UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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U.S. DISTRICT COURT
EASTERN MICHIGAN

SPIRIT AIRLINES, INC.,

Plaintiff,

CLOSED ~~Case No. 00-71535~~
Hon. Gerald E. Rosen

v.

NORTHWEST AIRLINES, INC.,

Defendant.
_______________________________/

OPINION AND ORDER REGARDING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on 31 MAR 2003

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Plaintiff Spirit Airlines, Inc. commenced this suit on March 29, 2000, alleging that Defendant Northwest Airlines, Inc. violated § 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a scheme of predatory pricing on its Detroit/Boston and Detroit/Philadelphia air travel routes over a few months in mid-1996 with the intent to drive Spirit out of these markets and either preserve or achieve a monopoly for Northwest on these routes. Spirit seeks an award of treble damages amounting to tens of millions of dollars, as well as an order enjoining Northwest from engaging in any further anticompetitive conduct.

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By motion dated July 5, 2002, Northwest now seeks an award of summary judgment in its favor on Spirit's § 2 claims of monopolization and attempt to monopolize. Northwest views these claims as resting solely upon a theory of predatory pricing,[1] and argues that Spirit has failed to establish either of the two prerequisites to such a claim as explicated by the Supreme Court in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 113 S. Ct. 2578, 2587-88 (1993). Northwest's motion focuses primarily upon the first prong of the Brooke Group inquiry, under which Spirit must show that Northwest's allegedly predatory fares on its Detroit/Boston and Detroit/Philadelphia routes were "below an appropriate measure of [Northwest's] costs." Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587. This test is easily stated, but its outcome is hotly disputed by the parties, who have marshaled the resources of talented attorneys and knowledgeable experts to present two very different views as to the "fares" and "costs" that should factor into this equation. The task before the Court, then, is to determine whether Northwest's approach is correct and Spirit's impermissible as a matter of law, or whether this "battle of the experts" should instead be resolved by the jury.

Northwest's motion has been fully briefed by the parties, and counsel appeared

[1]In its response to Northwest's motion, Spirit somewhat cryptically suggests that its claims rest upon other forms of anticompetitive conduct in addition to predatory pricing, but this response identifies little or no such conduct, nor does Spirit present any argument in support of any other theory of recovery. At the hearing on Northwest's motion, the Court invited the parties to submit statements as to the nature and scope of Spirit's § 2 claims, and the parties have done so. This matter will be revisited at the conclusion of this Opinion; in the meantime, the Court, like the parties in their initial submissions, will focus upon Spirit's claims of predatory pricing.

before the Court on December 12, 2002 to elaborate upon their respective positions. Following this hearing, the parties submitted supplemental briefs to address certain issues identified by the Court as especially pivotal to the outcome of this matter. Having reviewed the parties' submissions and the voluminous record presented in support of and opposition to Northwest's motion, and having considered the contentions of counsel at the December 12 hearing, the Court now is prepared to rule on Northwest's request for summary judgment. This Opinion and Order sets forth the Court's rulings.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiff Spirit Airlines, Inc. is a low-fare, no-frills airline. It offers only one class of service, minimal in-flight amenities, and a limited number of flights per day on a modest collection of city-pair routes. Spirit has no frequent-flier program, airport clubs, or preferential seating, and it generally sells its tickets on a non-refundable basis without any advance purchase or "stay over" requirements.

Since 1992, Spirit has offered limited commercial passenger service to and from Wayne County Detroit Metropolitan Airport ("Detroit Metro" or "DTW"). Spirit initially provided air travel service between Detroit Metro and Atlantic City, New Jersey, and then added service in 1993 between DTW and various Florida destinations. Spirit grew and operated at a profit each year from 1992 through 1995,[2] and planned to further expand its

[2]In 1992, Spirit had four aircraft, serviced four city-pairs, carried 140,931 passengers, and employed about 125 people. By 1995, these numbers had increased to ten aircraft, thirteen city-

offerings to Detroit passengers.

In contrast to Spirit's limited, no-frills operation, Defendant Northwest Airlines, Inc. is a large, full-service air carrier, serving hundreds of city-pairs. As of 1995, Northwest was the nation's fourth largest airline, carrying 50.8 million passengers and reporting $9.1 billion in annual revenues. Northwest has organized its air travel routes into a hub-and-spoke network, with Detroit Metro serving as one of its three hubs,[3] and it seems fair to say that Northwest enjoys a dominant position at its Detroit hub. Spirit cites statistics, for instance, revealing that Northwest controlled 64 of Detroit Metro's 86 gates in 1995 and accounted for 78 percent of the passenger seats into or out of DTW that year, while its nearest competitor, Southwest Airlines, held only a 4.1-percent share of passenger seats.

Plainly, then, Northwest posed the greatest competitive obstacle to Spirit's planned expansion of its Detroit operations. In particular, this case arises from Spirit's unsuccessful effort to institute passenger service between Detroit Metro and Philadelphia ("DTW-PHL") in late 1995, and between Detroit Metro and Boston ("DTW-BOS") in the spring of 1996. In each instance, Spirit's fares were well below those offered by

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pairs, 583,969 passengers, and roughly 450 employees.

[3]This Court has discussed the features of Northwest's hub-and-spoke network at length in its rulings in an unrelated antitrust suit brought by passengers against Northwest and two other major air carriers, Delta Air Lines and U.S. Airways. See, e.g., In re Northwest Airlines Corp. Antitrust Litigation, 208 F.R.D. 174, 179-80 (E.D. Mich. 2002); Chase v. Northwest Airlines Corp., 49 F. Supp.2d 553, 556-57 (E.D. Mich. 1999).

Northwest prior to its rival's entry into the market, but Northwest soon lowered its fares in response to Spirit's competition. Spirit's presence in these markets was short-lived; it ceased its DTW-BOS flights on September 8, 1996, and exited the DTW-PHL market on September 30, 1996. Spirit's expert, Dr. Kenneth G. Elzinga, states without contradiction that Northwest's fares following Spirit's exit quickly returned to their pre-Spirit levels, "or even a bit higher." (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Report at 8.) Spirit maintains that Northwest's fare reductions were not simply lawful responses to a competitor, but instead were instances of predatory pricing in violation of § 2 of the Sherman Act.

B. Spirit's Entry into and Exit from the DTW-PHL Market

In late 1994 and continuing into 1995, Spirit began to explore the possibility of adding flights between Detroit and various east coast cities, including Boston, Philadelphia, and New York. The airline initially considered offering these flights out of Detroit City Airport, but then shifted its focus to Detroit Metro because of physical constraints at City Airport and the Department of Transportation's denial of Spirit's application to offer flights between City Airport and LaGuardia Airport in New York. Spirit ultimately selected DTW-PHL as the first new route in its planned east coast expansion, primarily because the airline already offered service between Philadelphia and various Florida destinations, and because Spirit's management considered DTW-PHL to be an attractive market in light of its size and its potential base of price-sensitive and leisure travelers.

Following this decision, Spirit commenced an effort to secure the necessary ticket counter and gate space at Detroit Metro. The airline was unable to obtain any permanent gates, but instead entered into short-term leases with United Airlines and Continental Airlines, subject to cancellation on only thirty days' notice. Spirit reports that the gate negotiations spanned several weeks in the fall of 1995, and that the airline incurred approximately $100,000 in unrecoverable pre-operating costs in preparing to add the DTW-PHL route.

In November of 1995, Spirit published its fares for the DTW-PHL route, and it commenced non-stop jet service on this route on December 15, 1995. Spirit initially offered one flight per day each way, using an 87-seat DC-9 aircraft for this service.[4] Spirit's lowest one-way fare on this route was $49, with no advance purchase or minimum-stay requirements, and its average fare, minus travel agent commissions, ranged between $57 and $73. The airline quickly achieved relatively high load factors on this route, rising from 64.1 percent in January of 1996 to 88.5 percent in April of that year.

Prior to Spirit's entry into the DTW-PHL market, Northwest carried about 70 percent of the non-stop traffic on this route, and offered six daily flights; US Airways was a distant second with a market share of about 27 percent. At the time, Northwest's lowest unrestricted one-way fare on this route was $355, its lowest restricted fare was $75, and

[4]Spirit substituted a 117-seat aircraft on April 15, 1996, and apparently used the smaller aircraft to service a new DTW-BOS route commencing that same day.

its average one-way fare was $168.[5] Upon assessing the impact of Spirit's entry into the DTW-PHL market, Northwest initially elected to take no action, altering neither its fares nor its passenger capacity.

On June 28, 1996, Spirit added a second pair of daily flights between Detroit Metro and Philadelphia, in order to meet peak summer demand and increase the airline's appeal to business travelers by allowing an early morning departure and evening return in each direction. In response, Northwest immediately and dramatically reduced its fares, offering a lowest published fare that matched Spirit's $49 one-way fare, and resulting in an average one-way fare of about $77, nearly $100 less than Northwest's average fare prior to Spirit's entry into the market. Northwest also expanded its capacity on this route by adding another flight.[6]

Following Northwest's actions, Spirit suffered an immediate and precipitous decline in bookings on its DTW-PHL flights. Its monthly load factor, for example, dropped from 87 percent in May to 43 percent in July. Spirit canceled its second daily flight on this route effective August 20, 1996, and entirely exited the DTW-PHL market on September 30, 1996. By November, Northwest's fares on this route had returned nearly to their pre-Spirit levels of late 1995, with a lowest unrestricted one-way fare of $179, a lowest restricted fare of $149, and an average one-way fare of $152. By February

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[5]US Airways' fares apparently were comparable to Northwest's.

[6]US Airways also matched Spirit's lowest fare and added capacity.

of 1997, Northwest's average fare soared to $268. In addition, following Spirit's exit, Northwest returned to its pre-Spirit capacity level.

C. Spirit's Entry into and Exit from the DTW-BOS Market

Spirit's foray into the DTW-BOS market was similar, albeit more abbreviated. Again, Spirit elected to expand into this market primarily because the airline already offered flights out of Boston, and because of the existing high fares on this route and Boston's desirability as a leisure destination. The airline secured the necessary gate, ticket counter space, and other facilities at Detroit Metro over a two-week period in February of 1996, incurring less than $100,000 in unrecoverable pre-operating costs in the process.

Spirit published its fares for the DTW-BOS route on February 22, 1996, and commenced non-stop jet service on this route on April 15, 1996. Spirit offered one flight per day each way, using an 87-seat DC-9 aircraft for this service. Spirit's lowest one-way fare on this route was $69, and its average fare, minus travel agent commissions, ranged from $67 to $75.

Before Spirit's entry into the DTW-BOS market, Northwest was the only carrier providing non-stop service on this route, holding about a 90-percent market share and offering 8.5 flights per day. At the time, Northwest offered an unrestricted one-way fare of $411, a restricted fare of $184, and restricted sale fares ranging from $129 to $149, resulting in an average fare of $271. In response to Spirit's planned entry, Northwest announced a dramatic fare reduction effective April 15, 1996 (the same day Spirit commenced its flights), offering a lowest published fare on all of its flights that matched Spirit's $69 one-way fare for its single daily flight. Through this action, Northwest's average one-way DTW-BOS fare dropped below $90, almost $200 less than the carrier's average fare prior to Spirit's entry into the market. Northwest also expanded its capacity on this route by adding another flight and advancing the start date of its usual seasonal increase. For one of these two added flights, Northwest used a DC-10 aircraft with a seating capacity of 280 or more.

Spirit never was able to make any inroads against Northwest in the DTW-BOS market. Its highest monthly load factor was 31 percent, and its maximum passengers per month peaked at around 1,700, versus Northwest's average 30,000-passenger load during this period. Although Spirit initially had intended to add a second flight on this route in June of 1996, it abandoned this plan in light of its poor performance,[7] and the airline entirely exited the DTW-BOS market on September 8, 1996. As with DTW-PHL, Northwest's fares on the DTW-BOS route quickly returned to their pre-Spirit levels, with an average one-way fare exceeding $270 by January of 1997, and Northwest also removed capacity from this route.

D. The Various Tools for Measuring Northwest's Revenues and Costs

As noted at the outset, the disposition of Northwest's present motion turns in

[7]Northwest responded to this announcement by changing its pricing to match Spirit's fare only on certain flights, primarily those departing at around the same time as Spirit's flights.

substantial part upon a comparison of the airline's prices and costs. Although the parties differ sharply as to the outcome of this inquiry, they largely agree upon the tools to be used for assessing Northwest's financial situation. The Court surveys these tools here, with more details to follow as pertinent to the Court's analysis.

Northwest uses a monthly collection of reports known as the Flight Profitability System ("FPS") to measure its financial performance. FPS reports the profitability of each of Northwest's routes in various ways, and is used by the airline to make fare and capacity decisions. This system also serves as the source of the data used by the parties' experts to compare the airline's costs and revenues.

One of the FPS system's measures of profitability is Variable Allocated Contribution ("VAC"). For each Northwest route, VAC is calculated by subtracting variable expenses from total onboard revenue. Total onboard revenue includes gross passenger revenues, cargo revenue (freight and mail), and other miscellaneous revenues such as alcohol sales, excess baggage fees, and cancellation and re-booking fees, minus commissions paid to travel agents. The variable expenses considered under the VAC formula include passenger variable costs — *i.e.,* those incurred for each passenger traveling on a route, such as the costs of processing a passenger's ticket and boarding, the costs of in-flight food and beverages, the expense of liability insurance, and the incremental cost of the fuel needed to carry each passenger — and non-passenger variable expenses — *i.e.*, those incurred in flying an aircraft on a particular route, such as pilot, flight attendant, and fuel expenses, takeoff and landing fees, cargo handling expenses, incremental reservations and sales staff costs, and certain aircraft maintenance expenses.

A second measure of profitability, "VACO," subtracts the cost of aircraft ownership from the VAC calculation. This aircraft expense can be viewed as an "opportunity cost," since a plane devoted to one route cannot be used on a different route or leased to another carrier. FPS computes this cost by estimating the value of a medium-term lease for the relevant aircraft type. A further subtraction from VACO produces Fully Allocated Contribution ("FAC"), a measure which allocates a portion of Northwest's fixed costs — *e.g.*, aircraft depreciation, amortization, and insurance, overall administrative expenses, general reservations, sales, and maintenance costs, airport expenses, and advertising costs — to each of Northwest's various routes.

All of the above measures include revenue from purely "local" passengers — *i.e.*, those who board at the origin city and disembark at the destination — as well as a predetermined allocation of a portion of the revenue from "connecting" passengers — *i.e.*, those who are traveling a given route as a segment of a longer trip.[8] The "VABS" measure, in contrast, includes the VAC computation ***plus*** the so-called "beyond revenue" generated by the connecting passengers — that is, the revenue contributed by connecting

[8]Northwest refers to this latter figure as a "segment revenue allocation." FPS uses a standard formula to allocate each passenger's revenue among the segments of the overall route.

passengers on the segments other than the one being measured.[9] Likewise, FPS derives the "VABSO" measure by adding this "beyond revenue" to its VACO calculation.

Finally, the parties and their experts occasionally refer to "VABSO+," which is the VABSO measure minus an allocation of the long-term fixed costs that Northwest expects to incur as it grows over time. Spirit's expert, Daniel P. Kaplan, estimates that the VABSO+ measure encompasses 92 to 93 percent of Northwest's total costs.

E. Other Evidence of Northwest's Allegedly Predatory Conduct

In addition to expert economic analysis comparing Northwest's fares and costs, Spirit points to various materials in the record which, in its view, suggest that Northwest officials deliberately employed various measures with the intent to drive Spirit from the DTW-PHL and DTW-BOS markets. Spirit maintains, for instance, that Northwest exploited its control over limited gate and other resources at Detroit Metro in order to place Spirit at a competitive disadvantage. In support of this claim, Spirit cites an internal Northwest memo advocating that the existing DTW concourses be destroyed upon the opening of the new midfield terminal, so that other carriers would not "benefit from the vacuum which is created once [Northwest] vacates its existing gates" at the old facility. (Plaintiff's Response, Ex. 78 at 101-02403.)

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[9]This measure necessarily features some double-counting of revenues, as connecting passenger revenues are allocated to each segment on which the passenger travels. However, this "beyond revenue" is offset by the passenger variable expenses for the other segments, as well as a factor known as "spill," which is intended to account for the revenues lost — *e.g.*, seats which are no longer available to local passengers — as a result of Northwest's accommodation of connecting passengers.

More specifically, Spirit quotes from electronic mail messages exchanged among Northwest employees regarding the price that Spirit should be charged for the use of Northwest's gates. In November of 1995, Northwest employee Harry Butler wrote:

> Any increase that is "industry acceptable" should be applied, and then some more. We have a lock on the available gates, plus they are here taking customers in "our" market. The only reason we handle their one flight is that there is no other option for them.

(Plaintiff's Response, Ex. 60.) In response, Detroit customer service manager Thomas Donovan wrote:

> I would agree with Harry. []If we can get an increase we should. They really do not have much of an option.

(Id.) Similarly, Spirit cites another electronic mail message discussing Northwest's plan to lease long-vacant office space to Spirit, unless it was determined that this space could be used "as leverage." (Plaintiff's Response, Ex. 77 at 54-00895.)

Spirit also cites evidence of Northwest's general intent to act aggressively in order to preserve its dominant position at Detroit Metro. At a strategy session in 1994, for example, Northwest's then-chief executive officer, John Dasburg, identified Detroit Metro as one of the airline's four "strategic assets" — that is, an asset which provides a "competitive advantage," which is "very difficult to penetrate," and which other carriers "can't replicate except at tremendous cost." (Plaintiff's Response, Ex. 84, Dasburg Tr. at 3-4.) Mr. Dasburg then stated:

> [W]hile you would not be willing to endure losses to support nonstrategic assets, you will defend your strategic assets. So as a

> consequence you will absorb certain — a certain amount of operating losses in order to support a strategic asset . . . .
>
> You can't say this about many markets. If it's not strategic — this is very important — if an asset is not strategic, you will not support losses. If an asset is strategic, you will defend that asset, and you will defend it at almost all cost. And since every business knows or can guess what every other businesses' strategic assets are, we all know who will defend at all cost what asset. So our competitors know that we will defend Detroit . . . at all cost.

(Id. at 11.)

Finally, Spirit contends that Northwest's predatory intent can be inferred from its choice of very aggressive responses to Spirit's entry into the DTW-PHL and, especially, the DTW-BOS market. Upon Spirit's entry into these markets, Northwest conducted a "new competitive equilibrium analysis," under which the airline evaluated four possible levels of competitive response: (i) take no action; (ii) a "partial match" of fares on only a few selected daily flights; (iii) a "full match" of Spirit's fares on all Northwest flights; and (iv) a "full match" of fares plus added capacity by, for example, adding flights or substituting aircraft with greater seat capacity. (See Plaintiff's Response, Ex. 53.) In response to Spirit's entry into the DTW-BOS market, Northwest adopted the broadest of these four strategies, matching Spirit's fares on all of its flights and adding significant capacity on this route. Likewise, while Northwest initially took no action in response to Spirit's entry into the DTW-PHL market, it switched to the "full match plus added capacity" strategy after Spirit added a second daily flight on this route. Spirit construes these responses as evidence of Northwest's intent to drive Spirit from these markets.

III. ANALYSIS

A. The Standards Governing Northwest's Motion

Through its present motion, Northwest seeks summary judgment in its favor on Spirit's monopolization and attempt-to-monopolize claims under § 2 of the Sherman Act. This motion is governed by the familiar standards of Federal Rule of Civil Procedure 56, under which summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court cases — Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) — ushered in a "new era" in the federal courts' review of motions for summary judgment. These cases, in the aggregate, lowered the movant's burden in seeking summary judgment.[10] As explained in Celotex:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

[10]"[T]aken together, these three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure, § 2727, at 468 (1998) (footnote omitted).

Celotex, 477 U.S. at 322, 106 S. Ct. at 2552.

In considering a defendant's motion for summary judgment, then, the question is "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented," and the "mere existence of a scintilla of evidence in support of the plaintiff's position" does not satisfy this test. Anderson, 477 U.S. at 252, 106 S. Ct. at 2512. When performing this inquiry, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. at 255, 106 S. Ct. at 2513.

These same principles govern, of course, in cases brought under the Sherman Act. In fact, one of the Supreme Court's above-cited trilogy of summary judgment decisions, Matsushita, was itself an antitrust case. As in other complex fields, however, substantive antitrust law has placed a gloss upon the traditional standards for resolving a motion for summary judgment. Matsushita observes, for example, that "antitrust law limits the range of permissible inferences from ambiguous evidence," and the Court cautioned that "mistaken inferences in [predatory pricing] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." Matsushita, 475 U.S. at 588, 594, 106 S. Ct. at 1356, 1360. Moreover, if a defendant in a § 2 case advances a legitimate business explanation for its allegedly anticompetitive conduct, the plaintiff must produce probative evidence tending to rebut this explanation in order to defeat a motion for summary judgment. See Beard v. Parkview Hosp., 912 F.2d 138, 145 (6th Cir. 1990). With these principles in mind, the Court turns to Northwest's motion.

B. The Law Governing Spirit's § 2 Predatory Pricing Claims

Spirit's complaint in this case advances two claims under § 2 of the Sherman Act, 15 U.S.C. § 2. First, Spirit has asserted a claim of monopolization, under which it must show (i) that Northwest possessed monopoly power in the relevant DTW-BOS and DTW-PHL markets, and (ii) that Northwest willfully acquired, maintained, or used this power in an anticompetitive or exclusionary manner. See Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999); Chase, 49 F. Supp.2d at 565. Alternatively, Spirit charges that Northwest unlawfully attempted to monopolize the DTW-BOS and DTW-PHL markets, which requires proof (i) that Northwest engaged in predatory or anticompetitive conduct with (ii) a specific intent to monopolize and (iii) a dangerous probability of achieving monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91 (1993). Under either of these theories, Spirit must show that Northwest engaged in anticompetitive conduct, and it points to Northwest's allegedly predatory pricing on its DTW-PHL and DTW-BOS routes as satisfying this requirement.[11]

Turning, then, to the more specific issue of predatory pricing, the Supreme Court has identified two prerequisites to recovery under this theory. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices

[11]Spirit's complaint also cites Northwest's allegedly unlawful exercise of control over gates at Detroit Metro as another form of anticompetitive conduct. As noted earlier, however, the parties' initial briefs in support of and opposition to Northwest's motion focus almost exclusively upon Spirit's allegations of predatory pricing. The Court will address Spirit's other examples of allegedly anticompetitive conduct at the conclusion of this Opinion.

complained of are below an appropriate measure of its rival's costs." Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587 (footnote omitted).[12] Second, a plaintiff must demonstrate that its competitor had "a dangerous probability[] of recouping its investment in below-cost prices." 509 U.S. at 224, 113 S. Ct. at 2588.

In addressing these two elements of a claim of predatory pricing, the Supreme Court has cautioned:

> These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing — lowering prices — is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [,] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.

509 U.S. at 226-27, 113 S. Ct. at 2589-90 (citations omitted).

As explained below, Spirit's § 2 claims in this case fail precisely because of this inability to distinguish between lawful competition and unlawful predation. Under the record presented and the governing legal standards, a trier of fact could not permissibly

[12]The Court noted that there was a "conflict among the lower courts over the appropriate measure of cost," but found it unnecessary to resolve this issue "[b]ecause the parties in this case agree that the relevant measure of cost is average variable cost." 509 U.S. at 222 n.1, 113 S. Ct. at 2587 n.1. Likewise, in the present case, the parties and their experts initially appeared to agree that average variable cost is the appropriate measure. At the December 12 hearing, however, Spirit's counsel suggested that average total cost is also a relevant measure. The Court addresses this issue below.

infer that Northwest's reduction in fares following Spirit's entry into the DTW-BOS and DTW-PHL markets was predatory rather than merely competitive.

C. Northwest Is Not Entitled to Summary Judgment in Its Favor Under a Purported "Meeting Competition" Defense.

Before assessing whether Spirit has identified genuine issues of fact as to both elements of a claim of predatory pricing, the Court first must address a threshold, *per se* defense advanced by Northwest: namely, that a business cannot be guilty of predatory pricing where it does no more than ***match*** the prices of its competitor. Northwest reasons that a competitor must be free to at least match its rival's prices without running afoul of antitrust law, and that a pricing scheme cannot be truly "predatory" — that is, it poses no risk of eliminating a rival — if it merely matches the prices offered by the competition. Spirit's response is twofold: (i) that no such "meeting competition" defense exists under antitrust law, and (ii) that this defense, even if it existed, would be unavailable to Northwest here, since the airline did far more than merely match Spirit's fares. The Court need not resolve this latter, factual dispute, because it finds no legal authority for a "meeting competition" defense, at least not as the "silver bullet" posited by Northwest.

According to Northwest, the Sixth Circuit has recognized a "meeting competition" defense in two of its rulings, Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982), and D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1435, 1438 (6th Cir. 1983), cert. denied, 467 U.S. 1242 (1984). In Richter Concrete, for example, the Court observed that defendant Hilltop Concrete's prices, while lower than those of plaintiff Richter Concrete, nevertheless were higher than those of other competitors in the market. In light of these market conditions, the Court found it unnecessary to decide whether Hilltop's pricing scheme, above average variable cost but below average total cost, might be indicative of predatory pricing under a different set of circumstances:

> . . . [W]e find that the only reasonable inference to be drawn from the evidence is that Hilltop priced below its total cost in order to meet its competitor's prices. It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors. Indeed, "[t]o force a company to maintain non-competitive prices would be to turn the antitrust laws on their head." We accordingly find that the plaintiff failed to introduce sufficient evidence to allow a jury reasonably to infer that Hilltop engaged in anticompetitive conduct.

Richter Concrete, 691 F.2d at 826 (citation and footnote omitted).

Similarly, in D.E. Rogers, the defendant had priced at or above average variable cost, and the District Court had found that "it was a close question as to whether [the defendant's] prices were below average total cost." D.E. Rogers, 718 F.2d at 1434, 1437. The Sixth Circuit found that this evidence gave rise to a presumption that the defendant had not engaged in predatory pricing, with the plaintiff bearing the burden of rebutting this presumption through direct or circumstantial evidence of predatory intent. Citing the above-quoted passage from Richter Concrete, the Court held that price cuts motivated by and directed at the plaintiff or other competitors did not "conclusively prove" the requisite intent, because "[i]t is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff." D.E. Rogers, 718 F.2d at

1435 (internal quotations and citation omitted).

These decisions, on their face, appear to stop well short of the rule that Northwest would ascribe to them. In both cases, the defendants had priced above their average variable costs, thereby failing to trigger any inference that they were forgoing short-term profits in the hope of driving out their competitors and securing long-term monopoly gains. Thus, in the absence of below-cost pricing, it was left to the plaintiffs to identify ***other*** indicia of predatory intent. In this context, the statement relied upon by Northwest here — namely, that "[i]t is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors," Richter Concrete, 691 F.2d at 826 — is most fairly read as a comment upon the sort of evidence that a ***plaintiff*** must produce in order to prove predatory intent, at least in the face of a defendant's presumptively non-predatory pricing above average variable cost. In particular, prices which merely meet the competition do not overcome this presumption of lawful, non-predatory conduct.

Here, by contrast, Northwest seeks to appeal to price-matching as an ***affirmative defense*** that altogether defeats liability, even if the defendant's prices otherwise would be viewed as presumptively predatory — *i.e.*, below average variable cost, as Spirit claims is the case here. Whatever might be said for such a rule, the Sixth Circuit had no occasion to adopt it in Richter Concrete or D.E. Rogers. Rather, this Court reads those decisions as addressing the possible avenues of proof available to a plaintiff in a predatory pricing case, rather than recognizing any bright-line affirmative defense available to a defendant in such a case. The Sixth Circuit held, in effect, that evidence of price-matching alone does not suffice to demonstrate predatory conduct. Spirit does not appear to advocate a contrary rule here.

In any event, any "meeting competition" defense that might be gleaned from these Sixth Circuit decisions would be substantially undermined by the Supreme Court's subsequent ruling in Brooke Group. Because both Richter Concrete and D.E. Rogers predated the Supreme Court's Brooke Group decision, it remained open to the Sixth Circuit to determine how much weight to give below-cost pricing versus other potential indicia of predatory intent, such as matching or beating a rival's prices. Brooke Group now has settled this issue: below-cost pricing is the *sine qua non* of predation. Above-cost prices, even those "that are below general market levels or the costs of a firm's competitors," do not "inflict injury to competition cognizable under the antitrust laws." Brooke Group, 509 U.S. at 223, 113 S. Ct. at 2588.

This is an objective standard, as the courts have recognized. See, e.g., United States v. AMR Corp., 140 F. Supp.2d 1141, 1196 (D. Kan. 2001). It rests on the premise that the alleged predator is a rational economic actor that likely would not sell below cost, thereby incurring at least short-term losses, unless it sought to drive its rivals out of the market and thereafter enjoy monopoly profits. See Phillip Areeda & Donald F. Turner, *Predatory Pricing & Related Practices under Section 2 of the Sherman Act,* 88 Harv. L.

Rev. 697, 698, 712 (1975).[13] It further draws from economic theory holding that above-cost pricing is efficiency-enhancing, since the practice generally threatens the survival only of higher-cost competitors that cannot afford to match the alleged predator's lower prices. See Brooke Group, 509 U.S. at 223, 113 S. Ct. at 2588; Areeda & Turner, *supra,* at 704-09. Above-cost pricing might drive rivals from the market, but not in a way that antitrust law deems "exclusionary."

The "meeting competition" defense advocated by Northwest, in contrast, rests upon quite different premises. If recognized, it would permit an alleged predator to match its rival's prices, even if this would result in below-cost pricing, and even if the rival firm set its prices at an economically rational, profit-making level. This principle presumably rests upon notions of "fairness" to the alleged predator, as well as the economic theory that "mere" price-matching should not be enough to drive rivals from a properly functioning market. If the rival nevertheless ***does*** exit the market, as happened here, this theory presumably would hold that the factors that produced this outcome, whatever they might be, are beyond the reach of antitrust law.

For two separate reasons, the Court declines Northwest's invitation to adopt this theory as a matter of law as a basis for awarding summary judgment. First, there is ample

[13]There may be limited exceptions to this general rule, such as promotional pricing intended to establish a firm's presence in a market, or the selling-off of obsolete products before exiting a market. See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990); Areeda & Turner, *supra,* at 713-14. No such exception applies here, however.

evidence in the record that casts doubt upon the economic soundness of a "meeting competition" defense in this case. Spirit's experts have opined, and even Northwest's experts surely must realize, that a "mere match" by Northwest posed a significant threat to new low-fare entrants in the DTW-BOS and DTW-PHL markets. Given such amenities as frequent flier miles and greater flight frequency, a significant number of Detroit Metro passengers would likely choose Northwest over a competitor offering the same, or even a somewhat lower, fare. For precisely this reason — namely, the difficulties of proof and qualitative, case-by-case judgments inherent in a "meeting-rather-than-beating" inquiry — the leading commentators whose theory was endorsed in Brooke Group have argued against judicial recognition of a "meeting competition" defense. See Areeda & Turner, *supra,* at 715-16.[14]

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[14]The difficulties of proof are amply demonstrated by the parties and their experts in this case, with the two sides suggesting a variety of competing measures of whether Northwest merely matched or instead beat the fares offered by Spirit. Northwest focuses on its published prices, which never dropped lower than Spirit's fares, while Spirit's experts opine that two or three percent of Northwest's passengers during the relevant period actually paid fares less than Spirit's lowest fares. Given these different, seemingly legitimate approaches to the "matching" inquiry, there is little if any virtue in a "meeting competition" defense as a purported "bright line rule" that would allow a firm to make pricing decisions without fear of antitrust liability.

Indeed, Northwest's expert, Janusz A. Ordover, seemingly acknowledges as much. In opining that fare-matching should not be "regarded as evidence of anticompetitive conduct," Dr. Ordover notes that the airlines frequently change their fares, leading to "thousands of daily fare actions in the industry," and he reasons that a plaintiff's appeal to fare-matching would "require the fact finder to assess complicated calculations of quality differentials." (Defendant's Motion, Ex. 3, Ordover Rep. at 5-6.) The Court agrees, and finds this same reasoning equally applicable to a defendant's appeal to fare-matching as a *per se* bar to liability. A focus upon below-cost pricing, in contrast, is far more workable and amenable to on-the-spot use in pricing decisions — a firm need only compute its own costs (something it presumably would do anyway) to determine how much it may lawfully reduce its prices without running afoul of antitrust law.

Next, and more importantly, the economic theory advocated by Northwest here is not the one adopted by the Supreme Court, and this Court is bound to follow the latter authority. Brooke Group holds that there are two, and only two, prerequisites to recovery under a predatory pricing theory: below-cost pricing and a dangerous probability of recoupment. See Brooke Group, 509 U.S. at 222-24, 113 S. Ct. at 2587-88. If Spirit can prove these elements, it will have demonstrated a scheme of predatory pricing, without the need for any comparison of Spirit's and Northwest's fares. Although Brooke Group does not formally and expressly reject the possibility of a "matching competition" defense, it does adopt an economic model which is at odds with the assumptions underlying such a defense. This Court declines to graft an additional economic theory onto the one endorsed by the Supreme Court, particularly in a case where portions of the record tend to undermine this theory.[15]

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[15]The Court recognizes that the District Court in AMR Corp., *supra,* construed Richter Concrete, D.E. Rogers, and other decisions as recognizing a "meeting competition" defense to a claim of predatory pricing. See AMR Corp., 140 F. Supp.2d at 1204-08. Yet, these decisions all predated Brooke Group by a number of years, and AMR Corp. does not address the possible impact of this intervening Supreme Court ruling. In addition, this Court already has explained why, in its view, Richter Concrete and D.E. Rogers do not truly adopt a "meeting competition" defense. Finally, the Court notes that AMR Corp.'s application of this defense rested in part upon the premise that price-matching "cannot create the kind of market position that the prohibition of predatory pricing was meant to preclude." AMR Corp., 140 F. Supp.2d at 1205 (internal quotations and citation omitted). To the extent that this is meant to suggest that mere matching can never be exclusionary, the Court again observes that this premise remains open to question in this case, and that, in any event, the economic theory underlying this premise differs from the model adopted in Brooke Group. Thus, the Court respectfully declines to follow AMR Corp. on this point.

This is not to say, however, that the Brooke Group standard is utterly incompatible with any sort of match-versus-beat inquiry. Under the second prong of this standard, for instance, a

D. Spirit Has Failed to Produce Evidence that Northwest Set Its Fares Below an Appropriate Measure of Its Costs.

Having resolved this preliminary matter, the Court now turns to an assessment of Spirit's claim of predatory pricing under the two-part standard set forth in Brooke Group. Spirit first must establish that Northwest's fares on the DTW-PHL and DTW-BOS routes in the relevant time periods — July to September of 1996 for the DTW-PHL route, and April to September of 1996 for the DTW-BOS market — were "below an appropriate measure of [Northwest's] costs." Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587. Absent evidence that would permit such a finding, Northwest is entitled to summary judgment in its favor.

1. The Determination of the "Appropriate Measure" of Northwest's Costs

Plainly, in order to compare Northwest's prices and costs, it first is necessary to ascertain the "appropriate measure" of these two figures. Beginning with the latter, the Supreme Court found it unnecessary in Brooke Group to "resolve the conflict among the lower courts over the appropriate measure of cost," because the parties in that case "agree[d] that the relevant measure of cost is average variable cost." Brooke Group, 509

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plaintiff must show a dangerous probability of recoupment, which entails, among other things, proof that the defendant's below-cost pricing was capable "of producing the intended effects on the firm's rivals," Brooke Group, 509 U.S. at 225, 113 S. Ct. at 2589 — in this case, driving the rival from the market. If the defendant merely matches the plaintiff's prices, it cannot be assumed that this will drive the plaintiff out of the market — the plaintiff, after all, presumably has set its prices at a sustainable level that produces a profit. Accordingly, Northwest is free to offer its price-matching evidence to rebut Spirit's proof as to recoupment, and for any other purposes that it deems appropriate. The Court merely declines to grant dispositive weight to this evidence.

U.S. at 222 n.1, 113 S. Ct. at 2587 n.1.[16]

This also appeared to be the case here, prior to the December 12, 2002 hearing on Northwest's motion. Northwest and its expert, Dr. Janusz A. Ordover, clearly advocate the "average variable cost" measure. (See Defendant's Motion, Br. in Support at 18; Defendant's Motion, Ex. 3, Ordover Rep. at 16.) Likewise, in response to Northwest's motion, Spirit expressly stated that "[t]he experts on both sides agree that average variable cost is the 'appropriate measure of cost' in the predation analysis." (Plaintiff's Br. in Opposition at 3.) Finally, the reports of Spirit's experts, Dr. Kenneth G. Elzinga and Dr. Daniel P. Kaplan, confirm this apparent consensus. (See Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 22-23; Defendant's Motion, Ex. 2, Kaplan Rep. at 12.)

Despite all this, Spirit's counsel suggested at the December 12 hearing that average ***total*** cost is another relevant measure.[17] In support of this contention, Spirit cites a three-tiered standard discussed in certain Sixth Circuit decisions. Under this "modified Areeda/Turner" test, prices below average variable cost give rise to a prima facie case of predatory pricing, with the burden then shifting to the defendant to prove that its prices were justified despite their potentially destructive effect upon competitors. See, e.g.,

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[16]The comparison of price to average variable cost is often referred to as the "Areeda/Turner" test. See D.E. Rogers, 718 F.2d at 1436-37; Richter Concrete, 691 F.2d at 823-24. See generally Areeda & Turner, *supra,* at 716-18 (advocating the use of average variable cost as a surrogate for marginal cost, which often is difficult to ascertain).

[17]Average total cost is derived by adding "fixed, or long run, costs to variable costs." Richter Concrete, 691 F.2d at 821 n.3.

Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1055-56 (6th Cir.), cert. denied, 469 U.S. 1036 (1984); D.E. Rogers, 718 F.2d at 1436-37. If the defendant prices above average variable cost but below average total cost, this pricing scheme is presumed lawful, but the plaintiff still has the opportunity to prove through other evidence that the defendant acted with a predatory motive. See Arthur S. Langenderfer, 729 F.2d at 1056; D.E. Rogers, 718 F.2d at 1436-37. Finally, pricing above average total cost is conclusively deemed non-predatory. See Arthur S. Langenderfer, 729 F.2d at 1056-58.

Spirit's eleventh-hour appeal to average total cost confronts at least two substantial hurdles, however. First and foremost, Spirit's own experts did not analyze Northwest's financial data under this three-tiered scheme. To the contrary, Dr. Elzinga opines in his report that fixed costs are "irrelevant in considering whether a predation strategy is operative," and he defines the relevant inquiry in this case as "compar[ing] the incremental revenues (the price) Northwest received from [its allegedly predatory campaign] versus the incremental (or average variable) cost Northwest incurred" by adopting this strategy. (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 23-24.) He then reports that Dr. Kaplan applied this analytical framework, and concluded that "Northwest charged a price below average variable cost." (Id. at 33.) Dr. Kaplan confirms this in his report, stating that he was asked by Spirit's counsel "to provide separate opinions as to whether Northwest's fares were below its average variable cost at any time when Northwest and Spirit both served either Philadelphia-Detroit or Boston-

Detroit," and that he "relied on the predation methodology provided to me by Professor Kenneth Elzinga" in arriving at his opinions. (Defendant's Motion, Ex. 2, Kaplan Rep. at 2.) Spirit faces considerable difficulty, therefore, in demonstrating that it can satisfy a standard that its experts have never addressed.

Moreover, this Court harbors substantial doubt as to whether the Sixth Circuit's prior three-tiered scheme of shifting presumptions remains viable following the Brooke Group decision. This standard, after all, rests upon the premise that a firm's prices might lie within a "gray area," above average variable cost but below average total cost, such that it is necessary to consider other indicia of predation. The Supreme Court, however, has expressed its unwillingness to rest a finding of predation upon anything other than below-cost pricing. Brooke Group insists that a plaintiff "must prove" that the defendant's prices are below an "appropriate measure" of its costs, Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587; it does ***not*** hold that a plaintiff may prevail despite pricing somewhat ***above*** this "appropriate measure" of cost by offering some other form of evidence of predation. Indeed, while the Court acknowledged that its prior decisions had "reserved as a formal matter the question whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost," it emphasized that "the reasoning in [these earlier opinions] suggests that only below-cost prices should suffice." 509 U.S. at 223, 113 S. Ct. at 2588 (internal quotations and citations omitted).

As explained earlier, the unmistakable message of Brooke Group is that the existence of a predatory pricing scheme must be adjudged solely by reference to an objective comparison of the defendant's prices and costs. Once the "appropriate measure" of costs is ascertained, the remaining inquiry is straightforward — the defendant's prices are either below these costs (and the analysis proceeds to the issue of recoupment) or above (and the analysis is at an end). There seemingly is no way of recognizing a "gray area," in which other indicia of predation then become relevant, without running afoul of the danger explicitly recognized in Brooke Group – namely, that the judiciary might engage in an open-ended assessment of the "appropriateness" and possible exclusionary effect of a firm's prices, thereby "courting intolerable risks of chilling legitimate price-cutting." 509 U.S. at 223, 113 S. Ct. at 2588.[18]

Accordingly, just as the Court will not insist that Spirit prove something ***more*** than below-cost pricing — as explained above, Spirit need not also overcome a "meeting competition" defense — it will not permit Spirit to get by with something ***less*** than this showing. In accordance with Brooke Group, Spirit must establish that Northwest's prices are below an "appropriate measure" of its costs. Although there might be some debate as to what this "appropriate measure" might be, there can be no doubt that prices above this

[18]Notably, the Sixth Circuit's three-tiered predatory pricing standard derives from a Ninth Circuit decision which adopted this "modified Areeda/Turner" test. See D.E. Rogers, 718 F.2d at 1436-37 (quoting William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1981)). Yet, it appears that the Ninth Circuit no longer adheres to this standard in the wake of Brooke Group. See, e.g., Pool Water Products v. Olin Corp., 258 F.3d 1024, 1035 (9th Cir. 2001) (equating predatory pricing with pricing below an appropriate measure of costs).

level cannot support a claim of predatory pricing. It follows, in the Court's view, that Spirit's proffered "other indicia" of Northwest's predatory intent are not relevant to the "below-cost pricing" prong of the predatory pricing inquiry.

This leaves only the choice between two possible measures of Northwest's costs, average variable cost and average total cost. As noted, however, the record here does not permit much debate on this subject — under the unanimous view of the parties and their experts, the "appropriate measure" is average variable cost. As Dr. Elzinga explains, the inquiry of economic relevance is whether a firm is sacrificing short-term profits by charging less than its marginal cost. (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 22.) Further, "[b]ecause marginal or incremental cost is considered difficult to measure, Areeda and Turner substituted average variable cost as a proxy," (id.), and Spirit's experts have done the same. Consequently, the Court, too, will look primarily to Northwest's average variable costs on the two routes at issue here.[19]

2. There Is No Evidence that Northwest Engaged in Below-Cost Pricing in the "All Passenger" DTW-PHL and DTW-BOS Markets.

Having established the analytical framework governing the first prong of the Brooke Group inquiry, the Court now turns to the substantive comparison of Northwest's prices and costs. In support of its motion, Northwest maintains that, as a matter of law, its fares exceeded its average variable costs during the entire period of alleged predation

[19]As will be seen below, it turns out not to matter much whether one considers Northwest's average variable costs or its average total costs, because Spirit does not fare particularly well under either measure.

in the two relevant markets. Spirit responds by questioning whether the "relevant markets" in this case should encompass all or only a subset of the passengers on the DTW-BOS and DTW-PHL routes. The Court will address these two proposed market definitions separately.

Turning first to the markets consisting of all passengers on Northwest's DTW-BOS and DTW-PHL flights, the report of Northwest's expert, Janusz A. Ordover, establishes without contradiction that Northwest's revenues in these markets exceeded the airline's average variable costs under a variety of measures of these two values. First, the VABS measure of Northwest's monthly route-by-route costs and revenues — a measure which, as noted earlier, includes the costs deemed by Northwest's FPS system to be variable, as well as the revenues from local passengers, a portion of the revenues from connecting passengers, and an additional "beyond revenue" contribution from these connecting passengers — reveals: (i) a positive revenue-to-cost margin for the DTW-BOS route ranging from a low of about $4.5 million to a high of over $7.1 million in the relevant months of April through September of 1996; and (ii) a positive revenue-to-cost margin for the DTW-PHL route ranging between $2.8 million and $3.3 million in the relevant months of July through September of 1996. Use of the related VABSO measure necessarily reduces this margin, as aircraft ownership is included as an additional cost, but Northwest nevertheless enjoyed positive returns under this measure in all of the relevant monthly periods.

Northwest's revenues also exceeded its costs under the VAC and VACO measures of profitability. These measures are similar to the corresponding VABS and VABSO computations, but without the "beyond revenue" contribution of connecting passengers. Considering the VACO measure, which produces a lower revenue-to-cost margin because of its additional cost of aircraft ownership, Northwest's FPS figures reveal: (i) a positive monthly revenue-to-cost margin for DTW-BOS ranging from about $0.4 million to just over $2.7 million; and (ii) a positive monthly revenue-to-cost margin for DTW-PHL ranging from about $0.7 million to roughly $1.1 million.

Indeed, with a single exception, ***all*** of the measures reported by Northwest's FPS system reflect that Northwest's revenues exceeded its costs for all of the relevant months in both the DTW-PHL and the DTW-BOS markets. The sole exception is the FAC measure as computed for the DTW-BOS route in the month of May, 1996, which shows a negative margin of just over $1 million. This FAC measure, however, includes an allocation of a portion of Northwest's fixed costs to each of the airline's routes, and thus is akin to average total cost. As observed earlier, Spirit's own expert, Kenneth G. Elzinga, acknowledges that fixed costs are "irrelevant in considering whether a predation strategy is operative." (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 23.)

Even if FAC provided a suitable measure of Northwest's costs, the Court still would face the question whether a single month of negative revenue-to-cost margin would suffice to permit an inference of predatory pricing. Given the uncertainty involved in a firm's estimate of its anticipated costs and revenues, this Court would be reluctant to conclude that a single negative monthly measure with the benefit of hindsight supports an inference that Northwest deliberately adopted a below-cost fare structure. To the contrary, as observed by Northwest's expert, "the fact that Northwest was profitable even based on the much higher fully allocated cost standard during [all but one month of] this period provides further support for the conclusion that its conduct was not predatory." (Defendant's Motion, Ex. 3, Ordover Rep. at 26.)

Arguably, however, all of these various measures overstate Northwest's price/cost margin in one key respect — namely, they all include revenues (and costs) from connecting as well as local passengers, while Spirit and Northwest actually competed only for local DTW-PHL and DTW-BOS passengers. Even so, a "local-only" comparison continues to reflect an above-cost fare structure; Northwest's expert states without contradiction that the airline's "true local" revenues exceeded the cost component of both the VAC and VACO measures during each month of the period of alleged predation. Again, the only contrary result involves the DTW-BOS route in May of 1996: using the cost component of the VABSO+ measure, which incorporates an allocation of certain long-term fixed costs, it appears that Northwest's "true local" revenues briefly fell below this variant of its costs during this one-month period. Nonetheless, as indicated earlier, the Court does not view this single isolated instance of negative revenue-cost margin as sufficient to permit an inference of predatory pricing, particularly since the

VABSO+ measure includes fixed costs that arguably should not be considered.

Indeed, it does not appear that Spirit's own experts attribute any significance to this lone instance of VABSO+ costs in excess of "true local" revenues. Rather, faced with the largely uniform evidence of Northwest's above-cost, revenue-generating fare structure during the period of alleged predation, Spirit and its experts endeavor to identify a different, yet legally cognizable measure that would support a contrary conclusion of below-cost pricing. Accordingly, the Court turns to an examination of the alternative measures proposed by Spirit.

3. Spirit Has Not Produced Evidence of a Legally Cognizable Market in Which Northwest Engaged in Below-Cost Pricing.

As indicated, a comparison of Northwest's average variable costs and revenues in the "all passenger" and "true local passenger" DTW-PHL and DTW-BOS markets reveals that Northwest did not engage in below-cost pricing during the period of alleged predation. In apparent recognition of this, Spirit and its experts propose two alternative measures of Northwest's relevant costs and revenues. The cost component of each of these measures is roughly the same as the cost component of the VACO and VABSO+ measures of Northwest's profitability. Spirit's expert, Daniel P. Kaplan, has computed a per-passenger average variable cost by, generally speaking, dividing the cost component of the monthly VACO and VABSO+ figures by the total number of passengers (local and connecting) who traveled the relevant route during the month in question. Using the VACO cost measure, for example, Dr. Kaplan has determined that Northwest's per-passenger average variable cost for the DTW-BOS route ranged between $65.87 and $85.24 in the months of April through September, 1996, while the per-passenger average variable cost for the DTW-PHL route ranged from $53.47 to $60.17 in July through September, 1996.[20]

If Dr. Kaplan's cost figures were compared to the revenue amounts reported by FPS, or even just the "true local" revenues, Northwest's fare structure still would produce an almost entirely positive revenue-to-cost margin.[21] Where Spirit's two measures part company from Northwest's, however, is in their calculation of Northwest's relevant revenues. Specifically, rather than considering ***all*** of the Northwest passengers who traveled on the DTW-PHL and DTW-BOS routes, or even just the ***true local*** passengers, Spirit's experts consider the revenues derived from only a ***subset*** of Northwest's local passengers on these two routes. Under the first of Spirit's proposed formulations, Northwest's average variable costs are compared to the revenues derived from passengers who paid the ***lowest fares*** offered by Northwest following Spirit's entry into the relevant markets — $69 in the case of DTW-BOS, while the lowest DTW-PHL fare began at $49 and then increased to $69. Upon deducting a roughly 10-percent travel agent commission from these fares, and then comparing the resulting figures to his calculated per-passenger

[20]If one instead uses the cost component of the VABSO+ measure, these per-passenger costs increase by roughly $8 to $10.

[21]The sole exception, once again, would be the DTW-BOS route in May of 1996 using the VABSO+ cost component.

costs, Dr. Kaplan reports that, in most cases, Northwest's per-passenger costs exceeded its revenues from the passengers who paid the lowest available fare.[22]

Spirit's second proposed measure is somewhat more complex, and rests upon the observation of Spirit's expert, Dr. Elzinga, that Northwest's fare structure is "bimodal" in nature. In the DTW-BOS market, for example, Dr. Elzinga views Northwest's fares in the period immediately prior to its alleged predation as falling largely into two clusters, one ranging roughly from $80 to $200, and the other ranging approximately from $340 to $460. Two-thirds of Northwest's passengers paid fares in the lower range, while one-third paid fares in the higher cluster. Dr. Elzinga opines that this bimodal structure is suggestive of more than one product market because, if only one market existed, economic theory holds that the price differential between the two fare clusters would disappear. He designates the passengers in the lower-fare cluster as "price-sensitive," while the passengers who paid the higher fares are deemed "price-insensitive."[23] Dr. Elzinga then asserts that Spirit and Northwest compete only in the former, "price-sensitive" market, and that Northwest's relevant revenues in this case, therefore, should

[22]This result holds true for each month of alleged predation in the DTW-BOS market, but the outcome of this comparison is more equivocal during the period where Northwest's lowest DTW-PHL fare was $69 rather than $49.

[23]Dr. Elzinga notes that this approach finds support in airline industry studies, which frequently distinguish between "business" and "leisure" travelers. He further observes that the airlines seek to take advantage of this distinction through their use of "yield management" techniques, which are intended to control the number of seats on each flight that are available to passengers traveling in the various fare classes.

be computed solely by reference to its price-sensitive passengers — *i.e.,* those passengers who Northwest "solicited in response to Spirit's entry." (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 29.)

Based on this "bimodal market" theory, Dr. Kaplan computed the average per-passenger revenue collected by Northwest from its price-sensitive passengers during the period of alleged predation. Although the details of this calculation are not germane to the Court's analysis, Dr. Kaplan estimated the size of the "price-sensitive" market by determining the number of price-insensitive passengers during the corresponding months in 1995, and then assuming an annual growth rate of three percent, plus a somewhat greater demand in the "price-insensitive" market during the period of alleged predation in 1996 because of the significantly lower average fares paid even by these passengers. Having estimated the number of Northwest's price-insensitive passengers during the period of alleged predation, Dr. Kaplan subtracted this figure from Northwest's entire passenger load, and then computed the revenues derived from the remaining group of purportedly price-sensitive passengers. Comparing these revenues to Northwest's per-passenger costs, Dr. Kaplan reports negative revenue-to-cost margins ranging from $1.55 to $19.90 per passenger for each month of the alleged period of predation in both the DTW-BOS and DTW-PHL "price-sensitive" markets.

Spirit's two measures, in short, provide at least some evidence that Northwest engaged in below-cost pricing. The question becomes whether these measures are consistent with the underlying record and the governing standards of antitrust law. In addressing this issue, the Court places little importance upon Northwest's protest that the markets examined by Spirit's experts do not comport with the broader "all passenger" markets described in Spirit's complaint. While this is true, the Court nonetheless would freely grant leave for Spirit to amend its complaint to conform to its experts' analysis of the complete evidentiary record, see Fed. R. Civ. P. 15(a), and Northwest has not identified any legally cognizable prejudice it would suffer if such an amendment were allowed.

Spirit's proposed measures raise a number of other concerns, however. First, Spirit's own experts have elsewhere suggested that it is potentially misleading to perform a price/cost comparison in only one portion of a market. Dr. Elzinga, for example, testified as follows on behalf of the defendant in the Brooke Group litigation:

> [I]f you did an Areeda-Turner test on [an alleged predator] for its sales and associated costs in a corner of the market, . . . it wouldn't tell you anything as to whether [this firm] was a predator in the market. In fact, it could tell you something very misleading.

(Defendant's Motion, Ex. 23, Brooke Group 1/23/1990 Trial Tr. at 101-51.) Likewise, Dr. Elzinga and another of Spirit's experts, David E. Mills, cautioned in an article that "applying the Areeda-Turner test to prices charged in a narrow segment of the market is prone to snaring innocent competitors." Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 Antitrust L.J. 559, 573 (1994). Indeed, even in this litigation, Dr. Elzinga's initial versions of his expert report referred only to single "all passenger" DTW-BOS and DTW-PHL markets, and made no distinction between price-sensitive and price-insensitive passengers.[24]

Moreover, the record tends to support Northwest's view that Dr. Elzinga's posited "bimodal" fare structure is "a fallacy," (Defendant's Reply Br. at 12), at least for purposes of computing Northwest's relevant revenues in this case. As noted by Northwest's expert, Dr. Ordover, the fare gap observed by Dr. Elzinga largely disappeared during the period of alleged predation, when Northwest lowered its fares and eliminated most restrictions — *e.g.*, advance purchase or minimum stayover — in response to Spirit's entry into the DTW-PHL and DTW-BOS markets. During this period of intense competition, there was much less, if any, distinction between the "price-insensitive" and "price-sensitive" markets. Dr. Ordover states the obvious: "Even if price-insensitive passengers are willing to pay some premium for the ability to book a seat at the last minute, they are not willing to do so if they can book a last minute seat at a much lower price than the price offered by the incumbent carrier." (Defendant's Motion, Ex. 13, Ordover Rebuttal Rep. at 17.) It makes little sense, then, to analyze Northwest's costs and revenues by reference to a market that arguably did not even exist during the relevant period of alleged predation.

In any event, if it is appropriate to consider a "price-sensitive" or "lowest fare"

[24]As observed by Northwest, this suggests the possibility that Spirit's proposed "price-sensitive" and "price-insensitive" markets were after-the-fact inventions, developed only once it became evident that the price/cost comparisons in the "all passenger" markets were favorable to Northwest's position.

market, it surely follows that the revenues from this market must be compared solely to the costs ***in this same market.*** Dr. Elzinga himself emphasizes this point, stating that "to assess predation one looks at the fares Northwest charged in the price-sensitive market that Spirit tried to enter, and compares those fares with ***Northwest's marginal (i.e. variable costs) of serving that market.***" (Plaintiff's Response, Ex. 1, Elzinga 4/5/2002 Rep. at 33 (emphasis added).) Similarly, one court has cautioned:

> Here, plaintiffs seek the best of both worlds. They single out a particular item — Ripley County legal advertising — as allegedly priced below cost. Yet, they attempt to rely on inferences which, at most, would establish the variable cost of operations as a whole. Plaintiffs should be required to show that defendants' prices *as a whole* are below cost, or they should be required to isolate the variable (or incremental) costs attributable to Ripley County's legal ads and show . . . below-cost pricing of these legal ads . . . . Plaintiffs have made neither of these showings.

<u>Morgan v. Ponder</u>, 892 F.2d 1355, 1363 n.17 (8th Cir. 1989).

Spirit's evidence in this case suffers from precisely this deficiency. As noted, Dr. Kaplan has compared the per-passenger revenues in the "price-sensitive" and "lowest fare" markets against the per-passenger average variable costs of ***all passengers,*** whether local or connecting, price-sensitive or price-insensitive. This approach would be tenable only if it were assumed that per-passenger costs remain relatively constant across these various subsets of passengers. Spirit's experts, however, do not explain why the Court should accept this assumption, and its validity is far from self-evident.

To the contrary, there is considerable evidence in the record that this assumption is unwarranted. As observed by Northwest's expert, Dr. Ordover, the analysis of Spirit's own expert, Dr. Kaplan, reveals that Northwest's average variable costs declined during the period of alleged predation, largely because of the airline's increased load factor (*i.e.*, percentage of seats filled) during this period. This suggests that the incremental cost of serving the price-sensitive or low fare passengers most attracted by Northwest's reduced fares was, in fact, lower than the average cost of serving Northwest's passenger base as a whole. Dr. Ordover's rebuttal report supports this proposition — he estimates the variable costs of serving the incremental passengers spurred by Northwest's response to Spirit's entry into the DTW-PHL and DTW-BOS markets, and concludes that these costs are "well below" Dr. Kaplan's estimates of Northwest's net revenues from its "price-sensitive" passengers. (Defendant's Motion, Ex. 13, Ordover Rebuttal Rep. at 14.)

In order to raise an issue of fact as to whether Northwest engaged in below-cost pricing in the "price-sensitive" passenger market, it would behoove Spirit and its experts to challenge Dr. Ordover's calculations or, alternatively, to explain why it is not necessary to isolate the costs of serving price-sensitive passengers from those incurred in serving Northwest's remaining passengers. Spirit has done neither. In fact, Dr. Kaplan's analysis actually tends to support Dr. Ordover's conclusions, as he notes that airlines generally operate most cost-efficiently when their load factors are high. Spirit's apples-to-oranges comparison of a ***segment*** of passenger revenues against the ***whole*** of passenger costs does not provide a suitable foundation upon which the trier of fact could conclude that Northwest engaged in below-cost pricing. See In re Northwest Airlines Corp. Antitrust

Litigation, 197 F. Supp.2d 908, 914 (E.D. Mich. 2002) (stating that an admissible expert opinion in an antitrust case must "account for and not ignore[] inconvenient evidence," and must "incorporate all aspects of the economic reality of the [relevant] market" (internal quotations and citation omitted)).

Apart from this factual deficiency, the Court harbors considerable doubt whether Spirit's proposed "lowest fare" and "price-sensitive" markets are legally viable. Initially, the Court observes that Spirit's price-cost comparisons within these "submarkets" are somewhat in tension with the central animating principle of the Areeda/Turner test and the first prong of the Brooke Group standard. So long as a firm is pricing above cost, any resulting harm to competitors generally either "reflects the lower cost structure of the alleged predator, and so represents competition on the merits," or is the product of complex market forces and product differences that the judiciary is ill-equipped to evaluate through the blunt instrument of a predatory pricing inquiry. Brooke Group, 509 U.S. at 223, 113 S. Ct. at 2588; see also Areeda & Turner, *supra,* at 704-09. This test might be under-inclusive and produce some false negatives, but the Supreme Court stated its preference to err on this rather than the other side, observing that "the costs of an erroneous finding of liability are high" because false positives will "chill the very conduct the antitrust laws are designed to protect." Brooke Group, 509 U.S. at 226, 113 S. Ct. at 2589-90 (internal quotations and citations omitted).

It necessarily follows, in this Court's view, that an alleged predator's prices and costs must be measured in the relevant market in its entirety, and under the terms by which this firm actually competes in this market. As noted by Northwest, the Sixth Circuit has expressly instructed that "the relevant area of inquiry" in a case of alleged predation "should be [the defendant's] operations taken as a whole." Directory Sales Mgmt. Corp. v. Ohio Bell Telephone Co., 833 F.2d 606, 614 (6th Cir. 1987); see also International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1396 (8th Cir.) (holding, in a case where a charter tour operator charged Northwest and related entities with predatory pricing, that "[t]o evaluate [Northwest's] pricing structure fairly, it was necessary to consider not just its lowest prices, but all of its prices for the routes involved"), cert. denied, 510 U.S. 932 (1993). Here, this means that Northwest's prices and costs must be assessed by reference to the totality of the DTW-BOS and DTW-PHL markets that this airline actually serves, including local and connecting passengers, and including price-sensitive and price-insensitive passengers. Although Spirit might well have been targeting only a portion of the customers in these markets, this does not mean that ***Northwest's*** operations should be evaluated by reference to the competitive model that ***Spirit*** has chosen. To conclude otherwise would undermine the bright-line virtue of the Brooke Group rule, under which a firm need only consider its own operations and compute its own costs in order to set prices that do not run afoul of predatory pricing law.

Nonetheless, as proof of the legitimacy of its proposed "price-sensitive passenger" market, Spirit begins with the proposition that the relevant market in an antitrust suit must be determined by reference to the "area of effective competition" between the parties. Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523 (1962). In recognition of this principle, various courts have found it appropriate to consider only a portion of the full product line offered by the defendant. See, e.g., Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 767-68 (9th Cir. 2001) (finding an issue of fact as to the existence of distinct markets for original equipment major brand vintage tires and private brand vintage tires); Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1547-49 & n.7 (10th Cir. 1995) (distinguishing between full-service bar review courses and supplemental workshops targeting only the multistate exam), cert. denied, 516 U.S. 1044 (1996) ; U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995-98 (11th Cir. 1993) (distinguishing between brand-name and generic anchors), cert. denied, 512 U.S. 1221 (1994). Moreover, as noted earlier, there is evidence in the record that airlines generally, and Northwest in particular, have recognized the existence of separate submarkets for business and leisure travelers, a distinction somewhat analogous to Spirit's proposed differentiation between price-sensitive and price-insensitive passengers. It follows, in Spirit's view, that the proper definition of the relevant market in this case turns upon a "battle of the experts" that must be resolved by the trier of fact.

The Court cannot agree. First, the Court notes the unusual, *post hoc* way in which Spirit arrived at its definition of the price-sensitive passenger market — namely, through

Dr. Elzinga's observation of the bimodal distribution of prices actually paid by Northwest passengers immediately before and after the period of alleged predation. The existence of a distinct price-sensitive market, in other words, rests solely upon an observable gap in the ***prices paid*** by two sets of passengers, and not upon any differences in the ***products purchased*** by these two groups of passengers. None of the cases cited by Spirit recognizes a separate submarket based exclusively on a higher or lower price paid by a particular group of customers. Rather, Brown Shoe lists "distinct prices" as only one of several "practical indicia" of the existence of a separate submarket. Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524. Indeed, while the Court in Brown Shoe found it appropriate to treat men's, women's, and children's shoes as distinct submarkets, the Court was unwilling to further segregate these markets based upon price:

> Brown argues that the predominantly medium-priced shoes which it manufactures occupy a product market different from the predominantly low-priced shoes which Kinney sells. But agreement with that argument would be equivalent to holding that medium-priced shoes do not compete with low-priced shoes. We think the District Court properly found the facts to be otherwise. It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00.

370 U.S. at 326, 82 S. Ct. at 1524.

In this case, likewise, it would defy common sense to assert that Northwest passengers can be meaningfully distinguished solely by their willingness (in the price-insensitive market) or unwillingness (in the price-sensitive market) to pay any price Northwest might set for air travel on its DTW-PHL and DTW-BOS routes. Rather, the industry recognition of distinct markets for business and leisure travel presumably rests on such product differences as minimum advance purchase and stayover requirements, frequent flier clubs, and preferred seating arrangements. It seems reasonable to assume, for example, that many business passengers would be willing to pay a higher, unrestricted fare in order to accommodate last-minute travel needs, while leisure travelers would be content to accept an advance-purchase restriction in exchange for a lower fare. Yet, Spirit does not propose to segment the DTW-PHL and DTW-BOS markets on the basis of such product distinctions.[25]

Moreover, by electing to distinguish submarkets solely by fare, or perhaps by reference to the counterintuitive notion of "willingness to pay," Spirit has left itself the difficult task of analyzing a market which, if it ever existed, seemingly ceased its separate existence during the period of alleged predation. As noted, Northwest's previously "bimodal" fare distribution essentially collapsed during this period, with passengers naturally gravitating toward the airline's lower yet mostly unrestricted fares. This

[25]The Court cannot say, of course, why Spirit fails to propound such a feature-based segmentation of the product market. It is worth noting, however, that at least some of these feature-based submarkets presumably would not produce the negative revenue-to-cost comparison sought by Spirit. It could be contended, for example, that the parties compete for unrestricted-fare passengers, since Spirit sells most of its tickets without minimum-stay or advance-purchase restrictions. Yet, this would sweep in many of Northwest's business or "price-insensitive" travelers, who tend to pay higher fares, and therefore would be more likely to generate revenues in excess of the costs incurred in servicing these passengers. Indeed, most of Northwest's passengers during the period of alleged predation would fall into this "unrestricted-fare" submarket, since the airline suspended most of its fare restrictions in response to Spirit's entry into the DTW-PHL and DTW-BOS markets.

reaction to reduced fares belies the notion of "price-insensitive" passengers, or at least indicates that this submarket is far smaller than posited by Spirit's experts.

Alternatively, Spirit perhaps means to suggest that Northwest's fare reductions were over-inclusive, encompassing not just price-sensitive passengers but also a number of price-insensitive passengers who would have paid more, yet were happy to accept the bargain being offered by Northwest.[26] This, too, presents a dilemma for Spirit, however, as it then must explain how Northwest was able to price below cost as to its price-sensitive passengers ***and also*** a considerable portion of its price-insensitive passengers, (see Plaintiff's Suppl. Memorandum at 4), yet still achieve — as the evidence shows that it did — a positive revenue-to-cost margin across its passenger base viewed as a whole. An essential premise underlying Spirit's appeal to a "price-sensitive" market is that Northwest was able to offset its purported losses in this market through larger gains in the "price-insensitive" market — in other words, that Northwest used its dominant, unchallenged position in the latter market as leverage to drive Spirit out of the former. To the extent that the "price-sensitive" market ceased to exist during the period of alleged predation — and even Spirit concedes that "Northwest briefly obscured the different demand elasticities" in these two purported submarkets "by suspending restrictions on

[26]This appears, in fact, to be Spirit's position. As discussed earlier, Spirit argues that Northwest could have adopted a more modest competitive response to Spirit's entry into the DTW-PHL and DTW-BOS markets, with fare reductions targeted more specifically at those passengers most likely to choose Spirit. Instead, Spirit charges that Northwest selected its most aggressive response, slashing fares across the board on all its flights.

low fares," (Plaintiff's Suppl. Memorandum at 4 n.25) — Northwest could not have succeeded in such a strategy.[27]

Finally, even assuming that ***Northwest's*** passengers could be meaningfully separated into "price-sensitive" and "price-insensitive" submarkets, Spirit and its experts have entirely ignored the question whether ***Spirit itself*** competes only in the former submarket. One would think, from Spirit's presentation, that this airline offered only a single low fare on the DTW-BOS and DTW-PHL routes, with no effort to capture higher revenues from subsets of its passenger base. In fact, however, the record shows that Spirit, like Northwest, charged a number of different fares on the two routes — its fares ranged from $69 to $159 on the DTW-BOS route, and from $49 to $139 on the DTW-PHL route. (See Defendant's Motion, Ex. 2, Kaplan Rep., Ex. D.) It would appear, in short, that the "area of effective competition" between the parties is somewhat more complex than Spirit's "lowest fare" or "price-sensitive" analysis might suggest.

On both legal and factual grounds, then, the Court is unable to discern any "battle of the experts" that remains for the trier of fact to resolve. Rather, the market definitions

[27]To the same effect, Spirit's post-hearing submission includes graphs indicating that, immediately before and after the period of alleged predation, Northwest generated sixty to eighty percent of its revenue on the DTW-PHL and DTW-BOS routes from its purported "price-insensitive" passengers, and twenty to forty percent of its revenue from "price-sensitive" passengers. This trend was reversed during the period of alleged predation, however, with "price-sensitive" passengers accounting for seventy to eighty percent of Northwest's revenue. Again, one is left to wonder how Northwest produced overall positive revenues during this period, given the substantial drop-off in revenues derived from its profitable "price-insensitive" passengers and the corresponding increase in seemingly unprofitable low-fare passengers.

and cost/revenue comparisons put forward by Spirit's experts fail to comport with the governing legal standards for evaluating claims of predatory pricing. As explained in Brooke Group:

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita,* "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Brooke Group, 509 U.S. at 242, 113 S. Ct. at 2598 (citations omitted). Such is the case here, where the brute market facts establish that Northwest's fares did not fall below the airline's average variable costs, and where Spirit has not produced sufficient facts or identified pertinent legal authority to validate its experts' opinion that below-cost pricing occurred in some alternative, legally relevant "lowest fare" or "price-sensitive" market.

The Court appreciates Spirit's concern that, through skillful use of yield management techniques, Northwest might well be able to "subsidize" its competition with low-fare, no-frills carriers by capturing higher revenues from business or connecting passengers, or from travelers who, all other things (including price) being equal, might favor Northwest because of "extras" such as premium seating or frequent flier mileage. Yet, these are simply features of the competitive model chosen by Northwest, as well as the competitive response it adopted following Spirit's entry into the subject markets. These features, furthermore, have not been given to Northwest for free; rather, the airline must cover the costs of its chosen business model through passenger revenues, or else face charges of predatory pricing and, more seriously, insolvency.[28]

The law governing claims of predatory pricing does not permit this Court to condemn such practices as yield management and graduated fare structures merely because they might not best serve all segments of the passenger population, or because they might make it more difficult for new entrants like Spirit to survive. Rather, this law, as explicated in Brooke Group and endorsed by scholars including Spirit's own experts, deliberately eschews any qualitative judgments about the competitive desirability of one business practice versus another. The sole and objective benchmark is whether the alleged predator's prices exceed its costs, by reference to the products it actually sells and the markets in which it actually competes with the alleged victim of predation. Under this standard, the record compels the conclusion that Northwest's prices were not predatory, because the airline operated profitably on both the DTW-BOS and DTW-PHL routes during the entire period of alleged predation. Consequently, Spirit having failed as a matter of law to establish the first prong of the Brooke Group standard, Northwest is entitled to summary judgment in its favor on Spirit's claims of predatory pricing.[29]

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[28]The financial difficulties of the major airlines have been widely reported. Indeed, as noted by the Court at the December 12 hearing, it appears that Spirit unfortunately has chosen to challenge Northwest on two of the rare routes where Northwest has turned a profit.

[29]Given this conclusion, the Court need not address Northwest's two remaining arguments in support of its motion — namely, that the evidentiary record is inadequate as a matter of law to establish either (i) Northwest's possession of monopoly power in the relevant markets, or (ii) the airline's likelihood of recouping any losses it incurred as a result of its

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's July 5, 2002 Motion for Summary Judgment is GRANTED.[30]

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DEPUTY COURT CLERK

Gerald E. Rosen
United States District Judge

allegedly below-cost fare structure. In both cases, Northwest's principal premise is that it would be relatively easy for competitors — and, experience shows, it *was* reasonably easy for Spirit — to enter the DTW-BOS and DTW-PHL markets. Given these purportedly low barriers to entry, Northwest surmises that the circumstances would not have permitted either the acquisition of monopoly power or the recoupment of any short-term losses suffered during the period of predation. Were the Court to reach these issues, it likely would conclude that these matters, as opposed to the parties' dispute over Northwest's below- or above-cost pricing, turn upon a "battle of the experts" that is properly resolved by the trier of fact.

This leaves only the question whether anything remains of Spirit's claims in this case. As noted at the outset, Spirit alleges that Northwest engaged in other forms of anticompetitive conduct apart from predatory pricing, but the parties' current round of submissions addresses only the latter theory of recovery. To resolve this uncertainty, the Court invited the parties at the December 12 hearing to submit statements of the remaining issues in this case in the event that Northwest's summary judgment motion were granted. In its submission, Spirit maintains that portions of its claims for damages and injunctive relief would remain viable even in the face of such an adverse ruling. Nonetheless, Spirit then states that these "remaining portions, unaccompanied by Northwest's act of predatory pricing, do not warrant the time, money and resources necessarily involved with the prosecution of the remaining portions of the federal antitrust action." (Plaintiff's Post-Hearing Statement of What Remains at 3.) Consequently, the Court's award of summary judgment to Northwest leaves nothing further to resolve in this case.

[30]In light of this ruling, the Court need not resolve Northwest's August 30, 2002 motion challenging two expert reports and an affidavit submitted by Dr. Keith B. Leffler on behalf of Spirit. The Court notes, in any event, that these expert materials proved inconsequential to the disposition of Northwest's summary judgment motion. Accordingly, Northwest's August 30, 2002 motion to strike is DENIED AS MOOT.