

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.)
)
Plaintiffs,)
)
v.)
) Case No. 1:13-cv-01236-CKK
)
US AIRWAYS GROUP, INC., et al.,)
)
Defendants.)
_____)

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
BY VIRGIN AMERICA INC.**

Virgin America Inc. (“Virgin America”) hereby moves for leave to file a brief *amicus curiae* addressing the merits of this case. With the Court’s permission, Virgin America will file its brief on November 15, 2013, and will limit its brief to no more than twenty-five (25) pages. The brief will focus on legal arguments and will incorporate factual information that has been introduced and subjected to cross-examination by the parties including information unique to Virgin America and its perspective on competition in the airline industry. Virgin America will seek to avoid presenting arguments or factual information presented by other *amici*.

The Amended Complaint in this case addresses the potential merger’s harm to competition in multiple markets, including nonstop hub-hub services operated by US Airways and American, as well as the loss of competition in over a thousand connecting city pairs. Yet, within the last week, the Attorney General at a news conference said the Department of Justice was contemplating a potential settlement focused on concessions at a limited number of key busy

airports. That report triggered a motion seeking to file a brief *amicus curiae* by Southwest Airlines focused solely upon slot divestitures to address the increase in concentration at two busy airports: Ronald Regan Washington National Airport and New York LaGuardia Airport. Due to the recent shift in focus towards just a few large airports and away from the harm to competition on nonstop hub-hub routes and in the connecting city pairs identified in the Amended Complaint, Virgin America believes that it can offer its unique perspective to the Court and show that this shift is unfounded. Virgin America's filing will provide information on the state of competition in the domestic airline industry and the barriers to competition created by the major US legacy airlines, including Defendants. Virgin America believes that it can show the Court that unless this merger is blocked, a simple fix for a few large airports will leave most of the hub-hub routes as monopoly markets and the connecting city pairs and all the passengers who travel in them without any remedy at all. The parties each have stated that they do not object to Virgin America filing a brief *amicus curiae*.

VIRGIN AMERICA'S INTEREST

Virgin America is one of only a handful of low cost carriers (LCCs) in the United States. Virgin America began operations in August 2007. Virgin America is the last airline to have entered the domestic U.S. marketplace and become a major carrier as defined by the US Department of Transportation. It has its main base of operations at San Francisco International Airport and Los Angeles International Airport. It operates fifty-three (53) Airbus A320 aircraft and generated over \$1.3 billion in revenue in 2012. Virgin America flies to San Francisco, Los Angeles, New York, Newark, Washington D.C. (Washington Dulles International Airport and Ronald Reagan Washington National Airport), Las Vegas, San Diego, Seattle, Boston, Fort Lauderdale, Orlando, Dallas-Fort Worth, Los Cabos, Cancun, Chicago, Puerto Vallarta, Palm

Springs (seasonally), Philadelphia, Portland, San Jose, Austin and Anchorage (seasonally). Unlike other LCCs, Virgin America competes for business passengers with a first class cabin, high quality service and low fares in direct competition with major legacy carriers. Virgin America was the first airline to offer on-board Wi-Fi web access on all of its flights and also offers unique on-board amenities such as on-demand food/beverage ordering from the seat and seat-to-seat chat. It also includes live TV and in-flight movies on all of its aircraft. When Virgin America enters legacy markets, service increases and fares drop significantly - producing a “Virgin America Effect.” And yet, as Virgin America will explain in its *amicus*, barriers to entry resulting from recent mergers among the largest US carriers—barriers that will be solidified by this merger—will prevent Virgin America, other LCCs, and potential new entrants from affecting competition in almost all of the hub-hub and over one thousand connecting city pairs listed in the Amended Complaint.

As other proposed *amici* have noted, a brief *amicus curiae* should be allowed when an *amicus* “has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997)). To that end, Virgin America is distinct among LCCs and has a unique perspective that can help the court beyond what the lawyers for the parties are able to provide. Other LCCs are not in the same competitive position as Virgin America. Allegiant’s and Spirit’s business models are focused on leisure customers and not business travelers. JetBlue focuses primarily on point-to-point leisure customers, and Southwest is the largest domestic US airline. Virgin America is unique among LCCs in that the vast majority of its flights operate in large *business* markets in competition with the large legacy carriers and it offers a first class and

economy class product geared for business travelers. This, along with Virgin America being the last carrier to enter the domestic airline industry and become a U.S. major carrier provides it with a unique perspective on the current state of competition and barriers to entry in the domestic airline industry.

ARGUMENT

Virgin America opposes the proposed merger as structured for all the reasons set forth in the Plaintiffs' Amended Complaint. The core of the Plaintiffs' case is the loss of competition for nonstop passengers traveling between the Defendants' hub airports and connecting passengers traveling in over a thousand city-pairs over the Defendants' hubs. In response, Defendants have claimed that Virgin America and other LCCs have had a "profound and permanent effect on industry competition" and thus counter the huge anticompetitive impact of this merger.¹ (*E.g.*, Answer by U.S. Airways at 2-3) This is incorrect. Virgin America will explain why, due to entry barriers created by the mergers of other legacy airlines, which will be exacerbated by this merger, that is not the case. Virgin America will also detail why the divestiture of slots/gates at a few large airports, alone, cannot address the core anticompetitive issue raised by the Government in its Complaint—the loss of competition on the hub-hub overlap routes and in over a thousand city-pair markets. Virgin America will explain how this loss of competition could be mitigated by the Defendants' agreeing to provide current and future LCCs access to the networks behind the Defendants' hubs. Absent such access for Virgin America and other small airlines to these city pairs, most of the competitive issues in the

¹ Defendants' claims have placed Virgin America's position as a competitor at issue in this case. Indeed, Virgin America has responded to four subpoenas and had the deposition of a senior executive taken by the parties.

Amended Complaint and the immense harm to consumers will remain without a remedy unless the merger is blocked entirely.

CONCLUSION

Virgin America respectfully requests that this Court issue an Order granting Virgin America permission to file a brief *amicus curiae* on the merits of this case, on the terms set forth above and such other terms as the Court may establish.

Dated: November 11, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Robert Robertson", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of November, 2013, the foregoing Motion was filed with the Clerk of the Court using the Court's CM/ECF system, served electronically via the Court's CM/ECF system upon counsel of record, and served via first class regular mail upon the following:

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