IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, v. SABRE CORP., et al., *Appellees*.	No. 20-1767 Appeal from the United States District Court for the District of Delaware No. 1:19-cv-01548-LPS

THE UNITED STATES' REPLY ON ITS VACATUR MOTION

The United States' vacatur motion (Mot.) follows this Court's "settled practice of vacating the district court judgment" under *Munsingwear* when an appeal has become moot due to the unilateral action of the party who prevailed in the lower court. *Bagby v. Beal*, 606 F.2d 411, 414 (3d Cir. 1979); *see Camreta v. Greene*, 563 U.S. 692, 698 (2011) (vacating mooted part of opinion below "[i]n line with our normal practice when mootness frustrates a party's right to appeal"); *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("vacatur must be granted [under *Munsingwear*] where mootness results from the unilateral action of the party who prevailed in the lower court"); 3d Cir. Doc. 16, at 4. Appellees concede that "this appeal

is moot" in light of their unilateral decision to terminate the merger agreement after prevailing below. 3d Cir. Doc. 19, at 1 (Response). No more is needed to grant this motion, notwithstanding Appellees' strident and factually inaccurate attempts to distract from settled principles of law.

Appellees first concoct a novel argument that "this Court should not reward the DOJ's poor decision to challenge this merger by vacating" the judgment below. Response 9. *Munsingwear* vacaturs, however, are based on a party's inability to appeal an adverse decision, not on any assessment of the appeal's underlying merits. *See U.S. Bancorp*, 513 U.S. at 27 ("It seems to us inappropriate, however, to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about their merits."); *id.* at 28 (reiterating the irrelevance of "judicial estimates regarding their merits"). Vacatur is appropriate because the United States cannot exercise its appellate rights to show serious legal errors in the decision below.

Appellees' second argument stands both the law and the facts on their heads. Appellees falsely claim that the United States "bears at

least some level of responsibility" for the mootness in light of its alleged "gamesmanship" in coordinating with the United Kingdom's Competition & Markets Authority (CMA) during its investigation of the merger. Response 12-13. The propriety of a *Munsingwear* vacatur, however, turns on "whether *the party seeking relief* from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24 (emphasis added). Here, the *United States* did nothing to "cause[] the mootness" of its appeal; *Appellees* alone "caused the mootness" by abandoning their transaction for business reasons, even while simultaneously appealing the CMA's decision. As Farelogix's CEO recently explained: "[W]e now were into a COVID environment, and we felt like [the U.K. appeal] could go on, but we, really both of us, needed to focus on our businesses, and that's a little more difficult to do when you're under a merger agreement, and it would have required an extension. And with the outcome of CMA kind of unknown, we felt it was simply the better move to kind-of mutually agree to not extend it."

InPhocus, *Episode 10—Farelogix tells all on the failed Sabre deal*, 16:38-17:15 (May 14, 2020) (transcribed).[1]

Moreover, Appellees' baseless accusations that the United States somehow improperly coordinated with the CMA are false and nonsensical. The CMA is the designated antitrust enforcement agency of the sovereign U.K. government. It reached an independent decision based on its own investigation of the facts and its analysis under U.K. law. The United States' exchange of information with the CMA—which Appellees expressly authorized—is a routine function when a merger affects multiple jurisdictions. *See DOJ-FTC Antitrust Guidelines for International Enforcement and Cooperation* § 5 (2017) ("International Cooperation").[2] The termination of the merger agreement and the resulting mootness in this case was caused solely by Appellees' own actions and was not the result of the authorized exchange of information between independent antitrust enforcement agencies.

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[1] *See* https://www.phocuswire.com/InPhocus-episode-10-Farelogix-Sabre-story. Sabre likewise has indicated that it abandoned the merger to improve its liquidity during "this period of prolonged uncertainty." Sabre Q1 2020 Earnings Report 9 (May 8, 2020), at https://investors.sabre.com/static-files/7bb14561-fda2-498b-8b40-fd3ba8edbfc6.

[2] *See* https://www.justice.gov/atr/internationalguidelines/download.

Furthermore, Appellees' allegations of "gamesmanship" misrepresent facts readily available to them. Without evidence, Appellees falsely claim that DOJ "appears to have prompted the CMA to investigate" the merger after "pressur[ing] Appellees to sign a waiver that enabled the DOJ and the CMA to exchange Appellees' confidential documents and data." Response 2. As documents produced to Appellees in the litigation clearly demonstrate, however, it was the CMA that first contacted the DOJ about the merger after the CMA was "informed by the Parties' lawyers that the transaction is being notified" in the United States, and it was the CMA which first "asked [the Parties] to provide [it] and [DOJ] with waivers." CMA-LIT-EMAILS-ATR001-00000062, 00000065 (attached as Exhibit A with limited redactions of CMA e-mail addresses and phone numbers).

In addition, longstanding DOJ policy makes clear that "the decision whether to provide a waiver is at the [party's] discretion." DOJ-FTC Model Waiver of Confidentiality, Frequently Asked Questions, at 3.[3] "In recent years, merging and other interested parties have been increasingly willing to grant [confidentiality] waivers" to

[3] *See* www.justice.gov/atr/file/705866/download.

different enforcement agencies to "facilitat[e] joint discussion and analysis," "avoid duplicative information production, and promote the adoption of efficient remedies." *International Competition Network*, *Waivers of Confidentiality in Merger Investigations*, at 2, 4 (2018).[4]

If there is any "gamesmanship" here, it is Appellees' efforts both to overturn the CMA decision on appeal and to shield the judgment below from vacatur—which, if successful, would allow Appellees to agree to merge again while arguing the judgment below should be given res judicata effect.[5] *Munsingwear* vacaturs exist precisely to prevent this sort of scenario.

I. The Equities Favor Vacatur.

Although Appellees correctly note that *Munsingwear* vacatur is an equitable form of relief, Response 8-9, they ignore the equity driving the

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[4] *See* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_ModelWaiver.pdf.

[5] The CMA's decision prevents Appellees from attempting to merge within the next ten years. Thus, if Appellees overturn the CMA's decision on appeal, they could attempt to merge again. That hypothetical possibility, however, is not enough to cure this case's mootness. *Cf. United States v. Mercy Health Servs.,* 107 F.3d 632, 636 (8th Cir. 1997) (holding the appeal was moot after the merger was abandoned, though appellees "could, at some time in the future, again decide to merge").

doctrine: "those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). "[V]acat[ing] the judgment below" when a civil case "has become moot while on its way here" is the "duty of the appellate court" because it fairly "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 39-40.

The "principal condition to which [courts have] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action," such as by reaching a settlement. *U.S. Bancorp*, 513 U.S. at 24. But that condition is absent—and vacatur is appropriate—where "mootness results from unilateral action of the party who prevailed below." *Id.* at 25. That is just what happened here—Appellees unilaterally abandoned their proposed merger for business reasons—and in *Equitable Resources* and *Mercy Health*. Mot. 5. Now "deprived of a review on the merits" of the judgment below through no fault of its own, the United States "ought not to be forced to acquiesce" in it. *Old Bridge Owners Co-op. Corp. v. Twp. of Old Bridge*,

246 F.3d 310, 314 (3d Cir. 2001). Appellees cite no cases denying *Munsingwear* vacatur in these circumstances[6] and identify no legitimate reason for denying vacatur.

A. *Munsingwear* Vacatur Does Not Turn On An Appeal's Prospective Merits.

Appellees argue, contrary to established precedent, that this Court should not give the United States a "bailout" because "DOJ earned this judgment by bringing a meritless case" that "was contrary to both Supreme Court precedent and economic reality." Response 10-11. A *Munsingwear* vacatur, however, does not turn on an assessment of the appeal's underlying merits. *U.S. Bancorp*, 513 U.S. at 27; p. 2, *supra*. Otherwise, appellants would have to fully brief moot appeals to motions panels in 5,200 words just to obtain vacatur.

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[6] The cases denying *Munsingwear* vacaturs cited by Appellees (at 8-9) are easily distinguishable. In *Humphreys v. DEA*, 105 F.3d 112, 114 (3d Cir. 1996), this Court declined "to vacate [its] previously released decision and withdraw the opinion merely because Dr. Humphreys died" before the mandate was issued. In *U.S. Bancorp*, Petitioner settled. 513 U.S. at 214. And in *Blankenship v. Blackwell*, 429 F.3d 254, 258 (6th Cir. 2005), "Appellants could and should have acted more expeditiously" to protect their ballot-access claim. Here, however, Appellees argue that the United States protected its appellate rights too expeditiously. *See infra* Part II.

Moreover, Appellees misdescribe this case. The district court found that the United States' arguments about competition between the merging parties were supported by "real-world economic reality," while "Defendants opted to tell the Court a story that is not adequately supported by the facts." Op. 74 n.16, 92 (attached to original motion). The court further found that Sabre acquired Farelogix in part to "neutralize" Farelogix as a "competitive threat," and that "evidence suggests that Sabre will have the incentive to raise prices . . . and stifle innovation" following the acquisition. Op. 87. The court even recognized that its ruling was "somewhat odd" because the government had persuaded it "[o]n several [factual] points that received a great deal of attention at trial," "largely due to the surprising lack of credibility on these points of certain defense witnesses, including Sabre CEO Menke, Sabre deal leader Boyle, and Farelogix CEO Davidson." Op. 91-92.

Vacatur is appropriate because Appellees have deprived the United States of an opportunity to argue that the district court misapplied the law to its own factual findings by, among other things, misreading *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018)

(*Amex*), as compelling it to ignore economic realities. Mot. 5 (discussing the outsized practical effect of this holding).[7]

B. Neither The United States Nor The CMA Caused This Appeal To Become Moot.

Appellees also wrongly argue against vacatur because the United States "coordinated extensively with the CMA" before the CMA "deci[ded] to block the Sabre-Farelogix merger." Response 11. Under *U.S. Bancorp*, the relevant question is whether "the party seeking relief" in fact "caused the mootness by voluntary action." 513 U.S. at 24. The United States did not cause the CMA's independent decision that the merger violated U.K. law, and additionally the CMA's decision

[7] The district court reached alternative holdings, but its "foremost" alternative holding was also based on its reading of *Amex*. *See* Op. 75 (identifying the government's "foremost" error as improperly "dissect[ing] Sabre's overall GDS services into" different parts "inconsistent with *Amex*"). While finding that Sabre and Farelogix competed, the court declined to define a market including both firms' products, despite established precedent that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists," *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Op. 75-77. Moreover, contrary to Appellees' suggestion (Response 5), the United States did produce evidence that the merger would harm competition in a two-sided market. *See* Doc. 243, at 30-31 (post-trial brief); Doc. 244, ¶¶239-244 (proposed facts).

(which Appellees are appealing) did not cause the mootness; Appellees alone mooted the case by abandoning their deal for business reasons. *See* pp. 3-4, *supra*.

Appellees now claim that "the CMA's improper actions led [them] to abandon the merger." Response 12. Pre-trial, however, Sabre's counsel told the district court that they planned to renegotiate and thus extend the merger agreement (as they had done previously) if the CMA did not approve the merger: "I think the client's intention would be to move forward with the litigation in the U.K. That, of course, would require us to renegotiate the April 30th contract." 1/17/20 Tr. 22-23 (attached as Exhibit B). Understandably, Appellees could not then have predicted COVID-19, but that underscores why it was their unilateral choice to abandon the deal for business reasons that rendered this appeal moot.[8]

[8] In a March status conference, the district court inquired into "the urgency of this matter" given the COVID-19 pandemic. 3/30/20 Tr. 4 (attached as Exhibit C). Sabre's counsel argued the pandemic's effect on the travel business "underscore[d]" the need for the court to rule quickly. *Id.* at 6-7. Instead of renegotiating the merger agreement during their CMA appeal as previously suggested, Appellees terminated the agreement instead.

II. The United States Did Not Manipulate The Judicial Process By Quickly Filing A Protective Notice Of Appeal.

Appellees also wrongly argue that the United States "manipulate[d] the judicial process" by "rush[ing] to file its [protective] notice of appeal the day after Judge Stark issued his decision," even though the Solicitor General had not yet authorized the appeal. Response 11-12. Under the district court's scheduling order, however, Appellees could consummate the merger seven days after the court's April 7th decision, Doc. 25-2, at 1, and it is "extraordinarily difficult to 'unscramble the egg'" once a merger is consummated. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 353 (3d Cir. 2016) (citation omitted). Thus, the United States filed a protective notice of appeal on April 8, 2020, in case it had to move quickly in this Court for an injunction pending appeal. *See* Doc. 278 ("The United States files this notice to protect its appellate rights, and to give the Solicitor General time to review the decision and determine whether to authorize the appeal, and whether to seek interim equitable relief.").

Once the CMA ruled against the merger on April 9, 2020, the government's need for imminent relief subsided. Contrary to Appellees'

speculation (Response 12), the United States did not know how the CMA would rule beforehand, and was preparing to move for an injunction pending appeal if the CMA allowed the merger.[9]

Appellees' claim that the United States quickly filed its notice of appeal so "the appeal would be pending before the case would become moot" (Response 12) makes no sense in light of the facts at the time and basic legal principles. Because Appellees had represented to the district court that they would renegotiate the merger agreement if the CMA ruled against it, the United States did not know that Appellees would abandon their merger. Also, had the case become moot before the United States filed its notice of appeal, the United States could have moved the district court to vacate its judgment under Federal Rule of Civil Procedure 60(b)(6), *see Dragon Intellectual Prop., LLC v. Apple, Inc.*, 2018 WL 4658208, at *2 (D. Del. Sept. 27, 2018), and then appealed that decision if vacatur were denied. Having already filed a

[9] Even after the CMA ruled against the merger, the United States still considered seeking such injunctive relief because the United States "asked Defendants to confirm that they cannot close the deal unless and until the CMA's decision has been overturned" but they refused to supply such confirmation, merely stating that they were "evaluating options." Doc. 280, at 1-2.

protective notice of appeal, the United States instead decided to move for vacatur in this Court once the Solicitor General authorized this appeal and this motion.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

/s/ Nickolai G. Levin

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May 29, 2020

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Rule 27(d)(2)(1) of the Federal Rules of Appellate Procedure because it contains 2,571 words, excluding the parts of the motion exempted by Rule 27(a)(2)(B) and Rule 32(f).

2. This motion complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using New Century Schoolbook.

May 29, 2020

/s/ Nickolai G. Levin
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing motion with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that all counsel of record are users of the appellate CM/ECF system, and will be served by that system.

/s/ Nickolai G. Levin
Nickolai G. Levin

EXHIBIT A

From: Flipse, Rachel (ATR) </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2385782500384DE69F4EA80023080E92-FLIPSERA>
Sent: Wednesday, February 20, 2019 10:20 PM
To: Anna Caro <[redacted]@cma.gov.uk>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@ATR.USDOJ.GOV>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline (ATR) <Caroline.Laise@ATR.USDOJ.gov>
Subject: RE: Sabre/Farelogix

Dear Anna,

Thank you for sending the waivers. We have requested similar waivers from the parties to allow us to share information we have received as well, and we hope to receive those by the end of this week. We would be happy to have a call next week, but are not available on the morning of the 27th. Are you available at 10 a.m. (DC time) on Thursday, February 28, by chance?

As for timing, we can provide more information after we have waivers in hand, but I will note that Sabre has publicly announced that we have issued a second request, and that they now hope to close the transaction in mid-2019.

Best,

Rachel Flipse

From: Anna Caro [mailto:[redacted]@cma.gov.uk]
Sent: Wednesday, February 20, 2019 7:08 AM
To: Flipse, Rachel (ATR) <Rachel.Flipse@ATR.USDOJ.GOV>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@ATR.USDOJ.GOV>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline (ATR) <Caroline.Laise@ATR.USDOJ.gov>
Subject: RE: Sabre/Farelogix

Classification: **Official**

Dear Rachel

The Parties have now provided waivers to us to allow us to share information with the DOJ on this case (attached for your reference). We wanted to ask whether it would be possible to arrange another call for next week to discuss the markets and sectors and any concerns you may have identified at this stage of your investigation in slightly more detail. Would you be available for a call at 11am (DC time) on Wednesday 27 February?

For our own internal planning purposes, would you also be able to give us an update on the timing of your investigation and when you expect to reach a decision?

Best wishes

Anna

Anna Caro | Principal Case Officer | Mergers | Competition and Markets Authority
Victoria House | Southampton Row | London | WC1B 4AD | 020 [redacted]

From: Anna Caro
Sent: 07 February 2019 15:54
To: Flipse, Rachel (ATR) <Rachel.Flipse@usdoj.gov>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@usdoj.gov>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@usdoj.gov>
Subject: RE: Sabre/Farelogix

Classification: **Official**

Dear Rachel

Many thanks again for taking the time to speak with us last week. The CMA have now decided to open a Phase 1 investigation into the merger. In this context, we have contacted the Parties and asked them to provide us and you with waivers. Once these have been put in place, it might be helpful to arrange another call to discuss updates and case timings.

Best wishes

Anna

Anna Caro | Principal Case Officer | Mergers | Competition and Markets Authority
Victoria House | Southampton Row | London | WC1B 4AD | 020 [redacted]

From: Flipse, Rachel (ATR) <Rachel.Flipse@usdoj.gov>
Sent: 01 February 2019 15:15
To: Anna Caro <[redacted]@cma.gov.uk>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@usdoj.gov>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@usdoj.gov>
Subject: Re: Sabre/Farelogix

Not a problem! 10:30 works for us.

Thanks,
Rachel

Rachel A. Flipse
Trial Attorney
U.S. Department of Justice, Antitrust Division
450 5th Street NW, Suite 8602
Washington, DC 20530
(202) 598-2674 (office)
(202) 230-6203 (cell)

On Feb 1, 2019, at 10:14 AM, Anna Caro <[redacted]@cma.gov.uk> wrote:

> Classification: **Official**
>
> Hi Rachel
>
> Really sorry for the confusion – if you are unable to wait, we will dial in now.
>
> Anna
>
> **From:** Flipse, Rachel (ATR) <Rachel.Flipse@usdoj.gov>

Sent: 01 February 2019 15:08
To: Anna Caro <[redacted]@cma.gov.uk>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@usdoj.gov>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@usdoj.gov>
Subject: Re: Sabre/Farelogix

Hi Anna,

Just confirming that we are still on to speak this morning. We have dialed in to the call.

Many thanks,

Rachel

Rachel A. Flipse
Trial Attorney
U.S. Department of Justice, Antitrust Division
450 5th Street NW, Suite 8602
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(202) 598-2674 (office)
(202) 230-6203 (cell)

On Jan 30, 2019, at 10:19 AM, Flipse, Rachel (ATR) <Rachel.Flipse@ATR.USDOJ.GOV> wrote:

> Thank you, Anna. We look forward to speaking with you on Friday.
>
> Best,
>
> Rachel
>
> **From:** Anna Caro [mailto [redacted]@cma.gov.uk]
> **Sent:** Wednesday, January 30, 2019 10:10 AM
> **To:** Flipse, Rachel (ATR) <Rachel.Flipse@ATR.USDOJ.GOV>
> **Cc:** Schuett, Ruediger (ATR) <Ruediger.Schuett@ATR.USDOJ.GOV>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@ATR.USDOJ.gov>
> **Subject:** RE: Sabre/Farelogix
>
> Classification: **Official**
>
> Dear Rachel
>
> Many thanks – We are available for a call at 10am on Friday. Please use the following dial-in details:
>
> +44 [redacted]
> Participant code: [redacted]
>
> We look forward to speaking with you.
>
> Best wishes
>
> Anna
>
> **Anna Caro** | Principal Case Officer | Mergers | Competition and Markets Authority
> Victoria House | Southampton Row | London | WC1B 4AD | 020 [redacted]

From: Flipse, Rachel (ATR) <Rachel.Flipse@usdoj.gov>
Sent: 30 January 2019 13:56
To: Anna Caro <[redacted]@cma.gov.uk>
Cc: Schuett, Ruediger (ATR) <Ruediger.Schuett@usdoj.gov>; Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@usdoj.gov>
Subject: Re: Sabre/Farelogix

Dear Anna,

Thank you for your email. Unfortunately, we are not available for a call this morning or tomorrow. We are available on Friday between 10 am and 12 pm DC time, if that works for you. If not, please let us know if there are some windows next week that would be convenient.

Best,
Rachel Flipse

Rachel A. Flipse
Trial Attorney
U.S. Department of Justice, Antitrust Division
450 5th Street NW, Suite 8602
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(202) 598-2674 (office)
(202) 230-6203 (cell)

On Jan 30, 2019, at 4:29 AM, Anna Caro <[redacted]@cma.gov.uk> wrote:

Classification: **Official**

Dear Rudi, Caroline and Rachel

Many thanks for getting back to us. I appreciate that this is short notice, but would you be available for a call at 11.30am (DC time) today? Alternatively, we are available tomorrow at 11am (DC time).

Kind regards

Anna

Anna Caro | Principal Case Officer | Mergers | Competition and Markets Authority
Victoria House | Southampton Row | London | WC1B 4AD | 020 [redacted]

From: Schuett, Ruediger (ATR) <Ruediger.Schuett@usdoj.gov>
Sent: 29 January 2019 16:47
To: Anna Caro <[redacted]@cma.gov.uk>
Cc: Alba Ziso <[redacted]@cma.gov.uk>; Laise, Caroline <Caroline.Laise@usdoj.gov>; Flipse, Rachel (ATR) <Rachel.Flipse@usdoj.gov>
Subject: RE: Sabre/Farelogix

Dear Anna,

Thank you very much for your message. We are happy to set up a call with our Transportation, Energy, and Agriculture Section, which is handling this matter.

I have copied Caroline Laise, the Section's Assistant Chief, and Rachel Flipse, who is leading the investigation.

Best regards,
Rudi

Ruediger R. Schuett
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International Section
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202-598-8404 (office)
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ruediger.schuett@usdoj.gov

From: Anna Caro [mailto:[redacted]@cma.gov.uk]
Sent: Tuesday, January 29, 2019 4:47 AM
To: Marshall, Lynda <Lynda.Marshall@ATR.USDOJ.gov>; Schuett, Ruediger (ATR) <Ruediger.Schuett@ATR.USDOJ.GOV>
Cc: Alba Ziso <[redacted]@cma.gov.uk>
Subject: RE: Sabre/Farelogix

Classification: **Official**

Dear all

Further to the email below, would you be able to let us know the name of the person to contact regarding the Sabre/Farelogix transaction? We would like to get in touch in order to arrange a high level call to discuss the merger.

Best wishes

Anna

Anna Caro | Principal Case Officer | Mergers | Competition and Markets Authority
Victoria House | Southampton Row | London | WC1B 4AD | +44 20[redacted]

From: Anna Caro
Sent: 07 January 2019 17:14

To: 'Lynda.Marshall@usdoj.gov' <Lynda.Marshall@usdoj.gov>;
'Ruediger.Schuett@usdoj.gov' <Ruediger.Schuett@usdoj.gov>
Cc: Alba Ziso <[redacted]@cma.gov.uk>
Subject: Sabre/Farelogix

Classification: **Official**

Dear all

I am a Principal Case Officer at the UK Competition and Markets Authority (CMA) working on the anticipated acquisition by Sabre of Farelogix.

The case team has been informed by the Parties' lawyers that the transaction is being notified to the FTC and the DOJ in the US and I would be interested in arranging an introductory telephone call with your agency's case team to discuss the merger.

Could you please email me the name of the person I should contact?

Many thanks in advance for your cooperation.

Kind regards

Anna

Anna Caro | Principal Case Officer | Mergers | Competition and Markets Authority
Victoria House | Southampton Row | London | WC1B 4AD | 020 [redacted]

EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

UNITED STATES OF AMERICA

4 : CIVIL ACTION

Plaintiff, :

5 v :

:

6 SABRE CORPORATION, SABRE GLBL INC., :

FARELOGIX IONC., and SANDLER CAPITAL :

7 V, L.P., :

: NO. 19-1548-LPS

8 Defendants.

- - -

9

Wilmington, Delaware

10 Friday, January 17, 2020

Pretrial Conference

11

- - -

12

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

13

- - -

14 APPEARANCES:

15

UNITED STATES ATTORNEY'S OFFICE

16 BY: SHAMOOR ANIS, ESQ.

17 and

18 UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST DIVISION

19 BY: JULIE S. ELMER, ESQ.,

DYLAN M. CARSON, ESQ.,

20 KATHERINE CELESTE, ESQ., and

VITTORIO E. COTTAFAVI, ESQ.

21 (Washington, District of Columbia)

22 Counsel for Plaintiffs

23

Brian P. Gaffigan
24 Official Court Reporter

25

1 APPEARANCES: (Continued)

2

SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
3 BY: JOSEPH O. LARKIN, ESQ., and
VERONICA B. BARTHOLOMEW, ESQ.
4
and
5
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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following pretrial

4 conference was held in open court, beginning at 8:31 a.m.)

5 THE COURT: Good morning.

6 (The attorneys respond, "Good morning, Your

7 Honor.")

8 THE COURT: Let me have you all put your

9 appearances on the record to get us started, please.

10 MS. ELMER: Good morning, Your Honor. Julie

11 Elmer for the United States.

12 THE COURT: Good morning.

13 MR. CARSON: Good morning, Your Honor. Dylan

14 Carson for the United States.

15 MR. COTTAFAVI: Good morning, Your Honor.

16 Vittorio Cottafavi for the United States.

17 MS. CELESTE: Good morning, Your Honor. Katie
18 Celeste for the United States.
19 MR. ANIS: Good morning, Your Honor. Shamoor
20 Anis for the United States.
21 THE COURT: Good morning to all of you.
22 MR. LARKIN: Good morning, Your Honor. Joe
23 Larkin from Skadden on behalf of Sabre.
24 MR. SUNSHINE: Good morning, Your Honor. Steve
25 Sunshine also on behalf of Sabre.

1 MS. REINHART: Good morning, Your Honor. Tara
2 Reinhart from Skadden also on behalf of Sabre.
3 MR. MASON: Good morning, Your Honor. Dan Mason
4 of Paul Weiss on behalf of the Farelogix defendants.
5 MR. GALLO: Good morning, Your Honor. Ken Gallo
6 of Paul Weiss for Farelogix.
7 MR. HOWLEY: Good morning, Your Honor. Dan
8 Howley on behalf of Farelogix.
9 MR. KREINER: Evan Kreiner, Skadden Arps on
10 behalf of the Sabre defendants.
11 MS. BARTHOLOMEW: Good morning, Your Honor.
12 Veronica Bartholomew on behalf of Sabre.
13 THE COURT: Okay. Well, thank you and welcome

to all of you.

So we're here for the pretrial conference for bench trials scheduled to begin on Monday, January 27th. I have a pretty brief agenda for this morning. Happily for me in the pretrial order, I saw really only one dispute. We'll talk briefly about that. It had to do with the deposition designations.

I do want to talk to you about the number of hours that you need for this trial. I'll walk through some of the other things I saw in the pretrial order and tell you about the mechanics of how I'll run the courtroom in this bench trial. And I will, at the end, give you an

opportunity to raise any issues additionally that you think you may have.

Before we jump into that, any questions from the plaintiff?

MS. ELMER: No, Your Honor.

THE COURT: And from defendants?

MR. LARKIN: No, Your Honor.

THE COURT: Let's talk briefly about the testimony by deposition. My understanding is if I read it correctly, the government wants to follow what I will

11 candidly tell you is my general practice which is you have
12 to use time at trial for any deposition designations that
13 you want me to consider either by reading the deposition
14 testimony in or playing it by video.
15 My understanding is the defendants have
16 something else in mind. If I correctly understand the
17 positions, I'm happy to hear from you a little bit further.
18 Does the government want to say anything about this?
19 MS. ELMER: Your Honor, you have correctly
20 stated what our position is. We intend to put on short
21 videos, probably three or four of them, in trial.
22 THE COURT: All right. The defendants, if you
23 want to propose something else and argue for it, you may.
24 MR. LARKIN: No, Your Honor. I think we don't
25 have any objections. It was simply trying to be as

1 efficient as possible with the Court's time. We're mindful
2 of Your Honor's direction this case will be tried in a week,
3 and we were trying to present the evidence in a way that was
4 mindful of your time, so ...
5 THE COURT: Okay. Well, I do appreciate that.
6 And while I recognize it could seem efficient not to use
7 time together to read me or play video depositions, the

8 reality is when I'm in the courtroom with you, I will be
9 thinking about your case; and when I'm not, I can't promise
10 that I will be thinking about your case; and so to insure
11 that I am exposed to the full record, it works best for me
12 if you take up time in trial for it.
13 It also in my view forces you to really think
14 carefully about what it is is worth your time to put into
15 the record. So we'll go with that approach.
16 Essentially, that means I'm adopting the
17 government's proposals for paragraphs 17 to 19. It was
18 unclear to me how it is you proposed to resolve objections
19 to designations or counterdesignations. I typically use a
20 letter writing process for that after you have identified
21 the objections and met and conferred on them, which it
22 looked like you had agreed to do by two days before you
23 intend to play it.
24 Typically, I would have you thereafter file a
25 letter that clearly identifies where the objected to

1 deposition testimony is and allows each side to provide
2 essentially up to one sentence per objection or response to
3 objection; and you would submit along with that letter the
4 deposition testimony highlighted to show me everything that

5 is designated and especially highlighted to show me where
6 the dispute is, portions of the testimony are.
7 That has worked in the past. If you care to
8 propose something different, you are welcome to do so, but
9 it was unclear how you proposed that I resolve any
10 objections. What does the government want to say?
11 MS. ELMER: That sounds like a good proposal to
12 the government.
13 THE COURT: How about from the defendants?
14 MR. LARKIN: Agreed, Your Honor.
15 THE COURT: All right. Then you will need to
16 work together to make sure I get what I need two days
17 before you intend to play the deposition testimony.
18 All right. There was also a reference at page
19 eight of the pretrial order that the compilation, I take it,
20 of deposition testimony need not be in chronological order.
21 If you all have agreed that you don't need to
22 play the testimony straight through in the order that it
23 was given, that's fine by me. Typically it is played in
24 the order that the testimony was given, but if you are in
25 agreement that that need not be the case, that's fine by me.

1 Is that the agreement that you all have reached?

MS. ELMER: Your Honor, it is. I think we were thinking to play our direct excerpts first and then the defendants could play their's.

THE COURT: When we get to their case-in-chief.

MS. ELMER: Yes, or to the extent it makes sense.

THE COURT: At least you would have that option.

MS. ELMER: Yes, sir.

THE COURT: Is that what you have in mind that is agreeable to you?

MR. LARKIN: I think if there are counterdesignations of the testimony that the government has designated, I think we would propose to play the video at one time. I wouldn't have anticipated that they would play their designations of a witness they have identified and we would wait for the second week of trial to play the same video of the same witness, just subsequent testimony. I understand Ms. Elmer's proposal would be they play the designations in direct in the first 20 minutes of the video and then we would put our 20 minutes on right thereafter.

THE COURT: And that is how it is typically done.

MR. LARKIN: Right.

THE COURT: That's fine. It seems to me you

1 won't have any disputes about this, but you have the
2 flexibility to resolve that.
3 MS. ELMER: We are in agreement with Joe Larkin,
4 Your Honor.
5 THE COURT: All right.
6 MR. LARKIN: Thank you.
7 THE COURT: Now, in terms of the number of hours
8 then for the case, I've got increasing familiarity with your
9 case. The pretrial memoranda is very helpful. Thank you
10 for those.
11 I have previously indicated I don't think you
12 need any more than 20 to 25 hours. I will tell you I don't
13 think you need more than 20 hours. You did not put in a
14 specific request in your proposed pretrial order. What is
15 the government's position at this point for how many hours
16 you are requesting?
17 MS. ELMER: Your Honor, the government still
18 believes that given the complexity of the industry and the
19 fact that we bear the burden of proof, that 30 hours would
20 actually be required, but we do think that with belt
21 tightening, and our best efforts, we can get it down to
22 25 hours.

23 THE COURT: So you are requesting 25?

24 MS. ELMER: Yes, Your Honor.

25 THE COURT: Okay. And what about the

1 defendants?

2 MR. LARKIN: Your Honor, your proposal of 20 to

3 25 hours seems sufficient to us.

4 THE COURT: All right. I think it is probably

5 best for you if I give you specific number so that you can

6 plan for that, so I don't intend to leave you with a range.

7 Did you want to ask for a specific number in that range?

8 MR. LARKIN: Sure. If the government is

9 requesting 25, we would like 25 as well.

10 THE COURT: And to be clear, I will give you

11 both the same amount of time.

12 MR. LARKIN: Okay.

13 THE COURT: Is there any chance you are going to

14 ask for less than 25, knowing that the government will get

15 the same amount or is your request 25?

16 MR. LARKIN: Can I just confer with

17 Mr. Sunshine?

18 THE COURT: Absolutely.

19 MR. LARKIN: Yes. I mean, Your Honor, I think

20 at this time we anticipate 20 hours should be enough, but I
21 think we need to see how the government's case unfolds, but
22 20 hours should be sufficient.
23 THE COURT: All right. Is there anything
24 further you want to say about that?
25 MS. ELMER: Your Honor, the government believes

1 that 25 hours would be the minimum amount of time that we
2 would need in order to put on our case.
3 THE COURT: All right. Well, I am -- and I will
4 ask the record to note -- reluctantly going to give 25 hours
5 to each side, no more than 25 hours to each side.
6 I think I'm being overly generous. As I think
7 we talked about before, I have had many complex trials.
8 25 hours a side is on the very high end. In fact, it may be
9 the most I have ever given the parties, particularly this
10 being a bench trial where I would think you could be even
11 more efficient. Just because I'm giving you 25 hours a side
12 doesn't mean you need to feel at all compelled to use all
13 of it.
14 Let me talk to you about how I keep track of
15 time. It seemed from the pretrial order that you largely
16 understand it, but I want to make sure there is no

17 misunderstanding.

18 Basically, this being a bench trial, if I'm on

19 the bench, someone is being charged for the time.

20 You're, of course, charged the time for your

21 direct examinations, your cross examinations, your redirect

22 examinations, your opening statements, closing arguments if

23 you make one, and I encourage both openings and closings but

24 neither of them is strictly speaking required.

25 In terms of objections to admission of evidence,

1 we will deal with those first thing each morning when we

2 meet. So, for instance, if you have an outstanding

3 objection to the admission of an exhibit that you know is

4 going to be used on direct examination with a witness that

5 day because those have been provided to you the day before,

6 consistent with the process in the pretrial order, you need

7 to raise that objection when we first meet that day.

8 If you try to raise the objection later in the

9 day and you haven't flagged it for me, then it will be

10 deemed waived and the document in that instance would be

11 admitted.

12 At the time that we argue those objections, I

13 will charge you the time that it takes you to argue your

14 objections. So when you are speaking, the clock is running
15 on your time.
16 The time it takes me to articulate my decision
17 on the objection, I will split evenly between both sides.
18 That's pretty much how we keep track of time.
19 Any questions about that from the government?
20 MS. ELMER: Your Honor, no questions about that.
21 Although we do have a number of outstanding objections that
22 we have been trying to negotiate with the defendants in our
23 meet and confers, we have had some success but there is
24 still a number of outstanding issues; and the government
25 was wondering whether it might make some sense to have a

1 magistrate hear some of those disputes during the coming
2 week.
3 THE COURT: Between now and trial?
4 MS. ELMER: Yes, Your Honor.
5 THE COURT: Is that something you propose to the
6 defendants?
7 MS. ELMER: That is something that we would like
8 to propose.
9 THE COURT: Okay. Do the defendants have a
10 position on that?

MR. LARKIN: Your Honor, it's the first time we're hearing about that. I actually thought we were moving through some of these evidentiary objections pretty productively over the last few days.

No objections to seeking help from the magistrate if we need it, but I guess, not to be overly optimistic, but I think we'll have a minimal number of objections that we present to the Court either on the first day of trial or before trial.

THE COURT: Any response to that?

MS. ELMER: That's news to me and good news to me, Your Honor.

THE COURT: Okay. Well, let's do this. I recognize Monday is a holiday. Let me have the Government on behalf of all parties write me a letter by some time on

Wednesday and let me know if you feel you're making progress and you think it's not going to be too much for me to do. You know, let me know that. If either side feels you're not making progress or for any reason you would like the attention of a Magistrate Judge, let me know that as well on Wednesday. That would at least give me Thursday and Friday to find a magistrate judge to see if he or she on could help

you.

MS. ELMER: Thank you, Your Honor.

MR. LARKIN: Thank you.

THE COURT: Any questions about that?

MS. ELMER: No, Your Honor. Thank you.

MR. LARKIN: No. Thank you.

THE COURT: A few other things that I noticed in the pretrial order. None of this is in dispute, as far as I understand it, but things I wanted to point out to you.

As to paragraph 38 and 40, and this is just emphasizing what I've already just told you, you talk about objections to admission of exhibits and objection to use of certain demonstrative exhibits, including exhibits that may be used in openings or closings.

I just want to emphasize, you need to get my attention on those pending objections, those ripe objections first thing in the morning. I really try my best to get those all dealt with first thing in the day so the rest of

the day goes smoothly. If you don't do that and you raise it later in the day, we will deem it to be waived.

The pretrial order contains a maximum universe of exhibits and objections to exhibits. Exhibits on the

5 exhibit list in the pretrial order that are not objected
6 to on the exhibit list, so it's already on your attachment
7 here, listed as an exhibit, and no objections are listed on
8 that table for it. Those exhibits will be received into
9 evidence by operation of the pretrial order once the exhibit
10 is shown to a witness. So that means a couple of things.
11 One is, you do need to show a witness an exhibit
12 if you want it to be made part of the evidentiary record.
13 I don't allow, you know, at the end of trial suddenly a
14 whole universe of exhibits come into evidence that no one
15 took the time to even show to a witness and therefore showed
16 to me.
17 However, you don't necessarily need to have a
18 proper foundation to introduce that exhibit through that
19 witness. If there's no objection to it, then what I'm
20 really trying to do is just make sure it's important enough
21 that you use some time at trial and I have a chance to see
22 and understand if that exhibit is in evidence.
23 At least one time during your examination, you
24 need to formally offer into evidence all of those exhibits
25 that you want to be admitted, you know, provided that you've

1 shown them to that witness. It's typically done best in a

bench trial either at the beginning or at the end of the examination.

If things are working the way they should have, there are no objections at that point because we've already dealt with all of the objections, but for the record it will be clear if you offer them all into evidence by number, either the beginning or the end of the examination, then we'll make clear on the record that there are no further objections at that point.

And I also encourage you before you rest your case to check with my deputies to make sure that all of the exhibits that you think are admitted as part of your case are shown on our record as having been admitted.

Any questions about any of that from the Government?

MS. ELMER: No, Your Honor.

THE COURT: And from the defendants?

MR. LARKIN: No, Your Honor.

THE COURT: Okay. On confidential information, which you all addressed at paragraph 42 to 45 and 55 to 57, it's very difficult to close the courtroom. It's a high burden that you would have to meet. Mechanically, it can be difficult. I sometimes need to have a Marshal present to make sure we can escort people out of the courtroom, lock

the door, et cetera.

I don't intend to close the courtroom. If you do think that you're going to have the need to ask me to close the courtroom for any portion of the trial, you're going to need to give me as much notice as possible and you're going to need to be prepared to make a specific showing as to why. Particularly given that this is a bench trial, there can be ways, or we keep the courtroom open, and if there really is particularly protectable confidential information, it can be conveyed to me and to the witness without the public necessarily hearing it.

For instance, you know, I can see it if you hand me an exhibit. The witness can talk about it without necessarily saying out loud what the information is that we're all looking at. Just because normally you may project things on the screen that the public can see, we can make exceptions to that. That's easier than just closing the courtroom.

All of that said, it's unclear to me if you anticipate this even being an issue. Does the Government have any update on that?

MS. ELMER: Your Honor, our main concern is that

23 the defendants have designated a lot of deposition testimony
24 and exhibits as confidential. We would say an
25 over-designation. For example, some of the testimony of

1 Fair Logic that relates to information that's contained in
2 press releases or in marketing materials that is posted on
3 their website, and it's going to be very hard such that it
4 will be difficult to talk about almost anything in an open
5 courtroom, and so this might be another area where using a
6 Magistrate could be of some assistance to us if we are not
7 able to make better progress on resolving those disputes by,
8 say, Wednesday.
9 THE COURT: Okay. Do defendants want to say to
10 that?
11 MR. GALLO: Your Honor, Ken Gallo. We will
12 endeavor to work this out in the next few days. I'm
13 confident we can do that.
14 THE COURT: I will hope to share your
15 confidence.
16 Do you have a position on that?
17 MR. LARKIN: We do, Your Honor. I know with
18 respect to exhibits, though they have been designated as
19 confidential, I think we reached an agreement earlier this

20 week that if there's a document that has been redacted for
21 confidentiality, that the Government has agreed that that
22 wouldn't be shown up on the screen.
23 THE COURT: It would not be.
24 MR. LARKIN: It would not be shown up on the on
25 the big screen. Your Honor would have it, the witness would

1 have it. I think that's one way to deal with the documents.
2 Testimony is a little bit of a different issue, but I think
3 it would be helpful for us to meet and confer with the
4 Government on that before Wednesday.
5 THE COURT: Okay. Well, certainly, I do expect
6 you to meet and confer on that and update me on Wednesday.
7 As a general matter, if someone were in court live
8 testifying about press releases, it's hard to imagine that
9 that would be something I would close the courtroom for and
10 instead, if possible, I try to apply that same analysis to
11 deposition testimony as if I would if the person were in the
12 courtroom. That said, meet and confer. I will be competent
13 that you can work it out. If you can't, you will let me
14 know Wednesday how you propose we go ahead and resolve those
15 disputes.
16 MR. LARKIN: Okay.

17 THE COURT: Post-trial briefing. You briefly
18 touched upon paragraph 52. Two things to say on this. I
19 will -- we'll talk about it further toward the end of the
20 trial. It's hard for me to imagine that I won't want
21 post-trial briefing. The way you all wrote it in the
22 pretrial order, it suggests that maybe we won't have
23 post-trial briefing, but it seems to me overwhelming and I
24 will need to have some assistance in that regard. If that
25 is the case, I will have you file proposed findings of fact

1 and then a separate brief providing the legal argument.
2 You refer to conclusions of law. Just to make
3 sure we're all on the same page, it used to be some judges,
4 at least here, would have conclusions of law that really
5 were just citations to the law without applying that law the
6 to facts and then they would file a third document called a
7 brief. I dispensed with that second document to the
8 conclusions of law. It's not helpful. What you will file
9 if we do the written submissions after trial are one
10 document, proposed findings of fact, a separate document
11 that basically is a traditional brief, so you don't
12 necessarily need a statement of facts, but the key part of
13 it is that you are applying the law to the facts that you

14 think I should find.

15 One thing I don't have a sense of and would

16 welcome your views at this point. How urgent is it that I

17 get you a decision? I know you told me there's some urgency

18 in getting you the trial, but as I think about what my

19 obligations may be after this trial and how quickly I may

20 need you to brief it and how quickly I may need you to make

21 the decision. I welcome your thoughts. Obviously, you can

22 update me again towards the end of trial.

23 But what is the Government's current thought on

24 that?

25 MS. ELMER: Your Honor, it's our understanding

1 that the termination date of the parties' merger agreement

2 or the defendants' merger agreement is April 30th, but I

3 will let the defendants speak to that.

4 THE COURT: Okay. Thank you.

5 MR. SUNSHINE: Your Honor, good morning. Steve

6 Sunshine.

7 THE COURT: Good morning.

8 MR. SUNSHINE: Ms. Elmer is correct, the

9 termination on the agreement is April 30th. That's the drop

10 dead date. The deal has been pending now for 15 months and

11 there are efficiencies and synergies that aren't being
12 achieved because the two businesses can't come together.
13 There are two obstacles to, both in the transaction. One,
14 of course, is Your Honor's decision in this case. The other
15 obstacle is we're still waiting for final approval of an
16 investigation in the U.K. by the authority there, the CMA.
17 The final drop dead date for them is April 12th. There's
18 some hope and confidence that they'll make a decision before
19 April 12th.
20 So obviously, Your Honor, every day matters.
21 It's a very rapidly evolving industry. There's assets that
22 could be used. So I can't give you a specific date, but
23 speed is of the utmost importance.
24 THE COURT: I should understand by a termination
25 date of April 30th, if, for instance, it took me until

1 May 15th to get a decision, that is unhelpful, at least to
2 your client?
3 MR. SUNSHINE: That's certainly right, Your
4 Honor. I mean, certainly, as a matter of contract law, the
5 deal would terminate. It doesn't mean, of course, it can't
6 be renegotiated, but it has been a very difficult path for
7 these companies on a deal that's really a relatively small

deal in the big scheme of things. So I think that's correct.

THE COURT: And as I started to think about all the other things I have to do, this April 12th deadline that you believe you'll hear from (check) in the U.K. Is that right?

MR. SUNSHINE: That's right, Your Honor. April 12th is actually their statutory deadline. The decision may come prior to April 12th, but April 10th is the end date.

THE COURT: If on or about April 12th you've heard from the CMA that they are not approving the deal, what implications does that have here?

MR. SUNSHINE: Your Honor, that would be a regulatory decision that then would be subject to litigation and I think that there would then be litigation in the U.K. That would relieve the time pressure on Your Honor for making a decision. We still would expect -- I think the

client's intention would be to move forward with the litigation in the U.K. That, of course, would require us to renegotiate the April 30th contract.

Again, the situation in the U.K. is very

5 different. Fair Logic has no customers or revenues there,
6 so the expectation, and it's just our expectation, we
7 certainly can't provide assurance, our expectation is we'll
8 get clearance from the U.K. authorities, but if we don't, it
9 will be a litigation path.
10 THE COURT: Okay. Thank you.
11 MR. SUNSHINE: Thank you.
12 THE COURT: Anything the Government wants to say
13 about any of that?
14 MS. ELMER: No, Your Honor.
15 THE COURT: All right. A couple other things
16 about the pretrial order and some of the mechanics of the
17 trial.
18 First off, if the parties did not identify a
19 dispute in the pretrial order and I don't address the topic
20 today, then what you have in the pretrial order is
21 acceptable to me and is hereby adopted.
22 Uncontested facts. Those will become part of
23 the evidentiary record, but I do that in connection with any
24 post-trial briefing, so you'll need to resubmit any proposed
25 uncontested facts that you want to be part of the record.

1 You'll need to do that in connection with the post-trial

2 briefing. There's no page limit for that. You can agree on
3 as much as you want to agree on and submit that to me after
4 trial.
5 In terms of factual issues to be tried and legal
6 issues to be tried, it didn't seem to me that you need
7 anything from me on that. We're having a trial and that's
8 why, but did I misunderstand, was there anything you think
9 you need from me on what the factual and legal issues are
10 that will be the subject of the trial?
11 MS. ELMER: Your Honor, from the Government's
12 perspective, no.
13 THE COURT: How about from the defendant?
14 MR. LARKIN: No.
15 THE COURT: Witness examinations, live witness
16 examination is limited to direct, cross, and redirect. We
17 generally don't allow recross examination. In terms of
18 approaching a witness, you ask for leave once per witness
19 for leave to approach. It will be granted, and that means
20 that it's granted freely to you for the rest of your
21 examination of that witness. You don't have to ask each
22 time thereafter that you approach.
23 If there happened to be any submissions, written
24 submissions after normal business hours or on the weekend or
25 holidays, I need you to send me a courtesy copy by e-mail.

We have a specific chambers e-mail address for that. Mr. Looby can give that to you if you don't already have it. But in addition to the formal filings of ECF, make sure you submit a courtesy copy to that e-mail address to make sure that we see it.

That's pretty much it on my list. So let me see if there are other issues the parties want to raise. First, from the Government?

MS. ELMER: Your Honor, as a housekeeping matter, paragraphs 47 through 49 of the proposed pretrial order. The United States had set forth a reservation of rights about defendants' expert, Norm Rose. They have withdrawn Mr. Rose, so we withdraw our reservation of rights, and therefore his name should also be removed from paragraph 12 of the proposed witness list.

THE COURT: Thank you. Let me just get confirmation on that from defendants. That's all correct?

MR. LARKIN: Confirmed.

THE COURT: Okay. That's it from the Government?

MS. ELMER: Your Honor, one more item. We seek the Court's guidance about the trial team or the number of

23 people who may appear in a standup role before the Court.
24 We have had a number of attorneys enter appearances because
25 we've had an aggressive trial schedule and we've had a

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1 number of attorneys do depositions. We had depositions in
2 different places on different days, and at the DOJ,
3 generally, we like to allow the attorneys who did the work
4 to also take the witness at trial.
5 So with the Court's permission, we would like to
6 do that. If Your Honor would like us to restrict the number
7 of people who participate in the trial, we're happy to
8 readjust our presentation.
9 THE COURT: I have no request that you restrict,
10 and I view that as entirely your call, but since you raised
11 it, my preference would be that you give as many people
12 opportunities as you think should have it. So I fully
13 encourage that, but that's your call. There's certainly
14 nothing close to a restriction from my perspective.
15 MS. ELMER: Thank you, Your Honor.
16 THE COURT: Okay. Thank you.
17 Issues defendants want to raise?
18 MR. LARKIN: Your Honor, just I think one
19 housekeeping matter. The exhibits are due to Your Honor

20 this Wednesday. Would Your Honor prefer a hard drive or a
21 hard copy to that, and if so, how many sets would Your Honor
22 like?
23 THE COURT: Bear with me.
24 (Pause.)
25 THE COURT: So our normal practice is the formal

1 version of the exhibits that are entered into evidence that
2 will be the basis for my decision we don't actually need
3 until the end of the trial, and they're often provided to us
4 in connection with the post-trial briefing. And when we get
5 there, one set of hard copy, one set electronically, one
6 electronic set as well would be adequate. So from my
7 perspective, I don't need them before trial.
8 MR. LARKIN: Okay.
9 THE COURT: It is typical, although not
10 required, of course, that when a witness is testifying,
11 often you give me binders with copies that are use as sort
12 of working copies but not the official copy. Those are most
13 helpful if you give them to me when the witness is on the
14 stand, but that's not a requirement. Does that help?
15 MR. LARKIN: Yes. Understood, Your Honor.
16 THE COURT: Okay.

17 MR. LARKIN: One other item. We have Your
18 Honor's proposed trial schedule for each of the days. We're
19 just trying to get a sense of breaks and lunch to help with
20 our staff. Do you have any guidance on that? It would be
21 helpful.
22 THE COURT: For better or worse, I don't have
23 a lot of consistency on that. So the first thing to
24 understand, this is what I set out on December 20th, that is
25 the at least then current maximum window that I could give

28

1 you. It's not a guarantee that I will be with you all of
2 those hours. I'm trying my best to keep those hours on
3 those days free for you but things do come up.
4 We will certainly take at least, if we have a
5 full day, we'll take at least one break in the morning, one
6 break in the afternoon and a lunch break. I can keep the
7 lunch break typically to 30 to 40 minutes but I can give you
8 longer if you want. I try to keep the breaks to something
9 on the order of 15 minutes in the morning and the afternoon.
10 Again, because we don't have a jury, we have got
11 some flexibility here. And certainly if anything comes up
12 where a witness or a lawyer needs a break, an unexpected
13 break, I hope you will just let me know and we'll obviously

do our best to accommodate it.

So beyond that, I'm not sure that I can give you more guidance.

MR. LARKIN: Thank you, Your Honor. That's helpful.

There is one other issue that my partner Tara can speak to.

THE COURT: Of course.

MS. REINHART: Tara Reinhart.

One issue that we hope will not be a problem but we have not been able to reach agreement with the DOJ so we thought we should raise it now related to a third-party

witness who we would call, we wanted to call live, he is only available January 31st which will be the fourth day of the trial. He is again a third party. He is a CEO of one of the largest travel management companies, Carlson Wagonlit Travel, and he is located in Minneapolis, and his availability is very important to us.

I think it is important for the Court to hear from him live rather than by video. And we would expect a shortened examination, under an hour for sure. We believe we can put him on at the beginning of the day on Friday at

11 8:30 a.m. and he would be finished before the first break.
12 It is not clear whether the government's case
13 will still be going on at that point, but if it is, we would
14 ask he be taken out of turn and be allowed to testify at
15 that time.
16 THE COURT: Okay. Does the government object to
17 this?
18 MS. ELMER: Your Honor, that day is the day that
19 we expect we would be putting on our expert, and our concern
20 is that our expert would be held over the weekend where we
21 would not be able to communicate with him. And so what we
22 have proposed instead is that defendants -- that we suspend
23 our case-in-chief at the end of the day Thursday and the
24 defendants have all day Friday to present whatever evidence
25 that they would like to present and then we can resume and

1 finish our case-in-chief on Monday, to avoid interrupting
2 his presentation.
3 THE COURT: All right. Well, a couple of
4 things.
5 First, I'm going to be willing to accommodate a
6 schedule concern such as the one raised by the defendants.
7 So it happens often in a bench trial that we have to take

8 witnesses out of order. We try our best. We don't do the
9 just for fun but this seems like good cause, so that is not
10 going to be a problem.
11 If the trial proceeds at the pace that you all
12 expect, and it looks like on the Thursday that may be this,
13 your expert for the government would have to be interrupted,
14 it's not clear to me that you would not be permitted to
15 continue to confer with your expert while he is on direct if
16 he hasn't been passed for cross yet. I'm not sure that
17 there would we be anything to stop you from continuing to
18 confer with him while he is on direct; and I believe, if I'm
19 following you, that's discretionary decision for me, and I
20 would likely exercise my discretion in a way that says you
21 can continue to confer with him as long as you haven't
22 passed him for cross.
23 There are other ways we can deal with this,
24 including possibly the way the government proposes, though
25 that sounds more extreme to me than is probably going to be

1 required, but we can evaluate that on the Thursday of the
2 trial if it comes to pass.
3 So any questions about that?
4 MS. ELMER: No, Your Honor. Thank you, Your

5 Honor.

6 THE COURT: Is there anything further on that?

7 MS. REINHART: No. Thank you very much, Your

8 Honor.

9 THE COURT: Anything else from defendants?

10 MR. MASON: No, Your Honor.

11 THE COURT: It looks like no.

12 MS. ELMER: One more matter I neglected to bring

13 up a moment ago; and that is the witness rule, and the

14 government requests that rule be applied to all witnesses

15 except for the experts and corporate representatives.

16 THE COURT: You mean a sequester rule?

17 MS. ELMER: Yes. Yes, Your Honor.

18 THE COURT: Is there any objection to that?

19 MR. LARKIN: No.

20 MR. GALLO: No objection.

21 THE COURT: No objection. Okay. And do you

22 know who their corporate representatives are going to be?

23 MS. ELMER: That was one other thing we would

24 like to request is defendants disclose who those corporate

25 representatives would be on Wednesday.

1 We have an exchange of witness order that we

must do at noon on that day, and we would request that be rolled into that exchange.

THE COURT: Any objection to that?

MR. LARKIN: No, Your Honor.

MR. GALLO: No objection.

THE COURT: All right. Anything else?

MS. ELMER: That's it, Your Honor.

THE COURT: Is there anything else from the defendants? No.

MR. LARKIN: No, Your Honor.

THE COURT: All right. I will see you in a week in-a-half.

MR. ROVNER: Your Honor, may I?

THE COURT: Yes.

MR. ROVNER: Phil Rovner from Potter Anderson on behalf of United Airlines. Can I approach?

THE COURT: Sure. Good morning.

MR. ROVNER: Good morning, Your Honor. As I said, I am representing United Airlines. United has a witness that has been called, Michael Ty Ratcliffe. He is identified in paragraph 10, No. 17.

I didn't want to interrupt when the issue of confidentiality came up but United Airlines produced documents pursuant to under the protective order, marked

them highly confidential. I think Your Honor addressed the issue about documents not publishing them on the screen.

Our concern only is that when he is on the stand, if he is asked questions about confidential material, we wanted to know how you wanted to address that. I was going to wait but I don't want to surprise you at trial with that, so I thought would come forward today just to raise the issue.

THE COURT: It is better to surprise me today. I appreciate that.

Well, I mean I have the same disinclination that I stated a little while ago to closing the courtroom. Even when there is testimony about confidential documents, I think it can be done in a way that doesn't disclose material that shouldn't be disclosed, but as importantly, I'm not sure that I'm going to be persuaded that there is information at issue in this case that shouldn't be disclosed publicly.

It's great that you are here. I would, of course, expect that you are here when he is testifying.

MR. ROVNER: I will.

THE COURT: There is particularized standards

23 that I'm going to enforce. If there is any chance I'm going
24 to be persuaded to close the courtroom for any portion of
25 the trial, if you want to submit something in writing in

1 advance of his testimony, I would trust the parties would
2 give you a good clue as to when he is going to be called.
3 If you want to educate me in advance with a short letter
4 brief, that's fine. But I mean I certainly can promise I'm
5 willing to hear you, but I'm not at all promising I'm going
6 to be persuaded that I should close the courtroom.
7 MR. ROVNER: I understand, Your Honor. As you
8 said, it's better to surprise you today than at trial. Just
9 as a third party, we're not sure what will be presented
10 because we're not the one doing it, so I just will be
11 surprised perhaps. So I just wanted to make sure that I
12 put you on notice that that could come up. Hopefully, it
13 won't, and the parties are going to be meeting and hopefully
14 resolving these issues.
15 THE COURT: Right. And I think it would happen
16 anyway, but I certainly expect the parties to keep you in
17 the loop, recognizing that you have raised this concern if
18 for no other reason than that it is quite possible that I
19 will charge all of the time that it takes to work this out,

20 and it could be quite laborious, depending on what you
21 argue, I may take that out of the parties' time. So they
22 have every incentive to try to work with you and see if we
23 can resolve this efficiently.
24 MR. ROVNER: Thank you, Your Honor.
25 THE COURT: Thank you. Anyone else?

1 All right. We will be in recess. I will see
2 you all at trial. Thank you very much.
3 (Pretrial conference ends at 9:11 a.m.)
4
5 I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.
6
7 /s/ Brian P. Gaffigan
Official Court Reporter
8 U.S. District Court
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EXHIBIT C

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

UNITED STATES OF AMERICA

4 : CIVIL ACTION

Plaintiff, :

5 v :

:

6 SABRE CORPORATION, SABRE GLBL INC., :

FARELOGIX INC., and SANDLER CAPITAL :

7 V, L.P., : NO. 19-1548-LPS

Defendants.

8 - - -

9 Wilmington, Delaware

Monday, March 30, 2020

10 *Status Telephone Conference*

11 - - -

12 BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

13 APPEARANCES: - - -

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15 and

UNITED STATES DEPARTMENT OF JUSTICE

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held remotely, beginning at 2:40 p.m.)

THE COURT: Hi, everybody. This is Judge Stark. Who is there for the United States, please?

MS. ELMER: Good afternoon, Judge. This is Julie Elmer. And I have with me Shamoor Anis, Craig Conrath, Bobby Lapore, and Rachel Flipse.

THE COURT: Okay. Great. Thank you very much.

And who is there for Sabre?

MR. LARKIN: Good afternoon, Your Honor. This is Joe Larkin from Skadden. I have Tara Reinhart and Steve Sunshine from Skadden with me, and Jane Ann Neiswender from Sabre.

THE COURT: Okay. Great.

And who is there for Farelogix?

MR. MASON: Good afternoon, Your Honor. It's Dan Mason of Paul Weiss for Farelogix defendants. I'm joined by my colleagues from our Washington office, Ken Gallo, Joe Bial, and Dan Howley. I am also joined by Edna Lopez, the general counsel at Farelogix.

THE COURT: All right. Great. Thank you very much.

Let me note for the record it is our case of United States versus Sabre Corp. and Farelogix, Inc., et al., Civil Action No. 19-1548-LPS.

I want to thank you all for calling in and being

available. It may be that others are listening in as well, but, of course, only the parties will have a chance to speak. And I will ask, given that we're on a phone line, if everyone could keep things on mute except for when you are speaking and if the speakers will please identify themselves when they speak.

First, I hope everybody is okay. It seems like pretty much a lifetime ago when we were in court together for trial, even though it's not been that long on the calendar.

I wanted to talk to you all just briefly to tell you that we have been working diligently on our post-trial opinions in this case, but we do still have a lot of hard work ahead of us.

At the moment, I have currently prioritized the opinion in this case as one of my top priorities for April. Of course, I'm dealing with a lot of unforeseen circumstances in court and in my other cases, but at the moment, you guys are right at the top of my list of priorities for the month of April.

But given the unfortunate circumstances in the world due to the pandemic, which I understand has hit the travel industry particularly hard, I figured it would be wise if I just checked in on you to get your updated view as to the urgency of this matter before I devote a

great deal more attention in an expedited way to your case.

So I'm curious about any thoughts you want to share about that, particularly whether anything has changed from your perspective, and particularly as to the urgency.

I'm also curious if anybody knows, given what unfortunately is going on in the United Kingdom at the moment, whether you still expect the CMA to be reporting back on or around April 12th.

So that's the reason for the call, and I'm happy to hear whatever you want to share with me.

Let me start with the government, please. Go ahead.

MS. ELMER: Your Honor, it is our understanding that the statutory deadline of the CMA is April 12th, but that the operative date for the Court to consider is April 30th, which is the date on which the defendants have an option to terminate their merger agreement, and the defendants have the power to extend that date by mutual agreement. In fact, they have already done so at least one time.

The CMA process is separate and parallel, and they aren't looking to us for their timing. So it is our thinking that the Court should take as long as it needs in order to issue its decision, particularly under these

extraordinary circumstances.

THE COURT: Okay. Is there anything else you want to add?

Again, that was Ms. Elmer. The connection is pretty good, but is that right? Was that Ms. Elmer?

MS. ELMER: That is correct, Your Honor. It is Julie Elmer. And that's it for right now from us.

THE COURT: Okay. Wonderful. Thank you very much.

How about from Sabre, please?

MR. SUNSHINE: Your Honor, good afternoon. Steve Sunshine speaking for Sabre.

Your Honor, this is a question that we dealt with many times during the course of the proceeding, and the short answer is that actually nothing has changed. The April 12th date is the statutory deadline. The April 30th date has always been that contract date that has been hanging out there. There is nothing new in the comments that Ms. Elmer is providing.

I will say two things:

One, the crisis has hit the travel agency very hard -- I'm sorry -- the travel business very hard. There is some relief that is still being worked out that is in the government's stimulus bill, so that is all still sorting out, but the contract still is in place. The

parties are required to close, and I think it actually just, I think, underscores the need to have a decision, have clarity, move forward and have these companies combine their assets.

The second, the CMA deadline, remains April 12th. After the trial concluded, Your Honor, I went to actually the final CMA hearing on this matter, and it became very clear to all at the hearing that the CMA panel is quite interested in what Your Honor does. This is a transaction that is principally focused on the U.S., principally addresses U.S. business. There's -- Farelogix has almost -- I'm sorry. Farelogix has no assets, no sales, no customers in the United Kingdom. So we think your decision would be quite persuasive to the CMA and very helpful to get the right resolution in London on a transaction that is a principally a U.S.-to-U.S. transaction.

THE COURT: Okay. And I think on my calendar April 12th is a Sunday. If that is correct, is that truly the statutory deadline as far as you understand it, Mr. Sunshine?

MR. SUNSHINE: Yes, Your Honor. That is the statutory deadline. My suspicion, Your Honor, is that the CMA would not wait until Sunday; that they probably would get the decision at the end of the week, but the actual

deadline is the 12th.

THE COURT: Okay. Is there anything else you want to add for Sabre?

MR. SUNSHINE: I don't. I would invite any of my colleagues if I've missed anything important that should be addressed.

(Pause.)

THE COURT: Okay. It sounds like you covered it. Thank you, Mr. Sunshine.

How about from Farelogix?

MR. GALLO: Thank you, Your Honor. This is Ken Gallo.

We agree with the comments that Mr. Sunshine just made. We appreciate all the effort the Court has undertaken on this case, and we understand the difficult circumstances that you are working under today.

A decision before April 12th would be a great help to Farelogix if it is possible for the Court to do it for the reasons Mr. Sunshine indicated. But beyond that, we have nothing else to add.

THE COURT: Okay. Thank you very much.

Ms. Elmer, anything you want to say in response to what you heard?

MS. ELMER: Yes, Your Honor.

If, as Your Honor knows, the CMA gives a

provisional finding on February 7th that the merger was noncompetition and should be blocked, and if the CMA final report aligns with the CMA provisional findings, then the defendants would be unable to close their transaction unless and until they successfully appeal the CMA decision. And it is our understanding that that would take several months, minimum.

So we do believe that the operative date that the Court should have in mind is that April 30th contract date where the parties can walk away from their agreement and (static) -- the defendants are able to extend by mutual agreement.

THE COURT: Okay. Thank you very much.

Anything that anybody else wants to add?

MR. SUNSHINE: Your Honor, Steve Sunshine again.

One thing that we certainly have seen courts do in other circumstances would be to issue an order which way the Court is ruling with an opinion to follow. And given the state of affairs, that would be a useful way to proceed.

Certainly if Your Honor were to rule in favor of the government, as Ms. Elmer pointed out, there would be a long, detailed process involved.

On the other hand, if Your Honor was so inclined

as to rule in defendants' favor, then I think the ability to achieve those efficiencies straight away would be possible, and it would be clear to CMA and have the U.S. speaking in advance of the statutory deadline.

So that could be quite a helpful way to proceed if Your Honor saw to it.

THE COURT: Okay. Thank you for that.

Anybody else?

MS. ELMER: Your Honor, this is Julie Elmer for the United States. I'd like to respond to that suggestion from Mr. Sunshine.

It's the United States' position that any order that is issued does need to be -- you know, it would be important that it be sufficiently detailed so that all the parties would be able to assess accurately their right of appeal.

THE COURT: Okay. Thank you. Anybody else?

(Pause.)

All right. Well, thank you. This was really for me to get information, and so what you all have said is the kind of input I was looking for, and I will factor it in as I determine how to proceed.

In the meantime, it's good to hear everybody's voice. I trust and hope that you are all safe and healthy, and I hope that that is the case for everybody.

Thanks very much, and we'll let you know if and when we need more from you.

Good-bye.

(The attorneys respond, "Thank you, Your Honor.")

(Status telephone conference ends at 2:53 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court