevant Geographic and Product Markets.

The Complaint alleges that "[i]f permitted to proceed, anticompetitive effects from the proposed transaction would arise in at least two relevant antitrust markets: the market for Newark slots, and the market for scheduled air passenger service between Newark and other destinations." Compl. ¶ 28. United contends that these alleged relevant markets are deficient as a matter of law.

Market definition is an inherently factual inquiry that almost never provides an appropriate basis for dismissal. As this Court has explained, "[t]he relevant market element of an antitrust claim 'can be determined only after a factual inquiry into the commercial realities' of the market." *Bristol-Myers Squibb Co. v. Ben Venue Labs*., 90 F. Supp. 2d 540, 547 (D.N.J. 2000) (Walls, J.) (rejecting defendant's attempts on summary judgment to preclude potentially viable claims through a "hyper-technical attack" on market definition) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 482 (1992)).[3]

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[3] *See also Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430, 436 (3d Cir. 1997) (explaining that while there is no "per se prohibition" against dismissal of antitrust claims for failure to plead relevant market, the "general rule" is that, "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers") (citations omitted); *Fineman v. Armstrong World Indus., Inc*., 980 F.2d 171, 199 (3d Cir. 1992) ("determination of a relevant product market or submarket ('market') is a

Relevant antitrust markets include both product and geographic dimensions. In *Queen City Pizza*, the Third Circuit cited the Supreme Court's holding that "'[t]he outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" 124 F.3d at 437 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Tunis Bros. Co. v. Ford Motor Co*., 952 F.2d 715, 722 (3d Cir. 1991)). "The relevant geographic market, from which the court calculates the market share in the relevant product markets, is that area in which a potential buyer may rationally look for the goods or services he seeks." *Gordon v. Lewistown Hosp*., 423 F.3d 184, 212 (3d Cir. 2005) (citing *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa*., 745 F.2d 248, 260 (3d Cir. 1984)).

Despite the highly fact-bound nature of market definition, *Bristol-Myers Squibb*, 90 F. Supp. 2d at 547, United argues that the Court must, as a matter of law, reject the United States' alleged relevant markets on three grounds: First, United challenges the geographic scope of both markets, asking the Court to hold as a matter of law that airlines (with respect to slots) and passengers (with respect

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highly factual one best allocated to the trier of fact") (citing *Weiss v. York Hosp.*, 745 F.2d 786, 825 (3d Cir. 1984)); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.") (collecting cases).

to air passenger service) view JFK and LaGuardia Airports as reasonable substitutes for Newark Airport. UA MTD 22-23. Second, United argues that slots cannot constitute a distinct product market as a matter of law, despite the fact that slots are the subject of the very transaction at issue here. *Id*. at 23-31. And, third, United contends, again as a matter of law, that there is no such thing as a market for air passenger service to and from Newark. *Id*. at 25-27. Each of these arguments is without merit.

A. The Complaint Adequately Alleges that Newark Airport Constitutes a Separate Relevant Geographic Market.

The Complaint alleges that Newark Airport constitutes a relevant geographic market both in terms of airlines' acquisitions of slots (the Slot market) as well as airline passengers' purchase of scheduled air passenger service (the Service market). This case concerns United's attempt to acquire Newark slots from Delta, which would further entrench its market power at Newark Airport. The slots at issue can be used only at Newark – not at JFK, LaGuardia or any other airport. *See, e.g.*, Compl. ¶¶ 1, 7, 12-14, 29. In other words, United is acquiring assets that are themselves limited to Newark.

United argues nonetheless that the Complaint is subject to dismissal because the United States "fails to consider air passenger service to and from other New York metropolitan airports," by focusing solely on customers' "convenience" and

"preference" rather than reasonable interchangeability. UA MTD 23-24. This argument disregards the numerous allegations in the Complaint that explain that other New York-area airports are not reasonably interchangeable with Newark for purposes of the Slot and Service markets. As to the Slot market, the Complaint alleges, *inter alia*:

- "To serve Newark, an airline must have slots[.]" Compl. ¶ 1.
- "There are no alternatives to slots for airlines seeking to enter or expand service at Newark." *Id*. ¶ 29.
- "Airlines do not view service at other airports as reasonable substitutes for service offered at Newark, and thus they are unlikely to switch away from slots at Newark in response to a small but significant increase in the price of slots." *Id*. ¶ 30.

With respect to the Service market, the Complaint alleges:

- Many passengers traveling to or from locations in Northern New Jersey and portions of Manhattan "do not consider [LaGuardia and JFK] to be meaningful alternatives." *Id.* ¶ 33.
- Those customers "would not turn to [LaGuardia and JFK] even if fares at Newark were to increase by a modest amount." *Id*.
- As a result, "[a] hypothetical monopolist over all scheduled air passenger service at Newark likely would increase fares on routes to and from Newark by, on average, at least a small but significant and non-transitory amount." *Id*. ¶ 34.

In addition, the allegation that United already possesses monopoly power at Newark and is using that power to impose what it refers to as a "Newark premium" on passengers at the airport, Compl. ¶ 44, provides additional support for the

proposition that other airports are not reasonable alternatives to Newark in both the Slot and Service markets. If Newark were reasonably interchangeable with other airports, United would not be able to charge a "Newark premium."

The few cases on which United relies do not help its argument. Contrary to United's characterization of the case, the allegations in *Skyline Travel, Inc. v. Emirates*, an unpublished decision from the Southern District of New York, are not analogous to the Complaint here. In *Skyline Travel*, the court rejected a facially implausible alleged relevant market limited to a *single airline* at a single airport, and "taking into account only *two ethnicities* and *one state of residence* of passengers," where the complaint proffered "no facts plausibly explaining why the market should be limited in this particular way." No. 09-cv-8007, 2011 WL 1239783, at *3 (S.D.N.Y. Mar. 28, 2011) (emphasis added). The other two cases United cites, both of which are unpublished, are similarly inapt. *See Concord Assocs., L.P. v. Entm't Props. Trust*, No. 12 Civ. 1667, 2014 WL 1396524, at *17 (S.D.N.Y. Apr. 9, 2014) (dismissing claim where complaint failed to allege why relevant market should be limited to casinos within 100 miles of New Concord Casino in the Town of Thompson, New York, but not include casinos in Atlantic City, Connecticut, and elsewhere that were "within convenient transit" of the population center [New York City metropolitan area] from which the New

Concord Casino draws"); *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296, at *1, *4, *11 (N.D. Cal. Sept. 27, 2010) (on preliminary injunction motion, rejecting plaintiffs' alleged markets based on a "thorough record by way of a two-day evidentiary hearing" where plaintiffs' expert "conducted no econometric or quantitative analysis of the anticompetitive effects of the merger" and plaintiffs' own testimony was inconsistent with the markets they alleged).

United may well take the position at trial that fares at LaGuardia and JFK do in fact constrain fares at Newark, but no legal principle compels that conclusion as a matter of law at the motion to dismiss stage.

United also argues that the Complaint should be dismissed because the geographic market is "entirely result-oriented" and inconsistent with allegations in the Complaint "suggesting that the other New York City area airports offer service to many of the same locations [as Newark], and implying that some passengers may view LGA and JFK as alternatives." UA MTD 29-30. The question for market definition, however, is not whether there are "some" or even "many" Newark passengers willing to switch to JFK or LGA (or anywhere else), but whether there is sufficient interchangeability between Newark and other airports for enough customers such that the Court should find a broader market. *See, e.g.*, *Queen City Pizza*, 124 F.3d at 437-38; *see also, e.g.*, *United States v. Visa U.S.A.*

Inc., 163 F. Supp. 2d 322, 338 (S.D.N.Y. 2001) (finding relevant market for general purpose credit and charge cards even though debit, cash and checks compete with them to some extent), *aff'd*, 344 F.3d 229 (2d Cir. 2003). Whether there is sufficient interchangeability between Newark and other airports is a question of fact that cannot be resolved on a motion to dismiss.

Once again, the cases cited by United do not support dismissal here. *See, e.g.*, *Ferguson Med. Group, L.P. v. Mo. Delta Med. Ctr.*, No. 1:06CV8 CDP, 2006 WL 2225454, at *5 (E.D. Mo. Aug. 2, 2006) (rejecting alleged geographic market that "goes east and south, but not north and west, of the alleged monopolist's place of business" with "no reasonable explanation, other than to artificially boost [the defendant's] market power"). United's calling the Newark Slots and Service markets "result-oriented" merely begs the question of whether the United States will be able to offer sufficient facts to prove its claims at trial.

B. The Complaint Adequately Alleges That Slots Constitute a Relevant Product Market.

The Complaint alleges that slots at Newark constitute a relevant product market: "To serve Newark, an airline must have 'slots,'" Compl. ¶ 1, and "[t]here are no alternatives to slots for airlines seeking to enter or expand service at Newark," *id.* ¶ 29. The Complaint further alleges that airlines acquire slots from one another. *Id.* ¶¶ 21-22. Airplanes, pilots, gates, fuel, and any number of other

products and services are required to provide air passenger service at Newark, but none is a substitute for slots. Thus, airlines wishing to enter or expand their service at the airport have no choice but to obtain slots. Likewise, the Complaint properly alleges that airlines do not view slots at other airports as substitutes for slots at Newark. *Id.* ¶ 30.

Just within the last year, United argued to the FAA that a "secondary market for slots" exists at Newark and other slot controlled airports, and that "this market is currently functioning well."[4] In this case, however, United now contends that "slots have no legal significance separate and apart from the market for commercial air travel, so as a matter of law, there can be no separate slots market." UA MTD 27-28. United's sole support for its new position is a single case: *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F. Supp. 2d 549 (W.D. Va. 2000). In *Virginia Vermiculite*, the court rejected the plaintiffs' contention that vermiculite mining rights constituted a separate relevant market from the market for the sale of vermiculite. *Id.* at 578-79. This intensely fact-bound ruling provides no guidance in this case. First, *Virginia Vermiculite* was decided on

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[4] *Comments of United Airlines, Inc.*, Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, Notice of Proposed Rulemaking, Docket No. FAA-2014-1073, at 4, 29-30 (May 8, 2015).

summary judgment, under a very different standard and after the completion of discovery. *Id*. at 553. Moreover, the court adopted the defendants' market definition largely because plaintiffs had "no qualified antitrust economics witness to rebut" defendants' market definition evidence. *Id.* at 578.[5]

C. The Complaint Adequately Alleges a Relevant Product Market for Air Passenger Service to and from Newark Airport.

The Complaint alleges a second relevant market consisting of scheduled air passenger service between Newark and other destinations. Compl. ¶¶ 31-34. While in other circumstances the Department of Justice might "examine each route from Newark to another airport as a relevant market itself or as part of a broader relevant market involving flights between two cities," *id.* ¶ 34, the Service market alleged by the United States here reflects the "commercial realities" of the Proposed Acquisition. Slots are assets that are deployed differently over time by the carriers that hold them. Airlines continually reassess how to deploy their slots and enter and exit routes (or expand and contract service on routes) to take advantage of profit opportunities and compete with other carriers that serve the

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[5] United also fails to mention that the Fourth Circuit on appeal after trial did not adopt the district court's analysis of the relevant product market, or even reach the issue, finding instead that the donation of lands at issue in that case did not constitute "concerted action" subject to Section 1. *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 283 (4th Cir. 2002).

airport. The impact of a slot transaction on any given route will change depending on how the slot is used. *Id.* ¶ 32. Thus, examining individual routes on which the slots are currently being used would not capture fully the competitive impact of the Proposed Acquisition on the airport as a whole. *Id.* ¶¶ 31-34.

United argues that the Service market is deficient as a matter of law because "it assumes that every route from EWR to *any other destination* is interchangeable, and is thus in the same relevant market." UA MTD 25 (emphasis in original). The United States does not contend that a flight from Newark to San Francisco is interchangeable with, for example, a flight from Newark to Houston. Rather, an "inquiry into the commercial realities" of an acquisition of slots that can be used to fly from Newark to the destination of the airline's choice supports the Complaint's allegation that air passenger service to and from Newark is a relevant market. Neither of the two cases cited by United involved the sale of airport slots, and neither supports a finding that the Service market is defective as a matter of law.[6]

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[6] *See Rodney v. Northwest Airlines*, 146 F. App'x 783, 785, 787-88 (6th Cir. 2005) (affirming denial of class certification in case alleging that plaintiffs paid supracompetitive prices on 74 separate routes as a result of Northwest's monopolization of three airport hubs because individual questions predominated where even plaintiffs' expert testified that "his analysis would have to be performed on a route-by-route basis"); *Malaney*, 2010 WL 3790296, at *12 (after evidentiary hearing, rejecting plaintiffs' proposed national market where plaintiffs' expert "did no economic modeling to support a national market" and airline

III. The Sherman Act Authorizes the United States to "Prevent and Restrain" Violations of the Antitrust Laws.

In addition to its argument that any harm arising from the Proposed Acquisition is speculative and hypothetical, United also contends that, even if the United States is able to prove by a preponderance of the evidence that the Proposed Acquisition is likely to harm Newark consumers, the United States and this Court are powerless to act now. Instead, United argues, the United States must permit the Proposed Acquisition to proceed and wait for the anticompetitive effects of United's acquisition to take root before bringing this action. UA MTD 14, 18.

United's position that the Sherman Act proscribes only "agreements and acts of monopolization that result in actual anticompetitive effects and that have actually caused demonstrable injury to competition," *id.* at 1, is belied by the language of the Sherman Act itself. The plain text of Section 4 of the Sherman Act expressly confers jurisdiction to this Court to "*prevent* and *restrain* violations" of the Sherman Act and directs the United States to "institute proceedings in equity to *prevent* and *restrain*" such violations. 15 U.S.C. § 4 (emphasis added).

The Supreme Court has recognized for nearly a century that analysis under the Sherman Act is forward-looking and must consider "the nature of the restraint

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concentration at the national level was "far below the Merger Guidelines threshold that would trigger DOJ scrutiny").

and its effect, actual or *probable*." *Bd. of Trade of Chicago*, 246 U.S. at 238 (emphasis added). The Court has also made clear that actions for injunctive relief brought by the United States pursuant to Sherman Act Section 4 "deal[] primarily, not with past violations, but with threatened future ones," such that "an injunction may issue to prevent future wrong, although no right has yet been violated." *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928); *see also F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170-71 (2004) ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm.").

United attempts to limit the reach of the Sherman Act by distinguishing it from Section 7 of the Clayton Act, 15 U.S.C. § 18, which United acknowledges "deals with acquisitions that do not have current, actual anticompetitive effects, but that *are likely to* have some future adverse impact on competition." UA MTD 2-3, 17 (emphasis in original). As Judge Posner explained in *Rockford Memorial*, however, "[b]oth statutes as currently understood prevent transactions likely to reduce competition substantially." 898 F.2d at 1283.[7] Judge Posner's opinion for

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[7] *See also Vantico Holdings S.A. v. Apollo Mgmt., LP*, 247 F. Supp. 2d 437, 458 (S.D.N.Y. 2003) ("Because § 1 of the Sherman Act looks to the probable effects of an agreement, there is no substantive difference between the standards underlying a violation of § 7 and § 1."); *Cmty. Publishers, Inc. v. Donrey Corp.*,

the Seventh Circuit dismissed the very same argument that United makes here – "that section 7 prevents *probable* restraints and section 1 *actual* ones" – as mere "word play." *Id.* (emphasis in original).

United's argument fares no better with respect to the United States' Section 2 claim. United uses snippets from the 1950 legislative history of amendments to the Clayton Act in an attempt to create a gap between the reach of Section 2 and Section 7 of the Clayton Act. UA MTD 17. No such gap exists. Where, as here, an acquisition "tends to maintain a monopoly by cutting off an avenue of future competition . . . condemnation under § 2 is appropriate." 4 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 912b (3d ed. 2009); *see also Grinnell*, 384 U.S. at 566, 576 (acquisition challenged under Sherman Act Section 2); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1266 (E.D. Pa. 1987) (holding in preliminary injunction context that plaintiffs established probability of success on their allegation that the challenged merger would result in actual monopolization in violation of Section 2 in markets where post-acquisition share was over "70% of the market").

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892 F. Supp. 1146, 1173 (W.D. Ark. 1995) (mergers challenged under Section 1 "should be evaluated by the same substantive standards as those applied under Section 7"); *McCaw Personal Commc'ns, Inc. v. Pac. Telesis Grp.*, 645 F. Supp. 1166, 1173 (N.D. Cal. 1986) ("the standard . . . under the Sherman Act is similar, if not identical, to that under the Clayton Act").

The United States has both the authority and the duty to seek injunctive relief to prevent violations of the antitrust laws *before* the conduct actually harms consumers. None of the cases cited by United hold to the contrary. While it may be true that many Sherman Act cases "involve conduct that already has occurred and where the harm is readily apparent," *see* UA MTD 14, actual harm is not a prerequisite to a suit in equity by the United States.[8]

With the exception of *Dentsply*, 399 F.3d 181, and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), none of the cases on which United relies involved equitable actions brought by the United States. And neither *Dentsply* nor *Microsoft* supports United's argument that the United States may not sue to prevent violations of Sections 1 or 2 of the Sherman Act from occurring. To the contrary, in *Microsoft*, the court rejected Microsoft's arguments that the United States had to show "direct proof" that its continued monopoly power was attributable to its anticompetitive conduct, and held that "with respect to actions

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[8] *See also Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 152 F.3d 588, 591, 592 (7th Cir. 1998) (private plaintiff entitled to injunctive relief even though it failed to offer evidence of any actual injury; plaintiff has to prove only "that he is likely to be harmed by the defendant's wrongful conduct unless that conduct is enjoined"); *In re Mercedes-Benz Antitrust Litig.*, No. 99-4311, 2006 WL 2129100, at *22 (D.N.J. July 26, 2006) (J. Walls) ("[T]he Court notes that injunctive relief in antitrust actions 'is not dependent on the existence of actual or measurable injury.'") (quoting 2 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 326a (2d ed. 2000)).

seeking injunctive relief," such a causal link between the conduct and the harm could be inferred where the conduct "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power." 253 F.3d at 79 (quoting 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651c).

It would make no sense to require the United States to wait for a price-fixing conspiracy to result in higher prices, a boycott to put a competitor out of business, or, as here, an anticompetitive acquisition actually to harm consumers, before it could seek an injunction to prevent the harm.

IV. The Court Should Not Permit Defendants to Close the Proposed Acquisition Pending Resolution of this Action.

United asks that the Court grant Defendants permission to close the transaction immediately. UA MTD 31-36. It is unclear whether United is asking for permission to complete the transaction *only if* the Court denies the motion to dismiss but grants Delta's separate request for a stay pending the outcome of the FAA rulemaking as is suggested by the first paragraph of its argument, *see id.* at 31, or if United is seeking an order allowing it to close regardless of the outcome of its and Delta's motions.

United's request conflicts with its commitment not to complete the transaction pending resolution of this case. Early in the Rule 26(f) conference process, United, Delta, and the United States came to the understanding that the

United States would be willing to proceed on an expedited schedule on the condition that the Defendants would not require the United States to seek preliminary injunctive relief from the Court. That understanding is reflected in the Joint Scheduling and Case Management Order, submitted to the Court on December 18, 2015, in which United and Delta expressly agreed "not to consummate or otherwise complete the EWR Slot Lease Agreement dated June 16, 2015, ('Proposed Acquisition') until 12:01 a.m. on the sixth day following entry of judgment by the Court, and only if the Court enters judgment in favor of Defendants, or unless otherwise permitted to do so by order of the Court." Joint Scheduling and Case Management Order ¶ 1, ECF No. 23-1.

United is also wrong that the Complaint does not allege a proper basis for injunctive relief. Its first argument, that "an antitrust plaintiff must allege that the underlying conduct resulted in actual anticompetitive effects," UA MTD 32-33, makes no sense for the same reasons discussed above in Section III. This is a rehash of United's argument that the Complaint should be dismissed because "the Slots Transaction has not even occurred yet." *See* UA MTD 33. If United were correct, the United States would never be able to bring suit in equity to prevent anticompetitive conduct that had not yet occurred notwithstanding the express language of Section 4 of the Sherman Act.

United's second argument is another version of its argument that the harm alleged in the Complaint is hypothetical and speculative. As discussed in Section I above, that argument disregards the many allegations in the Complaint showing that United's acquisition of Delta's Newark slots, if allowed to proceed, would harm consumers. The fact that slots can be transferred back and forth does not mean that the Complaint fails to allege sufficient harm to support a request for injunctive relief. As the Complaint alleges, allowing United to operate Delta's slots for even a short time will bolster United's already anticompetitive pricing power at Newark. The slots at issue are not "in limbo" as United asserts, UA MTD 32, but rather Delta is using them productively today *to compete head-to-head against United* and will continue to do so during the pendency of this action. Immediately upon transfer of slots to United, Delta's competitive presence vis-à-vis United at Newark will be decreased by more than one-third.

The United States has adequately pled claims for injunctive relief under Sections 1 and 2 of the Sherman Act. To the extent the Court finds any merit to United's position that it can walk away from its agreement not to close the transaction during the pendency of this lawsuit, the United States should be afforded the opportunity for full briefing on whether the Court should preliminarily enjoin the transfer of slots from Delta to United.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendant United's motion to dismiss.

Respectfully submitted,

/s

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2016, I caused a true and correct copy of the foregoing document to be filed and served upon all counsel of record via the Court's CM/ECF system.

/s Amanda Klovers
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