IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* v. AMR CORPORATION, AMERICAN AIRLINES, INC., and AMR EAGLE HOLDING CORPORATION, *Defendants.*	)	Civil Action No.: 99-1180-JTM

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION *IN LIMINE*
TO EXCLUDE EVIDENCE RELATED TO A MEETING COMPETITION DEFENSE

I. INTRODUCTION

The United States believes that the defendants (collectively, "American") will attempt to offer evidence in support of their claim that their conduct should be immunized from liability under the Sherman Act due to the application of a "meeting competition" defense. Analogizing to the absolute statutory meeting competition defense to price discrimination under the Robinson-Patman Act (15 U.S.C. §13(b)), American argues that if it can show that it merely "matched" the prices set by the low cost carriers ("LCCs"), then -- even assuming that its matching prices were below an appropriate measure of cost -- the Court cannot find in favor of the United States. (American 3/16/01 Memo. at

27.) As set forth below, there is no "meeting competition" defense under Section 2 of the Sherman Act and American should be precluded from offering any evidence in support of this specious claim. Thus, the United States moves *in limine* to exclude evidence related to such a defense pursuant to FED. R. EVID. 402.

II. SUMMARY OF ARGUMENT

A "meeting competition" defense cannot save American from liability in this case for at least the following three reasons. First, there is no judicial authority for a generalized "meeting competition" defense to monopolization claims involving predatory pricing or other predatory acts. No Sherman Act case holds that a meeting competition defense excuses predatory *pricing*, let alone predatory *capacity additions* like the ones at issue in this case. Second, a meeting competition defense to Sherman Act monopolization claims clearly would conflict with the goals of the Sherman Act. American's version of this defense would apply even if a monopolist's prices are indisputably predatory and entrench its monopoly to the detriment of consumers. Third, even if the Court decides to create new law by importing the Robinson-Patman Act meeting competition defense into the Sherman Act, the defense does not apply to sweeping capacity additions like American's that were not made in good faith.

III. DISCUSSION

A. <u>There Is No "Meeting Competition" Defense To Sherman Act Predation</u>

The Robinson-Patman Act's statutory meeting competition defense is an absolute defense to

price discrimination in the sale of a commodity.[1] The prototypical price discrimination case involves a seller who sells the same commodity to two different customers at different prices. The meeting competition defense excuses such discrimination between customers if the seller's lower price was a good faith response to a competitor's lower price. In this case, American responded to lower LCC fares not merely by lowering its own fares, but also by engaging in a predatory scheme of capacity additions that made no business sense except insofar as they eliminated or reduced competition from LCCs. There is no judicial authority allowing a generalized Robinson-Patman-like "meeting competition" defense to monopolization claims involving even simply predatory pricing, let alone to claims involving non-price predatory and exclusionary acts such as those involved in this case.

Not only is there is no judicial authority establishing a "meeting competition" defense to monopolization claims involving non-price predation, it is impossible to imagine how the defense would apply to non-price predatory acts. For example, it is impossible to imagine what would have been "meeting competition" in the context of the non-price "predatory" conduct found in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (refusing to continue joint ski ticket with competing ski resort), or the exclusionary conduct found in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) (limiting availability of replacement parts to competing independent

[1]The Robinson-Patman meeting competition defense is an affirmative defense to price discrimination. As such, the burden of proving affirmatively the defense is on the party charged with a violation of the Act. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978). "In other words, when a prima facie case is made out by plaintiff, the burden shifts to the defendant to show, if he can, that the discriminatory prices were charged in good faith to meet competition within the statutory meaning." 3 VON KALINOWSKI, ET AL., ANTITRUST LAWS AND TRADE REGULATION ¶ 40.02[1] (2d ed. 1999). If the Court decides to import the Robinson-Patman Act defense into the Sherman Act and apply it in this case, American would bear the burden of proving that it met LCCs' competition in good faith.

service organizations). It also is impossible to imagine what "meeting competition" means in a case involving the airline industry, an industry in which passengers pay a wide variety of fares for the same flight. If, for example, an entrant airline with a 100-seat flight offers 80 seats at $125 and 20 seats at $50, is it meeting competition for American to offer 40 seats on a 100-seat flight at $50? Is it meeting competition for American to offer 80 seats at $50? Is it meeting competition if American not only offered an entire 100-seat flight at $50, but also added three more 100-seat flights and sold all the seats at $50? It is difficult to understand how a meeting competition defense to *price* discrimination would apply to the type of conduct engaged in by American in this case.

Moreover, the application of a meeting competition defense to Sherman Act predatory pricing is also with out a legal basis. Meeting a competitor's price is perfectly legitimate in the absence of acts that violate the Sherman Act. However, no case holds that meeting competition excuses predatory pricing that violates the Sherman Act.[2] Indeed, American concedes that the Tenth Circuit has never

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[2]Although there are cases that seem, on their face, to allow a "meeting competition" defense to Sherman Act predatory pricing, closer examination suggests otherwise. For example, in *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982), the Court stated that "[i]t is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors." However, the court went on to find that "plaintiff failed to introduce sufficient evidence to allow a jury reasonably to infer that [defendant] engaged in anticompetitive conduct." *Id.* That is, the court did not find that defendant engaged in predatory pricing but was excused by a "meeting competition" defense; rather, the court found that "the only reasonable inference to be drawn from the evidence," *id.*, was that defendant was merely meeting the price of a competitor *in the absence of any predatory behavior*.

Although the court in *ILC Peripherals Leasing Corp. v. International Bus. Mach. Corp.*, 458 F. Supp. 423, 433 (N.D. Cal. 1978), appears to allow a meeting competition defense, the key basis for the court's decision was plaintiff's failure to show that any of IBM's prices were predatory. *Id.* at 433-434. As in *Richter*, the court did not find that defendant had engaged in predatory pricing but was excused by a "meeting competition" defense. The Ninth Circuit has not found authority allowing a "meeting competition" defense to Sherman Act predatory pricing. In *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982), the court noted that "appellants cite no authority allowing the defense of the meeting competition when a

applied a meeting competition defense in a Sherman Act predatory pricing case. Nonetheless, American argues that if it matched fares set by new entrants it should be entitled to a complete defense to the United States' Section 2 claims, even if American's fares were below an appropriate measure of cost. (American 3/16/01 Memo. at 27.)

It is easy to understand why the case law does not, and should not, support a complete "meeting competition" defense to Sherman Act predatory pricing. Consider another simple example. Suppose American offered a 100-seat flight at $100, but a more efficient new entrant airline offered a 50-seat flight at $50. Suppose that in response American "met the competition" by dropping fares on its existing flight to $50. Finally, suppose that American's $50 fare was $30 below any relevant measure of costs and that American's sole purpose in incurring the loss was to eliminate competition and preserve its monopoly. Although this conduct plainly would violate the Sherman Act, American would have the Court excuse it under a meeting competition defense.[3] In other words, American is asking for license to

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company's prices dropped below its average variable costs." *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1248 (9th Cir. 1982) (collecting cases and specifically noting that *ILC Peripherals* did not involve "a defendant whose prices were proved to be below its marginal or average variable costs").

[3]The commentary on "meeting competition" also recognizes that the defense is inappropriate when it protects actions that create or maintain a monopoly. For example, the most recent edition of Areeda and Hovenkamp's treatise does not support a meeting competition defense when the defense allows actions that tend to create a monopoly by eliminating competition from a more efficient competitor. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 748, at 461-462 (rev. ed. 1996) (premising support for defense on assumption that competitors have equal costs and meeting competition does not tend to create a monopoly). In this case, the LCCs frequently had *lower* costs than American; *i.e.*, the LCCs were more efficient than American. Furthermore, American went well beyond merely matching the LCCs' prices: it engaged in a predatory scheme of capacity additions to maintain and/or acquire monopoly power on many DFW routes. As a result, Areeda and Hovenkamp provide no support for a meeting competition defense in this case.

predate in violation of the Sherman Act as long as it comes up with some evidence that it met LCC fares. Such a defense would turn the Sherman Act on its head because it would excuse any non-price predatory behavior that excluded a more efficient competitor and maintained a monopoly as long as it was accompanied by something that looked like "meeting competition" on price.

B. A "Meeting Competition" Defense Is Inconsistent With The Sherman Act's Goals

As the foregoing example clearly illustrates, a "meeting competition" defense to monopolization would undermine the goals of the Sherman Act. The Supreme Court has stated that "'Congress designed the Sherman Act as a 'consumer welfare prescription.'" *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984) (*quoting Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)); *see also Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 642 (10th Cir. 1987); *Westman Comm'n Co. v. Hobart Int'l Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986). Furthermore, "[c]onsumer welfare is maximized when economic resources are allocated to their best use . . . and when consumers are assured competitive price and quality." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995) (citations omitted). In contrast to the Sherman Act, "the Robinson-Patman Act's framers 'intended to punish perceived economic evils not necessarily threatening to consumer welfare per se.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 143 (2d Cir. 1998) (*quoting Coastal Fuels of P.R. v. Caribbean Petroleum Co.*, 79 F.3d 182 (1st Cir. 1996). Although a meeting competition defense might serve to protect consumer welfare in the context of the Robinson-Patman Act, *see Great Atl. & Pac. Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 83 n.16 (1979) (the meeting competition defense "may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between

sellers."); *see also* 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2352a, at 167 (1999) ("the [Robinson-Patman Act] is certainly less hostile toward competition with such a defense than it would be without one."), importing the defense into the Sherman Act clearly would not protect consumer welfare.

A "meeting competition" defense would legalize Sherman Act predation: it would allow a monopolist airline to set fares below any measure of cost and engage in non-price predatory acts to drive more efficient competitors out of business. Furthermore, the defense would discourage entry: what entrepreneur would even consider starting a new airline to compete with a monopolist knowing that by simply "meeting competition" on fares, the monopolist could price below any measure of costs, flood the market with capacity and increase frequency with the sole intention of driving the entrepreneur out of business? Such legalized predation would yield less entry, fewer flights, lower capacity and higher fares than would prevail if LCCs were given the opportunity to compete on a level playing field. That is, a "meeting competition" defense to monopolization would deprive consumers of a competitive market for air travel, thereby diminishing consumer welfare and undermining the goals of the Sherman Act.[4]

C. Even If "Meeting Competition" Applied, It Would Not Protect American's Predatory Capacity Actions

Even if the Court would consider creating a "meeting competition" defense to Sherman Act predation, the defense would not protect American's sweeping predatory capacity additions for at least

[4]The Supreme Court has stated that "efforts to increase [the meeting competition defense's] availability at the expense of broader, affirmative antitrust policies must be rejected." *United States v. United States Gypsum Co.*, 438 U.S. 422, 459 n.32 (1978). Allowing the defense to apply to monopolization claims clearly would extend the defense's scope at the expense of the Sherman Act's broader policy of protecting competition and consumer welfare. The defense, therefore, should not be applied in this case.

two reasons. First, for a dominant airline to meet LCC fares while exceeding LCCs' capacity and frequency is hardly "meeting" competition. Airlines compete on many terms, including fares, frequency and capacity. To meet the competition on one term while exceeding the competition on other terms cannot be called "meeting competition" in any meaningful sense. American's actions simply cannot be construed as "meeting competition" because American did not merely lower its fares to the LCCs' levels in a narrowly-tailored competitive response to the LCCs; rather, it engaged in a sweeping response that gave it capacity, frequency and availability levels that significantly exceeded those of the LCCs.

Second, even if American merely met LCCs' fares, its capacity additions were not made in good faith. If the Court were to import the Robinson-Patman Act meeting competition defense into the Sherman Act, the defense surely would not allow American to swamp a route with low-fare capacity in order to eliminate competition. The Supreme Court's decision in *Falls City Indus., Inc. v. Vanco Beverage Inc.*, 460 U.S. 428, 450 (1983) suggests that an excessive response to a limited low-price offer by a competitor would violate the good faith requirement of the Robinson-Patman Act's meeting competition defense. *See also* SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, PREDATORY PRICING LAW: A CIRCUIT-BY-CIRCUIT SURVEY 118 (1995) (a lower price "must be reasonable in scope; where one defendant's competitors makes an isolated sale below the market level, the meeting competition defense does not authorize a sweeping cut to that level." (citing *Falls City Indus.*, 460 U.S. at 450)). This suggests that even if the Robinson-Patman Act's meeting competition defense applies, American's excessive low-fare capacity additions in response to limited low-fare offers by LCCs violated the defense's good faith requirement.

IV. CONCLUSION

American would have the Court look only at its fares and completely ignore its predatory capacity additions. As long as it "met" the LCCs' fares, argues American, it is entitled to a "meeting competition" defense even if its fares were below an appropriate measure of its costs, even if its predatory capacity additions eliminated competition from more efficient LCCs, and even if American subsequently raised fares to the detriment of air travelers. There is a good reason that no judicial authority supports such a "meeting competition" defense: to excuse non-price predatory acts under such a defense would be to legalize predation, thereby depriving consumers of the benefits of competition and undermining the goals of the Sherman Act. In the case of the airline industry, the result would be less entry, fewer flights and higher fares than would prevail if LCCs were allowed to compete fairly against an incumbent monopolist. Furthermore, even if the Court would consider making new law, American cannot prevail on a meeting competition defense because its sweeping additions cannot be construed as "meeting competition" in any meaningful sense and because its capacity additions were not made in good faith. Therefore, the Court should enter an order excluding evidence regarding any putative "meeting competition" defense.

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Respectfully submitted,

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