MESSINA LAW FIRM
A PROFESSIONAL CORPORATION

961 Holmdel Road
Holmdel, New Jersey 07733

Gil D. Messina
Admitted in MA and NJ

Phone 732.332.9300

Fax 732.332.9301

Email: gmessina@messinalawfirm.com

February 7, 2014

Via Facsimile: (202) 307-2784
Email: antitrust.atr@usdoj.gov

William H. Stallings
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530

RE: Tunney Act Comments
United States v. US Airways Group, Inc., Case No. 1:13-cv-01236 (CKK)

Dear Mr. Stallings:

We are writing to you pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("the Tunney Act") with our comments relating to the proposed final judgment which, if approved by the Court, will settle the Government's lawsuit in *United States v. US Airways Group, Inc.*, Case No. 1:13-cv-01236 (CKK) ("the DOJ Action") and potentially permit the finalization of the merger between American Airlines and US Airways, thereby creating the largest airline in the world. It is our firm belief that the proposed settlement does *not* address in any meaningful way the injury to consumers that the DOJ Action was intended to prevent.

The decision of the Department of Justice to bring this action was a welcomed one. As the Attorney General publicly announced at the time: "By challenging this merger, the Department of Justice is saying that the American people deserve better. This transaction would result in consumers paying the price – in higher airfares, higher fees and fewer choices. Today's action proves our determination to fight for the best interests of consumers by ensuring robust competition in the marketplace." This laudable goal withered, apparently, in the face of the unprecedented publicity campaign and political pressure that was brought to bear by the airlines; precisely the type of pressure the Tunney Act was passed to prevent.

The airlines' filing with the Court on December 9, 2013, (as required by the Tunney Act, but after the merger had closed), disclosed dozens of contacts between representatives of the airlines and government officials, including contacts with White House, Department of Labor and Department of Transportation officials. These do not include other contacts by politicians and union officials with federal officials on behalf of the airlines. While all of these groups have their own interests to advance, conspicuously absent from the cast of characters reported to have had access to federal officials appears to be representatives of consumers – "the American people" – the protection of whom the Attorney General professed to be most concerned about

when the suit was brought. Once pressure had been applied, it was simply a matter of time before the settlement was announced on November 12, 2013. Was the settlement a political product? There was publicity about the politicians in Washington, D.C. not losing access from Reagan National Airport to their hometowns. This bit of trouble appears to have been assuaged by the Government's settlement which, according to Assistant Attorney General Baer, "allows the parties to retain the small aircraft commuter slots at Reagan National intended to serve small and medium sized cities." (This "concession" to traveling politicians is supposedly backed by an agreement between the airlines and DOT, which requires the former to maintain such service for not less than five years.) The facts below show that the settlement has done *nothing* for the other average consumers, other than to reduce or cut services to their hometowns, and has, despite DOJ's best laid plans, also cut airline service to and from Reagan National. This is the kind of closed door dealing that led to the passage of the Tunney Act in the first place.

The Tunney Act's procedures are intended to insure that the allegations in the Government's complaint are adequately addressed by the proposed settlement and that the settlement is ***in the public interest.*** A simple review of the results of the merger shows the negative effects this merger has already had on the traveling public.

On August 13, 2013, when the DOJ Action was filed, Mr. Baer publicly stated that if the merger was to go through, "consumers will lose the benefit of head-to-head competition" between the two airlines "on thousands of airline routes across the country – in cities big and small." As the DOJ also announced at that time, the merger "would substantially lessen competition for commercial air travel in local markets throughout the United States and result in passengers paying higher airfares and receiving less service." What has the DOJ's settlement achieved in less than two months since the merger occurred on December 9, 2013?

- December 18, 2013 (*Barrons*): "Last week [American Airlines] pulled all of its American-branded March and April Santa Barbara flights from industry computers .... We believe the [US Airways] management team may have utilized the delay associated with the Department of Justice's lawsuit to fine-tune a list of early system changes ... ."

- December 19, 2013 (*KTVN Channel 2 News*): "The merger between American Airlines and US Airways is causing airlines to reduce flights at Reno-Tahoe International Airport and many airports across the country." Because the Justice Department caused US Airways to give up slots at seven busy hub airports, "[n]ow other airlines are canceling service on less profitable routes and moving those flights to the new and more lucrative routes at the larger, busier airports. The result is Southwest has announced ... it is canceling its nonstop daily flight between Reno and Seattle and ... between Reno and Portland." In the "race to get more slots at larger airports[,] Jackson, Mississippi, Branson, Missouri, and Key West, Florida have lost all of their Southwest Airlines service effective June 8. Louisville, Dayton, San Antonio, New Orleans, Orlando, Tampa Bay, Nashville,

Norfolk and Chicago Midway also lost flights as a result of the new slot availability."

- January 15, 2014 (*Reuters*): Although flights out of Reagan National received special protection in the DOJ settlement, its smaller destinations were not entirely immune from cuts by the new American: "Last summer, Doug Parker, the US Airways chief executive who became CEO of the combined company, told lawmakers that forcing the combined airline to surrender slots at Reagan National would risk fewer flights to small and medium-sized cities. Among the 17 cities affected by the Reagan National changes are Augusta, Georgia; Jacksonville, North Carolina; Little Rock Arkansas; Omaha, Nebraska, Pensacola, Florida; Fort Walton Beach, Florida, Islip, New York; Detroit, San Diego and Montreal. The airline said affected customers would still have access through connecting flights."

- January 15, 2014 (*The Washington Post*): "American Airlines said Wednesday that it would end direct flights from Reagan National Airport to 17 small and midsize cities as part of the deal that the paved the way for its merger with US Airways." They include "less lucrative destinations such as Fayetteville, N.C., Savannah, Ga., and Islip, N.Y." "'It's hard to imagine a low-cost carrier picking up this service,' said William S. Swelbar, a researcher at the MIT International Center for Air Transportation. 'They tend to service only the largest markets out there.'"

- January 17, 2014 (*Newsday*): "Long Island MacArthur Airport is losing its two daily US Airways Flights to Washington, D.C."

- January 19, 2014 (*NPR & WUNC* Broadcasting): "Direct flights to DC just got harder from Eastern NC." "Airports in Fayetteville, Jacksonville and Wilmington are losing their non-stop flights to Reagan National Airport in Washington, D.C."

The Government Accountability Office ("GAO"), the American Antitrust Institute ("AAI") and MIT performed studies and issued reports about the serious, negative impacts this merger would have upon consumers throughout the country. Those reports were based upon unassailable statistics which the DOJ simply chose to ignore in its rush to accommodate the airlines' merger plans.

The Basic Facts.

The basic facts, which the settlement ignores and the attendant risks which the settlement

does nothing to address, are the following:[1]/

- The merger will result in the largest airline in the United States and the world and closely follows the 2008 merger of Delta and Northwest (which resulted in the then-largest airline in the U.S.), the 2010 merger of United and Continental (which resulted in the largest airline in the U.S.), the 2011 merger of Southwest and AirTran (which was the then-largest airline in terms of passengers).
- The four top airlines will control more than 90% of the market.
- The four top airlines will have more than 90% of the market in terms of total operating revenue.
- From 2008 to the present, capacity growth has not rebounded despite a strengthening economy and a growing demand for air travel.
- The combined American - US Airways had 12 overlapping non-stop routes, 7 of which will result in a monopoly. Of the other 5 non-stop, overlapping routes, the combined airline will control between 50%-75% of those markets.
- The combined American - US Airways will have 24 connecting airport-pair markets that will result in a monopoly.
- The combined American - US Airways will have 475 airport-pair markets with a decrease from 3 to 2 effective competitors.
- The combined American - US Airways will have 749 airport-pair markets with a decrease from 4 to 3 effective competitors.
- On connecting flights, American and US Airways compete on more than 1,665 airport-pair markets affecting more than 53 million passengers.
- This merger will result in more than two times the number of airport-pairs losing an effective competitor than occurred in the United-Continental merger for airports with 1, 2 or 3 competitors.

[1] Except as otherwise stated, the facts are taken from the Government Accountability Office report ("GAO Report") entitled AIRLINE MERGERS ISSUES RAISED BY THE PROPOSED MERGER OF AMERICAN AIRLINES AND US AIRWAYS (June 19, 2013). The GAO Report, Report by the American Antitrust Institute ("AAI Report") and three Reports by the MIT International Center for Air Transportation.

- This merger will affect 567 more airport-pairs than were affected by the United-Continental merger and 18 million more passengers.

- The two airlines do not share any airport hubs, consequently New York can serve as a better hub than Philadelphia, while Miami can serve as a better hub than Charlotte, which will likely result in the closing of one or more of these hubs as happened in prior mergers. For example, in 2001, after American acquired TWA, St. Louis ceased to be an American hub. Following the Delta - Northwest merger, service at Delta's hub in Cincinnati and Northwest's hub in Memphis have been greatly reduced. And finally, in the past week, United announced the closing of its hub in Cleveland, contrary to assurances given at the time of its merger with Continental that Cleveland would be preserved and even grown.

- The combined American - US Airways will control the following dominant percentages of the domestic passenger market in the following key airports:

  - Miami - 72%;
  - Charlotte - 70%;
  - Philadelphia - 54%;
  - Chicago-O'Hare - 43%;
  - Phoenix - 32%;
  - LAX - 23%; and
  - JFK - 18%.

- The merger of Southwest and its key rival AirTran has eliminated any constraint formerly imposed on pricing practices, therefore, the American - US Airways merger, if allowed, will increase fares without that constraint. Southwest initiated 2 of the 3 price increases in the third quarter of 2012 and has consistently raised its prices since then, along with the network airlines. (USA TODAY, October 19, 2012).

- The weekend after the announcement of the proposed merger between American and US Airways, Delta, United, American, US Airways and Southwest substantially increased fares purchased by passengers within 7 days for domestic travel. The year before (2012) there were 7 successful price increases, in which Southwest participated, initiating 2. (USA TODAY, February 22, 2013).

- Several studies have shown that increased dominance at airports leads to higher fares and creates competitive barriers to entry.

- US Airways CEO, Douglas Parker, testified before Congress that there will not be new entrants into the airline industry because a new entrant cannot cover its cost of capital.

- American had consistently said it would emerge from bankruptcy as a new and powerful stand-alone company. Indeed, the then-CEO and Chairman of American, Tom Horton, in an article entitled "American Resists US Airways Pressure," and subtitled "CEO says airline can compete on its own," told USA TODAY'S editorial board: "This company is going to be very successful. I think that we have a very powerful company coming out of restructuring." Moreover, Horton stated, "Our company is only going to get more valuable." Furthermore, he rejected the notion by Mr. Parker that American lacked access to the East Coast. Horton said American satisfied the East Coast with its hubs in New York and Miami: "Those are the most important population centers and we are very strong in them. What that airline (US Airways) does is carry a lot of connecting traffic over Charlotte and does so in a way that I would suggest is somewhat unrewarding." (USA TODAY July 20, 2012).

- In July 2011, American placed a $40 billion order for 460 new aircraft.

- Prior to American considering a merger with US Airways, American announced it would increase capacity by 20% over the next 5 years after emerging from bankruptcy. As you know, that proposed increase by American, with additional increases in departures from each of its hubs, would have created substantial competition and required the other airlines to either increase their capacity or lower their prices. In addition, the proposed capacity increases flew in the face of the other airlines' so-called "capacity discipline," a euphemism for decreasing availability and the natural consequence of increasing prices. (You know this was a major concern of US Airways.)

Additionally, the MIT Reports reported the following:[2]/

- From 2007 to 2012, after the mergers of Delta-Northwest, United-Continental and Southwest-AirTran, scheduled domestic departures decreased by 14.3% at all airports.

    - Large Hub (-8.8%)
    - Medium Hub (-26.2%)
    - Small Hub (-18.2%)
    - Non-hub (-15.4%)

[2] TRENDS AND MARKET FORCES SHAPING SMALL COMMUNITY AIR SERVICE IN THE UNITED STATES by Michael D. Wittman and William S. Swelbar (MIT International Center for Air Transportation, May 2013).

It is conceded that 7 of the 12 non-stop overlapping flights will result in a monopoly. This fact alone, under the binding authority of the Supreme Court in *Brown Shoe Co. v. United States,* 370 U.S 294 (1962) requires that the merger be "proscribed." In addition, according to the GAO, at least 24 connecting airport pairs will result in a monopoly. Again, any one of these is sufficient to require that this merger be "proscribed."

Although US Airways' "Advantage Fares" offered consumers up to 40% discounts on connecting flights as compared to fares for non-stop flights by competitors, Mr. Baer stated on August 13, 2013, when the DOJ's suit was announced, that "If this merger happens, US Airways' aggressive discounting – called advantage fares will disappear. ... . How do we know it? We know it from the internal analysis and the planning documents put together by American in considering the likely effects of this merger."

In an on-line article appearing in *Law 360* on January 30, 2014, the immediate past head of the DOJ's Antitrust Division, Christine Varney, blasted the DOJ's proposed settlement. Ms. Varney is quoted as saying:

> "The commitment from the airlines to divest departure gates and 138 takeoff and landing slots at seven key airports to what the DOJ refers to as 'low-cost' carriers will not actually remedy the concerns articulated in the government's suit challenging the merger ... .
>
> Speaking at the annual meeting of the New York State Bar Association's Antitrust Law Section, Varney claimed that the low-cost carriers do not introduce competition on the fare from Washington, D.C. to Omaha or from Washington, D.C., to Pittsburgh. When you bring in JetBLue and those guys to Reagan National Airport, they're going to add more flights to Florida."

Ms. Varney concluded by stating that the DOJ "made such a strong argument on maverick pricing, now they're going to settle the case and they are saying 'We're going to keep maverick pricing at bay because we're bringing new low-cost carriers in,' ... "But in fact low cost carriers don't fly the routes that those others fly."

This conclusion has even now been borne out by the many route cuts already made by the co-called low-cost carriers since they acquired American and US Airways slots as part of the DOJ's settlement.

In short, the proposed settlement does not address the central concerns raised by the DOJ's complaint and, as the evidence already shows, the settlement will *not* be in the public interest.

The District Court should reject the proposed settlement as the facts and the law require in order to insure that in the airline industry competition rather than combination should be the rule of trade.

The United States does not need another situation in a vital industry where the participants are "Too Big to Fail."

Sincerely yours,

Gil D. Messina
Joseph M. Alioto

GDM/JMA/hs