UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. UNITED CONTINENTAL HOLDINGS, INC., and DELTA AIR LINES, INC., Defendants.	**Case No. 2:15-cv-07992-CLW** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DELTA AIR LINES INC.'S MOTION TO DISMISS PLAINTIFF'S CLAIMS PURSUANT TO FED. R. CIV. P. 12

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LIST OF ABBREVIATIONS

80/20 Rule	High Density Traffic Airports; Slot Allocation and Transfer Methods, 57 Fed. Reg. 37308 (Aug. 18, 1992)
Agencies	FAA and DOT, collectively
Buy/Sell Rule	High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52180 (Dec. 20, 1985)
DCA	Ronald Reagan Washington National Airport
Delta	Delta Air Lines, Inc.
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
EWR	Newark Liberty International Airport
EWR Order	Order Limiting Scheduled Operations at Newark Liberty International Airport, 73 Fed. Reg. 29550 (May 21, 2008)
FAA	Federal Aviation Administration
HDR	The High Density Rule, 33 Fed. Reg. 17896 (Dec. 3, 1968); 14 C.F.R. §93 (1969)
JFK	John F. Kennedy International Airport
JFK Order	Order Limiting Scheduled Operations at John F. Kennedy International Airport, 73 Fed. Reg. 3510, 3512 (Jan. 18, 2008)
LGA	LaGuardia Airport
LGA Order	Operating Limitations at New York LaGuardia Airport, 71 Fed. Reg. 77854 (Dec. 27, 2006)
NPRM	Notice of Proposed Rulemaking, Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport, 80 Fed. Reg. 1274 (Jan. 8, 2015)
Slot	Takeoff or landing authorization
United	United Airlines, Inc.

Defendant Delta Air Lines, Inc. ("Delta") respectfully submits this memorandum of law in support of its motion to dismiss with prejudice Plaintiff's Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[1]

SUMMARY OF THE ARGUMENT

Plaintiff's Complaint alleges violations of Sections 1 and 2 of the Sherman Act. The only conduct alleged in the Complaint to support these claims is United Airlines, Inc.'s ("United") acquisition of takeoff and landing operating authorizations ("slots") at Newark Liberty International Airport ("EWR") in the present transaction and over time, and United's failure to operate all of the EWR slots that it holds. Compl. ¶¶ 3-4, 19-24. More specifically, the Complaint alleges that United has monopoly power based on its holding of "73% of the slots at Newark" (*id.* ¶ 44), that United "is already exercising this power" by holding "many slots that it does not use" (*id.* ¶¶ 44, 23), and that United "now seeks to maintain and enhance its monopoly power by acquiring 24 additional slots" from Delta in the proposed transaction (*id.* ¶ 45).

[1] Defendant United Continental Holdings, Inc. is concurrently filing its own motion to dismiss. Delta supports and agrees with the arguments presented by United in its motion to dismiss.

Noticeably absent from the Complaint, however, is any acknowledgment that the U.S. Department of Transportation ("DOT") and Federal Aviation Administration ("FAA") (together, the "Agencies") claim plenary jurisdiction over both the acquisition and usage of slots. Pursuant to its authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace,"[2] the Agencies instituted their slot management program nearly 50 years ago, limiting the number of scheduled flight operations per hour at certain slot-controlled airports. Since then, the Agencies have exercised their authority to establish a pervasive regulatory scheme for the management of slots at congested airports, including all aspects of both slot transfers and slot usage.

In devising this scheme, the Agencies have consistently and repeatedly invoked their statutory obligation to act in the "public interest."[3] The Agencies have interpreted this broad public interest standard—*often with the support of the U.S. Department of Justice* ("DOJ")—to include not only "safety considerations" such as "assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce,"[4] but also considerations of airline service to underserved communities, equality between domestic and foreign air carriers, and

[2] 49 U.S.C. § 40103(b).

[3] 49 U.S.C. § 40101(a) & (d).

[4] 49 U.S.C. § 40101(d)(1).

various factors concerning ***competition***, such as: "placing maximum reliance on competitive market forces and on actual and potential competition"; "*preventing . . . anticompetitive practices in air transportation*"; "*avoiding unreasonable industry concentration, excessive market domination, monopoly powers*, and other [similar] conditions"; "encouraging, developing, and maintaining an air transportation system relying on *actual and potential competition*"; and "encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ***ensure a more effective and competitive airline industry***."[5]

Relying on its claimed comprehensive regulatory authority to balance both competitive effects and concerns about airspace safety and efficiency, the FAA in 2008 imposed its slot rules at EWR to address the "persistent congestion and delays at Newark during the peak operating hours, as well as a dramatic projected increase in flight delays at the airport."[6] The EWR Order forced airlines serving the airport to cut back their operations, allocated slots to carriers, and imposed a minimum usage requirement on slots under which airlines must use their slots at least 80 percent of the time or risk having them taken away by the FAA. The

[5] 49 U.S.C. § 40101(a) (emphasis added).

[6] Order Limiting Scheduled Operations at Newark Liberty International Airport, 73 Fed. Reg. 29550 (May 21, 2008) ("EWR Order").

EWR Order also required airlines to submit all slot transfers to the FAA for review and approval.

Importantly, the Agencies are currently re-examining the slot rules at EWR in a comprehensive rulemaking that is expected to conclude late in 2016 (the "NPRM").[7] The NPRM specifically addresses the Agencies' review of slot transfers at EWR (and JFK and LGA), how slots at EWR are allocated, how they should be used by the carriers, and how such usage must be balanced against the Agencies' claimed authority to consider competitive concerns and their overall responsibility for maintaining the safe and efficient use of airspace. The history establishes that the Agencies have clear authority and expertise for slot management at EWR, and have used that authority to establish rules governing both slot transfers and usage—the conduct challenged in Plaintiff's Complaint.

As a result, Plaintiff's claims in this case create a serious conflict with the Agencies' regulatory scheme governing slots at EWR. The Agencies' regulations governing slot transfers and usage reflect a careful balancing of both competitive effects and airspace safety and efficiency. Plaintiff's antitrust lawsuit, and the policies it purports to advance, reflects no such balancing or even consideration of airspace safety and efficiency, much less the broad public interest considerations

[7] *See* Notice of Proposed Rulemaking ("NPRM"), Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport and Newark Liberty International Airport, 80 Fed. Reg. 1274 (Jan. 8, 2015).

the Agencies apply to their regulation of slots. Rather, Plaintiff's case is premised on a theory that United's failure to use all the slots it has on any given day is an illegal act of monopolization. Compl. ¶ 3. Plaintiff's antitrust claims, and the relief they seek, would require airlines like United to use all the slots they have, all the time, for fear of running afoul of the Sherman Act and DOJ enforcement. DOJ effectively seeks to substitute its judgment for that of the Agencies, which have specifically rejected this approach to slot management.

The irreconcilable conflict between DOJ's narrow antitrust objectives and the Agencies' broader objectives of safety and efficiency (including their asserted authority over competition) compels the conclusion that this case should be dismissed under the doctrine of implied immunity, as set forth in the Supreme Court's decision in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007). Not only does the Complaint in this case challenge conduct at the heart of the Agencies' comprehensive regulatory regime governing slot transfers and usage, it attacks conduct that the Agencies' current rules expressly permit, and that pending changes to those rules are designed to address. Plaintiff's lawsuit thus "threatens serious harm to the efficient functioning" of the Agencies' "active and ongoing" regulation of slot transfers and usage at EWR, requiring its dismissal. *Id.* at 283.

Alternatively, the collision between this lawsuit and the Agencies' asserted broader public interest directives requires that this case be dismissed under the doctrine of primary jurisdiction pending resolution by the expert agencies—FAA and DOT—of their ongoing rulemaking relating to slot usage at EWR and the other New York metropolitan area airports. The Agencies have proposed to enact substantial revisions to the existing slot management regime. There is no reason to speculate about that now, or to permit Plaintiff to pursue an antitrust case that seeks to establish its own, conflicting version of slot regulation. Plaintiff asks the Court to order relief that not only may be entirely unnecessary, but may undermine the work of the expert agencies charged with comprehensive administration of slots and their usage. For this additional reason, Plaintiff's Complaint should be dismissed.

STANDARD OF REVIEW

Delta moves for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Implied immunity deprives a court of subject matter jurisdiction, warranting dismissal under Rule 12(b)(1). *See, e.g.*, *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734–35 (1975). Plaintiff bears the burden of persuasion to convince the Court it has subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). In deciding a Rule 12(b)(1) motion for lack of subject matter jurisdiction, the Court

may consider and weigh evidence outside the pleadings. *Id.* at 178. If the Court concludes that it lacks subject matter jurisdiction, dismissal is required. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 242 (3d Cir. 2012).

Dismissal on implied immunity grounds may also be appropriate under Rule 12(b)(6) because "assertion of implied immunity is an affirmative defense that appears on the face of the complaint." *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 501-02 (S.D.N.Y. 2003) *vacated and remanded sub nom. Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) *rev'd sub nom. Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *see also In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 150 (2d Cir. 2003). In considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the Court must accept all factual allegations as true, construe the complaint in the light most favorable to the Plaintiff, and determine whether, under any reasonable reading of the complaint, the Plaintiff may be entitled to relief. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.*

BACKGROUND

I. History of the Agencies' Regulation of Slot Transfers and Usage.

A. The High Density Rule of 1968.

The FAA first instituted a slot control system in the so-called "High Density Rule," 33 Fed. Reg. 17896, 17898 (Dec. 3, 1968); 14 C.F.R. §§ 93.121-93.129 (1969) ("HDR"), which sought to reduce airspace congestion by capping the number of hourly arrivals and departures permitted at five designated "high density traffic airports." In promulgating the HDR, the FAA relied on its authority to ensure the efficient use of the national airspace under sections 307(a) and (c) of the Federal Aviation Act of 1958. 33 Fed. Reg. at 17897, 17898. That Act created the FAA (as the Federal Aviation Agency) and directed its Administrator to "assign by rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft and the efficient utilization of such airspace." Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 307(a), (c), 72 Stat. 731, 749-50, 49 U.S.C. §§ 1348 (a), (c) (1958).[8] Pursuant to that mandate, the FAA promulgated the HDR to further the "public interest in efficient, convenient, and *economical air transportation*." HDR, 33 Fed. Reg. at 17897 (emphasis added).

[8] The Federal Aviation Act of 1958 was repealed in 1994, but § 307(a) is now codified as revised at 49 U.S.C. § 40103(b).

B. The Buy/Sell Rule.

In 1985, the Agencies amended the HDR to establish new regulatory procedures and rules for the allocation and transfer of slots. High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52180 (Dec. 20, 1985); 14 C.F.R. §§ 93.211-93.229 (1986) (the "Buy/Sell Rule"). The Agencies concluded that amendments were necessary to further promote competition and reduce congestion because the prior allocation procedure was not "functioning in a manner which provide[d] for the efficient allocation of slots, for rapid adjustment to market conditions and shifting carrier needs and preferences, for adequate opportunity for expansion of operations, or for new carriers to serve high density airports." *Id.* at 52181.

The Buy/Sell Rule initially allocated slots to incumbent carriers based on their existing slot holdings under the HDR; thereafter, carriers were allowed to buy, sell, lease, and trade slots among themselves for any consideration, subject to FAA approval, without which the recipient of the slot transfer could not use the slot. *Id.* at 52191. The Buy/Sell Rule also instituted for the first time a minimum usage requirement. *Id.* at 52193. This "use it or lose it" restriction required that, subject to certain exceptions, slots be used 65 percent of the time or be recalled by the FAA. *Id.* The minimum usage requirement was meant to "prevent[] the

holding of 'pocket' slots for speculative purposes and serve[] to maximize utilization of airport capacity." *Id.* at 52189.

Although many affected parties expressed concerns about possible anticompetitive effects of the Buy/Sell Rule, the Agencies emphasized that they had closely considered the Rule's effects on competition in accordance with their claimed statutory mandate:

- "[T]he Department had to be mindful of ***statutory responsibilities*** including the need ***to place maximum reliance on competitive market forces*** . . ." 50 Fed. Reg. at 52182 (emphasis added).

- "***Many commenters expressed opinions that the purchase and sale of slots would have various anticompetitive or other effect adverse to the public interest***. . . . The Department of Transportation believes that most of the problems anticipated will not result from the specific rule adopted, and that ***in consideration of all of the effects of the rule that the net costs of the amendment will be outweighed by its benefits***." *Id.* (emphasis added).

- "The Department [of Transportation] believes that ***the ability to buy and sell slots also removes existing artificial barriers to entry into high density airport markets. The elimination of barriers to entry is essential for the optimal operation of a competitive market***." *Id.* (emphasis added).

- "***Inherent in the concern that a buy-sell rule will result in market concentration is the notion that larger carriers will use their resources to dominate markets. The Department does not believe that such anticompetitive behavior will be a problem, because of the lack of business incentives to do so and because of the impracticality of obtaining any monopoly control of slot-constrained markets***." *Id.* at 52185-86 (emphasis added).

The Buy/Sell Rule thus established a comprehensive regulatory scheme governing slot transactions and usage that the Agencies asserted balanced both competitive concerns and their broader public interest considerations.

C. The 80/20 Slot Usage Rule.

In 1992, the Agencies increased the minimum usage requirement under the Buy/Sell Rule from 65 to 80 percent. High Density Traffic Airports; Slot Allocation and Transfer Methods, 57 Fed. Reg. 37308 (Aug. 18, 1992); 14 C.F.R. §§ 93.221-93.227 (1993) (the "80/20 Rule"). Once again, the Agencies concluded this change to the slot rules was necessary to balance both competition and operational concerns, including safety and minimizing airspace congestion. While the Agencies considered increasing the usage requirement to 90 percent, they settled on 80 percent because doing so accommodated "potential problems of sporadic cancellations caused by weather, mechanical failure, or schedule reductions on a holiday." *Id.* at 37309-10. The Agencies observed that usage already approached or exceeded 90 percent in practice, and that "[t]he closer the use requirement approaches 90%, the more severely it will impact the holders of fewer slots." *Id*. at 37310. Stating that they "wanted to achieve a balance that would not jeopardize the viability of the smaller carriers while still ***promoting the efficient use of slots***," the Agencies concluded that "[t]he 80% requirement thus accomplishes the ***twin objectives of improving efficiency and increasing potential***

access for new entrants without substantially disrupting existing air service." *Id.* (emphasis added); *see also id.* ("This higher percentage should encourage carriers ***to hold no more slots than their markets demand, potentially freeing up underutilized slots for use by other carriers without imposing impractically stringent use requirements***.") (emphasis added).

D. Slot Management at EWR.

Notwithstanding its classification as a high-density airport under the HDR in 1968,[9] slot constraints were not imposed at EWR until 2008. *See* Order Limiting Scheduled Operations at Newark Liberty International Airport, 73 Fed. Reg. 29550 (May 21, 2008) ("EWR Order").[10] The FAA adopted the EWR Order to address "persistent congestion and delays at EWR during the peak operating hours, as well as a dramatic projected increase in flight delays at the airport during the summer of

[9] The FAA suspended the HDR's application at EWR in 1970 because airport capacity could meet demand. High Density Traffic Airports, 35 Fed. Reg. 16591 (Oct. 24, 1970); 14 C.F.R. §§ 93.121-93.133 (1971).

[10] The FAA issued similar temporary orders at LGA and JFK to address the problems of congestion and delay following Congress' enactment in 2000 of the Wendell H. Ford Aviation and Investment Reform Act of the 21st Century, Pub. L. No. 106-181, 114 Stat. 61, codified in various sections of Title 49 ("AIR-21"), which directed the FAA to phase out the HDR at those airports in order to promote competition at hub airports. *See* Operating Limitations at New York LaGuardia Airport, 71 Fed. Reg. 77854 (Dec. 27, 2006) ("LGA Order"); Order Limiting Scheduled Operations at John F. Kennedy International Airport, 73 Fed. Reg. 3510, 3512 (Jan. 18, 2008) ("JFK Order"). Both the LGA and JFK Orders imposed restrictions on slot transfers and usage, which the FAA concluded were necessary to balance concerns about competition, alleviating congestion and delay, and the safe and efficient use of airspace.

2008 if proposed schedules were implemented as requested by carriers." *Id.* The EWR Order adopted hourly slot limits, and imposed the same 80 percent minimum usage requirement already in effect at other slot-constrained airports. *Id.* at 29554. The EWR Order also required all slot transactions to be submitted to the FAA for confirmation and approval. *Id.* ("Notice of a trade or lease under this paragraph must be submitted in writing to the FAA Slot Administration Office . . . The FAA must confirm and approve these transactions in writing prior to the effective date of the transaction.").

In promulgating the EWR Order, the FAA made clear that it expressly considered effects on competition at the airport. For example, in response to several carriers' comments that the order "diminish[ed] the ability of new entrants to compete at EWR and strengthen[ed] the position of EWR's hub carrier [United's predecessor]," the FAA emphasized that it "intended the proposed order to describe a short-term vehicle to preserve realistic scheduling at EWR," and that the slot transfer and usage rules were designed to "permit operational flexibility and growth within the airport's capacity." *Id*. at 29551. The FAA also emphasized that it "will closely monitor the operation of the airport and the application of the mechanisms for the trade and lease of "slots," warning that if it "***detect[ed] unfair or anticompetitive behavior, [it would] not hesitate to take corrective action and***

to propose more stringent controls on [slot] transactions in the future." *Id.* (emphasis added).[11]

E. Delta-US Airways Slot Transaction.

In addition to issuing regulations governing slot transfers and usage at slot constrained airports like EWR, the Agencies have also taken action to block or modify specific slot transactions among airlines. In 2009, for example, Delta and US Airways filed a joint petition with the Agencies for waiver from the prohibition on the purchase or sale of LGA slots to allow the carriers to consummate a transaction involving slots at LGA and DCA. The Agencies tentatively granted the waiver subject to the carriers' divestiture of 40 slots at LGA and 28 slots at DCA. The Agencies stated that the divestitures were necessary to address certain competitive issues, explaining that "while the proposed transaction had a number of benefits, ***a grant of the waiver in its entirety would result in a substantial***

[11] The FAA issued a final rule for JFK and EWR, and another for LGA, in October 2008. *See* Congestion Management Rule for LaGuardia Airport, 73 Fed. Reg. 60574 (Oct. 10, 2008); Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty Airport, 73 Fed. Reg. 60544 (Oct. 10, 2008). However, the D.C. Circuit stayed those rules, and the FAA rescinded them on October 9, 2009. *See* Congestion Management Rule for LaGuardia Airport, 74 Fed. Reg. 52132 (Oct. 9, 2009); Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty Airport, 74 Fed. Reg. 52134 (Oct. 9, 2009). The FAA then extended all three of the temporary orders as a means of controlling congestion while it worked out a long-term solution, and they all remain in effect today. *See, e.g.*, Operating Limitations at Newark Liberty International Airport; Notice of Extension to Order, 79 Fed. Reg. 16857 (Mar. 26, 2014) (amending and extending effectiveness of original EWR Order). The current EWR Order is set to expire on October 29, 2016. *Id.* at 16857.

increase in market concentration that would harm consumers," and that ***"[t]he public interest would best be served . . . by creating new and/or additional competition at the airports to counterbalance that harm***." Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 Fed. Reg. 7306 (Feb. 18, 2010) ("2010 Interim Order") (emphasis added). The Agencies asserted that their "public interest" standard required them to emphasize pro-competitive policies, like "low-priced services," "entry into air transportation markets by new and existing air carriers," "actual and potential competition," "avoiding unfair . . . or anticompetitive practices in air transportation," and "unreasonable industry concentration, excessive market domination [or] monopoly powers . . . in air transportation." *Id.* at 7307 (quoting 49 U.S.C. § 40101(a) and (d)). The Agencies subsequently approved the Interim Order, affirming their claimed statutory authority to consider pro-competitive policy goals as an integral part of the "public interest" standard.[12]

Unable to accept the divestiture conditions, Delta and US Airways abandoned the initial transaction. However, in May 2011 Delta and US Airways

[12] Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 Fed. Reg. 26322 (May 11, 2010) ("2010 Final Order") ("The 'public interest' includes policies furthering airline competition . . . . These goals have been public policy since at least the time of adoption of the Airline Deregulation Act of 1978, and they include (among others) maximizing reliance on competitive market forces; avoiding unreasonable industry concentration and excessive market domination; and encouraging entry into air transportation markets by new carriers.") (citations omitted).

filed another petition for waiver informing the Agencies that they were prepared to divest up to 32 LGA and 16 DCA slots in a DOT-approved process to alleviate any lingering competitive concerns of the Agencies.[13] Once again, the Agencies applied their broad "public interest" standard, "balanc[ing] the economic benefits of the transaction against any potential resulting adverse economic consequences." Petition for Waiver and Other Relief, 76 Fed. Reg. 45313, 45314 (July 28, 2011). Having "carefully evaluated the risks and potential benefits of the proposed transaction, ***focusing our public interest analysis on the effects of the transaction as a whole***," the Agencies tentatively concluded that "potential benefits of the proposed transaction . . . outweigh its potential harms," and approved the carriers' waiver request. *Id.* at 45332 (emphasis added).

F. The Slots NPRM.

The Agencies' regulation of slot transfers and usage is active and ongoing. On January 8, 2015, the Agencies issued a Notice of Proposed Rulemaking ("NPRM") seeking to replace the FAA's interim orders governing slots at JFK, EWR, and LGA with a program that includes, among other things, a secondary market that would allow carriers to buy, sell, lease, and trade slots, subject to DOT approval. Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 80 Fed.

[13] *See* Petition for Waiver and Other Relief, 76 Fed. Reg. 45313 (July 28, 2011).

Reg. 1274 (Jan. 8, 2015). Under the proposed rules, airlines must report all but the smallest slot transactions to the FAA, which would then refer the transactions to DOT for the Secretary to conduct a broad "public interest" review, including of any competitive effects under "***antitrust law standards and policies***," and determine whether the transaction should be approved.[14] *Id.* at 1292 (emphasis added).[15]

The NPRM would retain the 80 percent slot usage requirement at the three major New York metropolitan area airports, but proposes a revision to the requirement's calculation method so that carriers must "use an allocated slot at

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[14] Even slot transfers predating the NPRM, which are temporary under the existing Orders, "still would be subject to the FAA approval process and DOT review" if carriers wished to make them permanent. *Id.* at 1290.

[15] Delta and United have previously argued that the Agencies lack the legal authority to review slot transactions for competition issues (including under the antitrust laws), but the FAA, DOT, and DOJ have consistently rejected those arguments. *See, e.g.*, 2010 Final Order, 75 Fed. Reg. at 26326-27 ("The FAA has consistently relied on pro-competitive policy goals in carrying out its slot programs. . . . We also do not accept the comments of the Joint Applicants, Continental or United, that the Department of Justice, not the Secretary (or FAA), is the sole source of competition authority over slot transactions."); U.S. Department of Transportation Notice of Practice Regarding Proposed Airline Mergers and Acquisitions, 80 Fed. Reg. 2468, 2468 (Jan. 16, 2015) ("This Notice describes the [DOT's] practice and authorities with regard to airline mergers and acquisitions, *including those that involve a transfer of slots. The Notice is not proposing any changes, new procedures, or new approaches*. . . . The DOT has authority over slot transactions that stem from proposed airline mergers and acquisitions. . . . *DOT is authorized to prohibit airline conduct comparable to antitrust violations*. . . . DOT has independent authority under the Clayton Act . . . .") (emphasis added); *see infra* Background, Section II (discussing DOJ's support of the Agencies' claimed authority over competition issues).

least 80 percent of the time *for the same flight or series of flights*" on each day of the week for which it is allocated. NPRM, 80 Fed. Reg. at 1287 (emphasis added). Claiming to have "observed some underutilization behavior at JFK, EWR, and LGA," which they believed "could adversely affect the opportunities for new entrants to begin service at a particular airport or could reduce the choices available to consumers," the Agencies proposed altering the usage calculation so that it could "better ensure that the scarce resource of slots is used optimally." *Id.* at 1288. The new calculation method would tie an individual slot to the "same flight or series of flights," "generally with the same flight number, generally serving the same market, and distributed regularly in the same season." *Id*. at 1287.

II. DOJ Has Supported the Agencies' Assertion of Broad "Public Interest" Authority to Regulate Slot Transactions and Usage.

DOJ has itself advocated in support of the Agencies' asserted authority to consider competition in regulating slots. *See, e.g.*, Buy/Sell Rule, 50 Fed. Reg. at 52185 ("DOJ in their comments stated that both the Airline Deregulation Act and the Federal Aviation Act require DOT to rely, to the maximum extent possible, on market mechanisms to create an efficient procompetitive system for allocating slots.").

The DOJ has also supported the Agencies' assertion of their comprehensive authority to regulate slot usage and transfers based on broad public interest

considerations, including competition. For example, in connection with the Delta/US Airways Slot Transaction, DOJ filed comments supporting the FAA's 2010 Interim Order, arguing that "the FAA's proposed waiver with conditions will be in the public interest because it will free up slots for other carriers, facilitating entry at LGA and DCA, increasing competition and lowering fares for consumers, without interfering with the purported benefits of the transaction."[16] DOJ also strongly supported the Agencies' assertion of jurisdiction over competition-related issues as part of their "public interest" determination:

- "The FAA may grant the waiver if it is in the public interest. ***Its public interest inquiry is guided by several pro-competitive principles*** . . . [quoting 49 U.S.C. §§ 40101(a)(10)-(13)]."[17]
- "As explained in our initial Comments and in the tentative decision itself, the ***FAA has sufficient statutory authority and factual bases*** upon which to conclude that waiver of its prohibition on permanent slot transfers to facilitate the parties' transaction without conditions would not be in the 'public interest.'"[18]
- "[T]he FAA needs to consider carefully whether the net benefits promised by ***such a substantially reduced divestiture package are sufficiently large to offset anticipated harms from the underlying transaction.*** As the size of the divestiture decreases, it becomes even more important to ensure that the divested slots go to uses that ***maximize efficiency and consumer benefit***."[19]

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[16] Reply Comments of the United States Department of Justice at 2, Docket No. FAA-2010-0109 (Apr. 5, 2010) ("DOJ Reply Comments").

[17] Comments of the United States Department of Justice at 1-2, FAA-2010-0109 (Mar. 24, 2010) (emphasis added).

[18] DOJ Reply Comments at 2 (emphasis added).

[19] *Id.* at 7-8 (emphasis added).

- "With respect to [whether the Agencies have statutory authority to consider competition-related issues in deciding whether the waiver request is in the public interest], ***we defer to the agency's interpretation of its public interest standard and note that parties' contentions are contradicted by literally decades of FAA actions that have invoked competitive considerations in connection with ensuring the safe and efficient use of airspace***."[20]

III. The DOJ's Antitrust Complaint in This Case.

On November 10, 2015, DOJ filed the instant lawsuit seeking to enjoin United's acquisition from Delta of 24 slots at EWR. DOJ alleged that United currently controls 73 percent of all slots at EWR and that the acquisition would increase United's share of slots by about 2 percent. Compl. ¶ 37. The Complaint alleges violations of Sections 1 and 2 of the Sherman Act. *Id.* at ¶¶ 48- 49. The only actions alleged in support of these claims are (1) the slot agreement between United and Delta, (2) United's historical acquisition of 21 total EWR slots during 2010-11, and (3) United's alleged failure to use all of its slots. *Id.* at ¶ 22 ("The present transaction is the latest of United's efforts to buy up any additional slots that become available at Newark, despite United already owning more than it is willing to use.").

Although Plaintiff does not allege that United's pre-existing slot holdings—acquired with the Agencies' approval—violated the Agencies' regulations, the Complaint nevertheless alleges that "United's control of 73% of the slots at

[20] *Id.* at 11 (emphasis added).

Newark gives it monopoly power," and that "[t]he addition of 24 slots to United's existing cache [of slots] would further enhance its existing monopoly power as well as its ability to maintain and reinforce the high entry barriers faced by competitors seeking to enter or expand at Newark." *Id.* at ¶¶ 44-45. Plaintiff does not assert that United's slot usage falls below the level determined by the Agencies to satisfy their competitive and airspace safety and efficiency objectives. Indeed, Plaintiff concedes that the under-usage of slots by United that is alleged to violate the antitrust laws substantially exceeds the 80% minimum usage requirement.[21] The Complaint merely asserts that "United does not use all of the slots it controls at Newark," and that "United's failure to use the slots it already controls deprives Newark passengers of flight options that would exist if the slots were flown." *Id.* at ¶ 3.

ARGUMENT

I. Plaintiff's Complaint Should Be Dismissed Because the Doctrine of Implied Immunity Precludes Application of the Antitrust Laws to Conduct Pervasively Regulated by the Agencies.

The application of the antitrust laws to the proposed slot transaction between Delta and United would threaten serious harm to the Agencies' comprehensive authority to regulate slot acquisitions and usage based on a broad public interest

[21] The Complaint alleges that United "grounds" up to 82 of its 902 slots each day. Compl. ¶ 3. However, even assuming that those numbers are correct, the percentage of its slots that United uses each day—91 percent—far exceeds the 80 percent minimum use requirement established by the FAA.

standard, and would create the risk of airlines being subject to inconsistent standards. The Agencies' pervasive regulation of slot acquisitions and usage, under which they claim the authority to take into account competitive considerations, satisfies the standard for implied immunity from the antitrust laws. Under the implied immunity doctrine, the "antitrust laws [should] not come into play when they would prohibit an action that a regulatory scheme permits." *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990).

The standard for implying antitrust immunity was most recently articulated in the Supreme Court's 2007 decision in *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264 (2007). In *Billing*, a group of sixty investors filed two antitrust class action suits against ten leading investment banks. During the stock market bubble of the late 1990s, the banks had served as underwriters, forming syndicates to execute the IPOs of hundreds of technology-related companies. The investors alleged that the banks violated antitrust laws by conspiring not to sell shares of the new IPOs unless the buyers agreed: (1) to pay excessively high sales commissions; (2) to purchase other, less desirable securities in a practice known as "tying"; and (3) to buy additional shares of the IPO at escalating prices in a practice known as "laddering." The investors alleged that the purpose of this conspiracy was to increase the price of shares that purchasers paid following the IPO above what the

price would have been in a competitive market, and to create an artificial demand for the shares, leading to increased commissions and fees for the banks.

The Court held that the conduct alleged was impliedly immune from the antitrust laws because to "allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets" and the SEC's "comprehensive authority" to regulate the conduct at issue. *Id.* at 278, 283. In finding "sufficient incompatibility to warrant an implication of preclusion," the Court in *Billing* articulated four "critical" factors: "(1) the existence of a regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a resulting risk that the securities and antitrust laws would produce conflicting guidance, requirements, duties, privileges, or standards of conduct;" and (4) whether the "practices lie squarely within an area of activity that the securities law seeks to regulate." *Id.* at 275-76.

As in *Billing*, "allow[ing] an antitrust lawsuit would threaten serious harm to the efficient functioning" of the Agencies' "comprehensive authority" to regulate the transfer and usage of slots. The Agencies indisputably meet the first and fourth factors, because they possesses the "regulatory authority" to "supervise" slot transfers and usage, both of which are "practices [that] lie squarely within the area of activity" the Agencies regulate. As explained more fully below, the second and

fourth *Billing* factors are satisfied because of the Agencies' "active and ongoing" regulation of slot transfers and usage, and the actual, present conflict between the Agencies' "comprehensive" regulatory scheme and DOJ's enforcement of the antitrust laws, and the prospective conflict between this lawsuit and the pending NPRM.

A. The Agencies Actively Exercise Their Claimed Authority to Regulate All Aspects of Slot Acquisition and Usage.

The second *Billing* factor examines whether the responsible regulatory agency is engaged in the "active and ongoing" exercise of its authority over the conduct at issue. 551 U.S. at 276, 285. In *Billing*, the Court found that the "SEC ha[d] continuously exercised its legal authority to regulate conduct of the general kind now at issue" by, among other things, "defin[ing] in detail . . . what underwriters may and may not do and say," and bringing "actions against underwriters who have violated these SEC regulations." *Id.* at 277.[22] Applying those principles here, there can be no dispute that the Agencies are engaged in the "active and ongoing" regulation of slot transfers and usage at EWR.

For nearly 50 years, the Agencies have promulgated rules defining what carriers "may and may not do" with the slots allocated to them by the FAA. Based

[22] As the Court observed in *Billing*, the Supreme Court held in *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975), that the SEC's "active role in review of proposed rates during the last 15 years" was an adequate demonstration of the agency's active regulation. *Billing*, 551 U.S. at 272 (citing *Gordon*, 422 U.S. at 685).

on that experience, the FAA imposed slot constraints at EWR in 2008, including mandatory rules governing slot transfers and usage. Under the EWR Order, all slot transactions must be submitted to the FAA for approval, without which the recipient carrier cannot operate the slots it seeks to obtain. EWR Order, 73 Fed. Reg. at 29554. The FAA also asserted in the EWR Order that it monitors slot transactions for anticompetitive effects, warning that if the FAA "***detects unfair or anticompetitive behavior, [it will] not hesitate to take corrective action and to propose more stringent controls on such transactions in the future***." *Id*. at 29551 (emphasis added). And as shown by the 2009 Delta-US Airways Slot Transaction, the Agencies do not hesitate to prohibit proposed slot transfers to address competitive concerns unless they are modified to the Agencies' satisfaction.[23]

The EWR Order also regulates slot usage. The FAA requires carriers to submit regular reports detailing their planned operations for each slot they hold. *See* EWR Order, 73 Fed. Reg. at 29554 ("Each carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier and for each Operating Authorization."). The FAA uses these reports to determine whether a carrier has complied with the 80 percent minimum usage requirement. If not, the carrier must relinquish the slot to the FAA for possible reallocation to other airlines. *Id.*

[23] *See*, *e.g.*, 2010 Interim Order, 75 Fed. Reg. 7306.

("[A]ny Operating Authorization not used at least 80% of the time over the period authorized by the FAA under this paragraph will be withdrawn by the FAA for the next applicable season . . . ."). Carriers that violate the usage rules are also subject to civil penalties. *Id.* at 29555 ("A carrier . . . will be liable for a civil penalty of up to $25,000 for every day that it violates the limits set forth in this Order.").

Thus, the existing EWR Order not only prescribes what carriers "may and may not do" with respect to both the transfer and usage of slots, it also provides mechanisms for the FAA to take action against those carriers who violate those rules. Moreover, the Agencies are currently considering significant changes to those rules based on their decades of administrative experience in a comprehensive rulemaking that proposes to overhaul the entire slot management program at the three major New York metropolitan area airports. *See* NPRM, 80 Fed. Reg. 1274. This is precisely the type of "active and ongoing" regulation the Supreme Court held in *Billing* to warrant preclusion of the antitrust laws.

B. Application of the Antitrust Laws to the Slot Transaction Threatens "Serious Harm to the Efficient Functioning" of the Agencies' Regulation of Slot Transfers and Usage.

The third *Billing* factor requires examining whether the simultaneous application of the Agencies' regulatory scheme and the antitrust laws "would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." *Billing*, 551 U.S. at 275-76. In *Billing*, the Court found this factor

satisfied for several reasons. First, application of the antitrust laws could prohibit conduct the SEC expressly "permits or encourages," and the Court expressed doubt that anyone "but a securities expert" could perform the necessary "line-drawing." *Id.* at 279 ("In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages . . . from activity that the SEC must (and inevitably will) forbid . . . ."). Second, the Court found problematic that the "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical," which created an "unusually high risk that different courts will evaluate similar factual circumstances differently." *Id.* Finally, the Court found that "any enforcement-related need for an antitrust lawsuit is unusually small" because "the SEC actively enforces the rules and regulations that forbid the conduct in question" and because "the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." *Id.* at 283.[24] Based on these facts, the Court concluded that the plaintiffs' antitrust action "threatened serious harm to the efficient functioning of the securities market" as regulated by the SEC.

[24] *See also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.").

Application of these principles to this case reveals a serious, irreconcilable conflict between Plaintiff's lawsuit and the Agencies' regulatory regime, "threaten[ing] serious harm to the efficient functioning" of the Agencies' regulatory authority.

1. The DOJ's Lawsuit Would Prohibit Conduct the Agencies Expressly Permit.

Plaintiff's Complaint seeks to prohibit under the antitrust laws the very same conduct that Agencies' slot usage rules expressly permit. DOJ alleges that "United's control of 73% of the slots at Newark gives it monopoly power over the markets for Newark slots and Newark scheduled air passenger service," and that "United now seeks to maintain and enhance its monopoly power by acquiring 24 additional slots from one of its largest competitors at Newark, Delta." Compl. ¶ 4. DOJ further alleges that United "grounds" up to 82 of its 902 slots each day, and that United's failure to "use all of the slots it controls at Newark" constitutes monopolistic behavior. *Id.* at ¶ 3. However, even assuming that those numbers are correct, the percentage of its slots that United *uses* each day—91 percent—far exceeds the 80 percent minimum use requirement established by the Agencies.[25]

[25] DOJ alleges that United seeks to lease Delta's EWR slots in order to maintain its monopoly—and that its stated purpose of expanding service is a pretext—because "United's existing cache of excess slots would allow it to add flights at Newark if that were its true goal." Compl. ¶ 24. But United's motivation is irrelevant—it is engaged in conduct expressly permitted by the Agencies' regulations.

Moreover, only the Agencies are able to draw the "fine line" between slot transactions or usage the Agencies permit as being in the public interest (which, the Agencies assert, includes concerns about anticompetitive effects), and slot transactions or usage the Agencies forbid. Neither the DOJ nor the courts are charged with balancing concerns about competition with concerns about safety and airspace efficiency and the other broad public interest factors the Agencies apply. Thus, as in *Billing*, when confronted with such difficult line-drawing exercises, they are "likely to make unusually serious mistakes," and the costs of such mistakes may be "unusually high." *Id*. at 281. For example, a carrier faced with the prospect of antitrust liability despite being in compliance with the slot usage rules would be forced to increase its usage by some unknown amount above the acceptable level set by the Agencies. The resulting increase in operations would exacerbate congestion and delay at airports like EWR, worsening the very problem that the minimum usage requirement was created to address.

Finally, "evidence tending to show unlawful antitrust activity and evidence tending to show lawful" slot usage activity would "overlap, or prove identical." *Billing*, 551 U.S. at 281. The DOJ's Complaint attacks United's share of slots, three small slot acquisitions (which have been almost entirely offset by United's return of slots to the FAA during the relevant period), past and current slot transactions, and United's attempt to acquire more slots despite using somewhat

less than 100 percent of its current holdings. Compl. ¶¶ 19-24. As an initial matter, DOJ's attack on United's current level of slot holdings primarily is a critique of the FAA's direct allocation of slots to United's predecessor (Continental) in 2008, which *ipso facto* is permitted by the FAA. Further, United's slot utilization is permitted—if not encouraged—by the Agencies' regulations. Indeed, the Agencies have on numerous occasions considered increasing the minimum usage requirement above 80 percent, but decided against it in order to "accomplish[] the twin objectives of improving efficiency and increasing potential access for new entrants without substantially disrupting existing air service." 80/20 Rule, 57 Fed. Reg. at 37310.[26]

DOJ's lawsuit thus invites the Court to engage in precisely the kind of second-guessing that the Court in *Billing* warned creates an "unusually high risk that different courts will evaluate similar factual circumstances differently." 551 U.S. at 281-82. As a result, carriers would be unsure whether conduct that complies with FAA regulations would nevertheless subject them to antitrust liability, thereby harming the Agencies' regulatory authority by chilling the precise conduct that the Agencies seek to promote.

[26] In the 80/20 Rule, the Agencies rejected a 90 percent usage rule out of concern that it would "severely . . . impact the holders of fewer slots" and "subject slots to withdrawal" for non-usage due to "exigencies" such as "sporadic cancellations caused by weather, mechanical failure, or schedule reductions on a holiday." 57 Fed. Reg. at 37310.

2. The Agencies' Asserted Authority to Regulate Slot Transfers and Usage Accounts for Competitive Concerns.

Preclusion of the antitrust laws is also warranted here because "any enforcement-related need for an antitrust lawsuit is unusually small." *Id.* at 283. As in *Billing*, the Agencies "actively enforce[] the rules and regulations" governing the transfer and usage of slots, and claim to be "required to take account of competitive considerations." *Id.* at 283-84. Indeed, the FAA and DOT have consistently and repeatedly asserted—*often with DOJ's support*[27]—that their authority to supervise slot transactions and monitor slot usage encompasses a review of competition, and allows the Agencies to take action to remedy any anticompetitive effects.[28] As a result, "there is a diminished need for antitrust enforcement to address anticompetitive conduct," *id.* at 284, because the very concerns that such an action would seek to remedy are included in the Agencies' claimed authority to more broadly consider competitive effects.

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[27] *See supra* Background, Section II.

[28] *See, e.g.*, NPRM, 80 Fed. Reg. 1287 (citing 49 U.S.C. §§ 40101, 40103, 40105, and 41712, stating: "These authorities empower the DOT to ensure the efficient utilization of airspace by limiting the number of scheduled and unscheduled aircraft operations at JFK, EWR, and LGA, while balancing between promoting competition and recognizing historical investments in the airport and the need to provide continuity. ***They also authorize the DOT to review proposed transfers of slots and to limit or prohibit transfers where they present a potential for significant anticompetitive effects or adverse effects on the public interest***.") (emphasis added).

3. The NPRM Threatens Further Conflict Between DOJ's Lawsuit and the Agencies' Regulation of Slots at EWR.

The Agencies' pending NPRM underscores the irreconcilable conflict between the DOJ's lawsuit and the Agencies' pervasive regulatory scheme. The NPRM proposes to overhaul the slot management program at EWR, LGA, and JFK, including significant changes to the rules governing slot transactions and slot usage. The proposed rules would require airlines to report all but the smallest slot transactions to the FAA, which would then refer the transactions to DOT for the Secretary to conduct a broad "public interest" review, including of any competitive effects under "antitrust law standards and policies." NPRM, 80 Fed. Reg. at 1292. The proposed rules thus create the potential for a more direct collision between the Agencies' broader public interest objectives and the DOJ's narrower antitrust goals. Indeed, if the proposed rules are adopted, the Agencies would conduct the same competitive review that the DOJ is now asking the Court to perform.

The NPRM also proposes to revise the slot usage requirements at the three major New York metropolitan area airports. Under the current EWR Order, slots must be "used at least 80% of the time . . . ," but a slot can be used for any particular flight to any destination. EWR Order, 73 Fed. Reg. at 29554. In contrast, the proposed rule would require airlines to "use an allocated slot at least 80 percent of the time *for the same flight or series of flights.*" NPRM, 80 Fed. Reg. at 1287 (emphasis added); *id.* at 1301. By tying the use of each slot to a

particular flight, the Agencies aim to increase slots usage by preventing carriers from "record[ing] usage on multiple slots," which "artificially allow[s] carriers to meet the minimum usage rules without scheduling a flight for each slot." *Id.* at 1284. The proposed changes to the usage rules are therefore designed to address the same conduct DOJ challenges in this lawsuit—the perceived underutilization of slots—while also addressing broader regulatory concerns pertaining to safety and airspace management vested exclusively with the Agencies.

II. The Complaint Should Alternatively Be Dismissed Under the Doctrine of Primary Jurisdiction.

In the event that the Court finds dismissal based on implied immunity inappropriate, dismissal is still warranted under the doctrine of primary jurisdiction.[29] The Third Circuit has explained that the primary jurisdiction doctrine "rests upon a judicial reluctance to hold practices within the scope of an agency's jurisdiction to be antitrust violations and then to act upon such holding by granting relief . . . before prior resort to the agency." *Laveson v. Trans World Airlines*, 471 F.2d 76, 83-84 (3d Cir. 1972). The Third Circuit further observed that "a different judicial posture might well cause the unity of the system of regulation to break down beyond repair." *Id.* at 84.

[29] Unlike implied immunity, which deprives the court of jurisdiction, primary jurisdiction is a prudential doctrine in which the court has jurisdiction but does not exercise it in light of the agency's expertise and the goal of "maintaining uniformity in the regulation of an area entrusted to a federal agency." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2006).

The primary jurisdiction doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956). The "central aim" of the doctrine is to "allocate initial decision-making responsibility between courts and agencies and to ensure that they do not work at cross-purposes." *Ellis*, 443 F.3d at 81. Accordingly, it "calls for judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 736 (3d Cir. 1983).

While there is "[n]o fixed formula" for determining when to apply the doctrine, *W. Pac. R. Co.*, 352 U.S. at 64, courts in the Third Circuit consider the following four factors:

> (1) Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

Natixis Fin. Prods., LLC v. Pub. Serv. Elec. & Gas Co., No. 2:13-CV-07076 WHW, 2014 WL 1691647, at *3 (D.N.J. Apr. 29, 2014) (Walls, J.).

All four factors support the application of primary jurisdiction here. To begin with, the second and third factors are met for the same reasons that satisfy implied immunity's first (the existence of a regulatory entity authorized to supervise the activities in question), third (a resulting risk that the regulatory law and antitrust laws would produce conflicting guidance, requirements, duties, privileges, or standards of conduct), and fourth (whether the practices lie within an area of activity that the regulatory law seeks to regulate) factors discussed above.[30]

A. Decisions About Slot Transfers and Usage Involve Technical and Policy Considerations Within the Agencies' Field of Expertise.

With regard to the first factor, there can be no dispute that the Agencies regulate all aspects of slot transfers and usage, of which—as the Agencies have asserted—competition is but one piece. While a court may be able to assess in isolation the competitive effects of a slot transaction, only the Agencies have the expertise to consider the entire, intricately linked regulatory regime they have established, which includes highly technical considerations beyond just competitive effects, such as aircraft safety and efficient airspace usage. The Supreme Court has emphasized that the doctrine of primary jurisdiction applies when technical "facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). Such is the case here:

[30] *See supra* Argument, Section I.

before the court can decide whether the EWR slot transaction is a violation of the antitrust laws, it must first know whether the transaction yields countervailing benefits to aircraft safety or airspace usage that may outweigh any competitive effects. These are questions that only the Agencies are able to answer.

Moreover, the Third Circuit has noted that "technical questions of fact uniquely within the expertise and ***experience of an agency***" include "matters turning on an assessment of industry conditions." *Richman Bros. Records v. U.S. Sprint Commc'ns Co.*, 953 F.2d 1431, 1435 n.3 (3d Cir. 1991) (emphasis added). Here, effective management of the slot system necessitates an understanding of past and current industry conditions—an understanding borne of the Agencies' long experience of comprehensive airspace regulation. The Agencies have been active in slot management for decades, recognizing long ago that "[a] reduction in air traffic delays can be accomplished only by increasing the capacity of the system or decreasing the demands placed on it," and that "regulatory action must be taken to alleviate congestion," leading to the HDR. Proposed Rule Making, 33 Fed. Reg. 12580, 12581 (Sept. 5, 1968). In promulgating the HDR, the Agencies relied on an analysis of "the public interest in efficient, convenient, and economical air transportation." HDR, 33 Fed. Reg. at 17897. "Because the public interest is not a simple fact, easily determined by courts, Congress has placed these types of determinations squarely in the hands of the [agencies]." *Ellis*, 443 F.3d at 84. The

Agencies' long experience and technical expertise weighing the costs and benefits to the nation's airspace of slot transfers and usage counsel in favor of allowing them to consider the EWR slot transaction in the first instance. *See id.* at 83.

B. The Regulatory Process Would Resolve the Issues in the Complaint.

The fourth factor—whether a prior application to the agency has been made—relates to whether the issue being litigated is "pending" before the agency, such that the agency's decision "has the potential to resolve the current conflict." *New York State Elec. & Gas Corp. v. New York Indep. Sys. Operator, Inc.*, 168 F. Supp. 2d 23, 30 (N.D.N.Y. 2001). That clearly is the case here.

In order for United to make use of the slots that it will receive from Delta, the slot transfer must be submitted to the FAA for its approval under the existing EWR Order. As the EWR Order makes clear, if the FAA "detects unfair or anticompetitive behavior," it will "not hesitate to take corrective action." 73 Fed. Reg. at 29551. In addition, the Agencies are in the midst of examining slot management issues, and the resulting NPRM would implement precisely the sort of competitive review that DOJ now asks the Court to conduct. Thus, under either the current or prospective regulatory regime, the regulatory process will "resolve the current conflict." *New York State Elec. & Gas Corp.* 168 F. Supp. 2d at 30

(N.D.N.Y. 2001).[31] Moreover, the Agencies retain the full authority to order that the transaction proceed, be cancelled, or be conditioned on other operational or commercial terms, as demonstrated with respect to past slot transfers, such as the one between Delta and US Airways. The Agencies claim to have the full authority to fully resolve any concerns about competition that DOJ may have. Thus, the fourth factor weighs in favor of applying primary jurisdiction.

C. This Case Should Be Dismissed Rather Than Stayed.

Once a district court decides to refer an issue or claim to an administrative agency under the doctrine of primary jurisdiction, it may either dismiss or stay the action. *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice."); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (affirming dismissal of case under primary jurisdiction doctrine where agency was "actively considering how it will regulate VoIP services"); *Ellis*, 443 F.3d 71 (remanding with directions to dismiss case where the same issues were simultaneously pending before the FCC). Dismissal is the appropriate remedy in this case.

[31] *See also Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144, 150-51 (W.D.N.Y. 2005) (finding agency's "inten[t] to issue a comprehensive set of rules" relevant to fourth factor).

There are two primary factors that courts consider when deciding whether to dismiss or stay a case: (1) "whether there is a risk that the statute of limitations may run on the claims pending agency resolution of threshold issues," *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir. 2006); and (2) whether "further judicial proceedings are contemplated," such as where only one issue or claim out of many is being referred to the agency. *United States v. Dan Caputo Co.*, 152 F.3d 1060, 1062 (9th Cir. 1998). Neither factor is present here.

First, there are no statute of limitations concerns. United does not yet have the ability to use the slots at issue. Once it gains that ability, and starts to use the slots, Plaintiff can bring a new case against United if it can adequately allege and prove that United has actually misused the slots within the meaning of the Sherman Act. By definition, therefore, no statute of limitations has begun to run on such a claim, which will not exist, if at all, until sometime in the future.[32]

Second, if the Court defers to the Agencies on the issue of whether United can lease slots from Delta—the only issue in this case—there will be nothing left for the Court to do. *See, e.g., Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903,

[32] Even if there were anticompetitive harm, the proposed transaction will again become subject to the Agencies' process in less than a year, either pursuant to the NPRM or by expiration of the EWR Order. And the Sherman Act's four-year statute of limitations for damages actions (*see* 15 U.S.C. § 15b) would not apply to any DOJ divestiture suit. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957) (permitting an antitrust suit seeking divestiture of duPont's ownership of General Motors stock thirty years after the stock was purchased).

913 (8th Cir. 2015) (dismissing case because agency's "resolution of the referred issue will likely dispose of the entire case"). There is a regulatory process in place that has been carefully constructed to review the exact conduct that the DOJ now attacks. The Court should let that process run its course.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed with prejudice under the doctrine of implied immunity or, in the alternative, dismissed without prejudice under the doctrine of primary jurisdiction.

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