IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ATLANTIC COAST AIRLINES HOLDINGS, INC., Plaintiff, v. MESA AIR GROUP, INC., Defendant.	)	Civil Action No. 1:03CV02198RMC

BRIEF OF DISTRICT OF COLUMBIA AND THE COMMONWEALTH OF VIRGINIA AS AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Atlantic Coast Airlines Holdings, Inc. ("Atlantic") has sued Mesa Air Group, Inc. ("Mesa"), alleging that Mesa, in coordination with United Air Lines, Inc. ("United"), is engaged in an anticompetitive scheme to take corporate control of Atlantic and profit by squelching Atlantic as a new competitor.

The Corporation Counsel is the official of the District of Columbia Government ("District") responsible for enforcing the District of Columbia Antitrust Act, D.C. Official Code § 28-4501 (2001) *et seq*., and, in a parens patriae capacity, the federal antitrust laws**.** The District takes no position as to whether Atlantic's complaint allegations are true.

Atlantic's motion for preliminary injunction raises serious questions as to the lawfulness of Mesa's conduct and the potential for anticompetitive harm. If Mesa were allowed to proceed with a plan to replace Atlantic's directors, an event that Atlantic contends would effectively terminate its plan to introduce a new low-cost airline based at Washington Dulles International Airport ("Dulles"), any resulting harm to airline competition and to consumers of air travel could be irreversible. Therefore, unless Mesa presents evidence in opposition to Atlantic's motion that substantially refutes the factual contentions upon which the motion is based, it is in the public interest for the Court to enter a preliminary injunction temporarily halting Mesa's consent solicitation to replace the directors of Atlantic, thereby preserving the status quo.

As the target of an alleged corporate takeover, Atlantic has standing to pursue claims that its threatened elimination as a competitor would violate the antitrust laws. Moreover, it is in the public interest for Atlantic's antitrust allegations to be subject to a careful, factual inquiry by this Court *prior* to the occurrence of events that could eliminate Atlantic as a competitor. Issuance of a preliminary injunction would allow for such judicial review. Finally, although the issue of government antitrust enforcement is not directly before the Court, the Court may properly take into consideration that issuance of a preliminary injunction would facilitate timely review of the transaction by antitrust enforcement agencies.

II. INTEREST OF THE AMICUS

The Corporation Counsel is the District's antitrust enforcement official. D.C. Official Code §§ 28-4505 to 28-4513 (2001) (hereinafter "D.C. Code" refers to the D.C. Official Code (2001)). Shortly after Atlantic filed its amended Complaint in this Court,

the Office of the Corporation Counsel opened an antitrust investigation into Mesa's alleged activity with respect to Atlantic, including Mesa's consent solicitation. Civil investigative demands for productions of documents are being issued today to both Atlantic and Mesa. The investigation is still in an early stage, and the Office of the Corporation Counsel has not reached any conclusions concerning the investigation.

Under the District's Antitrust Act, the Corporation Counsel has express authority to file an action for damages "on behalf of any individual residing in the District," as well as an action for damages or injunctive relief on behalf of the District's proprietary interests. D.C. Code § 28-4507. Moreover, under the Clayton Act, the Corporation Counsel has the same authority as a state attorney general to bring *federal* damages actions "as parens patriae on behalf of natural persons residing in such State." 15 U.S.C. §§ 15c and 15g. In addition, the Corporation Counsel has parens patriae authority to seek injunctive relief against antitrust violations that harm the District residents or the District's economy, based on the Supreme Court's determination that a state is a "person" that may seek injunctive relief against antitrust violations that harm its economy or the welfare of its citizens. *Georgia v. Pennsylvania R.R. Co*., 324 U.S. 439, 447-51; *see also California v. American Stores Co*., 495 U.S. 271 (1990).

The Corporation Counsel's antitrust enforcement efforts are intended to complement those of other antitrust enforcement agencies. The Corporation Counsel has express statutory authority to "cooperate with the federal government and the states in the enforcement" of the District's antitrust law. D.C. Code § 28-4513. Moreover, the core provisions of the District's Antitrust Act, D.C. Code §§ 28-4502 and 28-4503, are patterned after sections one and two of the Sherman Act. In construing these and other

provisions of the District's antitrust law, a court "may use as a guide interpretations given by federal courts to comparable antitrust statutes." D.C. Code § 28-4515.

The District is interested in this case because of Atlantic's allegations that Mesa is pursuing a course of action that would violate both federal and District antitrust laws "by foreclosing significant competition, restricting choices of D.C. consumers, and reducing the volume of flights available, and increasing prices to travelers to and from D.C. in the Relevant Markets." Amended Complaint ¶ 260 (filed Nov. 26, 2003) (hereinafter "Complaint"). The District has an interest in protecting its economy and its citizens from any restraints of trade that would raise prices and reduce choice. In addition, the District government itself has a proprietary interest, as a purchaser of air travel, in opposing any anticompetitive conduct pertaining to air travel to and from the D.C. area, including air travel to and from Dulles.

III. SUMMARY OF ALLEGATIONS

Atlantic contends in its Complaint and motion for preliminary injunction that Mesa and United are engaged in an anticompetitive scheme to take over Atlantic. This course of conduct would allegedly give Mesa and United the opportunity to earn greater profits by preventing Atlantic from pursuing its plan to become a new competitor.

Atlantic alleges that it has been operating solely under the "United Express" and "Delta Connection" names pursuant to code-share agreements with United and Delta Airlines respectively. Under the United agreement, United controls the destinations served and fares charged for all United Express flights, including flights to and from Dulles. Following United's bankruptcy filing, United was unwilling to continue the

code-share agreement, and the parties have been unable to work out a modified agreement.

On July 28, 2003, Atlantic announced that it would transform itself into an independent, "low-cost" carrier with its hub at Dulles. Atlantic has stated that it expects the new carrier, which will be called "Independence Air," to operate at least 80 regional jets, four Airbus A319s, and serve 56 destinations from Dulles by 2006. Although there is not yet a final list of cities to be served, Independence Air's website indicates that destinations are to be selected from a list of some 90 possible destinations throughout the United States. *See* www.flyi.com.

In early October 2003, Mesa announced that it intended to present an offer to Atlantic shareholders to exchange their Atlantic shares for Mesa shares. Mesa, like Atlantic, is a regional code-share carrier for a number of major airlines. Mesa also announced that it would seek to solicit the consent of Atlantic's shareholders to replace the Atlantic board with board nominees of Mesa's choosing. According to Mesa's preliminary (proposed) consent solicitation, the reconstituted board would consider having Atlantic continue as a code-share carrier:

> MESA BELIEVES THAT CONSENTING TO EACH OF THE PROPOSALS WILL GIVE THE STOCKHOLDERS OF ATLANTIC COAST THE OPPORTUNITY TO ELECT A BOARD THAT WILL CONSIDER RETURNING ATLANTIC COAST TO ITS HISTORIC BUSINESS STRATEGY OF OPERATING PURSUANT TO REVENUE GUARANTEE CODE SHARE AGREEMENTS WITH MAJOR AIRLINES SERVING HUB NETWORKS

See Preliminary Copy of Consent Statement of Mesa Air Group, Inc Act of 1934 dated December 8, 2003 (emphasis in original) found at on the SEC's website at http://www.sec.gov/Archives/edgar/data/810332/000091412103001712/me682374v7-14a.txt.

On November 12, 2003, Mesa and United announced that they had reached a Memorandum of Understanding "under which Atlantic Coast's regional jets would continue to fly as United Express flights if Mesa succeeds in taking control of Atlantic Coast." Complaint ¶ 52. Atlantic has alleged that United will pay Mesa an across-the-board premium on Mesa's future and existing codeshare flights for United Express if Mesa succeeds in replacing Atlantic's board and getting Atlantic to enter into a definitive agreement with United. *Id*. According to Atlantic, the effect of this course of action, if successful, would be to "kill[] Independence Air." Complaint ¶ 53.

Mesa is awaiting approval by the Securities and Exchange Commission before commencing the proposed consent solicitation. Atlantic alleges that its board of directors could be replaced "within a matter of hours" of the commencement of a consent solicitation. Complaint ¶ 223.

IV. ARGUMENT

A. Atlantic has alleged antitrust injury.

The threatened change in corporate control alleged by Atlantic is an "antitrust injury" that gives Atlantic standing to pursue its antitrust claims. The Supreme Court held in *Cargill, Inc. v. Monfort of Colorado, Inc*., 479 U.S. 104 (1986), that an antitrust plaintiff seeking injunctive relief must allege and ultimately prove that it would suffer threatened loss or damage constituting an "antitrust injury." "Antitrust injury" means "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cargill*, 479 U.S. at 109 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The Supreme Court has not had occasion to apply the antitrust injury standard in the context of a suit brought by a takeover target. While the Circuits are split on the question of target standing, and the D.C. Circuit has not addressed the issue, the Second Circuit has explained persuasively why the public interest is best advanced by according antitrust standing to a takeover target, thereby allowing the issue of antitrust injury to be addressed by the district court as a question of fact. *Consolidated Gold Fields PLC v. Minorco*, *S.A.*, 871 F.2d 252, 257-60 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). In *Gold Fields*, the Second Circuit held that a takeover target has standing under *Cargill* because its "loss of independence is causally linked to the injury occurring in the marketplace, where the acquisition threatens to diminish competitive forces." *Id*. at 258. The *Gold Fields* decision noted that "target standing" serves the public interest in effective enforcement of the antitrust laws:

> The government, with its limited resources, cannot be relied upon as the sole initiator of enforcement actions. That is why Congress authorized private enforcement of the antitrust laws. [citations omitted] But private enforcement depends on the willingness of affected companies to enter the fray and risk substantial money, time, and effort in lawsuits that have even more uncertainty of outcome than ordinary litigation. In the enforcement of [the Clayton Act's] proscription against anticompetitive acquisitions, non-target competitors claiming standing face the substantial barriers of proof erected by Cargill. Consumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction. The target of a proposed takeover has the most immediate interest in preserving its independence as a competitor in the market.

Id. at 260.

When invited by the Third Circuit to submit an *amicus* brief addressing a district court's dismissal on standing grounds of a takeover target's antitrust claims, the U.S. Department of Justice's Antitrust Division advanced the proposition that the issue of

whether a takeover target would suffer "antitrust injury" can be resolved only through a fact-dependent analysis. Amicus Brief filed in *Moore Corp, Ltd. v. Wallace Computer Services, Inc.*, Case No. 96-7066 (Apr. 19, 1996) (posted on Department's web-site at http://www.usdoj.gov/atr/cases/f0600/0633.htm.)

The purpose of such a factual inquiry is to address "the problem of the wrongly motivated private litigant by scrutinizing the plaintiff's injury to determine whether the self-interest the plaintiff seeks to vindicate is consistent with antitrust goals." Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 Mich. L. Rev. 1, 16 (1995). Under a fact-based "incentives" analysis, a takeover target normally has standing to challenge the takeover on antitrust grounds because the takeover, if anticompetitive, would threaten one or more forms of "antitrust injury," including:

> (1) collusion-induced output reduction harmful to the target and its constituents in both partial and full acquisitions of shares; (2) possible loss of trade secrets, confidential information, and other intellectual property injuring the target's competitive viability if the merger is not consummated; and (3) termination of its corporate existence in contravention of a merger law intended to preserve the independence of firms threatened by anticompetitive acquisitions.

Id. at 81.

Here, Atlantic has alleged both a collusion-induced output reduction and the impending loss of its independence. These "litigation incentives are fully compatible with antitrust goals," *id*., and support a determination that Atlantic has standing to pursue its antitrust claims.

B. A preliminary injunction will allow judicial review prior to any takeover of Atlantic.

In considering the evidence submitted in support and in opposition to Atlantic's motion for preliminary injunction, the Court should give great weight to the public's interest in thorough judicial review of Plaintiff's antitrust allegations.

The vehicle through which Mesa is allegedly seeking control of Atlantic leaves the Court with a stark choice. If the Court does not issue a preliminary injunction in this matter, Mesa will be free to proceed with a consent solicitation of Atlantic's board of directors as soon as the SEC approves such a solicitation. If the consent solicitation were successful, Atlantic's board members could possibly be replaced very quickly by Mesa nominees. Such a development could effectively terminate the instant lawsuit and prevent further consideration of Plaintiff's antitrust allegations on the basis of a more complete record. If, on the other hand, the Court issues a preliminary injunction, the Court will preserve its ability to make a final determination on the merits.

When determining whether to issue a preliminary injunction, courts in this Circuit consider four factors: (1) the likelihood that the plaintiff will succeed on the merits, (2) the likelihood of irreparable injury to the plaintiff if the preliminary injunction is denied, (3) whether granting a preliminary injunction would substantially injure the defendant, and (4) whether the public interest is served by the grant of a preliminary injunction. *See Serono Lab v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). "These factors interrelate on a sliding scale and must be balanced against each other." *Id*. at 1318. "A showing that the balance of hardships strongly favors injunctive relief could compensate for a less than compelling showing of likely success on the merits. 'When the balance [of

the hardships] tips decidedly in favor of the plaintiff . . . a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.'" *Vencor Nursing Centers v. Shalala*, 63 F. Supp. 2d 1, 13 (D.D.C. 1999) (quoting *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)); s*ee also National Senior Citizens Law Center v. Legal Services Corp.*, 751 F.2d 1391, 1395 (D.C. Cir. 1985).

Here, the balancing of hardships must go beyond weighing the financial disadvantages for Mesa if the Court were to temporarily enjoin its takeover attempt against the financial disadvantages for Atlantic if its new business strategy were preempted. From a public interest perspective, Atlantic's allegations are significant not for Atlantic's own sake but because of the potential for great harm to consumers of airline services in the D.C. area and elsewhere. The risk to the consuming public is the possible loss of a new low-cost carrier serving Dulles and various regional airports. Competition from a new airline entrant has the potential to lower fares dramatically on numerous routes.

When the equities tip strongly in favor of the moving party, a preliminary injunction should issue if serious questions on the merits are presented. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977). Serious questions include those "which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of the judgment by

altering the status quo." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

The issues raised in Atlantic's amended complaint are serious and difficult, including specification of proper relevant geographic and product markets, analysis of likely competitive effects, likelihood of new entry, and likelihood of potential efficiencies flowing from the transaction, and others. The public interest weighs heavily in favor of careful judicial consideration of these antitrust issues following development of a full evidentiary record. As the D.C. Circuit stated in a decision overturning the denial of a preliminary injunction halting the merger of two baby food manufacturers: "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 727 (D.C. Cir. 2001).

C. The Court may properly take into consideration that issuance of a preliminary injunction would facilitate review of the threatened takeover by antitrust enforcement agencies.

No issue of government enforcement is directly before this Court, but the Court may properly take into consideration, in balancing the equities, that issuance of a preliminary injunction will facilitate orderly review of the transaction by antitrust authorities. In this case, Atlantic has alleged that Mesa is not required to give federal antitrust authorities advance notification of the proposed consent solicitation under the federal Hart-Scott-Rodino ("HSR") pre-merger filing requirements. In the absence of such notification, the automatic injunctions of the waiting periods triggered by an HSR pre-merger filing would not take effect until after the corporate takeover had occurred. Mesa would be able to replace Atlantic's board with Mesa nominees and terminate the

introduction of Independence Air without the usual scrutiny by a federal antitrust agency. Complaint ¶ 47. By the time Mesa were required to file an HSR pre-merger notification and report form (and thereby comply with the automatic injunctions of statutory waiting periods prior to consummation), the Atlantic board would be replaced with Mesa nominees and Independence Air would be terminated. Complaint ¶¶ 46-47.

While the District of Columbia takes no position on proper application of the HSR rules to Mesa, the publicly available information supports an inference that Mesa has not yet filed an HSR notification and report. If it is correct that Mesa need not file an HSR form prior to effecting its consent solicitation, then federal antitrust authorities, and, by extension, state and District antitrust authorities, may not have a sufficient opportunity to review the transaction prior to Mesa's nominees obtaining effective control of Atlantic. As explained above, any harm to competition could occur almost simultaneously with a replacement of the Atlantic board by Mesa nominees.

One benefit of a preliminary injunction is that it would give the District of Columbia a reasonable period of time for its antitrust investigation into Mesa's alleged activity with respect to Atlantic. Last week the Office of the Corporation Counsel invited counsel for the parties to this litigation to submit, on a voluntary basis, presentations or other materials outlining their views on the antitrust issues presented by the proposed combination. In addition, the Office of the Corporation Counsel asked Mesa to agree to delay any consent solicitation of Atlantic's shareholders so that the Corporation Counsel (and any interested state attorneys general) have an opportunity to investigate the antitrust issues prior to any reconstitution of Atlantic's board. So far, Mesa has declined to agree to a time period for District review of investigative materials prior to Mesa's moving

forward with any takeover plans. As indicated earlier, the Office of the Corporation Counsel is issuing civil investigative demands today to both Mesa and Atlantic.

V. CONCLUSION

For the reasons stated above, unless Mesa presents evidence in opposition to Atlantic's motion for preliminary injunction that substantially refutes the factual contentions upon which the motion is based, the District of Columbia supports the issuance of a preliminary injunction to preserve the status quo.

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Corporation Counsel

/S/
CHARLOTTE W. PARKER (Bar #186205)
Deputy Corporation Counsel
Civil Division

/S/
BENNETT RUSHKOFF (Bar #386925)
Senior Counsel

/S/
DON ALLEN RESNIKOFF (Bar #386688)
Assistant Corporation Counsel

/S/
ANIKA SANDERS COOPER (Bar # 458863)
Assistant Corporation Counsel
Office of the Corporation Counsel
Suite 450-N
441 4th Street, N.W.
Washington, D.C. 20001
(202) 727-3500

Dated: December 8, 2003

Attorneys for the District of Columbia

The Commonwealth of Virginia has similar antitrust authority to the District's Corporation Counsel under the Virginia Antitrust Act, Va. Code §§ 59.1-9.1 to -9.17 (2001). Specifically, the Virginia Attorney General's Office may bring civil actions for injunctive relief, civil penalties, and damages sustained by state entities and political subdivisions of the Commonwealth, Va. Code § 59.1-9.15 (a) and (b), as well as actions to recover damages and secure other relief as parens patriae. Va. Code § 59.1-9.15(d). The Commonwealth of Virginia agrees with the Office of the Corporation Counsel's Brief in Support of Plaintiff's Motion for a Preliminary Injunction and wishes to be included as an amicus on the brief.

Respectfully submitted,

JERRY W. KILGORE
Virginia Attorney General

DAVID B. IRVIN
Senior Assistant Attorney General
and Chief
SARAH OXENHAM ALLEN
Assistant Attorney General
Antitrust and Consumer Litigation Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071

/S/
BENNETT RUSHKOFF (Bar #386925)
Local Counsel for the Commonwealth of Virginia
Office of the Corporation Counsel
Suite 450-N
441 4th Street, N.W.
Washington, D.C. 20001
(202) 727-3500

Attorneys for the Commonwealth of Virginia

Dated: December 8, 2003