UNITED STATES SUPREME COURT

	Docket No. ________________
	Case below:
In re	**Case No. 11-15463-SHL**
AMR CORPORATION, *et al.,*	**Chapter 11**
Debtors.	**(Jointly Administered)**
CAROLYN FJORD, *et al.,*	**Adversary No. 13-01392-SHL**
Plaintiffs,	
vs.	
AMR CORPORATION, *et al.,*	
Defendants.	
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OFFICIAL COMMITTEE OF THE UNSECURED CREDITORS,	
Intervenor.	

APPLICATION TO INDIVIDUAL JUSTICE FOR STAY OF ORDERS FROM THE U.S. BANKRUPTCY COURT AND U.S. DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK AND THE SECOND CIRCUIT COURT OF APPEALS PERMITTING MERGER OF AMR CORPORATION AND US AIRWAYS GROUP, INC. SCHEDULED TO OCCUR ON DECEMBER 9, 2013

PRELIMINARY STATEMENT

Plaintiffs Carolyn Fjord, *et al.* respectfully request from a Justice of this Court a Stay of the Bankruptcy Court's order permitting the consummation of the proposed merger between American Airlines and US Airways which is scheduled to occur before the opening of the securities markets on Monday, December 9, 2013.

Plaintiffs submit that the issues presented by this application are precisely those addressed by Justice O'Connor in her Order on an Application for Stay in *California v. American Stores Company*, 492 U.S. 1301 (1989). The analysis by Justice O'Connor supports a finding of irreparable harm and likelihood of success on the merits that were not credited by the courts below.

This is a private antitrust suit brought by 39 plaintiffs throughout the United States under Section 16 of the Clayton Antitrust Act (15 U.S.C. § 26), alleging that the proposed merger between American Airlines and US Airways is in violation of Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18).

The question of the legality of the proposed merger between American Airlines and US Airways, creating the largest airline in the United States and following on the whirlwind of mammoth mergers in the airline industry in the last

five years, is serious enough to warrant a stay of the orders which permit the consummation of the merger, pending an appeal.

According to the June 19, 2013, Report by the United States Government Accountability Office, a document admissible on its face pursuant to Fed. R. Evid. 803(8), more than 53 million passengers will be affected by this elimination of a major competitor in over 1,660 markets resulting in 47 monopolies, 475 duopolies, and 749 three-carrier oligopolies. Moreover, using the objective standard of the Herfindahl-Hirschman Index ("HHI")[1]/ and data from the Department of Transportation, this merger will also create approximately 1,000 presumptively illegal markets throughout the country. Furthermore, by reason of this massive elimination of competition in the airline industry in the United States, the top three combines (American/US Airways, United/Continental, Delta/Northwest) will control over 80% of the market as measured by either capacity, operating revenues, or assets. In addition, there is every reason to believe that the reduction

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[1] HHI is an index used to measure concentration in a market, which is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. See United States Department of Justice and Federal Trade Commission Horizontal Guidelines, § 5.3 (August 19, 2010) available at www.justice.gov/atr/public/guidelines/hmg- 2010.html#5 (the "Merger Guidelines"). The Department of Justice uses HHI numbers to determine thresholds for when an industry is considered highly concentrated or when potential mergers require investigations. *Id.*

of capacity, availability and service at the same time as substantial price increases, following the other mega-mergers, will continue unabated by this combine of major competitors.

Plaintiffs asserted in the Courts below that the proposed merger was and is prohibited by reason of the following decisions by the Supreme Court of the United States, none of which have been overruled: *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Philadelphia Natl. Bank*, 374 U.S. 321 (1963); *United States v. Aluminum Co. of America*, 377 U.S.271 (1964); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); and *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973).

These Supreme Court decisions, as noted by Judge Richard Posner in *Hospital Corp. of America v. FTC*, 802 F.2d 1381 (7th Cir. 1986), "seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the court to inform the statutory words 'may… substantially… lessen competition.'"

"None of these decisions has been overruled." *Id.* at 1385.

Notwithstanding the binding authority of these decisions by the Supreme Court of the United States, the Bankruptcy Court chose not to follow them and instead specifically determined to base its ruling allowing the merger on unidentified cases which the Bankruptcy Court stated "has evolved since the 1960's to encompass a more flexible, industry-specific analysis." Messina Declaration, Exhibit A, Memorandum of Decision, page 18, n. 12.

Under the law as stated by the Supreme Court of the United States, and pursuant to the purposes and intent of the Congress of the United States, as noted by the Supreme Court, the market control and trend toward undue concentration in this case clearly demonstrates "a substantial possibility, although less than a likelihood, of success on the merits of movant's appeal." *In re Chemtura Corp., et al.*, Debtors, Chapter 11, United States Bankruptcy Court for the Southern District of New York, Case No. 09-11233 (REG).

Although the lower Courts opted to analyze this merger under "a more flexible, industry- specific analysis" that "evolved since the 1960s" (Memorandum of Decision, p. 18, n. 12) rather than the binding authority of the Supreme Court, there is the substantial likelihood that a Justice of the United States Supreme Court may analyze the merger in accordance with those Supreme Court decisions, as did

Judge Posner in *Hospital Corporation of America v. Federal Trade Commission,* 807 F.2d at 1385, 1386.

There is no harm to anyone to permit review of the Second Circuit's and United States District Court's reviews of the decision by the Bankruptcy Court of the very important questions raised by the legality of this merger and the potential for harm to the whole of the United States. Accordingly, Plaintiffs' Application for a Stay should, we respectfully submit, be granted.

NATURE OF THE EMERGENCY

Plaintiffs Carolyn Fjord, *et al.* (the "Clayton Plaintiffs"), filed their Clayton Adversary Proceeding in the Debtors' Chapter 11 Bankruptcy Case on August 6, 2013, alleging, among other things, that the merger would substantially lessen competition in violation of Section 7 of the Clayton Act (15 U.S.C. § 18) and sought injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26) to enjoin the merger. Plaintiffs filed a Cross-Motion for a Temporary Restraining Order in the Bankruptcy Court to prevent the Defendants from consummating their merger during the pendency of proceedings to appeal that Court's orders to the District Court, which was denied by the Bankruptcy Court on November 27, 2013.

Defendants, AMR Corporation and US Airways have stated publicly that they intend to consummate their merger early on December 9, 2013, during the

pendency of Plaintiffs' action in the Bankruptcy Court, even though the Amended Merger Agreement does not require them to close their merger until January 17, 2014. (Decl. of Joseph M. Alioto, Exhibits I and J.) On November 27, 2013, the Bankruptcy Court also entered an Order Regarding Consummation of Merger Pursuant to Scheduling Order, a Memorandum of Decision re: Motion of Debtors for Entry of Order Pursuant to Bankruptcy Rule 9019(a) Approving Settlement Between Debtors US Airways Group, Inc., and United States Department of Justice, *et al*., and entered an Order Approving Settlement Between Debtors, US Airways, Inc., and United States Department of Justice.

On the evening of December 3 (Pacific time) and early morning of December 4, 2013 (Eastern time) Plaintiffs moved for a stay in the Bankruptcy Court pursuant to Fed. R. Bankr. P. 8005. That motion was denied by that Court on December 4, 2013.

Plaintiffs promptly moved for a stay in the United States District Court for the Southern District of New York on December 5, 2013. After a hearing on December 6, 2013, that Court denied plaintiffs' motion for a stay. Plaintiffs immediately requested a stay of the District Judge's order pending appeal, which was denied.

Plaintiffs then sought emergency relief in the Second Circuit Court of

Appeals on December 6, 2013, and on December 7, 2013, that Court denied plaintiffs' request for a stay.

Immediate relief is required to prevent irreparable injury in the form of lessening of competition in the domestic market for transportation of air passengers, to prevent the consummation of a merger, if later found illegal, the anticompetitive effects of which may not be possible later to unwind, and to preserve the status quo pending appeal of the Bankruptcy Court's orders. (See Decl. of Joseph M. Alioto, ¶ 3.)

STATEMENT OF FACTS

The Supreme Court has categorically and repeatedly determined that mergers such as that proposed by the Defendants are "proscribed" by the Clayton Act:

> Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

The facts which compel the conclusion that the proposed merger violates

the Clayton Act are the following:[2]/

- The merger would result in the largest airline in the United States and the world and closely follows the 2008 merger of Delta and Northwest (which resulted in the then-largest airline in the U.S.), the 2010 merger of United and Continental (which resulted in the largest airline in the U.S.), the 2011 merger of Southwest and AirTran (which was the then- largest airline in terms of passengers).

- The four top airlines will control more than 90% of the market.

- The four top airlines will have more than 90% of the market in terms of total operating revenue.

- From 2008 to the present, capacity growth has not rebounded despite a strengthening economy and a growing demand for air travel.

- The combined American - US Airways would have 101,000 employees.

- United has 82,000 employees.

- Delta has 72,000 employees.

- Southwest has 45,000 employees.

- The combined American - US Airways has 12 overlapping non-stop

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[2] Except as otherwise stated, these facts are taken from the Government Accountability Office report ("GAO Report") entitled AIRLINE MERGERS ISSUES RAISED BY THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS (June 19, 2013). The GAO Report, Report by the American Antitrust Institute ("AAI Report") and three Reports by the MIT International Center for Air Transportation are annexed to the Declaration of Gil D. Messina as Exhibits A, B and C, respectively. These reports are also referred to in the Affidavit of Darren Bush that was before the Bankruptcy Court on November 25, 2013.

routes, 7 of which will result in a monopoly. Of the other 5 non-stop, overlapping routes, the combined airline will control between 50%-75% of those markets.

- The combined American - US Airways will have 24 connecting airport- pair markets that will result in a monopoly.

- The combined American - US Airways will have 475 airport-pair markets with a decrease from 3 to 2 effective competitors.

- The combined American - US Airways will have 749 airport-pair markets with a decrease from 4 to 3 effective competitors.

- On connecting flights, American and US Airways compete on more than 1,665 airport-pair markets affecting more than 53 million passengers.

- This merger will result in more than two times the number of airport-pairs losing an effective competitor than occurred in the United-Continental merger for airports with 1, 2 or 3 competitors.

- This merger will affect 567 more airport-pairs than were affected by United-Continental and 18 million more passengers.

- The two airlines do not share any airport hubs, consequently New York can serve as a better hub than Philadelphia, while Miami can serve as a better hub than Charlotte, which may result in the closing of one or more of these hubs as happened in prior mergers. For example, in 2001, after American acquired TWA, St. Louis ceased to be an American hub. Following the Delta - Northwest merger, service at Delta's hub in Cincinnati and Northwest's hub in Memphis has been greatly reduced.

- The combined American - US Airways will control the following dominant percentages of the domestic passenger market at the following key airports:

Miami - 72%;
Charlotte - 70%;
Philadelphia - 54%;
Chicago-O'Hare - 43%;
Phoenix - 32%;
LAX - 23%; and
JFK - 18%.

- The merger of Southwest and its key rival AirTran has eliminated any constraint formerly imposed on pricing practices, therefore, the American - US Airways merger, if allowed, will increase fares without that constraint. Southwest has initiated 2 of the 3 price increases in the third quarter of 2012 and has consistently raised its prices since then with the network airlines. (USA TODAY, October 19, 2012).

- The weekend after the announcement of the proposed merger between American and US Airways, Delta, United, American, US Airways and Southwest substantially increased fares purchased by passengers within 7 days for domestic travel. The year before (2012) there were 7 successful price increases, in which Southwest participated, initiating 2. (USA TODAY, February 22, 2013).

- Several studies have shown that increased dominance at airports leads to higher fares and creates competitive barriers to entry.

- US Airways CEO, Douglas Parker, testified before the Senate that there will not be new entrants into the airline industry because a new entrant cannot cover its cost of capital. (Testimony before United States Senate).

- American had consistently said it would emerge from bankruptcy as a new and powerful stand-alone company. Indeed, the CEO and Chairman of American, Tom Horton, in an article entitled "American Resists US Airways Pressure," and subtitled "CEO says airline can compete on its own," told USA TODAY'S editorial board: "This company is going to be very successful. I think that we have a very

powerful company coming out of restructuring." Moreover, Horton stated, "Our company is only going to get more valuable." Furthermore, he rejected the notion by Mr. Parker that American lacked access to the East Coast. Horton said American satisfied the East Coast with its hubs in New York and Miami: "Those are the most important population centers and we are very strong in them. What that airline (US Airways) does is carry a lot of connecting traffic over Charlotte and does so in a way that I would suggest is somewhat unrewarding." (USA TODAY July 20, 2012).

- In July 2011, American placed a $40 billion order for 460 new aircraft.

- Prior to American considering a merger with US Airways, American announced it would increase capacity by 4%-5% in each of the next 5 years after emerging from bankruptcy.

Additionally, the MIT Reports report the following:[3]/

- From 2007 to 2012, after the mergers of Delta-Northwest, United-Continental and Southwest-AirTran, scheduled domestic departures decreased by 14.3% at all airports.

  Large Hub (-8.8%)
  Medium Hub (-26.2%)
  Small Hub (-18.2%)
  Non-hub (-15.4%)

It is conceded that 7 out of the 12 non-stop overlapping flights will result in a monopoly. This fact alone, under the binding authority of the Supreme Court in *Brown Shoe* above requires that the merger be "proscribed." In addition,

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[3] TRENDS AND MARKET FORCES SHAPING SMALL COMMUNITY AIR SERVICE IN THE UNITED STATES by Michael D. Wittman and William S. Swelbar (MIT International Center for Air Transportation, May 2013).

according to the GAO Report, at least 24 connecting airport pairs will result in a monopoly. Again, any one of these is sufficient to require this Court to "proscribe" this merger.

I. PLAINTIFFS DID NOT UNDULY DELAY SEEKING A STAY BELOW.

As stated above, the plaintiffs moved for a stay of the Bankruptcy Court's orders issued on November 27, 2013 (the day before Thanksgiving and the Court's closure for business on Thursday and Friday) on the evening of December 3-4, 2013[4]/, which was six days before the proposed merger closing. They promptly moved in the District Court on December 5th after the Bankruptcy Court denied the stay on December 4th and the District Court held a hearing the next day on December 6th, at which time it denied the motion for a stay. That evening, Plaintiffs moved in the Second Circuit for a stay, which issued its decision this afternoon.

The emergent issue was not unduly delayed by plaintiffs, as it moved before three lower courts for a stay before applying to this Court.

II. IRREPARABLE INJURY

As more fully explicated in Plaintiffs' briefs below, the showing of

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[4] Numerous defense counsel are located on the West Coast, as is plaintiffs' lead counsel, who initiated the filing on December 3.

irreparable harm was based upon those principles enunciated in Justice O'Connor's decision in *California v. American Stores, supra.*

A. Lessening of Competition is "Precisely" the Type of Irreparable Injury the Antitrust Laws were Intended to Protect

In *California v. American Stores Co.*, Justice O'Connor held that, "lessening of competition 'is precisely the type of irreparable injury that injunctive relief under Section 16 of the Clayton Act was intended to prevent.'" In other words, a lessening of competition results in irreparable injury.

We repsectfully submit that the United States Supreme Court is likely to find that Defendants' merger will result in a lessening of competition which would necessarily result in irreparable harm to Plaintiffs and tens of millions of consumers across the United States.

First, the Department of Justice Complaint included an attachment which lists approximately 1,000 city-pairs in which the Defendants' merger is "presumptively illegal." This attachment is based on data from the Department of Transportation upon which the HHI was then calculated. (Decl. of Joseph M. Alioto, Exhibit A.) The attachment, which objectively measures market concentration using HHI, demonstrates a lessening of competition in nearly 1,000 city-pair markets. *Id.* This demonstrated lessening of competition is a fact that is

not subject to reasonable dispute. Even when the settlement between the DOJ and Defendants is taken into account, it does not and cannot resolve the lessening of competition at all of the approximately 1,000 of these city- pairs, since the settlement only required Defendants to divest themselves of 104 slots at Reagan International Airport, 34 slots at LaGuardia and two gates at 5 other airports (Decl. of Joseph M. Alioto, Exhibit B.) The settlement affects just 112 of the new carrier's planned 6,500 daily flights. (Decl. of Joseph M. Alioto, Exhibit C.) The lessening of competition that will result in the markets listed in the DOJ complaint, but which are not impacted by the settlement, will result in irreparable harm to Plaintiffs and consumers in those markets. It has been publicly admitted that the settlement does not entirely resolve the anticompetitive threats of this merger, "'DOJ said that offering the 104 slots was the price for looking behind the curtain at the rest of their demands,' Wark [Associate General Counsel for American] said. 'They made it a gateway issue.'" (Decl. of Joseph M. Alioto, Exhibit D.)

Second, the June 19, 2013, Report by the United States Government Accountability Office ("GAO"), "Airline Mergers, Issues Raised by the Proposed

Merger of American Airlines and US Airways" [5]/ raises a number of anticompetitive issues (including lessening of competition) related to Defendants' merger, which cannot be entirely resolved by the main divestiture of slots at Reagan and LaGuardia. The GAO found that the Defendants' merger would result in a loss of one effective competitor in 1,665 airport-pair markets, affecting more than 53 million passengers. The elimination of competition in those markets would result in 24 monopolies, 475 duopolies, 749 markets with only three competitors, and 353 markets with just four competitors. (Decl. of Joseph M. Alioto, Exhibit E, p. i.) In addition, on the twelve non-stop routes where Defendants overlap, seven of them will result in monopolies, and the remainder will give the combined company anywhere from 45-75% market share of the remaining markets. Id. The divestiture of 104 slots at Reagan, 34 at LaGuardia, and two gates at five other airports cannot and does not resolve the lessening of competition that would occur at all the 1,665 airport-pair markets identified by the GAO Report, where at least one effective competitor would be lost, and all the other markets identified by the GAO Report would result in a lessening of

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[5] Such a study, which was prepared by the Government, and was presented as "Testimony Before the Subcomittee on Aviation Operations, Safety, and Security, Committee on Commerce, Science and Transportation, U.S. Senate," is admissible, credible evidence and is excepted from the hearsay rule under Fed. R. Evid. 803(8).

competition.

Third, the MIT Report, "Trends and Market Forces Shaping Small Community Air Service in the United States6," demonstrates that previous mergers have resulted in a substantial reduction of capacity, which is another intended anticompetitive effect of Defendants' merger. Since 2007, when the first merger in a series of mergers began with Northwest and Delta, capacity reductions have been enormous. Large hubs have reduced domestic departures by almost 9%, medium hubs by 26%, small hubs by 18%, and non-hubs by 15%. All small airports have had a reduction in departures of 21% and all airports 14%. (Decl. of Joseph M. Alioto, Exhibit F, p. 6.) "Capacity discipline" has been touted as a virtue of these airline mergers by US Airways CEO Doug Parker. Rather, it is the serious anticompetitive effect of a series of unchallenged mergers which threatens to be exacerbated again here in any of the 1,665 city-pairs where American and US Airways compete.

Fourth, the American Antitrust Institute ("AAI") analyzed Defendants' merger, in a paper dated August 8, 2012, entitled, "The Proposed Merger of US Airways and American Airlines: The Rush to Closed Airline Systems."[6] Here the

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[6] The data sourced in the report, which was prepared by the Massachusetts Institute of Technology's International Center for Air Transportation, is from the Diio Mi Market Intelligence Portal, which uses Innovata LLC's schedule

AAI determined that:

> Of the total number of top routes reported, about 40 percent involve US Airways an American as high and/or low carriers. On 44 percent of routes involving the merging carriers, either American is both the high fare and the low fare carrier or US Airways is both the high fare carrier and the low fare carrier…These comparisons reinforce the obvious conclusion that American and US Airways are dominant players in the industry…Given this pattern of high pricing, reinforced by evidence that the airlines rarely undercut each other, we could expect that on routes where the merging carriers do compete, they are more likely to be each other's biggest rivals…This lends support to the possibility that a price increase by one carrier could divert substantial sales to the merging partner, creating upward pricing pressure and increasing the probability of post-merger price increases." [Emphasis added.]

(Decl. of Joseph M. Alioto, Exhibit G, p. 17-18.) Even though the AAI Report pre-dates the DOJ settlement, its analysis cannot be discounted, since the Defendants' settlement with the DOJ only impacts an admitted, "3% of the total daily flights to be operated in the merged entity." A reasonable District Court Judge or other judge could easily find that Defendants' transaction will result in a lessening of competition and thereby irreparable injury in light of the above. In *California v. American Stores*, 492 U.S. at 1304, Justice O'Connor held that the

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Reference Service data product. The Diio Mi Schedule data is created in coordination with IATA and covers schedules of nearly every commercial airline in the world. Such a study is admissible, credible evidence and is excepted from the hearsay rule under Fed. R. Evid. 803(18).

7 Such a study is admissible, credible evidence and is excepted from the hearsay rule under Fed. R. Evid. 803(18).

private plaintiffs had "made an adequate showing of irreparable injury" to the consumers of California through a lessening of competition. The applicant therein, California's attorney general brought the action as a private plaintiff. *Id.* at 1302. Nothing in Justice O'Connor's decision required the attorney general himself to demonstrate "irreparable harm" by listing the specific grocery stores where he shopped, how much he spent there, or some other similar showing. The Fjord Plaintiffs herein are consumers, who are and will be direct purchasers of airline tickets from Defendants. Plaintiffs are individuals who are passengers and travel agents who have purchased airline tickets from Defendants in the past and who are expected to do so in the future. They are threatened with losses by reason of Defendants' merger with American in violation of Section 7 of the Clayton Act in the form of significant threats of higher prices for fares, diminished services, loss of flights, curtailment of capacity of aircraft and available seats, deterioration of quality of service, and lessening of competition. In reality, any argument as to whether Plaintiffs, individually and personally, will be irreparably harmed by this merger is tantamount to a challenge of Plaintiffs' standing-not irreparable harm. But Plaintiffs' standing to bring this action is clear beyond question, having been settled in two cases in the *Northern District of California, Reilly v. Hearst Corp.,* 107 F.Supp.2d 1192, 1194-95 (N.D. Cal. 2000) and *Reilly v. MediaNews Group,*

Inc., 2007 WL 1068202 (N.D. Cal. Apr. 10, 2007). Both of the cited cases held that a consumer who purchases from a merging defendant has standing to challenge the acquisition under Sections 16 and 7 of the Clayton Act. Although the decision in *Hearst* addressed the issue in the specific context of the Newspaper Preservation Act, the court in *MediaNews* found the Hearst reasoning valid and persuasive in the broader context of Sections 16 and 7. *MediaNews*, at *3 ("Even under the traditional antitrust analysis, independent of the newspaper context, plaintiff has standing as a consumer.") See also: *Lucas Automotive Engineering, Inc., v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1237 (9th Cir. 1998); *Glen Holly Entertainment, Inc. v. Tektronix, Inc.,* 352 F.3d 367, 372 (9th Cir. 2003) ("Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."); *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1562-65, 1568 (7th Cir. 1991) (consumers accorded standing under Clayton Act § 7 to challenge a hospital merger); see, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (consumers have standing to enforce the antitrust laws when violations cause them monetary injury); *California v. American Stores Co.*, 495 U.S. 271 (1990) (action by State as parens patriae to redress harm to its citizens as consumers resulting from a merger); see, also, *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 473-74 (1982) (injury to the "general economy" of a

state "is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves…").

III. THERE IS A "SUBSTANTIAL POSSIBILITY OF SUCCESS"

This factor has been articulated by the Circuit as "whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal." *In re Chemtura Corporation, et al.* at 14. "To establish a § 7 violation, a party 'must show that the merger would produce a 'firm controlling an undue percentage share of the relevant market, and would result in a significant increase in concentration of the firms in that market." *FTC v. HJ Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) quoting *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 363 (1963).

It is undisputed that the proposed merger will create the largest airline in the United States and in the world. With regard to market share as measured by capacity (available seat miles), the combined American Airlines-USAir along with United and Delta would control 80% of the domestic market, and if Southwest is included 96% of the domestic market. Just four airlines would control 96% of domestic capacity10. The combined entity would control approximately 28% of domestic capacity. (Dec. of Joseph M. Alioto, Exhibit E at 15.) With regard to market share as measured by operating revenues, the combined entity along with

United and Delta would control 85% of the domestic market, and 96% of the market if Southwest is included. The combined entity would control nearly 30% of domestic operating revenues. *Id.* With regard to market share as measured by total assets, the combined entity along with United and Delta would control 82% of domestic airline assets, and 96% of the market if Southwest is included. The combined entity would control approximately 25% of domestic airline assets. *Id.* Moreover, as discussed, supra at IIA, the DOJ Complaint attachment identifies approximately 1,000 city-pairs where the merger is presumptively illegal because of the increase in concentration, as measured objectively by the change in HHI. Defendants have publicly admitted that the settlement does not resolve the lessening of competition which will occur on each of those city-pairs where the merger is presumptively illegal. (Decl. of Joseph M. Alioto, Exhibit D.)

Furthermore, under a long and binding line of cases, the Defendants' merger constitutes a clear and egregious violation of § 7 of the Clayton Act. The United States Supreme Court could find that in light of the evidence and in light of the binding authority of the Supreme Court, which has never been overruled, that this merger must be enjoined. Section 7 prohibits acquisitions if their effect may be a substantial lessening of competition, or a tendency to create a monopoly.

Since the thrust of the statute is prospective, designed "primarily to arrest

apprehended consequences of inter-corporate relationships before those relationships could work their evil…," a transaction which may have the proscribed anticompetitive effects is prohibited. *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 597 (1957); see also *Brown Shoe Co. v. United States,* 370 U.S. 294, 317 (1962). Thus, if there is a "reasonable probability" that the acquisition will substantially lessen competition or tend to create a monopoly, it is prohibited by the Clayton Act. *Brown Shoe Co,* 370 U.S. at 323. By using these terms in Section 7, "which look not merely to the actual present effect upon future competition, Congress sought to preserve competition among many small businesses by arresting the trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *United States v. Von's Grocery Co.,* 384 U.S. 270, 277 (1966).

In determining whether an acquisition such as that proposed here may "substantially" lessen competition, the acquisition must be "functionally viewed, in the context of its particular industry." Thus, the court is to examine factors such as market share, degree of market foreclosure, barriers to entry, extent of concentration in the industry, and trend towards concentration in the industry. See, e.g., *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963); *Brown Shoe Co. v.*

United States, supra. The facts and circumstances here are a far more outrageous violation of § 7, than under the line of Supreme Court precedents, which have never been overruled, and where the Supreme Court has mandated divestiture.

For example, the projected combined market shares of the merged USAir-American entity (24%), and those of the next three largest competitors, Delta (22%), United (19%), and Southwest (18%), will be approximately 83%, a figure well in excess of the 77% combined market share of the four top firms that was condemned by the Supreme Court in *United States v. Philadelphia Nat'l Bank, supra*, 374 U.S. 321, where the defendants proposed to merge the 2nd and the 3rd largest banks in a four-county area. That merger, like the proposed USAir-American merger would have resulted in intense concentration of the market. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant intense concentration in the market, were both so high as to be presumptively illegal. (Decl. of Joseph M. Alioto, Exhibit E at ¶ 15)

The merger of USAir and American will result in the largest airline in the United States with 24% of the U.S. air passenger market and a highly concentrated market share by the top four airlines of approximately 83%. Such a concentration of market share in four firms is unacceptably high according to the

Supreme Court in *United States v. Alcoa*, 377 U.S. 271 (1964), which required divestiture where nine firms controlled 95% of all aluminum created in the United States. In the narrower submarket for insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome Cable Corporation was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures the Supreme Court deemed both markets "highly concentrated." (Compl. Dkt. No. 1, 49; Decl. of Joseph M. Alioto, Exhibit E at ¶ 15)

Similarly, the market share that will result from USAir's merger with American will exceed that which was condemned in *United States v. Continental Can Co.*, 378 U.S. 441 (1964), where the second largest competitor, Continental Can, acquired the sixth largest competitor, Hazel-Atlas, with Continental Can's post-merger market share rising from 21.9% to 25%. There, the Supreme Court ordered divestiture. Compl. Dkt. No. 1, 50; Decl. of Joseph M. Alioto, Exhibit E at ¶15).

The number of major airlines remaining after the defendants' proposed merger with American will be four, reflecting a persistent and dramatic pattern of concentration and reduced competition in the U.S. airline industry over the past few years. The Supreme Court in *United States v. Vons, supra*, 384 U.S. 270,

considered such factors alone to violate § 7 of the Clayton Act (the acquisition by Von's, which had a 4.7% share of the market, of Shopping Bag, with 4.2% of the market, together with the growing number of grocery market chains and the shrinking number of independently-owned stores resulted in the Court holding "these facts alone are enough to cause us to conclude…that the Von's-Shopping Bag merger did violate § 7"). Compl. Dkt. No. 1, 51; Decl. of Joseph M. Alioto, Exhibit E, at ¶15).

The proposed merger of Defendants is a merger of far greater magnitude, resulting in a far greater share of the market controlled by the merged entity than the Supreme Court prohibited in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), where the Court ordered divestiture of a merged entity which had combined the 10th and 18th largest brewers in the United States, but which, when combined, resulted in just the 5th largest brewer with only 4.49% of all domestic beer sales. Compl. Adv. Pro. Dkt. No. 1, 52; Decl. of Joseph M. Alioto, Exhibit E at ¶ 15.)

These Supreme Court cases have never been overruled or even diminished by later opinions and they determine beyond peradventure that the transaction is unlawful. In *Hospital Corp. of America v. Federal Trade Commission,* 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner of the Seventh Circuit observed the

above line of Supreme Court precedent, taken together, prohibited "any nontrivial acquisition of a competitor." And so here, as set forth by the Supreme Court, Defendants' proposed merger violates § 7. Accordingly, a reasonable District Judge, Court of Appeal or even the Supreme Court, would likely hold that under the evidence in this case of market share and concentration in the airline industry, and in light of the binding Supreme Court precedents, which were specifically recognized by the 7th Circuit in HCA, that Defendants' transaction violates § 7 of the Clayton Act.

CONCLUSION

It is, plaintiffs respectfully submit, clear that the proposed merger, if not stayed, will result in irreparable harm due to the lessening of competition and the elimination of a competitor. Plaintiffs have shown a likelihood that they will succeed on the merits and that they have not unduly delayed seeking to stay the merger. The defendants, who were prepared to close the merger in January 2014, will not be prejudiced and the harm to the consuming public resulting from the merger will greatly exceed any harm to defendants occasioned by a delay.

Respectfully submitted,

Dated: December 7, 2013
Holmdel, NJ

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