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*.	Civil Action No. 1:13-cv-01236-CKK

MEMORANDUM OF THE UNITED STATES AND PLAINTIFF STATES
IN OPPOSITION TO DEFENDANTS' PROPOSED SCHEDULING ORDER

The proposed merger of American Airlines and US Airways, which would create the world's largest airline, presents a substantial threat to competition in air travel in local markets throughout the United States and will likely result in hundreds of millions of dollars in harm to consumers annually. All this is at a time when both American and US Airways are reporting record earnings and American is set (absent the merger) to embark on a period of procompetitive expansion. Given what is at stake, this Court should allow both sides a full opportunity to develop the relevant evidence in discovery and to present that evidence at trial. *See, e.g.*, *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1041 (D.C. Cir. 2008) (Brown, J.) (explaining, in a government merger challenge, that the district court should take "whatever time it needed to consider the [] evidence fully"). Defendants' attempt to rush this matter to a trial on the merits in fewer than 75 days following the initial Scheduling Conference creates the very real risk that a challenge to a $14 billion merger—in dollar terms one of the largest merger challenges ever adjudicated—will be resolved on less than an appropriate record.

Antitrust cases typically involve a host of "complicated legal, factual and technical (particularly economic) questions" and therefore require "extensive discovery." Manual For Complex Litigation (Fourth) § 30 (2004). Plaintiffs' proposed trial-ready date of March 3, 2014, with trial starting thereafter at the Court's convenience, would leave four months for party and non-party document discovery and fact depositions, a month for expert reports and depositions, and then a month for pretrial motions and briefs. This schedule, while expeditious for a case of this magnitude, seeks to ensure that the Court will have an appropriate record.

1. American's Ongoing Bankruptcy Proceedings Do Not Justify Trying this Case on an Incomplete Record.

Defendants rely heavily on the American bankruptcy proceedings to justify their truncated schedule. They argue in this Court that "[t]he government's action has created enormous uncertainty for the employees and customers of both Airlines" (Def. Mem. at 6) without offering any specific examples of harm or evidence to support their assertions. Their suggestions of undue surprise and resulting uncertainty because of this lawsuit are unfounded. Just this past Friday, American argued to the bankruptcy court that the proposed plan of reorganization, which is based on the February 2013 merger agreement, should be confirmed because the parties had specifically accounted for a potential government antitrust challenge:

> In fact, this potential scenario [a government antitrust challenge] is contemplated by the express terms of the Merger Agreement, the Disclosure Statement, and the Plan, and these documents set forth the procedures to be followed in the event such a scenario were to arise. Accordingly, the circumstances before the Court are fully within the expectation of the Debtors' stakeholders, employees, business partners, and other parties in interest . . . .[1]

American described to the bankruptcy court the procedures to be followed and the

[1] Debtors' Memorandum of Law Regarding Impact of Department of Justice Action on Entry of Order Confirming Debtor's Third Amended Joint Chapter 11 Plan, at 3 (available at http://www.amrcaseinfo.com/pdflib/9924_15463.pdf).

parties' respective rights if there were such a challenge, and explained that the "delay attendant to the DOJ Action does not in any way undermine the Plan's feasibility."[2] Defendants were also well aware of the Antitrust Division's competition concerns and the likely timing of any lawsuit.[3] In short, from day one, interested parties knew what should have been clear: that a merger of two large firms competing in already highly concentrated markets might draw an antitrust challenge. It was Defendants' desire to pursue a highly problematic merger that created the problem they are now seeking to blame on others.

Defendants further suggest that any delay in American closing the merger and formally emerging from bankruptcy may mean a weaker American due to uncertainty and the potential loss of employees and customers. *See, e.g.*, Def. Mem. at 6-7.[4] This argument, however, ignores the fact that American's restructuring efforts have been extraordinarily successful and have positioned the company to compete as a strong and vibrant standalone firm. American reported record profits in the second quarter of this year[5] and just yesterday announced that July 2013 was the most profitable month in the company's history. In a letter to employees announcing the recent results, American's CEO wrote:

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[2] *Id.* at 4-5, 13.

[3] In a May 28, 2013 letter to the Antitrust Division, the parties insisted that the government make its antitrust enforcement decision prior to the scheduled August 15 bankruptcy court plan confirmation hearing. At the August 15 hearing, the bankruptcy court closed the official record on all issues except the impact of this case on plan confirmation. It has set a hearing on that issue for August 29, 2013. (Defendants previously agreed not to close the merger until thirty days after filing of the antitrust Complaint; Plaintiffs and Defendants are discussing whether Defendants will extend that agreement during the pendency of this Court's proceedings.)

[4] *See also* Brief of Amicus Curiae Allied Pilot's Ass'n *et al.* in Support of Defendants' Motion to Set Trial Date at 9 (arguing that American does not have motivated leadership and that its "competitive position is likely to erode further during the pendency of this case").

[5] Press Release, "AMR Corporation Reports Net Profit of $357 Million, Excluding Reorganization and Special Items – AMR's Best Second Quarter Result in Company History," July 18, 2013 (available at http://hub.aa.com/en/nr/pressrelease/amr-corporation-reports-net-profit-of-357-million-excluding-reorganization-and-special-items---amrs-best-second-quarter-result-in-company-history).

> Today is a very good day. This morning we reported our financial results for July and here's the headline: *we are completing one of the most successful turnarounds in aviation history. We are building a strong, competitive and profitable new American poised to lead again*.[6]

He further described in the letter how American is launching new routes (including new routes planned for 2014), buying new aircraft to allow American to "better match supply and demand with the right amount of schedule frequency as our competitors do," and importantly, "hiring hundreds of new flight attendants and recalling and training pilots at an accelerating pace."

In fact, for many months American management resisted a US Airways takeover in large part because the prior restructuring efforts had been so successful. Shortly after entering bankruptcy in November 2011, American management – as debtor in possession – undertook numerous actions to restore American's profitability. By the end of 2012, the restructuring was "near complete," with management recognizing that the "end result is a company that is well-positioned for long term success."[7] American now has a "competitive cost structure and strong balance sheet" with over $6 billion in available cash, hubs in desirable locations ("in the right place for the most valuable customers"), a base of "high value customers," revenue growth that has been consistently "at or near the top of the industry" over the past year, and an increasing number of corporate accounts.[8] On January 16, 2013— a month before the merger agreement with US Airways—American's CEO could not have been more optimistic:

> It is remarkable what the American team has been able to accomplish, including generating record revenues and a return to an operating profit for the year while restructuring every aspect of the company. I want to thank all of our people for

[6] "A Message from Chairman and CEO Tom Horton," Aug. 26, 2013 (Attached as Exhibit 1) (emphasis added).

[7] American Airlines, "The New American," Dec. 12, 2012, at 8 (Exh. 2). American noted that it was completing "one of the fastest restructuring efforts of all the major global carriers in the past decade." *Id.* (United Airlines was in bankruptcy for 38 months, Northwest Airlines for 20 months, and Delta Airlines for 19 months).

[8] *Id.* at 45, 4.

> their dedication, hard work and commitment to serving our customers during this time. Our momentum is growing toward emerging as a strong, healthy and vibrant competitor.[9]

American continues to thrive. It will offer more flights and more seats both domestically and internationally in 2013 than it did in 2012; it has placed the largest aircraft order in aviation history to give itself one of the youngest, most fuel efficient fleets in the industry; it is implementing customer service enhancements in its airplanes and its passenger facilities; and it has bolstered its network and alliances "by expanding service from its hubs to the domestic and international cities most desirable to high value customers."[10]

American accomplished all this well *before* its proposed merger with US Airways. Its momentum has not slowed since. And, as yesterday's earnings announcement demonstrates, there is no evidence it will slow during the pendency of this litigation.

The government does not discount that American may incur costs[11] and that the airlines' employees will face some uncertainty while this lawsuit is pending. This is true in every merger challenged by the government. As noted above, however, the possibility of such a challenge was contemplated and planned for by all stakeholders. The short-term costs and uncertainties must be balanced against American's current success, the need for a full and fair exploration of the claims at issue, and the merger's potential for long-term harm to consumers.

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[9] Press Release, "AMR Corporation Reports Fourth Quarter 2012 Net Profit of $262 Million, a $1.4 Billion Improvement Over Fourth Quarter 2011" (Jan. 16, 2013) (available at http://hub.aa.com/en/nr/pressrelease/amr-corporation-reports-fourth-quarter-2012-net-profit-of-262-million-a-14-billion-improvement-over-fourth-quarter-2011).

[10] *Id.* at 5.

[11] Defendants report (Mem. at 2) that American spends $500,000 per day in ongoing "professional fees" to remain in bankruptcy proceedings that appeared to be on the cusp of ending. This figure translates to one hundred professionals billing ten hours a day at $500 per hour, a pace that appears out of line with American's current posture in bankruptcy and that court's recent decision to close the record. In any event, the continuing size of those fees is more appropriately the subject of discussions between American and those outside professionals.

Further, any claim of urgency based on the December 13, 2013 merger agreement termination date that Defendants negotiated between themselves should carry little weight. They can change this self-imposed deadline with the stroke of a pen. Indeed, Defendants do not claim that the transaction will be abandoned after December 13; they state only that they "will have the right to terminate the transaction at any time after that date." Def. Mem. at 7. Faced with similar arguments, the Court of Appeals explained:

> [A]lthough the appellees state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. . . . Moreover, even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal.

FTC v. Heinz, 2000 WL 1741320, at *2 (D.C. Cir.) (emphasis in original).

2. The Government's Pre-Filing Investigation Is No Substitute for Full Discovery on Both the Allegations in the Complaint and the Airlines' Defenses.

Defendants' suggestion that the government's pre-complaint investigation is a substitute for or limits the government's post-complaint discovery rights is contrary to settled authority.[12] Investigations may extend to any number of issues that have no bearing on eventual litigation. Moreover, the filing of a lawsuit does not mean that the investigation itself was used to prepare for trial. Here, for example, Defendants planned to close the merger immediately upon the expected August 15 bankruptcy plan confirmation, thereby requiring the government to make an

[12] *See, e.g.*, *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("Here, even though the [agency] had already conducted a pre-filing investigation, . . . 'there is no authority which suggests that it is appropriate to limit the [agency]'s right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'") (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990)); *Saul*, 133 F.R.D. at 118–19 ("[T]he Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial. . . . Once the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind.").

enforcement decision by that date. They made a calculated decision to force the government's hand. They had that right, but they have no right to limit post-complaint discovery.

Nor was Plaintiffs' investigation as lengthy in real terms as Defendants assert. While Defendants have engaged in merger discussions at various times with each other and with other entities, they did not sign their merger agreement until February 13, 2013. They then delivered approximately 3 million pages of documents to the government in early May. Time was needed to review documents, take a limited number of investigative depositions (seven party, zero non-party), engage in substantive discussions with the parties, and make an enforcement decision. In the end, it was only six months between the merger agreement and the filing of this case.

In a situation like this, post-complaint discovery is particularly necessary as the Complaint and Defendants' Answer (not yet filed as of this submission) frame the issues to be litigated. Discovery is not just about obtaining evidence so that the government may carry its burden of proof at trial. The government also has the right to take full discovery as to any defenses to the Complaint. *See* Fed. R. Civ. P 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.").

Here, for example, Plaintiffs need additional deposition and document discovery from Defendants and other entities regarding: pricing and other competitive interactions between Defendants and their airline competitors; competitive effects in the markets at issue; smaller airlines identified by Defendants as allegedly being able to replace the competition lost as a result of the proposed merger (Def. Mem. at 3); any business customers Defendants identify as supporting the merger; the economic analysis upon which Defendants are likely to rely in support of their efficiencies claims; and the "real world" support for the assumptions used in that analysis. Plaintiffs also need to depose party witnesses in order to perfect admissible evidence

and cross examination material needed to establish factual inconsistencies with the Defendants' assertions; obtain and submit expert discovery, including expert reports and depositions; and engage in pre-trial motions practice to narrow and clarify the issues for trial. A March 3, 2014 trial-ready date allows for four months of document discovery and fact depositions, a month for expert discovery, and then a month for pretrial motions and briefs. In a case of this magnitude, that is hardly a leisurely schedule.

3. Six Months to A Full Trial on the Merits Is in Keeping with Timetables in Comparable Merger Cases.

Defendants rely heavily on their assertion that they are being held to a different litigation schedule than were parties to other government merger challenges over the last thirteen years (or, as they put it, "since the turn of the century"). But Defendants reach that erroneous conclusion based on improper comparisons and highly selective data. Comparing apples to apples produces a much different perspective.

To begin with, eleven of the cases appearing on Defendants' Table 1 (Def. Mem. at 4) were preliminary injunction proceedings brought by the Federal Trade Commission under section 13(b) of the FTC Act. 15 U.S.C. § 53(b). Unlike here, the courts in those cases were not being asked to make a determination on the antitrust merits of the FTC claim: "Critically, the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Whole Foods*, 548 F.3d at 1048 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)). Thus, the trial on the merits would follow only after the section 13(b) preliminary injunction ruling. Trial occurs before an administrative law judge (who ultimately recommends a decision to the five-member Commission) and typically involves a process that takes a year or more, including months of pretrial discovery. Here, in contrast, this Court will decide the merits. It is therefore

similarly entitled to have the benefit of full exploration of the issues in dispute. In short, the FTC cases listed in Defendants' Table 1 are completely inapposite.

Second, Defendants' Table 1 is highly selective and omits a number of recent merger challenges. Table A below shows the scheduled time to trial in representative merger cases brought by the United States (including three from "this century") that did not find their way onto Defendants' Table 1 because they were ultimately settled or abandoned:

TABLE A
SCHEDULED TIME TO TRIAL IN REPRESENTATIVE UNITED STATES MERGER CASES OMITTED FROM DEFENDANTS' TABLE 1

CASE NAME	FILING OF COMPLAINT	DAYS TO TRIAL
AT&T/T-Mobile	Aug. 31, 2011 (D.D.C)	166
Dean Foods	Jan. 22, 2010 (E.D. Wisc.)	545
JBS	Oct. 20, 2008 (N.D. Ill.)	200
Compuware	Oct. 29, 1999 (D.D.C.)	157
Northwest Airlines[13]	Oct. 23, 1998 (E.D. Mich.)	740
Primestar	May 12, 1998 (D.D.C.)	263
Lockheed Martin	Mar. 23, 1998 (D.D.C.)	168

When judged against this more complete set of benchmarks, Plaintiffs' proposed schedule is not in any way extraordinary. For example, Defendants ignore one of the most recent merger cases filed by the United States in this Court—*U.S. v. AT&T, T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 11-cv-01560 (D.D.C., filed Aug. 31, 2011). In that case, Judge Huvelle set a schedule that provided 166 days from the filing of the complaint to trial.

Finally, Defendants' comparison of this case to *U.S. v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 179-80 (D.D.C. 2001), is also inapt. SunGard was a far smaller merger—$825

[13] *U.S. v. NW Airlines Corp. et al*, No. 98-74611 (E.D. Mich. Filed Oct. 23, 1998) was the last litigated government challenge to a transaction that would combine the interests of two airlines. In that case, the United States challenged a partial stock acquisition that would have linked the competitive interests of the fourth and fifth largest airlines, leading to anticompetitive effects in numerous nonstop and connect routes throughout the United States.

million compared to the $14 billion here—and the firm being acquired was in imminent danger of losing substantial value prior to trial. American, however, is a successful company generating record profits. This case bears no resemblance to the situation in *SunGard*.[14]

4. The Public Interest Strongly Favors Plaintiffs' Proposed Schedule.

Defendants claim that the public interest favors a rush to judgment because the transaction will bring benefits to millions of passengers. Def. Mem. at 2. A different perspective—and the one motivating the lawsuit—is that the merger threatens significant consumer harm. That harm and any asserted benefits flowing from the merger should be carefully evaluated. As the Court of Appeals explained in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001):

> [T]he high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies . . . . Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those "efficiencies" represent more than mere speculation and promises about post-merger behavior.

The public interest here is similarly served by a rigorous analysis of Defendants' alleged efficiencies and consumer benefits.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Proposed Scheduling Order and enter the schedule Plaintiffs will submit later this week in the proposed Case Management Order.

[14] At a hearing in *U.S. v. Echostar*, No. 02-2138 (D.D.C. 2002) (Huvelle, J.), the court rejected defendants' reliance on *SunGard* in support of a truncated discovery schedule: "there was really only one issue there on how you define the relevant market, and I can say that that was a backbreaking experience for everybody concerned . . . it was certainly not something that anyone would consider the ordinary or desirable way for a judicial proceeding to proceed." Exh. 3 at 54.

Respectfully submitted on Aug. 27, 2013.

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