DynPort Vaccine Company, LLC, a CSRA Company, Frederick, MD, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MCDC intends to file additional written notifications disclosing all changes in membership.

On November 13, 2015, MCDC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on January 6, 2016 (81 FR 513).

The last notification was filed with the Department on June 23, 2016. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 11, 2016 (81 FR 53162).

**Patricia A. Brink,**

*Director of Civil Enforcement, Antitrust Division.*

[FR Doc. 2016–29873 Filed 12–12–16; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Alaska Air Group, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Alaska Air Group, Inc., et al.,* Civil Action No. 1:16–cv–02377. On December 6, 2016, the United States filed a Complaint alleging that Alaska Air Group's proposed acquisition of Virgin America Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Alaska to reduce the scope of its codeshare agreement with American Airlines and obtain Antitrust Division approval before selling certain assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Kathleen S. O'Neill, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 8000, Washington, DC 20530 (telephone: 202–307–2931).

**Patricia A. Brink,**

*Director of Civil Enforcement.*

### United States District Court for the District of Columbia

*United States of America, Department of Justice, Antitrust Division, 450 Fifth Street NW., Suite 8000, Washington, DC 20530,* Plaintiff, v. *Alaska Air Group, Inc., 19300 International Boulevard, Seattle, WA 98188,* and *Virgin America Inc., 555 Airport Boulevard, Burlingame, CA 94010,* Defendants.

Case No.: 1:16–cv–02377.
Judge: Reggie B. Walton.
Filed: 12/06/2016.

### Complaint

The United States of America (''Plaintiff''), acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin the proposed merger of Defendants Alaska Air Group, Inc. (''Alaska'') and Virgin America Inc. (''Virgin''), and to obtain equitable and other relief as appropriate. The United States alleges as follows:

### I. Introduction

1. The airline industry in the United States is dominated by four large airlines—American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines—that collectively account for over 80% of domestic air travel each year. In this highly-concentrated industry, the smaller airlines play a critical competitive role. In order to compete with the four largest airlines, these smaller airlines often must offer consumers lower fares, additional flight options, and innovative services. The proposed merger of Alaska and Virgin would bring together two of these smaller airlines—the sixth- and ninth-largest U.S. carriers, respectively—to create the fifth-largest U.S. airline.

2. Alaska and Virgin both provide award-winning service and tend to offer lower prices than the larger airlines, but they differ in at least one critical respect. Unlike Virgin, Alaska has closely aligned itself with American, the largest U.S. airline, through a commercial relationship known as a codeshare agreement, which allows each airline to market tickets for certain flights on the other's network. The codeshare agreement began in 1999 as a limited arrangement that permitted Alaska to market American's flights on a small number of routes Alaska did not serve on its own. Over the years, the two airlines have significantly expanded their relationship in size and scope through a series of amendments to the codeshare agreement. The most recent of these amendments was executed in April 2016—around the same time Alaska agreed to purchase Virgin.

3. Although the codeshare agreement effectively extends Alaska's geographic reach—potentially strengthening Alaska's ability to compete against other carriers like Delta and United—it also creates an incentive for Alaska to cooperate rather than compete with its larger partner, American. Specifically, Alaska may choose not to launch new service on routes served by American, or it may opt to compete less aggressively on the routes that both carriers serve, to avoid upsetting American and jeopardizing the partnership. Alaska may also decide to rely on the codeshare relationship in lieu of entering routes already served by American because doing so allows it to offer its customers the benefits of an expanded network without undertaking the risk and expense of offering its own competing service. As a result of these incentives, Alaska and American often behave more like partners than competitors.

4. Alaska's acquisition of Virgin would significantly increase Alaska's network overlaps with American, and would thus dramatically increase the circumstances where the incentives created by the codeshare threaten to soften head-to-head competition. Roughly two-thirds of Virgin's network overlaps with American's network, and Virgin has aggressively competed with American on many of these overlap routes in ways that have forced American to respond with lower fares and better service.

5. The proposed acquisition would diminish Virgin's competitive impact on the Virgin-American overlap routes by subjecting Virgin's network to the incentives that arise from Alaska's codeshare agreement with American. Virgin holds critical assets, including gates and takeoff and landing rights (known as ''slots''), at key airports within American's network. American divested some of these assets to Virgin as part of the settlement of the United

States's antitrust challenge to American's 2013 merger with US Airways. Once Alaska controls the Virgin assets, it likely will redeploy them in ways that accommodate rather than challenge American in order to preserve its codeshare agreement. To avoid competing head-to-head with its codeshare partner, Alaska will likely reduce service, decrease service quality, and/or raise prices on the Virgin-American overlap routes—or exit them entirely. Alaska will also be less likely to enter new routes in competition with American than Virgin is today. These harms will be heightened if Alaska continues to deepen its cooperation with American, which would have the effect of tying the nation's first- and fifth-largest airlines even more closely together.

6. Alaska's internal planning documents demonstrate how the incentives created by the codeshare agreement would likely reduce competition on the routes where American and Virgin compete today. In analyzing the proposed merger, Alaska executives reported to the company's board of directors that certain Virgin operations ''would not have [the] support of the American partnership.'' Accordingly, early during the consideration process, Alaska executives developed a plan that called for changes ''that we think would need to be made'' to Virgin's service following the merger. The plan contemplated reducing or eliminating service on many of the routes where Virgin and American offer competing service today, including some of the most traveled routes in the country.

7. For these and the reasons discussed below, the proposed merger between Alaska and Virgin likely would lessen competition substantially in numerous U.S. markets for scheduled air passenger service in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be permanently enjoined.

## II. Jurisdiction, Interstate Commerce, and Venue

8. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Alaska and Virgin from violating Section 7 of the Clayton Act, 15 U.S.C. 18. This Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Defendants are engaged in, and their activities substantially affect, interstate commerce, and commerce throughout the United States. Alaska and Virgin each annually transport millions of passengers across state lines throughout this country, generating billions of dollars in revenue.

10. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b) and (c). This Court also has personal jurisdiction over each Defendant. Both Defendants are found and transact business, and have consented to venue and personal jurisdiction, in this District.

## III. The Defendants and the Transaction

11. Defendant Alaska Air Group, Inc. is a Delaware corporation headquartered in Seattle, Washington. Last year, Alaska flew over 31 million passengers to approximately 112 locations worldwide, taking in more than $5.5 billion in revenue.

12. Alaska operates hubs in Seattle, Washington; Portland, Oregon; and Anchorage, Alaska, and has the largest share of traffic at each of these hubs. Alaska has maintained its status as the market share leader throughout the Pacific Northwest, which has helped Alaska achieve higher profit margins than most other domestic airlines for the past several years.

13. Defendant Virgin America Inc. is a Delaware corporation headquartered in Burlingame, California. Last year, Virgin America flew over 7 million passengers to approximately 24 locations worldwide, taking in more than $1.5 billion in revenue. Virgin America is one of several entities bearing the ''Virgin'' name pursuant to a licensing agreement with the Virgin Group, which owns approximately 18% of Virgin America's outstanding voting common stock.

14. Virgin America was founded in 2004. Unlike Alaska, Virgin does not have a hub-and-spoke network. Although Virgin has ''focus cities''—Los Angeles, San Francisco, and Dallas—from which it provides service to many destinations, Virgin does not use these focus cities as points for transferring large volumes of connecting traffic. Instead, the bulk of Virgin's passengers fly on nonstop flights in markets where Virgin is typically not the dominant carrier.

15. On April 1, 2016, Alaska and Virgin agreed to merge for $2.6 billion in cash and the assumption of $1.4 billion in liabilities.

## IV. Competition Between American, Alaska, and Virgin Today

### *A. The Formation and Expansion of the Codeshare Relationship Between American and Alaska*

16. Although codeshare agreements can take various forms, they generally allow for flights operated by one airline to be marketed and sold by another airline under the marketing airline's own brand. A codeshare agreement can extend an airline's network by enabling passengers to seamlessly book a connecting itinerary consisting of flights operated by different airlines. For example, a passenger seeking to fly from Walla Walla, Washington to Charlotte, North Carolina could purchase tickets for the entire trip through Alaska, using an Alaska flight from Walla Walla to Seattle that connects to an American flight from Seattle to Charlotte. This arrangement allows Alaska to rely on the codeshare agreement with American to offer service to Charlotte, instead of having to launch its own competing service between Seattle and Charlotte in order to serve the customer.

17. The codesharing partnership between Alaska and American began in 1999. The initial scope of the agreement was very limited: It allowed Alaska to market American's flights on only 88 routes where Alaska did not otherwise provide service, and did not permit American to market any Alaska flights. Since 1999, however, Alaska and American have repeatedly expanded their codeshare arrangement, enabling American to also market certain Alaska flights and increasing the number of flights each partner may sell on behalf of the other.

18. American and Alaska most recently expanded the codeshare agreement in April 2016, around the same time that Alaska was concluding its agreement to acquire Virgin. In agreeing to the amendment, Alaska chose to continue to expand its partnership with American even though it planned to grow its own network by acquiring Virgin. This April 2016 expansion further increased the number of routes included in the agreement, allowing Alaska to market American flights on over 250 routes, and American to market Alaska flights on about 80 routes.

19. The April 2016 expansion of the codeshare agreement also enabled American and Alaska to sell one another's flights on certain overlap routes where both companies offer competing nonstop service. Under this new arrangement, instead of strictly competing against one another to sell tickets between, for example, Seattle and Los Angeles, American and Alaska began selling each other's tickets for these routes as well. This type of codesharing on nonstop overlap routes, by definition, does not expand either airline's network. Instead, it provides them the opportunity to closely coordinate their service offerings on a

route where they would otherwise be competing at arm's length for business. Such close contact between competing airlines on routes they both serve can diminish competition and facilitate collusion.

*B. The Codeshare Relationship Incentivizes Alaska To Cooperate Rather Than Compete With American*

20. Today, Alaska is stronger than American in the Pacific Northwest, where American is comparatively weak, whereas American is stronger than Alaska throughout the rest of the United States. Through the codeshare agreement, Alaska offers its customers flights to more destinations, which helps Alaska retain the loyalty of frequent fliers who prefer to use one airline but want the ability to travel to domestic cities that Alaska does not serve independently. American derives similar benefits from the codeshare agreement—loyal American customers are provided greater ability to travel throughout the Pacific Northwest using Alaska's network.

21. Although the codeshare agreement provides both carriers commercial benefits by linking the Alaska and American networks, the agreement also makes Alaska dependent on American in a way that discourages competition between the two airlines. Specifically, American has significant leverage over Alaska because Alaska derives considerable value from using the American network to provide service throughout many areas of the United States it does not otherwise serve, while American relies on Alaska to provide access to far fewer destinations. To avoid undermining this lucrative partnership, Alaska may forego launching new service on routes served by American, or it may opt to compete less aggressively on the routes they both serve.

22. In addition, Alaska may choose to rely on the codeshare agreement in lieu of entering some routes already served by American because doing so allows it to offer its customers the benefits of an expanded network without undertaking the risk and expense of commencing its own competing service. By relying on an American flight to provide its customers service, Alaska can boast a more extensive network without actually launching service in competition with American. In essence, by choosing to rely on the codeshare agreement, Alaska is forgoing entry that would likely provide lower prices and more flight options to consumers.

23. The incentives created by the codeshare agreement are illustrated by the five-year growth plan that Alaska prepared prior to agreeing to acquire Virgin. The plan envisioned further cooperation between Alaska and American, calling for Alaska to ''strengthen the [American] partnership by trying to grow LA in a way that is complimentary [*sic*] to AA rather than competitive.'' But competitors are supposed to compete with, not complement, each other. Alaska would likely continue this strategy of avoiding growth that challenges American if it were to complete the merger. When Alaska was weighing whether to acquire Virgin, for example, a senior Alaska executive recognized that ''LAX . . . expansion may be counterproductive to our relationship with AA.''

*C. Unhindered by a Codeshare Relationship, Virgin Competes Aggressively With American*

24. In contrast to Alaska, Virgin has served as one of American's fiercest competitors. Virgin competes directly with American on twenty nonstop routes, which constitute approximately two-thirds of Virgin's entire network. In total, passengers spend about $8 billion per year to travel on these routes.

25. Virgin and American vigorously compete on so many nonstop routes in part because Virgin controls critical assets in cities where American maintains a hub. These assets include gates and/or takeoff and landing rights at airports such as Los Angeles International Airport, Washington Reagan National Airport, and Dallas Love Field. Virgin's presence at these important airports provides a critical alternative for consumers and helps keep American's prices lower than they otherwise would be.

26. Virgin's ownership of these assets and aggressive competition with American is no coincidence—consumers were promised the benefits of expanded Virgin service to counteract the anticompetitive effects threatened by the 2013 merger between American and US Airways. To resolve the United States's challenge to that merger, American agreed to divest a host of critical assets to low-cost competitors, including Virgin, at key U.S. airports. As contemplated by the settlement, Virgin has used the assets to compete directly with American. For instance, Virgin has utilized the two airport gates it acquired at Dallas Love Field to launch aggressive new service against American, forcing American to respond with lower prices. Virgin has estimated that its entry at Love Field caused American to lower certain fares on flights out of Dallas by more than 50%.

**V. The Relevant Markets**

27. Scheduled air passenger service enables consumers to travel quickly and efficiently between various cities in the United States. Air travel offers passengers significant time savings and convenience over other forms of travel. For example, a flight from Washington, DC to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.

28. Due to time savings and convenience afforded by scheduled air passenger service, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase. Another way to say this, as described in the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* (2010), and endorsed by courts in this Circuit, is that a hypothetical monopolist of all scheduled air passenger service likely would increase its prices by at least a small but significant and non-transitory amount. Scheduled air passenger service, therefore, constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

29. Moreover, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would switch to flights between other cities in response to a small but significant and non-transitory fare increase. A hypothetical monopolist of all scheduled air passenger service on any particular route between two destinations likely would be able to profitably increase its prices by at least a small but significant and non-transitory amount. Accordingly, scheduled air passenger service between each origin and destination pair constitutes a line of commerce and section of the country under Section 7 of the Clayton Act.

30. Scheduled air passenger service on those twenty routes on which Virgin and American compete today, and the routes on which they would have likely competed in the future, are relevant markets within the meaning of Section 7 of the Clayton Act.

**VI. The Transaction's Likely Anticompetitive Effects**

*A. The Merger Is Likely To Lessen Competition on the Routes Where Virgin and American Compete Today*

31. Alaska's acquisition of Virgin's network will extend the incentives

created by the codeshare agreement to the extensive overlaps between Virgin and American, and will therefore reduce the vigorous competition that Virgin is presently providing against American on some of the nation's largest nonstop routes. Specifically, the merger is likely to substantially lessen competition on each of the twenty nonstop routes on which Virgin and American currently compete because Alaska will have an incentive to avoid aggressive head-to-head competition in order to preserve its codeshare relationship with American. Once Alaska has control of Virgin, it is likely to reduce capacity, decrease service quality, and/or raise prices on these routes. In some cases, Alaska may completely stop serving the routes with its own flights, instead simply marketing American's flights between the destinations, thereby eliminating a meaningful competitive choice for millions of consumers.

32. Alaska itself has recognized that its acquisition of Virgin's assets will likely reduce competition on the Virgin-American overlap routes. As part of Alaska's early analysis of a possible acquisition of Virgin, Alaska executives developed a plan for post-merger changes to Virgin's service that specifically called for reducing—and in some instances completely eliminating—service on many of the routes where Virgin and American compete today, including routes that are among the most heavily traveled in the country. If carried out, these service reductions would not only cost consumers tens of millions of dollars each year, they would deprive consumers of some of the competitive benefits enabled by the American-US Airways merger settlement.

*B. The Merged Firm Will Be Less Likely To Enter Into New Competition With American Than Virgin Would Be Standing Alone*

33. Alaska's acquisition of Virgin will also lessen competition because Alaska is likely to enter fewer new routes in competition with American post-merger than Virgin would if Virgin remained a standalone airline. Alaska may avoid entering a route in competition with American for two reasons related to the codeshare: (1) It will fear endangering its lucrative relationship with American, and (2) it can already offer tickets on the route through the codeshare agreement. Virgin has no such inhibitions. In fact, Virgin's standalone growth plan called for the airline to enter several nonstop routes currently served by American but not Alaska. Alaska presently relies on its codeshare relationship with American to serve some of these routes, as well as others that may have been served by an independent Virgin in the future. Post-merger, Virgin's independent decision-making will be lost, and Alaska may avoid entering these types of routes. As a result, consumers will be deprived of the benefits of the future competition that Virgin would have provided.

**VII. Absence of Countervailing Factors**

34. New entry, or expansion by existing competitors, is unlikely to prevent or remedy the merger's likely anticompetitive effects. New entrants into a particular market face significant barriers to success, including difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

35. Defendants cannot demonstrate acquisition-specific and cognizable efficiencies that would offset the proposed acquisition's likely anticompetitive effects.

**VIII. Violation Alleged**

36. The United States hereby incorporates the allegations of paragraphs 1 through 35 above as if set forth fully herein.

37. The effect of the proposed merger, if approved, likely will be to lessen competition substantially, or tend to create a monopoly, in interstate trade and commerce in the numerous U.S. markets for scheduled air passenger service identified above, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

38. Unless enjoined, the proposed merger likely would have the following effects in the relevant markets, among others:

(a) Actual and potential competition in the relevant markets would be eliminated, including competition between Virgin and American;

(b) ticket prices and other fees would be higher than they otherwise would;

(c) industry capacity would be lower than it otherwise would; and

(d) service quality would be lessened.

**IX. Request for Relief**

39. Plaintiff requests:

(a) That Alaska's proposed merger with Virgin be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) that Defendants be permanently enjoined from and restrained from carrying out the planned merger of Alaska and Virgin or any other transaction that would combine the two companies;

(c) that Plaintiff be awarded its costs of this action; and

(d) that Plaintiff be awarded such other relief as the Court may deem just and proper.

Dated: December 6, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

__________/s/__________
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Acting Assistant Attorney General

__________/s/__________
JUAN A. ARTEAGA
Deputy Assistant Attorney General

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JONATHAN SALLET
Deputy Assistant Attorney General

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PATRICIA A. BRINK
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**United States District Court for the District of Columbia**

*United States of America,* Plaintiff, v. *Alaska Air Group, Inc.* and *Virgin America Inc.,* Defendants.

Case No.: 1:16–cv–02377.
Judge: Reggie B. Walton.
Filed: 12/06/2016.

**Competitive Impact Statement**

Plaintiff United States of America (''United States''), pursuant to Section

2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. Nature and Purpose of the Proceeding**

On April 4, 2016, Alaska Air Group, Inc. (''Alaska''), the sixth-largest domestic airline, agreed to acquire Virgin America, Inc. (''Virgin''), the ninth-largest domestic airline, for $2.6 billion in cash and the assumption of $1.4 billion in liabilities.

The airline industry in the United States is dominated by four large airlines—American Airlines, Delta Air Lines, United Airlines, and Southwest Airlines—that collectively account for over 80% of domestic air travel each year. In this highly-concentrated industry, the smaller airlines play a critical competitive role. In order to compete with the four largest airlines, these smaller airlines often must offer consumers lower fares, additional flight options, and innovative services.

Although Alaska would become only the fifth-largest domestic airline as a result of the proposed merger, its extensive codeshare agreement with the largest domestic airline, American, threatens to blunt important competition supplied by Virgin today. A codeshare agreement is a commercial relationship that allows each airline to market tickets for certain flights on the other's network. Although the codeshare agreement effectively extends Alaska's geographic reach—potentially strengthening Alaska's ability to compete against other carriers like Delta and United—it also creates an incentive for Alaska to cooperate rather than compete with American.

Alaska's acquisition of Virgin would significantly increase Alaska's network overlaps with American, and would thus dramatically increase the circumstances where the incentives created by the codeshare threaten to soften head-to-head competition. Roughly two-thirds of Virgin's network overlaps with American's network, and Virgin has aggressively competed with American on many of these overlap routes in ways that have forced American to respond with lower fares and better service. Unless the codeshare is substantially modified, the proposed merger would diminish the important competition Virgin has provided on these routes.

On December 6, 2016, the United States filed a civil antitrust Complaint seeking to enjoin the proposed acquisition. The Complaint alleges that Defendants' proposed merger would likely lessen competition substantially for scheduled air passenger service in numerous markets throughout the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Specifically, the Complaint alleges that following the merger, Alaska, as a result of its extensive codesharing relationship with American, would likely exit or compete less aggressively on routes where Virgin and American compete today, and would be less likely to enter new routes in competition with American in the future than Virgin would be standing alone.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to eliminate the likely anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Alaska would be obligated to substantially reduce the scope of its codeshare agreement with American in order to enhance Alaska's incentive to compete with American after the merger.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

**II. Description of the Events Giving Rise to the Alleged Violation**

*A. The Defendants and the Transaction*

Defendant Alaska Air Group, Inc. is a Delaware corporation headquartered in Seattle, Washington. Last year, Alaska flew over 31 million passengers to approximately 112 locations worldwide, taking in more than $5.5 billion in revenue. Alaska operates hubs in Seattle, Washington; Portland, Oregon; and Anchorage, Alaska, and has the largest share of traffic at each of these hubs.

Defendant Virgin America Inc. is a Delaware corporation headquartered in Burlingame, California. Last year, Virgin America flew over 7 million passengers to approximately 24 locations worldwide, taking in more than $1.5 billion in revenue. Virgin America is one of several entities bearing the ''Virgin'' name pursuant to a licensing agreement with the Virgin Group, which owns approximately 18% of Virgin America's outstanding voting common stock.

Virgin America was founded in 2004. Unlike Alaska, Virgin does not have a hub-and-spoke network. Although Virgin has ''focus cities''—Los Angeles, San Francisco, and Dallas—from which it provides service to many destinations, Virgin does not use these focus cities as points for transferring large volumes of connecting traffic. Instead, the bulk of Virgin's passengers fly on nonstop flights in markets where Virgin is typically not the dominant carrier.

On April 1, 2016, Alaska and Virgin agreed to merge for $2.6 billion in cash and the assumption of $1.4 billion in liabilities.

*B. Alaska's Codeshare Agreement With American*

Although codeshare agreements can take various forms, they generally allow for flights operated by one airline to be marketed and sold by another airline under the marketing airline's own brand. A codeshare agreement can extend an airline's network by enabling passengers to seamlessly book a connecting itinerary consisting of flights operated by different airlines. For example, a passenger seeking to fly from Walla Walla, Washington to Charlotte, North Carolina could purchase tickets for the entire trip through Alaska, using an Alaska flight from Walla Walla to Seattle that connects to an American flight from Seattle to Charlotte. This arrangement allows Alaska to rely on the codeshare agreement with American to offer service to Charlotte, instead of having to launch its own competing service between Seattle and Charlotte in order to serve the customer.

The codesharing partnership between Alaska and American began in 1999. The initial scope of the parties' codeshare agreement was very limited: it allowed Alaska to market American's flights on only 88 routes where Alaska did not otherwise provide service, and did not permit American to market any Alaska flights. Since 1999, however, Alaska and American have repeatedly expanded their codeshare arrangement, enabling American to also market certain Alaska flights and steadily increasing the number of flights each partner may sell on behalf of the other. American and Alaska most recently expanded the codeshare agreement in April 2016. As a result of the most recent expansion, Alaska is able to market American flights on over 250 routes, and American is able to market Alaska flights on about 80 routes. The April 2016 expansion also enabled American and Alaska to sell one another's flights on certain overlap routes where both companies offer competing nonstop service.

*C. Virgin's Aggressive Competition With American*

Virgin has served as one of American's fiercest competitors. Virgin competes directly with American on twenty nonstop routes, which constitute approximately two-thirds of Virgin's entire network. These twenty routes represent about $8 billion in commerce annually.

Virgin and American vigorously compete on numerous nonstop routes in part because Virgin controls critical assets in cities where American maintains a hub. These assets include gates and/or takeoff and landing rights at airports including Washington Reagan National Airport, Dallas Love Field, and Los Angeles International Airport. Virgin's presence in these markets provides a critical alternative for consumers and helps keep American's prices lower than they otherwise would be.

Virgin's ownership of many of these assets and aggressive competition with American is no coincidence—consumers were promised the benefits of expanded Virgin service to counteract the anticompetitive effects threatened by the 2013 merger between American and US Airways. To resolve the United States's challenge to that merger, American agreed to divest a host of critical assets at key airports where the two firms had a significant presence to low-cost competitors, including Virgin. *See* Final Judgment, *United States* v. *US Airways Group, Inc.,* Case No. 1:13–cv–01236 (CKK) (Dkt. No. 170) (D.D.C. Apr. 25, 2014). As contemplated by the settlement, Virgin has used the assets to compete directly with American. For instance, Virgin has utilized the two airport gates it acquired at Dallas Love Field to launch aggressive new service against American, forcing American to respond with lower prices. Virgin has estimated that its entry at Love Field caused American to lower certain fares on flights out of Dallas by more than 50%.

*D. The Transaction's Likely Anticompetitive Effects*

1. Relevant Markets

As alleged in the Complaint, scheduled air passenger service enables consumers to travel quickly and efficiently between various cities in the United States. Air travel offers passengers significant time savings and convenience over other forms of travel. For example, a flight from Washington, DC to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.

Due to time savings and convenience afforded by scheduled air passenger service, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase. Another way to say this, as described in the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* (2010), and endorsed by courts in this Circuit, is that a hypothetical monopolist of all scheduled air passenger service could profitably increase its prices by at least a small but significant and non-transitory amount. The Complaint alleges, therefore, that scheduled air passenger service constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

Moreover, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would switch to flights between other cities in response to a small but significant and non-transitory fare increase. A hypothetical monopolist of all scheduled air passenger service on any particular route between two destinations likely would be able to profitably increase its prices by at least a small but significant and non-transitory amount. Accordingly, scheduled air passenger service between each origin and destination pair constitutes a line of commerce and section of the country under Section 7 of the Clayton Act.

The Complaint alleges that scheduled air passenger service on those twenty routes on which Virgin and American compete today, and the routes on which they would have likely competed in the future, are relevant markets within the meaning of Section 7 of the Clayton Act.

2. Competitive Effects

The codeshare agreement between Alaska and American creates an incentive for Alaska to cooperate rather than compete with American. Alaska's acquisition of Virgin's network would extend this incentive to the extensive overlaps between Virgin and American, and will therefore likely reduce the vigorous competition that Virgin is presently providing against American. Specifically, the Complaint alleges that the merger is likely to substantially lessen competition on each of the twenty nonstop routes on which Virgin and American currently compete because Alaska will have an incentive to avoid aggressive head-to-head competition in order to preserve its codeshare relationship with American. Once Alaska has control of Virgin, it is likely to reduce capacity, decrease service quality, and/or raise prices on these routes. In some cases, Alaska may completely stop serving the routes with its own flights, and instead simply market American's flights between the destinations, thereby eliminating an independent and meaningful competitive choice for millions of consumers. The Complaint further alleges that Alaska's acquisition of Virgin will likely lessen competition because Alaska is likely to enter fewer new routes in competition with American than Virgin would if Virgin remained a standalone airline.

3. Entry and Expansion

As alleged in the Complaint, new entry, or expansion by existing competitors, is unlikely to prevent or remedy the merger's likely anticompetitive effects. New entrants into a particular market face significant barriers to success, including difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

**III. Explanation of the Proposed Final Judgment**

As alleged in the Complaint, Alaska's acquisition of Virgin threatens to substantially lessen competition on the routes where Virgin and American compete today, and would likely compete in the future, because Alaska's existing codeshare agreement with American creates significant incentives for Alaska to reduce—or eliminate—its competition with American on these routes.

The codeshare agreement incentivizes Alaska to avoid competition with American in two ways. First, the overall scale of the codeshare agreement and Alaska's dependence on it creates an incentive for Alaska to compete less aggressively with American in order to avoid upsetting American and jeopardizing the codeshare partnership. Second, the opportunity to market American's flights on particular routes creates an incentive for Alaska to rely on the codeshare to provide service to

its customers rather than undertaking the risk and expense of initiating its own service. Alaska's acquisition of Virgin would significantly increase Alaska's network overlaps with American, and would thus dramatically increase the circumstances where these incentives threaten to soften head-to-head competition.

As explained in more detail below, the relief set forth in the ''Prohibited Conduct'' section of the proposed Final Judgment would substantially reduce each of these incentives. First, through prohibitions on codesharing in a variety of circumstances, it would substantially reduce the overall size and scope of the codeshare partnership between Alaska and American, which, in turn, would decrease Alaska's reliance on the codeshare and enhance Alaska's incentive to compete on those routes where Virgin and American compete today. Second, it would prohibit Alaska from substituting to codeshare service on routes that Virgin already serves or would otherwise be likely to serve.

At the same time, because the codeshare between Alaska and American may benefit consumers in some circumstances by enabling Alaska and American to offer their customers service that neither airline would provide on its own, the proposed Final Judgment does not categorically prohibit all codesharing. Instead, the proposed Final Judgment focuses on reducing codesharing where it is likely to blunt Alaska's incentives to compete with American after the merger.

In addition, the proposed Final Judgment provides protections for the assets that Virgin acquired from American as part of the settlement of the lawsuit challenging the merger of American and US Airways to ensure the continued use of these assets in competition with American. Finally, the proposed Final Judgment includes notification, monitoring, and enforcement provisions so that Defendants comply with all of their obligations.

*A. By Prohibiting Codesharing in Certain Circumstances, the Proposed Final Judgment Incentivizes the Merged Firm To Compete Aggressively*

To reduce Alaska's dependence on the codeshare agreement with American, Section IV.A of the proposed Final Judgment requires Alaska to cease codesharing in four different scenarios no later than sixty days after the closing of the transaction. Together, the restrictions on codesharing will reduce by approximately 50% the volume of Alaska passengers flying on American flights.

First, Section IV.A.1 of the proposed Final Judgment prohibits Alaska and American from codesharing on routes where Virgin and American both offer competing nonstop service today, irrespective of network changes that either carrier makes in the future. By eliminating Alaska's ability to replace Virgin's service with codeshare flights on American, this provision will ensure that if Alaska wishes to offer its customers service on these routes, it will need to continue to compete head-to-head with American as Virgin does today.

Second, Section IV.A.2 of the proposed Final Judgment further reduces the overall scope of the codeshare relationship by prohibiting codesharing on all routes on which Alaska and American both offer competing nonstop service. Prohibiting codesharing on the Virgin/American overlap routes alone is insufficient to prevent harm from the merger because Alaska would retain the broader incentive to avoid endangering the partnership and could still choose to reduce or eliminate service on the routes where Virgin and American compete today. To adequately address this broader incentive, the proposed Final Judgment also prohibits codesharing on Alaska/American overlap routes because, as previously recognized by both the U.S. Department of Transportation and the Department of Justice, such codesharing can diminish competition and facilitate collusion by, for example, creating opportunities for the airlines to communicate about fares and closely coordinate their service offerings. Such codesharing is also especially unlikely to benefit consumers because it does not extend the reach of either carrier's network.

Third, in order to ensure that Alaska uses the Virgin assets to grow in ways that continue to enhance competition following the merger, the proposed Final Judgment prohibits Alaska from marketing American flights on routes that it is most likely to serve itself and prohibits Alaska from permitting American to market Alaska flights on routes that American is most likely to serve itself. Airlines are most likely to enter routes that emanate from one of their hubs or focus cities, and thus, Section IV.A.3 of the proposed Final Judgment prevents both Alaska and American from marketing each other's flights on routes that touch their respective hubs or focus cities, defined as ''Key Alaska Airports'' and ''Key American Airports'' in Definitions II.L and II.M of the proposed Final Judgment, respectively.

Finally, Los Angeles International Airport (''LAX''), which is not included as a ''Key Alaska Airport'' or ''Key American Airport,'' is a special case because both carriers will have significant operations at this airport post-merger. If Section IV.A.3 applied to LAX, it would eliminate all codesharing at this airport, including potentially beneficial codesharing on routes the two airlines would be unlikely to serve independently. Section IV.A.4 of the proposed Final Judgment therefore prohibits either carrier from codesharing on routes between LAX and either an American or Alaska hub or focus city, as the airlines are more likely to serve these routes on a standalone basis, but allows for codesharing on routes between LAX and other cities.

*B. The Proposed Final Judgment Provides Additional Protections for Assets American Divested to Virgin as Part of the American–US Airways Merger Settlement*

As alleged in the Complaint, Virgin aggressively competes with American on several routes using assets that American divested to Virgin to settle the United States's challenge to American's 2013 merger with US Airways. These assets, which include gates and takeoff and landing rights (known as ''slots''), are located at constrained airports in several of American's strongholds. Although the proposed Final Judgment strongly incentivizes Alaska to continue competing with American on routes that Virgin serves today through limitations on codesharing, Alaska may decide for independent reasons that these assets do not fit into its business or network plans and seek to sell or lease them to another carrier. Section IV.B of the proposed Final Judgment prohibits Alaska from allowing American to acquire or use the assets, which would circumvent the purpose of the American/US Airways settlement. In addition, Section IV.B of the proposed Final Judgment requires Alaska to obtain the United States's approval of a buyer or lessee if the combined company chooses to sell or lease these assets to a carrier other than American. This provision allows the United States to ensure that American does not have undue influence over the disposition of these assets. Section IV.C of the proposed Final Judgment permits Alaska to allow another airline to use the assets in limited circumstances that are routine, short-term, or necessary for operational or safety reasons and thus highly unlikely to harm competition—for example, when an airport orders Alaska to permit another airline to use an asset to prevent a potentially dangerous situation. Section IV.C also

permits Alaska to make one-for-one trades of slots or gates at the same airport, which is also highly unlikely to harm competition.

*C. The Proposed Final Judgment Includes Robust Notification, Monitoring, and Enforcement Provisions*

The proposed Final Judgment includes several provisions designed to allow the United States to assess the implementation and effectiveness of the proposed Final Judgment and ensure Alaska's compliance with its requirements. To this end, Section V.A requires Defendants to inform pertinent personnel of the Defendants' obligations under the proposed Final Judgment. Section V.B requires Defendants to comply with Section IV.A.2 no later than sixty days after Alaska or American enters a new route that creates a new competitive overlap. Section V.D of the proposed Final Judgment imposes annual reporting requirements regarding the scope of the codeshare relationship, including the identity of the routes subject to the codeshare, the number of passengers that have purchased tickets pursuant to the codeshare, and the amount of revenue Alaska has received from the codeshare. Section V.E also requires Alaska to notify the United States in advance if Alaska seeks to modify its contractual relationship with American as a means of providing the United States an opportunity to take action if the modification would threaten competition. In addition, Section VII of the proposed Final Judgment expressly reserves the right of the United States to take enforcement action to enjoin the codeshare agreement should changes in the competitive landscape or the networks or incentives of these airlines warrant such action.

**IV. Remedies Available to Potential Private Litigants**

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

**V. Procedures Available for Modification of the Proposed Final Judgment**

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of the judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: Kathleen O'Neill, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 450 Fifth Street NW., Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

**VI. Alternatives to the Proposed Final Judgment**

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have sought preliminary and permanent injunctions against Alaska's acquisition of Virgin. The United States is satisfied, however, that the remedies described in the proposed Final Judgment will effectively address the transaction's likely anticompetitive effects and preserve competition for the provision of scheduled air passenger service in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

**VII. Standard of Review Under the APPA for the Proposed Final Judgment**

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

*Id.* at § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *US Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's "inquiry is limited" because the government has "broad discretion" to determine the adequacy of the relief secured through a settlement); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed

remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court conducting inquiry under the APPA may consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also US Airways,* 8 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also US Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461)); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also US Airways,* 38 F. Supp 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (concluding that ''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in government antitrust enforcement actions, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also US Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language codified what Congress intended when it enacted the Tunney Act in 1974, as, Senator Tunney, the author of this legislation, unambiguously explained: ''The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11. A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways,* 38 F. Supp. 3d at 76.[3]

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[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

[3] *See also United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in

Continued

## VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 6, 2016

Respectfully submitted,

_________/s/_________

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## United States District Court for the District of Columbia

*United States of America*, Plaintiff, v. *Alaska Air Group, Inc.* and *Virgin America Inc.*, Defendants.

Case No.: 1:16–cv–02377.
Judge: Reggie B. Walton,
Filed: 12/06/2016,

## Proposed Final Judgment

Whereas, Plaintiff United States of America (''United States'') filed its Complaint on December 6, 2016, the United States and Defendants, Alaska Air Group, Inc. (''Alaska'') and Virgin America Inc. (''Virgin''), by their respective attorneys, have consented to entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issues of fact or law;

*And whereas*, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And whereas*, this Final Judgment requires Defendants to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

*and whereas,* Defendants have represented to the United States that the actions and conduct restrictions described below can and will be undertaken, and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any provisions contained below;

*Now, therefore,* before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

## I. Jurisdiction

The Court has jurisdiction over the subject matter of this action and Defendants. The Complaint states a claim upon which relief can be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

## II. Definitions

As used in this Final Judgment:

A. ''Alaska'' means Alaska Air Group, Inc., a Delaware corporation headquartered in Seattle, Washington, its successors and assigns, its Affiliates, and its subsidiaries or divisions, and their respective directors, officers, managers, agents, and employees.

B. ''Alaska/American Codeshare Agreement'' means the Amended and Restated Codeshare Agreement entered into between Alaska and American, dated February 15, 2015, and all predecessors, exhibits, schedules and amendments thereto.

C. ''Alaska/American Overlap Routes'' means any routes between two cities in the United States on which Alaska and American both provide nonstop scheduled air passenger service. For purposes of this definition only, the city that an airport serves will be determined by the City Market ID assigned to each airport by the U.S. Department of Transportation in the Airline Origin and Destination Survey (''DB1B''), and airports with the same City Market ID will be considered to serve the same city, except the following airports will not be considered to serve the same city as any other airport: (1) Los Angeles International Airport and (2) Norman Y. Mineta San Jose International Airport. The routes covered by this definition may change over the term of this Final Judgment as Alaska and American adjust their respective schedules. The Alaska/American Overlap Routes as of December 6, 2016 are listed in Appendix A for illustrative purposes.

D. ''American'' means American Airlines Group Inc., a Delaware corporation headquartered in Fort Worth, Texas, its successors and assigns, and its subsidiaries, divisions, groups and Affiliates, and their respective directors, officers, managers, agents, and employees.

E. ''Affiliate'' means an entity that is related to another entity by one owning shares of the other, by common ownership, or by other means of control, and includes any airline that operates Flights for Alaska or American pursuant to a capacity purchase agreement, but such airline shall only be deemed an Affiliate with respect to such Flights.

F. ''Codeshare Agreement'' means a contract between two airlines that allows them to market one another's flights by placing their respective unique, identifying codes on those flights. Each airline's code is established by the International Air Transportation Association.

G. ''Connecting Itinerary'' means a route within the United States with at least one intermediate stop at any airport between the origination and destination airports.

H. ''Defendants'' means Alaska and Virgin, and any successor or assignee to all or substantially all of the business or assets of Alaska or Virgin.

I. ''US/AA Divestiture Assets'' means all rights and interests held by Defendants in the two gates at Dallas Love Field (''DAL''), eight slots at Washington Reagan National Airport (''DCA''), and 12 slots at New York LaGuardia Airport (''LGA''), acquired by Virgin pursuant to the Final Judgment entered in *United States* v. *US Airways Group, Inc.,* Case No. 1:13–cv–01236 (CKK) (Dkt. No. 170) (D.D.C. Apr. 25, 2014).

J. ''Flight'' means scheduled air passenger service, without any intermediate stops, between an origin airport and destination airport, both within the United States.

K. ''Future Alaska-American Overlap Route'' means any Alaska-American Overlap Route created by Defendants or American commencing service between two cities after the consummation of the Transaction.

L. ''Key Alaska Airports'' means each of the following airports: (1) Portland International Airport (''PDX''); (2) Seattle-Tacoma International Airport (''SEA''); (3) San Francisco International Airport (''SFO''); and (4) Ted Stevens Anchorage International Airport (''ANC'').

M. ''Key American Airports'' means each of the following airports: (1) Charlotte Douglas International Airport (''CLT''); (2) Chicago Midway International Airport (''MDW''); (3) Chicago O'Hare International Airport (''ORD''); (4) Dallas/Fort Worth International Airport (''DFW''); (5) Dallas Love Field (''DAL''); (6) Fort Lauderdale-Hollywood International Airport (''FLL''); (7) John F. Kennedy International Airport (''JFK''); (8) Miami International Airport (''MIA''); (9) New York LaGuardia Airport (''LGA''); (10) Philadelphia International Airport (''PHL''); (11) Phoenix Sky Harbor International Airport (''PHX''); and (12)

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making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

Washington Reagan National Airport (''DCA'').

N. ''LAX'' means Los Angeles International Airport.

O. ''Market'' means to sell tickets for a Flight pursuant to a Codeshare Agreement, either as a standalone Flight or as part of a Connecting Itinerary.

P. ''Transaction'' means the transaction referred to in the Agreement and Plan of Merger by and among Alaska, Alpine Acquisition Corp., a wholly owned subsidiary of Alaska, and Virgin, dated April 1, 2016.

Q. ''Virgin'' means Virgin America Inc., a Delaware corporation headquartered in Burlingame, California, its successors and assigns, and its subsidiaries, divisions, groups, Affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

R. ''Virgin/American Overlap Routes'' means any routes on which Virgin and American both provide nonstop scheduled air passenger service as of December 6, 2016. The Virgin/American Overlap Routes are listed in Appendix B and will not change over the term of this decree.

**III. Applicability**

A. This Final Judgment applies to Alaska and Virgin, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

**IV. Prohibited Conduct**

A. Beginning sixty (60) calendar days after consummation of the Transaction, Defendants shall not directly or indirectly, under the Alaska/American Codeshare Agreement or otherwise:

1. Market any American Flight serving a Virgin/American Overlap Route, or permit American to Market any Alaska Flight serving a Virgin/American Overlap Route;

2. Market any American Flight serving an Alaska/American Overlap Route, or permit American to Market any Alaska Flight serving an Alaska/American Overlap Route;

3. Market any American Flight that originates or terminates at any Key Alaska Airport, or permit American to Market any Alaska Flight that originates or terminates at any Key American Airport; and

4. Market any American Flight, or permit American to Market any Alaska Flight, serving any route between LAX and a Key Alaska Airport or a Key American Airport.

B. Defendants shall not directly or indirectly sell, trade, lease, or sub-lease any of the US/AA Divestiture Assets without the prior written consent of the United States. Defendants shall not directly or indirectly transfer any interest in the US/AA Divestiture Assets to American or permit American to use the US/AA Divestiture Assets.

C. Notwithstanding Section IV.B, nothing in this Final Judgment shall prevent Defendants from (i) engaging in one-for-one trades of slots at different times at the same airport, (ii) engaging in one-for-one trades of gates at the same airport, (iii) continuing the subleases of the US/AA Divestiture Assets already in place as of December 6, 2016; (iv) permitting any airline to use any slots or airport gates if required by lawful directive of an airport authority or any other governmental body; or (v) permitting any airline to use any slots or airport gates on an ad hoc basis to accommodate a safety, security, or exigent operational need.

**V. Required Conduct**

A. Within thirty (30) calendar days of entry of this Final Judgment, Defendants shall certify to the United States that they have informed (i) all of Defendants' personnel involved in the implementation, operation, and enforcement of the Alaska/American Codeshare Agreement and (ii) all of Defendants' officers and directors of the obligations set forth in this Final Judgment.

B. Within sixty (60) calendar days of the creation of a Future Alaska/American Overlap Route, Defendants shall comply with the prohibition set forth in Section IV.A(2) on that Future Alaska/American Overlap Route.

C. Defendants shall certify to the United States annually on the anniversary date of the entry of this Final Judgment that Defendants have complied with all of the provisions of this Final Judgment.

D. Defendants shall notify the United States annually on the anniversary date of the entry of this Final Judgment of:

1. The identity of routes on which Alaska Markets American Flights, and separately for each route, whether Alaska Markets American Flights on a standalone basis, as part of a Connecting Itinerary, or both;

2. The number of passengers that purchased tickets pursuant to the Alaska/American Codeshare Agreement or any other Codeshare Agreement between Alaska and American for American Flights Marketed by Alaska during the prior calendar year; and

3. The amount of revenue that Alaska received during the previous calendar year from American pursuant to the Alaska/American Codeshare Agreement.

E. If Defendants amend the Alaska/American Codeshare Agreement or enter into any new or restated Codeshare Agreement with American, Defendants shall provide a copy of such amendment or agreement to the United States at least thirty (30) calendar days in advance of such amendment or agreement becoming effective, unless the United States agrees in writing that Defendants may make such agreement(s) or amendment(s) effective at an earlier date. Defendants shall satisfy the obligations set forth in parts A, C, D, and E of this Section by providing the required certifications, notifications, and copies of agreements to the Chief of the Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice.

**VI. Compliance and Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the

executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

## VII. No Limitation on Government Rights

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions as necessary to prevent or restrain violations of the antitrust laws relating to the Alaska/American Codeshare Agreement, or any past, present, or future conduct, policy, practice or agreement of Defendants.

## VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## IX. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

## X. Public Interest Determination

The entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest

DATED:__________

Court approval subject to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16

United States District Judge __________

## Appendix A

ALASKA/AMERICAN DOMESTIC U.S. OVERLAP ROUTES AS OF DECEMBER 6, 2016

| *Non-directional origin and destination pairs* | |
|---|---|
| Origin | Destination |
| Ted Stevens Anchorage International Airport | Los Angeles International Airport. |
| Ted Stevens Anchorage International Airport | Phoenix Sky Harbor International Airport. |
| Chicago O'Hare International Airport | Portland International Airport. |
| Chicago O'Hare International Airport | Seattle—Tacoma International Airport. |
| Dallas/Fort Worth International Airport | Portland International Airport. |
| Dallas/Fort Worth International Airport | Seattle—Tacoma International Airport. |
| Los Angeles International Airport | Portland International Airport. |
| Los Angeles International Airport | Salt Lake City International Airport. |
| Los Angeles International Airport | Seattle—Tacoma International Airport. |
| John F. Kennedy International Airport | Seattle—Tacoma International Airport. |
| Philadelphia International Airport | Seattle—Tacoma International Airport. |
| Phoenix Sky Harbor International Airport | Seattle—Tacoma International Airport. |
| Phoenix Sky Harbor International Airport | Portland International Airport. |
| Ronald Reagan Washington National Airport | Los Angeles International Airport. |
| Baltimore—Washington International Airport | Los Angeles International Airport. |
| Newark Liberty International Airport | Seattle—Tacoma International Airport. |
| John F. Kennedy International Airport | San Diego International Airport. |
| Newark Liberty International Airport | San Diego International Airport. |
| Miami International Airport | Seattle—Tacoma International Airport. |
| Fort Lauderdale–Hollywood International Airport | Seattle—Tacoma International Airport. |
| Washington Dulles International Airport | Los Angeles International Airport. |

## Appendix B

VIRGIN/AMERICAN DOMESTIC U.S. OVERLAP ROUTES

| *Non-directional origin and destination pairs* | |
|---|---|
| Origin | Destination |
| Boston Logan International Airport | Los Angeles International Airport. |
| Chicago O'Hare International Airport | Los Angeles International Airport. |
| Dallas Love Field Airport | Los Angeles International Airport. |
| Dallas/Fort Worth International Airport | Los Angeles International Airport. |
| Fort Lauderdale—Hollywood International Airport | Los Angeles International Airport. |
| Los Angeles International Airport | Miami International Airport. |
| Honolulu International Airport | Los Angeles International Airport. |

VIRGIN/AMERICAN DOMESTIC U.S. OVERLAP ROUTES—Continued

| Non-directional origin and destination pairs | |
|---|---|
| Origin | Destination |
| McCarran International Airport | Los Angeles International Airport. |
| Los Angeles International Airport | Washington Dulles International Airport. |
| Los Angeles International Airport | Ronald Reagan Washington National Airport. |
| Los Angeles International Airport | John F. Kennedy International Airport. |
| Los Angeles International Airport | Newark Liberty International Airport. |
| Los Angeles International Airport | Orlando International Airport. |
| Los Angeles International Airport | Seattle—Tacoma International Airport. |
| Dallas Love Field Airport | San Francisco International Airport. |
| Dallas/Fort Worth International Airport | San Francisco International Airport. |
| Fort Lauderdale—Hollywood International Airport | San Francisco International Airport. |
| Miami International Airport | San Francisco International Airport. |
| John F. Kennedy International Airport | San Francisco International Airport. |
| Los Angeles International Airport | San Francisco International Airport. |
| Chicago O'Hare International Airport | San Francisco International Airport. |
| Dallas Love Field Airport | Ronald Reagan Washington National Airport. |
| Dallas/Fort Worth International Airport | Ronald Reagan Washington National Airport. |
| Dallas Love Field Airport | LaGuardia Airport. |
| Dallas/Fort Worth International Airport | LaGuardia Airport. |
| Dallas Love Field Airport | McCarran International Airport. |
| Dallas/Fort Worth International Airport | McCarran International Airport. |
| Fort Lauderdale—Hollywood International Airport | John F. Kennedy International Airport. |
| Miami International Airport | John F. Kennedy International Airport. |
| Los Angeles International Airport | Kahului Airport. |
| McCarran International Airport | John F. Kennedy International Airport. |

[FR Doc. 2016–29883 Filed 12–12–16; 8:45 am]
BILLING CODE 4410–11–P

## DEPARTMENT OF JUSTICE

## Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Advanced Engine Fluids

Notice is hereby given that, on October 21, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Advanced Engine Fluids (''AEF'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Afton Chemical Corporation, Richmond, VA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AEF intends to file additional written notifications disclosing all changes in membership.

On March 20, 2015, AEF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 22, 2015 (80 FR 22551).

The last notification was filed with the Department on October 26, 2015. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 2, 2015 (80 FR 75469).

**Patricia A. Brink,**

*Director of Civil Enforcement, Antitrust Division.*

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BILLING CODE P

## DEPARTMENT OF JUSTICE

## Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Members of SGIP 2.0, Inc.

Notice is hereby given that, on November 9, 2016, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Members of SGIP 2.0, Inc. (''MSGIP 2.0'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, NEXTera ENERGY, Juno Beach, FL; India Smart Grid, New Delhi, INDIA; and Entergy, The Woodlands, TX, have been added as parties to this venture.

Also, California Public Utilities Commission, San Francisco, CA; CeteCom, Milpitas, CA; Ernst & Young, London, UNITED KINGDOM; Iteros (formerly CleanSpark LLC), San Diego, CA; Kitu Systems, Inc. (formerly Grid2Home), San Diego, CA; North America Energy Standards Board (NAESB), Houston, TX; Opus One Solutions, Richmond Hill, CANADA; SmartCloud, Inc., Bedford, MA; Tacoma Power, Tacoma, WA; The University of Tokyo, Tokyo, JAPAN; and Ward Bower Innovations LLC, Albuquerque, NM, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MSGIP 2.0 intends to file additional written notifications disclosing all changes in membership.

On February 5, 2013, MSGIP 2.0 filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 7, 2013 (78 FR 14836).