EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. US AIRWAYS GROUP, INC. and AMR CORPORATION, *Defendants.*	)	Case No. 1:13-cv-01236-CKK
AMERICAN ANTITRUST INSTITUTE, 2919 Ellicott Street, NW Washington, D.C. 20008 http://www.antitrustinstitute.org *Amicus Curiae.*	)	

[PROPOSED] BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE TO REPLY TO THE RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

ALBERT A. FOER
RICHARD M. BRUNELL
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott Street, NW
Washington, DC 20008
(202) 600-9640
rbrunell@antitrustinstitute.org

PHILLIP C. ZANE*
(D.C. Bar No. 452939)
ALLEN P. GRUNES
(D.C. Bar No. 989298)
GEYERGOREY LLP
1776 I Street, NW, Suite 900
Washington, DC 20006
(202) 644-8731
(240) 525-8736 (facsimile)
phillip.zane@geyergorey.com

*Counsel of Record

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and non-profit educational, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 125 prominent antitrust lawyers, law professors, economists, and business leaders.[1] *See* http://www.antitrustinstitute.org. AAI submitted Comments on behalf of itself and several consumer groups pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (APPA or the Tunney Act), to object to the settlement in this case because it is not in the public interest. It submits this amicus brief to reply to the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment ("Response").

INTRODUCTION

In its Comments, AAI contended that the settlement is not in the public interest primarily because the government failed to establish "a reasonable basis upon which to conclude that the divestitures in the proposed final judgment will adequately remedy the competitive harms alleged in the government's complaint,"

[1] AAI's Board of Directors alone has approved the filing of this brief. The individual views of members of the Board of Directors and the Advisory Board may differ from the positions taken by AAI. No party, party's counsel, or any other person or entity other than AAI or its counsel has authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

as the Tunney Act requires. *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 161 (D.D.C. 2010); *see also* U.S. Dept. of Justice, Antitrust Div. Policy Guide to Merger Remedies 3-4 (June 2011) ("DOJ Merger Remedies Policy Guide") ("the relief must effectively address each of the Division's competitive concerns"). Specifically, AAI pointed out that, although the settlement resolved the narrow competitive harm in the market for slots at Reagan National Airport,[2] it did not resolve or even address the bulk of the anticompetitive effects alleged in the complaint, including: (1) increased concentration in over 1,000 highly concentrated city-pair relevant markets; (2) loss of head-to-head competition between US Airways and American on at least 17 nonstop routes; (3) an increased likelihood of coordinated behavior among the remaining network airlines, resulting in (or from): (a) the elimination of US Airways' Advantage Fares; (b) increases in fares generally; (c) reductions in capacity and growth; (d) increases in baggage and ancillary fees and reductions in the quality and variety of ancillary services, and (e) thwarting American's aggressive standalone expansion plans.

[2] In fact, the information provided in the Justice Department's Response indicates that the increased concentration in the market for slots at DCA has not been fully resolved. The settlement apparently allows the combined firm to increase its market share in slots from 55 to 57%. *See* Response at 34-35 & n. 61; Am. Complaint ¶ 10. The government does not explain the rationale for allowing this increase in concentration in a highly concentrated market. *See* Am. Complaint ¶ 40 (pre-merger HHI is 3466).

AAI recognized that the slot divestitures were likely to increase competition and provide benefits for those consumers who fly on routes that the acquiring carriers choose to serve, but contended that those routes would be quite different from and much more limited than those adversely affected by the merger as alleged in the complaint. Moreover, AAI argued that the Justice Department failed to show how the divestitures to LCCs would resolve the *nationwide* anticompetitive harms alleged in the complaint, particularly when the complaint itself alleged that "competition from Southwest, JetBlue, or other airlines would not be sufficient to prevent the anticompetitive consequences of the merger," and the "enhanced cooperation" that will result from the merger "is unlikely to be significantly disrupted by Southwest and JetBlue." Am. Complaint ¶¶ 3, 93. AAI also contended that the settlement violated the rule that "out of market benefits" cannot justify anticompetitive effects in a relevant market, and that allowing the merger to be consummated prior to this Court's review was itself not in the public interest.

The Justice Department responds to these objections partly by miscasting them as claiming that the "proposed remedy fails to resolve *fully* the harms alleged in the Complaint," or does "not *perfectly match* the allegations of harm." Response at 23, 25 (emphasis added). AAI's objection is much more profound—that the government has failed to establish a reasonable factual basis to conclude that the remedy will prevent or even address the bulk of the anticompetitive harms alleged in the complaint. On this score, the Justice Department responds primarily by seeking to puff up the immediate, narrow competitive benefits of transferring 112[3] slots at Reagan National and LaGuardia Airports to Southwest, JetBlue and Virgin America, and by continuing to insist that this shift (along with the two gate divestitures at each of five other airports) will "position them to offer more meaningful competition system-wide" and promises to "impede the industry's evolution toward a tighter oligopoly." Response at 8, 9; *see also id.* at 40 ("The goal of the divestiture remedy is to enhance the ability of the LCCs to frustrate coordination among the legacy carriers."). However, as we explain below, the government's response offers little or no support for its belief that the harm from combining two of the remaining—and likely most disruptive—of the four legacy carriers can be remedied by marginally increasing the entry opportunities for LCCs, particularly when Southwest has made it clear that it does not intend to increase capacity in the near future.

[3] In considering whether, as the government contends, the procompetitive benefits of the divestitures "compare favorably with – and in some ways exceed – those afforded by preserving competition between US Airways and American," Response at 28, it is not appropriate to include the 26 slots that were already leased by JetBlue and Southwest and would have remained in their hands if US Airways and American continued to compete. *See* AAI Comments at 7 n.10; *see also* Am. Complaint ¶ 87 (indicating that JetBlue would have acquired another 10 DCA slots absent the merger). In purchasing, rather than leasing these slots, JetBlue and Southwest will not be adding any new service. The government does not challenge this point, although apparently continues to measure the effectiveness of the settlement using the larger number of slots (138). Southwest is acquiring 61% of the new slots (68 out of 112).

At a recent investor conference, Southwest Senior Vice President and CFO Tammy Romo explained, "We continue to have a disciplined growth strategy, with flat year-over-year capacity in 2014. . . . And we intend to keep a disciplined approach beyond this year, with the goal of achieving and sustaining adequate returns on capital." *Southwest Airlines at JPMorgan Aviation and Transp. & Industrials Conf—Final*, FD (Fair Disclosure) Wire, March 10, 2014; *see id.* ("And as we committed to you, we weren't going to grow our capacity until we achieved our 15% return on invested capital.").

The government points to the value being paid for the divested slots—over $425 million[4]—as indicative of their competitive significance. But even if the slot transfer puts as many seats into the hands of LCCs as the government claims it will, that capacity only amounts to about 3% of the domestic passengers carried by Southwest, JetBlue, and Virgin America in 2013, which hardly seems enough to make a material difference to the industry's competitive dynamics.[5]

[4] This figure apparently includes the value of the 26 slots previously leased to JetBlue and Southwest, which overstates the competitive significance of the divestitures. *See supra* note 3. Moreover, American received less than this amount, as the 16 slots previously leased to JetBlue were traded for 24 JFK slots that JetBlue previously leased to American. *See American Airlines Group Inc at JPMorgan Aviation Transp. & Industrials Conf.—Final*, FD (Fair Disclosure) Wire, March 10, 2014.

[5] At most, the government predicts the divestitures will enable the acquiring carriers to offer 5.5 million seats, which would translate into 4.6 million passengers, assuming Southwest's load factor of 84%. *See* discussion *infra* at Sec. II. In 2013, Southwest carried 115 million domestic passengers, JetBlue 26

ARGUMENT

I. THE COURT'S STANDARD OF REVIEW IS NOT AS LIMITED AS THE GOVERNMENT SUGGESTS

The Justice Department acknowledges that the Court's public interest review turns on "'whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable.'" Response at 16 (quoting *United States v. InBev N.V./S.A.*, 2009 U.S. Dist. LEXIS 84787, *19 (D.D.C. Aug. 11, 2009)). But its contention that this inquiry is "necessarily a limited one," is overstated. Response at 16; *see generally id.* at 15-18. The Court's inquiry is not limited in any qualitative sense. Rather, the limit on the Court's inquiry is a limit only on the *scope* of review, that is, the Court must review the proposed Final Judgment "in light of the allegations made in the complaint." *United States v. Verizon Commc'ns., Inc.*, 959 F. Supp. 2d 55, 59 (D.D.C. 2013) (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995)). Within this scope, the Court performs a simple, unqualified reasonableness test: "If there is a factual basis for concluding that the divestiture is a reasonably adequate remedy for the harm predicted in the Complaint, then the settlement should be approved. If there is not, then the settlement should be rejected." *Abitibi-Consolidated*, 584 F. Supp. 2d at 165.

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million, and Virgin America 6 million, for a total of 147 million passengers. *See* Dep't of Transp., Research and Innovative Technology Admin. (RITA), Bureau of Transp. Statistics, Transtats, http://www.transtats.bts.gov/carriers.asp?pn=1.

This limit on the scope of the Court's review—that it must be confined to the allegations made in the complaint—is entirely appropriate because the Court's authority to review the settlement is coextensive with the boundaries of prosecutorial discretion exercised by the Justice Department in bringing the particular complaint in the first place. *Mass. v. Microsoft*, 373 F.3d 1199, 1236-37 (D.C. Cir. 2004). It is only in this sense that "a court may not 'engage in an unrestricted evaluation of what relief would best serve the public.'" Response at 16 (quoting *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988)). Instead, it must consider "the strict relationship between complaint and remedy in evaluating the public interest." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981). In its 2004 amendments to the Tunney Act, Congress expressly rejected the minimalist "mockery" standard for judicial review, required district courts to consider the impact of the remedy "upon competition in the relevant market or markets," and continued to give district courts wide discretion over the procedure for making their public interest determinations, including requiring evidentiary submissions by the government. 15 U.S.C. § 16(e); *see United States v. SBC Commc'ns, Inc.*, 489 F. Supp.2d 1 (D.D.C. 2007).

II. THE JUSTICE DEPARTMENT HAS NOT DEMONSTRATED THAT THE COMPETITIVE BENEFITS FROM THE DIVESTITURES WILL COME CLOSE TO MATCHING THE HARMS ALLEGED IN THE COMPLAINT

The Justice Department does not contest the fact that the consumers and markets that will benefit from the divestitures are by and large not the same ones that will be adversely affected by the merger as alleged in the complaint. Indeed, it acknowledges that while the relevant markets in the complaint are hundreds of particular airline routes or city pairs, the divested slots can be used in myriad ways, and it would be impractical to dictate their use. *See* Response at 30 & n.52. [6]

The Department's primary rejoinder to this critique is to repeatedly cite to the statement in *SBC Commc'ns* that courts "may not require that the remedies perfectly match the alleged violations," 489 F. Supp. 2d at 17. *See* Response at 17, 23, 30. However, the allowance for remedies that do not "perfectly match" the alleged violations does *not* suggest that the remedy need not "match" the bulk of the alleged violations *at all*, for that would mean the settlement need not evince "a factual basis for concluding that the divestiture is a reasonably adequate remedy for the harm predicted in the Complaint," which this Court has said means "the settlement should be rejected." *Abitibi-Consolidated*, 584 F. Supp. 2d at 165.

[6] The Justice Department points out that even a full-stop injunction would not guarantee continued competition between the merging airlines on specific routes. But a necessary premise of the government's allegations that competition in specific city pair relevant markets would be impaired by the merger is that but for the merger, the merging parties would have continued to compete in them.

Implicit in the "perfect match" language is a threshold "imperfect match" *requirement*.[7]

Even assuming *arguendo* that net benefit to consumers as a whole is a permissible metric, as the government suggests, the government's filing falls far short of plausibly supporting its contention that the "procompetitive benefits [of the settlement] compare favorably with – and in some ways exceed – those afforded by preserving competition between US Airways and American." Response at 28. The Justice Department provides no cost-benefit analysis whatsoever.[8] Instead, the Justice Department merely offers a limited quantitative assessment of the scope of the benefits (in terms of numbers of consumers affected) as compared to *some* of the harms, but without addressing the magnitude of those benefits or harms, or considering all the other harms alleged in the complaint.

For example, the government contends "the benefits of LCC entry and expansion enabled by the remedy will extend to a larger number of passengers and

[7] The Department's remedy is not just insufficiently matched, but mismatched. Below, we elaborate on why this is inappropriate under the "out of market" benefits rule.

[8] The Justice Department argues that a cost-benefit analysis equivalent to what is required by federal agencies when adopting a significant rule is "far beyond what is required in a [Competitive Impact Statement (CIS)]." Response at 48 n.83. We agree. But a rough cost-benefit analysis—which one presumes the Department's economists have in fact done—is essential to evaluate the government's argument. *Cf. SBC Commc'ns*, 489 F. Supp. 2d at 9 (requiring government to provide further materials that would allow the Court to make the public interest determination).

deliver a greater overall benefit to consumers as compared to the Advantage Fare program." Response at 28. It reaches this conclusion by comparing the number of passengers who purchased Advantage Fare tickets in 2012 (2.5 million round-trip passengers) to the number of passenger roundtrips expected to result from the slot divestitures at DCA and LGA (2.75 million round trip passengers). *Id.* Even if the latter figure were not inflated,[9] the analysis begs the question of *how much* consumers will save and lose. The examples in the complaint indicate that Advantage Fares lowered prices by hundreds of dollars per ticket; thus the complaint alleges that the loss of Advantage Fares will cost 2.5 million consumers "*hundreds of millions of dollars more*." Am. Complaint ¶ 7 (emphasis added). How much will consumers save on the assumed 2.75 million LCC round trips per year that the government expects to result from the slot divestitures? The government doesn't say, but the "Southwest effect" appears to save consumers a

[9] This figure is inflated because it assumes a 100% load factor, and is apparently based on 134 slots rather than 112. *See supra* note 3. The government notes that "[b]enefits will also extend to passengers flying on legacy carriers on routes where the remedy injects new LCC competition because the legacy carriers will likely lower their prices in response to the new competition." Response at 29. However, the complaint alleges that the beneficiaries of Advantage Fares were not only those who bought such tickets, but they included those US Airways passengers who bought less expensive nonstop tickets as a result of the responsive fares offered by the legacy carriers, and those passengers of the legacy carriers whose nonstop fares were lower because of Advantage Fares. Am. Complaint ¶¶ 52, 58.

lesser order of magnitude per ticket.[10] Moreover, there is a major hole in the analysis. The government seems to assume that the LCCs will *add capacity* to operate the flights with the new slots, rather than move planes from one market to another—which would obviously come at some consumer cost in other markets.[11] Southwest's promise to investors that its capacity growth would be flat in 2014 and beyond calls into question the accuracy of this assumption.

The Justice Department also says, "Although the remedy will not replicate the [head-to-head] competition lost in each of [the 1000 city pair] routes,[12] it will allow LCCs to launch more than seventeen new nonstop routes and enter and expand service on connecting routes across the country, almost all of which will be

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[10] The government cites a study showing that in 2012 Southwest's presence on a route reduced one-way fares by about $17. *See* Response at 26 n.45. *But see* John Kwoka, Kevin Hearle & Phillippe Alepin, *Segmented Competition in Airlines: The Changing Roles of Low-Cost and Legacy Carriers in Fare Determination* 25-26 (Working Paper Feb. 6, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2212860 (confirming some Southwest effect, but finding that "Southwest does in fact *raise* price where it has a large market share") (emphasis added).

[11] The government makes much of the fact that the LCCs will use larger planes out of DCA than US Airways does, and thus can carry over two million more passengers. Response at 12. But that is a two-edged sword because US Airways' smaller planes were used for routes to smaller cities, which will face less service as a result.

[12] This is an understatement. Even assuming the best-case scenario in which the divested assets are used to add service on routes identified in the complaint where possible, how many of the 1000 city pairs would be affected? The Justice Department does not say, but the government does not contest that in the 100 most concentrated markets, only 18 involve any of the airports where slots or gates are to be divested. *See* AAI Comments at 5 n.7.

in competition with New American." Response at 29. While it is plausible that the divested slots will be used to inject competition on at least seventeen nonstop routes, the government fails to offer any analysis as to whether the gains to consumers from such competition will offset the losses to consumers from the loss of competition between American and US Airways on the seventeen nonstop routes on which they competed and the two other nonstop routes on which the complaint alleged American and US Airways would have competed. *See* Am. Complaint ¶ 89. The harms are certainly quantifiable. *See, e.g.,* William J. Baer, Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conf. Call Regarding the Justice Department's Lawsuit Challenging US Airways' Proposed Merger with American Airlines 3 (Aug. 13, 2013) (estimating that consumers would likely pay more than $3 million more per year due to the elimination of head to head competition on one route alone). And while the benefits depend on what routes the LCCs enter, a range could be estimated. Further, the government still offers no basis to believe that the scope of the connecting service likely to be added will come close to matching the loss of one-stop competition in the more than 1000 highly concentrated city-pair markets alleged in the complaint; indeed, it offers no estimate at all of the number of connecting routes likely to be added, let alone an estimate of the magnitude of the competitive benefits from such additions.

Finally, except for its speculative arguments about how the divestitures hold the promise to impede the industry's evolution towards a tighter oligopoly, discussed in the next section, the Justice Department still has nothing to say about the losses to consumers resulting from the other, nationwide anticompetitive harms alleged in the complaint. These include increases in baggage and ancillary fees and reductions in the quality and variety of ancillary services,[13] thwarting American's aggressive standalone expansion plans,[14] reducing capacity and growth generally,[15] and raising fares across the board.[16]

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[13] The complaint predicts, "Post-merger, the new American would likely lead new fee increases," and that the parties' "fee harmonization" plans alone would cost consumers $280 million annually. Am. Complaint ¶¶ 77, ¶ 79; *see also id.* ¶ 80 ("The merger would also likely reduce the quality and variety of ancillary services offered by the legacy airlines . . . .")

[14] The complaint states that American had planned to add service on nearly 115 new routes. *Id.* ¶ 8.

[15] The complaint explains that US Airways had projected that "the merged firm could reduce capacity by as much as 10 percent" and that American expected that the combined firm was "'unlikely [to] pursue growth.'" *Id.* ¶¶ 67, 70; *see also* AMR Answer ¶ 66 (admitting that "a 2012 American Airlines analysis concluded that 'following a merger, carriers tend to remove capacity or grow more slowly than the rest of the industry'"). More recently, American CEO Doug Parker told investors, "[W]e should make sure that we don't grow capacity unless demand grows and that we keep capacity in line with demand. That is not a new concept for most businesses, but it is for us and one that we at American are certainly committed to." *American Airlines Group Inc at JPMorgan Aviation Transp. & Industrials Conf.—Final*, FD (Fair Disclosure) Wire, March 10, 2014.

[16] The complaint explains, "The merged firm would be the world's largest airline, giving it sufficient size to lead industry fee and price increases across the board." Am. Complaint ¶ 78.

III. THERE IS NO REASONABLE BASIS FOR THE GOVERNMENT'S EXPECTATION THAT THE SETTLEMENT WILL IMPEDE THE INDUSTRY'S EVOLUTION TOWARDS TIGHTER OLIGOPOLY

The Justice Department is correct to emphasize that the remedy must address the coordinated effects among legacy carriers that are likely to result from the elimination of a fourth legacy carrier—which form the bulk of the allegations in the complaint (*see* Am. Complaint ¶¶ 41-81)—and thus it appropriately rejected Delta as a potential acquirer of the divested assets. However, the government offers no reasonable basis for this Court to conclude that the divestitures will materially affect the likelihood of coordinated interaction among legacy carriers, let alone adequately remedy this anticompetitive concern. As the complaint alleges, coordinated effects among the legacy carriers are more likely after American and US Airways merge, not only because the number of legacy carriers is reduced from four to three, but because as independent carriers American and US Airways had unique incentives to disrupt coordination,[17] whereas the merger perfectly aligns their business models and incentives with those of Delta and

[17] As the government pointed out in the CIS, "Absent the merger, US Airways and American, as independent competitors, would have *unique incentives* to disrupt coordination that already occurs to some degree among the legacy carriers." CIS at 6 (emphasis added). Those unique incentives, based primarily on their smaller size, explained US Airways' disruptive Advantage Fares, and American's pre-merger plan to emerge from bankruptcy with an aggressive growth strategy that was expected to "disrupt the industry's capacity discipline 'momentum.'" Complaint ¶¶ 49, 69; *see also id.* ¶ 81.

United.[18] The Response fails to explain how slightly beefed up LCCs can replace this lost competition and forestall coordination when they haven't done so in the past and they will confront an even tighter oligopoly in the future. *See* Am. Complaint ¶ 3 ("[E]nhanced cooperation [resulting from merger] is unlikely to be significantly disrupted by Southwest and JetBlue, which, while offering important competition on the routes they fly, have less extensive domestic and international route networks than the legacy airlines.").

The Justice Department repeatedly emphasizes the deference it is owed regarding its predictions about the efficacy of proposed remedies. Response at 17, 30, 31. But the government does not make any actual predictions that the entry and expansion of the LCCs enabled by the divestitures likely will prevent the enhanced cooperation predicted by the complaint, let alone any predictions supported by economic analysis. *Cf. SBC Commc'ns*, 489 F. Supp. 2d at 22 (settlement was within the public interest where it made "a reasonable, practical prediction of likely entry," which was supported by declaration of government economist). Rather, the government merely claims that the divestitures will "enhance the LCCs' *incentives* to invest in new capacity," and "*enable* them to

[18] *See American Airlines Group Inc at JPMorgan Aviation Transp. & Industrials Conf.—Final*, FD (Fair Disclosure) Wire, March 10, 2014 (new American CEO explaining, "We are all about the same size, and we are all global hub and spoke carriers. We are just doing the same thing.").

grow faster than they otherwise would," and "*position them* to offer more meaningful competition system-wide." Response at 15 (emphasis added).

Indeed, the Justice Department concedes that the remedy does not eliminate "all entry barriers faced by LCCs." Response at 15 n.28. Yet, it contends "LCCs have demonstrated *some* ability to overcome those disadvantages with the help of lower costs, and we *expect* that the network-wide strengthening brought about by the divestitures will, *over time*, *help* the LCCs overcome some of the other obstacles that limit their ability to expand." *Id.* (emphasis added). However, there is no "incipiency doctrine" for remedies. *See* DOJ Merger Remedies Policy Guide at 1 ("[A] successful merger remedy must *effectively* preserve competition in the relevant market.") (emphasis added). When the tables are turned, the Department holds defendants to a much higher standard, as it should. *See* Plaintiff's Post Trial Brief at 17-18, United States v. Bazaarvoice, Inc., 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. Jan. 8, 2014) (arguing that entry or expansion must be "timely, likely, *and* sufficient to counteract the likely competitive effects from the transaction" and defendant, to meet its burden, "must demonstrate that entry or expansion will fill the competitive void created by the acquisition (internal quotations and citations omitted)), *available at* http://www.justice.gov/atr/cases/f301400/301427.pdf.

The tentativeness of the government's argument, the lack of any supporting economic analysis, the complaint's recognition that the product offered by

Southwest and JetBlue "is different and the customer base is also different,"[19] and Southwest's self-imposed capacity discipline, all point inescapably to the conclusion that there is no reasonable factual basis for this Court to conclude that the settlement plausibly will remedy the coordinated effects that will result from this merger.

IV. THE SETTLEMENT VIOLATES THE OUT-OF-MARKET BENEFITS RULE

AAI argued that the proposed remedy violates the rule that "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963). It is true, as the Justice Department points out, this is a rule of liability. In other words, a merger that is anticompetitive in one market is illegal even if it is procompetitive in other markets. But this principle reinforces the Tunney Act requirement that a settlement adequately remedy the anticompetitive harms alleged in the complaint, *see Republic Servs.*, 723 F. Supp. 2d 157, and confirms that a failure to do so is not excused when the settlement creates procompetitive benefits in other markets.

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[19] Am. Complaint ¶ 47 (internal quotation marks omitted). The government points out that Southwest and JetBlue do compete for business travelers to some extent, *see* Response at 24-25, and the legacy carriers do compete for leisure travelers. However, there is no dispute that competition in airlines is segmented, *see, e.g.*, Kwoka et al., *supra* note 10, which limits the ability of Southwest and JetBlue to discipline the cooperation of the remaining legacy airlines.

The Justice Department contends, "There is no 'rule' precluding a settlement that reasonably resolves broad competitive issues even if it does not completely eliminate the possibility of harm in some other markets," and points to its discretion under the Horizontal Merger Guidelines to consider out-of-market procompetitive benefits. Response at 27 n.48. The problem is that the remedy does *not* resolve the broad competitive issues alleged in the complaint. And with respect to the more specific harms—such as the loss of Advantage Fares and loss of head-to-head competition on nonstop routes—those consumers who are harmed will not be benefited from the localized competition on routes added by the remedy. *See Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 25 (D.D.C. 2012) ("a merger that substantially decreases competition in one place—injuring consumers there—is not saved because it benefits a separate group of consumers by creating competition elsewhere"); DOJ Merger Remedies Policy Guide at 1 ("The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition *in the relevant market*." (emphasis added)).

The government undoubtedly has the prosecutorial discretion to decline to bring a case when the merger harms consumers in some markets and benefits consumers in others (and the benefits are inextricably linked with the harms). But the Horizontal Merger Guidelines suggest those circumstances are limited to cases where the harm is "small" and the benefits are "great," U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines 30 n.14 (2010), which the Department does not contend is the case here. And once the government brings a case alleging harms in specific markets, the Tunney Act itself limits the ability of the government to permit those harms in favor of benefits in other markets. *See* 15 U.S.C. § 16(e)(1) (court is required to consider "the impact of entry of such judgment upon competition *in the relevant market or markets*" (emphasis added)); *see also Verizon Commc'ns.*, 959 F. Supp. 2d at 59 ("The Court's role is to review the proposed Final Judgment in light of the allegations made in the complaint." (citing *Microsoft*, 56 F.3d at 1459)).

V. THE SETTLEMENT IS NOT IN THE PUBLIC INTEREST BECAUSE IT PERMITTED THE TRANSACTION TO CLOSE PRIOR TO THIS COURT'S REVIEW

AAI contended that the settlement's acquiescence to the consummation of the merger prior to Tunney Act review, without any hold-separate agreement, is itself not in the public interest as it subverts judicial review and makes restoration of the status quo ante more difficult and costly. As the Ninth Circuit has explained,

> By expanding a district court's authority over consent decrees through the independent review provisions of the APPA, Congress necessarily intended that the court have the power to make its review effective. We believe that the review process in merger cases would be undermined if courts were unable to maintain the status quo while determining whether a proposed consent decree is in the public

> interest. That very interest could be harmed irreparably by permitting a merger to become a *fait accompli* while the court awaited public comments and performed its APPA review function. For example, if after review of public comments a court were to disapprove a proposed consent decree because of the possibility of a substantial lessening of competition, and the government were to reconsider its position in view of the court's decision, harm from the interim restraints of trade could be irreparable. Moreover, the unwinding of a completed merger would present mammoth obstacles.

BNS, 858 F.2d at 461-62.

In response, the Justice Department contends that nothing in the Tunney Act prevents the parties from closing and courts have long acknowledged and accepted this practice. Response at 50. However, the three cases cited by the government in support of this proposition are distinguishable. In each case, the complaint and consent decree were filed simultaneously, as is often the case in APPA proceedings, so there was little chance that the remedy would not address the harm alleged in the complaint. In such cases, the Justice Department, in an exercise of its prosecutorial discretion, has the power to craft the complaint so that it is congruent with the settlement. In contrast, where, as here, the settlement resolves a pending litigation, there is a much greater chance that the settlement will not adequately resolve the anticompetitive harm alleged in the complaint, and so there is a much greater role for judicial review and a corresponding need to maintain the status quo pending that review. Accordingly, the Court should hold that the public interest requires that post-complaint APPA settlements include a provision maintaining the status quo pending judicial review.

To be sure, if the Court were to find the settlement is otherwise in the public interest, the settlement's failure to maintain the status quo pending judicial review would have no practical effect in this case. However, the question whether the public interest requires that post-complaint APPA settlements maintain the status quo pending judicial review remains justiciable under the Court's Tunney Act authority. The doctrine of mootness, in its most stringent application, is described as "the doctrine of standing set in a time frame" and requires that "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence." *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). However, in Tunney Act proceedings, there is no requisite personal interest, nor any other standing requirement, to assert public interest harm, and thus none that must continue throughout the proceedings. *See* 15 U.S.C. § 16(f)(3). And the public interest will be served if the Justice Department understands its obligation to preserve the status quo before the next settlement.

CONCLUSION

For the foregoing reasons, and those stated in AAI's Comments, this Court should find that the proposed settlement is not in the public interest.

Respectfully submitted,

AMERICAN ANTITRUST INSITUTE

/s/ Phillip C. Zane

PHILLIP C. ZANE
(D.C. Bar No. 452939)
GEYERGOREY LLP
1776 I Street, NW, Suite 900
Washington, D.C. 20006
(202) 644-8731
(240) 525-8736 (facsimile)
phillip.zane@geyergorey.com

Of Counsel:
ALBERT A. FOER
RICHARD M. BRUNELL
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott Street, NW
Washington, DC 20008
(202) 600-9640
rbrunell@antitrustinstitute.org

ALLEN P. GRUNES
(D.C. Bar No. 989298)
GEYERGOREY LLP
1776 I Street, NW, Suite 900
Washington, D.C. 20006
(202) 644-8731
(240) 525-8736 (facsimile)
allen.grunes@geyergorey.com

Attorneys for the
AMERICAN ANTITRUST INSTITUTE

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