UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. US AIRWAYS GROUP, INC., et al., Defendants.	Civil Action No. 13-cv-1236 (CKK) (Before Special Master Levie)

REPORT AND RECOMMENDATION #1 OF THE SPECIAL MASTER
(Redacted)

Currently pending before the Special Master are Defendants US Airways Group, Inc.'s, and AMR Corporation's (collectively, "Defendants") Motion to Compel Production of Factual Materials and Information Regarding DOJ's Approvals of Four Prior Airline Mergers from Plaintiffs. For the reasons that follow, the Special Master determines that, although Defendants have established the relevance of their requests, the various privileges asserted by Plaintiffs protect almost all of the requested material from disclosure. Accordingly, the Special Master recommends that the Court grant in part and deny in party Defendants' Motion. Pursuant to ¶ 5 of the Order Appointing Special Master [Doc. No. 69], the Special Master certifies this Report and Recommendation for appeal to the Court.[1]

[1] The parties agreed that the issue presented in the instant Motion was of such significance as to warrant use of the expanded word length provisions of ¶ 3 of the Order Appointing Special Master. For similar reasons, the Special Master believes it appropriate to certify this Report and Recommendation for appeal to the Court immediately, in the event any party wishes to appeal.

I. Introduction / Summary

Defendants are two large "legacy" airlines who announced plans in early 2013 to merge. The Department of Justice ("DOJ"), six state Attorneys General[2] and the District of Columbia filed suit to challenge the merger in August 2013.[3] [Doc. No. 1]. The Court appointed the Special Master to oversee discovery, including discovery disputes. [Doc. No. 69].

Defendants and Plaintiffs exchanged requests for production of documents ("RFP's") and interrogatories ("ROG's") in late August and engaged in numerous "meet and confer" sessions addressing the discovery sought. On September 20, Defendants filed the instant Motion to Compel, following which Plaintiffs filed an Opposition and Defendants filed a Reply. Accompanying the court filings were privilege logs submitted by the United States and Plaintiff States along with declarations from Defendants, the United States and Plaintiff States. Upon request of the Special Master, the documents at issue in this Motion were submitted to the Special Master for *in camera* review. The Special Master has considered all of the written submissions, including the documents at issue, and has heard oral argument on the Motion. The matter is now ripe for resolution.

At issue in this Motion are six requests for production and one interrogatory, which seek documents and facts relating to the United States' decisions not to challenge four prior airline mergers. In particular, Requests Nos. 15 – 17 and 19 seek "all documents that constitute, reflect, or contain the facts or forecasts upon which the DOJ based its clearance" of the 2005 merger between US Airways and America West (RFP 15), the 2008 merger between Delta and

[2] The Attorney General for the State of Texas has since reached a settlement agreement on these matters with Defendants and has withdrawn from the litigation. [Doc. No. 95].

[3] An Amended Complaint was filed on September 5, 2013. [Doc. No. 73].

Northwest Airlines (RFP 16), the 2010 merger between United and Continental (RFP 17), and the 2011 merger between Southwest Airlines and AirTran (RFP 19):

> including but not limited to factual information, assumptions, and forecasts concerning geographic market definition, product market definition, market participants, market shares, market concentration, capacity, competitive effects, entry, expansion, efficiencies, supply, demand, and other market conditions related to domestic scheduled air passenger service.

(*See* Mot. Exh. A at 20-21, 23, 27).

RFP 18 seeks:

> All documents that constitute, reflect, or contain the facts or forecasts upon which the DOJ based its decision not to seek to block or obtain a consent decree concerning the sale of slots at Newark related to the 2010 merger between United and Continental, including but not limited to factual information, assumptions, and forecasts concerning geographic market definition, product market definition, market participants, market shares, market concentration, capacity, competitive effects, entry, expansion, efficiencies, supply, demand, and other market conditions related to domestic scheduled air passenger service.

(Mot. Exh. A at 25).

RFP 20 seeks:

> All documents related to the airline merger analysis outlined in The Year in Review: Economics at the Antitrust Division, 2008-2009, Review of Industrial Organization, 2009, vol. 35, issue 4, pages 349-367, including all documents constituting, setting forth, or relating to the facts, studies, analyses, methods, and estimates that were the "basis" for conclude[ing] that the merger was likely precompetitive and ought not be challenged," and all documents referring to this publication that post-date the publication.

(Mot. Exh. A at 29).

ROG 2 asks Plaintiffs to "[p]rovide all of the factual information that each of the Plaintiffs relied upon in making a decision not to challenge under the antitrust laws each of the Previously Cleared Mergers." (Mot. Exh. B at 5). In the only direct reference to Interrogatory 2 in the Motion, Defendants characterize this Interrogatory as "ask[ing] for the same factual information [as in RFPs 15-19] directly." (Mot. at 2).

The privilege log submitted by the United States shows that the responsive discovery consists of eighteen documents which include: five staff recommendation memoranda; five Economic Advisory Group memoranda; four routing and transmittal slips; one PowerPoint presentation; two emails/email strings; and one email containing an attached PowerPoint presentation. (*See* Opp. Exh. B). The State Plaintiffs' privilege log shows that the responsive state discovery consists of two staff recommendation memoranda from the District of Columbia Attorney General's office; one recommendation memorandum from the office of the Michigan Attorney General; one report and two recommendation memoranda from the office of the Pennsylvania Attorney General; and one recommendation memorandum from the office of the Tennessee Attorney General. As noted, the Special Master has reviewed all of this material *in camera*.

II. **Relevance**

a. Legal Standard

Under Rule 26 of the Federal Rules of Civil Procedure,

> [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense … For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

[Fed. R. Civ. P. 26(b)(1) (amended 2000)]. The Rule is designed to "encourage the exchange of information," [*In re England*, 375 F.3d 1169, 1177 (D.C. Cir. 2004)], and, for this reason, "relevance is to be broadly construed" at this stage of litigation. [*Burlington Ins. Co. v. Okie Dokie, Inc.*, 368 F.Supp.2d 83, 86 (D.D.C. 2005) (citing *Food Lion v. United Food & Commer. Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997))]. Likewise,

> [t]he key inquiry is the relevance of the information to the issues in the case, not its eventual admissibility at trial. … [T]he test of relevancy for purposes

> of discovery under Fed. R. Civ. P. 26(b)(1) is broader than the test for admissibility at trial, as the Rule specifically provides. Hence, a party may discover information which is not admissible at trial if such information will have *some probable effect* on the organization and presentation of the moving party's case.

[Estate of Esther Klieman v. Palestinian Auth., 2013 U.S. Dist. LEXIS 134031 at *25-26 (D.D.C. Sept. 19, 2013) (quoting *Smith v. Schlesinger*, 513 F.2d 462, 472-73 (D.C. Cir. 1975))(emphasis added)].[4]

Although the Rule contemplates broad discovery, the court is tasked with limiting "the frequency or extent of discovery otherwise permitted under the rules or by local rule . . . if the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." [Fed. R. Civ. P. 26(b)(2)(C); *see U.S. v. Kellogg Brown & Root Servs*., 284 F.R.D. 22, 26 (D.D.C. 2012)].

The party requesting the discovery, here the Defendants, carries the burden of demonstrating the relevance of any material sought. (*See Kellogg Brown & Root*, 284 F.R.D. at 33). If Defendants make that showing, the burden will shift to Plaintiffs "to prove an applicable privilege." [*Alexander v. FBI*, 186 F.R.D. 185, 187 (D.D.C. 1999)].

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[4] *Schlesinger* pre-dates the 2000 Amendments to the Federal Rules of Civil Procedure. The earlier version of Rule 26 permitted discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," and did not create separate standards for material related directly to a party's claims or defenses and material relevant only to the subject matter of the case. [Fed. R. Civ. P. 26 (b)(1) (amended 1970)]. The Advisory Committee's comments to the 2000 amendments, however, make clear that "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. … When judicial intervention is invoked [in a discovery dispute], the actual scope of discovery should be determined according to the reasonable needs of an action." (Fed. R. Civ. P. 26, cmt. to 2000 amend.) In other words, although "the scope of discovery has narrowed somewhat under the revised rule," "the change, while meaningful, is not dramatic, and broad discovery remains the norm." [*Sanyo Laser Prods. Inc. v. Arista Records, Inc.*, 214 F.R.D. 496, 500 (S.D. Ind. 2003); *see also Thompson v. Dep't of Housing and Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001)]. In this particular case, the "reasonable needs" of this unique and significant antitrust action require appropriately extensive discovery. The Special Master therefore recommends adhering to *Schlesinger*'s recommendation that information be deemed relevant if it is likely to have "some probable effect on the organization and presentation of the moving party's case." (*Schlesinger*, 513 F.2d at 472-73).

b. Discussion

Defendants argue that the material at issue is relevant because it will enable them "to show that this merger is procompetitive even when evaluated using similar models, forecasts, and analyses as those the government itself relied on when it concluded that earlier mergers did not violate section 7 [of the Clayton Act]. [Mot. at 3-4 (citing *U.S. v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir. 1976))].

At oral argument, Defendants elaborated upon this point and explained that, at trial, they likely will present economic models and studies demonstrating that the proposed merger is procompetitive. According to Defendants, the models and studies probably will be similar to those relied upon by the Department of Justice when evaluating the earlier mergers. Defendants anticipate that the government will attack their use of these models by arguing that similar models failed to accurately predict the anticompetitive outcomes of those earlier mergers. In other words, the government will seek to demonstrate that the models it earlier relied upon were in fact fundamentally unsound.

Defendants contend that having access to the actual models used by the Department of Justice will enable them (Defendants) to guard against attacks by Plaintiffs on the "soundness" of Defendants' models. Defendants explain that accessing these models will enable them to show that it was not the unsoundness of the models but, rather, unaccounted-for outside economic forces, in particular the financial recession, which led to the airlines' decreased capacity following the earlier mergers. Adjusting the government's own models and analyses to account for these outside forces will show that those prior mergers are now having procompetitive effects, albeit later in time than the earlier models would have indicated. In other words, the contemplated production of Plaintiffs' analyses is reasonably likely to lead to admissible

evidence that will enable Defendants to show that the economic models which predict procompetitive outcomes, and upon which Defendants may rely here, are in fact viable, sound models.

Defendants argue that they are unable to create their own models based on the "raw data" which Plaintiffs have offered to produce because such "raw data" will omit certain factors essential to the government's analyses, such as the "neutral assumptions" upon which the DOJ's economists aver they relied.[5] (*See* Mot. Exh. D at 66).

Defendants further contend that Plaintiffs themselves "have established the relevance of this inquiry by alleging that the prior airline mergers did not produce the benefits DOJ predicted, and [Plaintiffs are] attempting to use this fact to attack the current merger." (Mot. at 4). By way of example, at oral argument, Defendants referenced numerous paragraphs in the Amended Complaint (¶¶ 34, 35, 36-39; 59-67 & 72) which refer directly to the earlier mergers, and noted that Plaintiffs' RFP No. 3 seeks information regarding the reports and analyses Defendants prepared regarding the four earlier mergers – the same material sought by Defendants.

Plaintiffs argue that the requested material falls outside of the scope of permissible discovery because the government's decision not to challenge earlier, arguably similar mergers is not a defense to the alleged anticompetitive threat posed by this merger.[6] (*See* Opp. at 2-3). For this reason, they contend, documents regarding those earlier decisions cannot be relevant in this matter. (*Id*.) According to Plaintiffs, "[h]ow [they] analyzed other mergers years ago when industry conditions were different has no bearing on legality of this merger" because "every

[5] Defendants submitted an article written by DOJ economists in which the economists addressed the type of analysis upon which they relied when considering the 2008 Delta Airlines – Northwest Airlines merger which included a reference to certain "neutral assumptions." (*See* Mot. Exh. D at 64-67). This article is discussed in greater detail *infra* at § III (e) ("Waiver").

[6] Defendants were very clear during oral argument that they are not seeking the material at issue in order to pursue a defense of selective prosecution.

merger must be evaluated on its own terms in light of current industry conditions." (Opp. at 2-3). Plaintiffs note that they offered to produce to Defendants "the basic factual materials collected in earlier investigations," but claim that Defendants rejected that offer. (*Id*. at 1).

The scope of discovery in this case is framed by Plaintiffs' claim that the proposed merger is likely to "substantially lessen competition, and tend to create a monopoly, in violation of Section 7 of the Clayton Act," [Am. Compl. (Doc. No. 73) at ¶ 13] and by Defendants' defenses to that allegation, including Defendants' contention that the merger is likely to increase, not decrease, competition.

The Special Master finds compelling Defendants' explanation that the requested discovery is relevant because it is likely to provide evidence that Defendants can use to rebut Plaintiffs' claim that the anticompetitive outcomes of the earlier mergers are likely to be replicated if the instant merger is approved. [*See* Reply at 1-2 (citing Am. Compl. at ¶¶ 34-35, 59-67, 72)]. The Amended Complaint addresses each of the four mergers, notes specific anticompetitive outcomes that have resulted from them, and suggests that the proposed merger would have both its own similar negative impact and that the impact would be exacerbated by the effects of the earlier mergers. (*See* Am. Compl. at ¶¶ 59-67).

Having access to Plaintiffs' analyses will enable Defendants to show that certain negative effects resulting from the earlier mergers, such as increased prices and decreased capacity, did not stem from the mergers themselves but, rather, from outside economic factors. In particular, use of Plaintiffs' models may enable Defendants to show that the predicted procompetitive outcomes are coming into being at the current time, thereby refuting Plaintiffs' claims that "the planned merger would be a further step in [the] industry-wide effort" to limit capacity,

"result[ing] in fewer flights and higher fares." (*Id*. at ¶ 59). The requested discovery therefore is likely to lead to admissible evidence.

This finding is supported by the fact that Plaintiffs themselves issued a request (Pls.' RFP No. 3) seeking "documents or data generated, modified, or acquired by you … relating to runs of any model used by the company to estimate or project the market share, passengers, or revenue of existing or additional scheduled air passenger service in a city pair for the purposes of … evaluating or analyzing the effects of any prior airline mergers, including Delta-Northwest, United-Continental, Southwest-AirTran, and US Airways – America West… ." (Reply Exh. 1 at 3).

It is difficult to read Plaintiffs' request as not seeking essentially the same material from Defendants that Defendants seek to obtain from Plaintiffs in the contested requests and interrogatory. That Plaintiffs are seeking this material makes it reasonably likely that Defendants are correct in their theory that Plaintiffs will attempt to attack the unsoundness of Defendants' models by showing that parallel models applied to the earlier mergers did not accurately predict the anticompetitive outcomes of the earlier mergers. The material sought is therefore relevant to the extent that it will enable Defendants to bolster their theory and defend against Plaintiffs' attacks.

Defendants argue that *United States v. Leggett & Platt, Inc*., 542 F.2d 655, 658 (6th Cir. 1976) provides support for the idea that such analyses can be relevant under certain circumstances. [*See* Mot. at 3-4 (citing *Leggett*, 542 F.2d at 658)]. In their Opposition and at oral argument, Plaintiffs seek to distinguish *Leggett & Platt* from the instant case and assert that they are unfamiliar with case law in which a court ordered production of "confidential assessments and internal deliberations." (*See* Opp. at 1, 3).

In *Leggett & Platt*, the Sixth Circuit noted that "investigatory inquiries into other industry acquisitions are relevant, and thereby discoverable unless privileged, to the extent they contain factual materials, such as surveys and economic analyses." (*Leggett*, 542 F.2d at 658). While the Special Master does not take issue with this general proposition, the Special Master does not find *Leggett & Platt* dispositive here. In that case, the government admitted that the requested discovery was relevant and the Sixth Circuit ultimately determined that the documents were privileged and therefore undiscoverable. (*Id*.) The Sixth Circuit's comment, therefore, is *dicta* and not central to that court's holding.

Nonetheless, the fact that *Leggett & Platt* does not provide persuasive authority for a determination of relevance here does not mean that the material is not relevant. Indeed, the Advisory Committee's comments to Rule 26 suggest that claims of relevancy need to be addressed in light of the facts of each particular case:

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. … Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. **In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.**

(Fed. R. Civ. P. 26, cmt. to 2000 amend.)(emphasis added).

This case presents unique circumstances. Plaintiffs claim that earlier mergers, which they elected not to challenge, have resulted in decreased capacity and increased ticket prices, and that the proposed current merger will exacerbate these effects. (*See* Am. Compl. at ¶¶ 59-67). By making this allegation, Plaintiffs placed the four earlier mergers at issue. Their assessment of the predicted outcomes of those mergers is directly relevant to these claims and to the defenses that

may be used to counter these claims. Because relevance is to be broadly construed at this stage, and because Defendants have put forth a reasonable scenario under which the requested material is likely to lead to admissible evidence, the Special Master finds, in the circumstances of this case, that the material is relevant for purposes of discovery.

Based on this finding, the Special Master now examines the applicability of the various invocations of privileges and work product protection. Despite a finding of relevance, the Special Master recommends that the materials sought, with one exception, not be produced because they are protected by the deliberative process privilege and the work product doctrine.

II. Privilege Claims

a. Deliberative Process Privilege

(1) The Privilege

Plaintiffs claim that the deliberative process privilege protects from disclosure all DOJ-generated documents except for document 15 and all of the State Plaintiff documents except for those generated by the office of the Pennsylvania Attorney General.

The deliberative process privilege "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations compromising part of a process by which governmental decisions and policies are formulated." [*In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966) *aff'd* 384 F.2d 979 (D.C. Cir. 1967))]. The purpose of the privilege is to

> assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting

> reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

[Public Citizen, Inc. v. OMB, 598 F.3d 865, 874 (D.C. Cir. 2009) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980))].

For the privilege to apply to a document, the document must be (1) predecisional, meaning that it was created prior to the agency decision at issue; and (2) deliberative, such that it "reflects the give-and-take of the consultational process." [*Judicial Watch, Inc., v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006)]. "Documents including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," are considered deliberative." [*Am. Petroleum Tankers Parent, LLC v. U.S*, 2013 U.S. Dist. LEXIS 96331 at *27 (D.D.C. July 10, 2013)].

The "deliberative" element generally renders purely factual material unprotected "unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." [*In re Sealed Case*, 121 F.3d at 737 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975))].

Moreover, the privilege is qualified and may be overcome by a showing of sufficient need. (*In re Sealed Case*, 121 F.3d at 737). "This need determination is to be made flexibly on a case-by-case, ad hoc basis," and should include an assessment of various factors, including " 'the relevance of the evidence, 'the availability of other evidence,' 'the seriousness of the litigation,' 'the role of the government,' and the 'possibility of future timidity by government employees.' " [*Id*. at 737-38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)].

(2) Discussion

With regard to the "predecisional" element of the privilege, Plaintiffs have submitted a Declaration from William Stallings, Chief of the Transportation Energy and Agriculture Section at the DOJ's Antitrust Division, which avers with respect to the 17 documents[7] to which the United States claims privilege that "all of the documents are confidential communications… which preceded a final decision made in each of the above merger investigations." (Pl. Opp., "Declaration of William H. Stallings," at ¶ 5).[8]

Plaintiffs' privilege logs and the Special Master's *in camera* review of the documents confirm that the dates of each document precede the merger decision in question. (*See generally* Pl. Opp. Exh. B). As Defendants have not challenged the dates associated with the documents and the Special Master has no reason to doubt the declaration or dates provided, the Special Master concludes that the "predecisional" element of the deliberative process privilege has been satisfied.

The "deliberative" element requires a more extensive discussion. Defendants argue that, inasmuch as they seek only "facts" and not "the ultimate policy recommendations conveyed to the relevant decisionmaker," the material must be produced. (Mot. at 5). Plaintiffs respond that Defendants seek not just factual information but, rather, the "'analyses' specifically undertaken to guide government enforcement decisions" which "reflect Plaintiffs' exercise of judgment in sifting through the relevant universe of information and focusing on what attorneys and

[7] As to document 15 only the investigatory files privilege is claimed.

[8] The declarations from the Plaintiff States include similar assertions.

economists consider important in a given case and thus are privileged." [Opp. at 4 (internal citations omitted)].[9]

Factual material may be protected by the deliberative process privilege if it "'reflect[s] an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter' and thus would 'expose the deliberative process within an agency. … Conversely, when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implementing judgment, the deliberative process privilege is inapplicable.'" [*In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 28 (D.D.C. 2008) (quoting *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434-35 (D.C. Cir. 1992))].

Having reviewed the documents, the Special Master agrees with Plaintiffs that the factual material contained in the documents generated by DOJ attorneys and by attorneys for the Plaintiff States, [DOJ Doc Nos. 1-3, 6, 8, 10-13, 16 – 18; State Doc Nos. DC-01 – DC-02, MI-01, TN-01] is encompassed within the deliberative process privilege. These documents clearly are analytical in the selection and evaluation of facts and applicable law and rely upon specific portions of previously completed economic analyses to put forth policy recommendations.

In formulating these documents, the authors selected particular details from DOJ Economic Advisory Group ("EAG") analyses, relied upon those details to offer predictions about the outcomes of the proposed mergers, and issued recommendations based on the predicted outcomes. The Special Master's review of these documents confirms that they are indeed an integral "part of a process by which governmental decisions and policies are formulated," (*Sears*, 421 U.S. at 151), and that factual information in these documents is "inextricably intertwined" with the analyses such that disclosure of the facts will reflect the deliberative process used by the

[9] Defendants' Motion (p. 5) notes that they seek "the facts, data analyses, economic studies, models, and forecasts that underlie those recommendations . . . ."

attorneys in terms of their legal theories and the application of those theories to the facts in each case. [*See FTC v. Boehringer Ingelheim Pharms., Inc.,* 286 F.R.D. 101, 108 (D.D.C. 2012) (citing *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 5 (D.D.C. 2002))].

Moreover, these documents constitute legal advice offered to decision-makers within the DOJ and State Plaintiffs' offices. As the D.C. Circuit has noted, "[t]here can be no doubt that [ ] legal advice, given in the form of an intra-agency memoranda prior to any agency decision on the issues involved, fit exactly within the deliberative process rationale." [*Brinton v. Dep't of State*, 363 F.2d 600, 604 (D.C. Cir. 1980); *see Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 249 F.R.D. 1, 10-11 (D.D.C. 2008)].

The documents prepared by non-lawyer economists employed by the DOJ's Economic Advisory Group [DOJ Doc Nos. 4-5, 7, 9, 14] present a somewhat different question. In these documents, the economists used factual data provided by the proposed merging airlines to analyze the potential outcomes of that merger. "Generally speaking, the [deliberative process] privilege does not protect 'purely factual' data unless revealing that data would 'expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency . . . .'" [*Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 14-15 (D.D.C. 1997) (quoting *Quarles v. Department of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990)]. Plaintiffs have offered to provide the underlying factual data to Defendants, however, and Defendants rejected their request, indicating that they seek not just the facts, but the "factual analyses." (*See* Mot. at 5).

While the facts themselves may not be protected by the deliberative process privilege, the selection of particular economic models is a subjective choice and therefore qualifies for protection. With this differentiation, the Special Master anticipates that the Plaintiffs produce all

of the "basic factual materials collected in earlier investigations" underlying the analyses (*see* Opp. at 1), including both data referenced and not referenced in the memoranda at issue, to the extent that Plaintiffs have not yet produced that material,[10] but does not order Plaintiffs to provide any part of the reports themselves, or the actual models, formulas, or forecasts used in the reports.

"[S]ubjective documents which reflect the personal opinions of the writer rather than the policy of the agency,' are considered deliberative." *Am. Petroleum*, 2013 U.S. Dist. LEXIS 96331 at *27 (quoting *Coastal States*, 617 F.2d at 866)]. The decision to use these models represents the individual economist's or economists' determination that these models, and the selection of the particular facts applied to those models, offer the most accurate means of assessing the merger at issue; it does not represent DOJ's opinion that these models are best suited to the type of data at issue. "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." (*Coastal States*, 617 F.2d at 866).

A brief summary of the documents at issue[11] confirms that they consist largely of subjective opinions, and not merely facts. DOJ Document 4 [26 WORDS REDACTED] Delta and Northwest [21 WORDS REDACTED] Delta and Northwest [32 WORDS REDACTED] Delta and Northwest constitutes a subjective choice – in essence representing his "personal opinion" [19 WORDS REDACTED] Delta's and Northwest's [4 WORDS REDACTED].

Likewise, in DOJ Document 5, [10 WORDS REDACTED] Delta-Northwest [40 WORDS REDACTED]. In reaching this conclusion, the economists [7 WORDS REDACTED]

[10] *See* Opp. at 1. At oral argument, Plaintiffs indicated that they had produced or were in the process of producing to Defendants all of the material submitted to DOJ by the airlines at issue in the earlier mergers.

[11] The highlighted portions show material for which the Special Master recommends redaction.

Delta and Northwest [10 WORDS REDACTED] Delta and Northwest [7 WORDS REDACTED]. This selection of facts and of economic models constitutes a subjective choice that qualifies for protection under the privilege.

Document 7 likewise relies on the economists' own selection of facts and models to issue various conclusions regarding the likely effects of the proposed Delta-Northwest merger [7 WORDS REDACTED]. Here, too, the economist's selection of particular [32 WORDS REDACTED] present subjective choices central to his ultimate findings.

Document 9 is similarly based on a particular selection of facts, inferences, and models, which its author uses to offer predictions of the likely [4 WORDS REDACTED] Southwest Airlines-Air Tran merger. [49 WORDS REDACTED] rests upon a selection of particular facts and upon the use of particular models and formulas chosen by the economist to reach conclusions regarding the harm likely to result from the merger.

Finally, Document 14 presents analyses [4 WORDS REDACTED] of the United Airlines – Continental merger. [41 WORDS REDACTED]. Nonetheless, the release of this material would tend to "prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position," (*Coastal States*, 617 F.2d at 866) because it would tend to disclose that, in the opinion of the memorandum's authors, certain analytic approaches were best suited to the assessment of the merger at issue.

While the use of selected facts and economic models suggests a finding that this material is protected by the privilege, quite important is the concern that permitting discovery of this material will create a risk of "diminish[ing] candor within an agency" (*Petroleum Info. Corp.*, 976 F.2d at1435) by restricting the amount of information provided in recommendations from the EAG to the DOJ decision makers. Each of these documents contains extensive descriptions

of the economists' work, including long, detailed economic analyses and the identification of certain self-selected inferences upon which the economists relied. Disclosing this material creates a real risk that, in the future, economists may be inclined to provide only the bare facts considered and the bare results of their analyses, with little description of how the economist in question reached those conclusions. This outcome would ultimately harm the decision making process by limiting the information provided to the decision maker, thereby inflicting the exact type of harm that the deliberative process privilege is intended to prevent. (*See Public Citizen,* 598 F.3d at 874; *see also Am. Petroleum*, 2013 WL 3562575 at *12).

Finally, while the deliberative process privilege is a qualified privilege that may be overcome by a showing of sufficient need, (*see In re Sealed Case*, 121 F.3d at 737), the Special Master finds that such a showing has not been made in this case.

Factors to be considered in the assessment of need include "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." (*In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d at 634). Although the material requested is relevant (*see supra* § II) and the size of the proposed merger renders this litigation particularly serious, Defendants have not presented persuasive reasons that they have sufficient need for the models, analyses, and conclusions drawn so as to overcome the invocation of the deliberative process privilege.

Defendants aver that they need the information in order to defend the soundness of their own models and to rebut Plaintiffs' claim that the anticompetitive outcomes of the earlier mergers are likely to be replicated if the instant merger is approved. (*See* Mot. at 4, Reply at 2-

3).[12] Plaintiffs, however, have offered to provide to Defendants all of the material which the other airlines provided to DOJ when DOJ considered those earlier mergers.

Using this material, Defendants may complete their own analyses of the earlier mergers and may rely on those analyses defend their own analysis of the current merger and to rebut Plaintiffs' claims. For example, to the extent that Defendants argue that the procompetitive effects of earlier mergers were delayed due to the economic recession, Defendants may present one model showing how the parties may have expected the merger to impact the airline market in the absence of the recession, and one showing how the merger actually did impact the market in light of the recession. Defendants may generate these models independently and do not require access to the actual inferences and models used by Plaintiffs.

For these reasons, the Special Master finds that the deliberative process privilege applies to this material and that Defendants have not demonstrated sufficient need for overcoming that privilege. The Special Master expects that Plaintiffs, as they have represented, will provide Defendants all basic factual material, not already produced, gathered during Plaintiffs' consideration of the earlier mergers.

b. Work Product Protection

(1) The Work Product Doctrine

Plaintiffs claim that the work product doctrine protects from disclosure all of the DOJ documents, except for document 15, and all responsive discovery from the State Plaintiffs.

[12] While Defendants note that they want to know what the "neutral assumptions" were upon which DOJ economists relied, (*see* Mot. Exh. D at 66), the Special Master does not find that such a "need" rises to the level of substantial need or undue hardship in not getting this information. If, as Defendants claim, they wish to show that different neutral assumptions may have produced more accurate results, Defendants can do so using whatever neutral assumptions they choose. While knowledge of DOJ's assumptions might be useful to Defendants, that knowledge is far from necessary to Defendants' stated purposes.

The work product doctrine protects material prepared in anticipation of litigation by an attorney or the attorney's representative. [*U.S. v. Deloitte LLP*, 610 F.3d 129, 134-35 (D.C. Cir. 2010); *see* Fed. R. Civ. P. 26(b)(3)(A)]. Two categories of work product exist: (1) fact work product and (2) opinion work product. "To the extent that work product contains relevant, nonprivileged facts, the [work product protection] merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery. However, to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." [*In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); *see Yeda Research & Dev. Co. v. Abbott GMBH & Co. KG*, 2013 LEXIS 84948 at *26-27 (D.D.C. June 18, 2013); *U.S. v. ISS Marine Servs.*, 905 F. Supp. 2d 121, 133 (D.D.C. 2012); *U.S. v. Clemens*, 793 F. Supp. 2d 236, 244-48 (D.D.C. 2012)].

(2). Discussion

Defendants do not challenge the fact that the materials in question were prepared in anticipation of litigation. The various declarations from the DOJ and the State Plaintiffs aver that the material was "prepared … in the course of an investigation that was undertaken with litigation in mind." [*Safecard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1202 (D.C. Cir. 1991); *see* Opp. Exh. B (Stallings Decl.) at ¶¶ 3-4; Rushkoff Decl. at ¶¶ 3-4; Pascoe Decl. at ¶¶ 4, 8-9; Donahue Decl. at ¶¶ 3-4, 8; Domen Decl. at ¶¶ 4, 7-8]. The Special Master's review of the material confirms that many of the documents offer a direct opinion regarding whether to pursue litigation regarding a particular case and, that in all cases, the opinions offered were designed to inform the decisionmaker's choice in this regard.[13] The

[13] To the extent that certain materials were prepared by non-lawyer economists, it is clear from examination of the documents and declarations submitted by the United States and the Plaintiff States that those materials were drafted

Special Master therefore concludes that the material was prepared in anticipation of litigation and qualifies for protection under the work product doctrine.

Defendants do argue, however, that the work product doctrine "does not protect relevant facts from discovery." (Mot. at 7). The Special Master is concerned that Defendants' argument represents too narrow a view of the doctrine. In fact, the work product doctrine protects both "deliberative material" and "factual materials prepared in anticipation of litigation." [*Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 620 (D.C. Cir. 1997); *see Martin v. Office of Special Counsel, Merit Sys. Protection Bd.,* 819 F.2d 1181, 1187 (D.C. Cir. 1987)]. The difference lies in overcoming the privilege.

While fact work product is protected, that protection can be overcome upon a showing of substantial need and undue hardship. [*In re Sealed Case*, 676 F.2s at 809-10; *see Upjohn Co. v. U.S.*, 449 U.S. 383, 401-02 (1981)]. By contrast, "Opinion work product … is virtually undiscoverable." [*Director, Office of Thrift Supervision v. Vinson & Elkins LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)]. This point is formalized in Rule 26: "If the court orders discovery of [factual] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." [Fed. R. Civ. P. 26 (b)(3)(B)]. "To the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." [*In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982)].

Defendants urge the Special Master to consider the "factual analyses" to be no different from the basic factual material upon which those analyses are based. (Mot. at 7). Those

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at the behest of attorney supervisors at DOJ and the State attorney general offices to inform the attorneys' litigation preparations. The privilege therefore applies to these materials as well as the material drafted by the attorneys themselves. [*See In re Apollo Group, Inc. Sec. Litig.*, 251 F.R.D. 12, 29-30 (D.D.C. 2008)].

analyses, however, were prepared "for the specific purpose of analyzing aspects" of the mergers at issue. [*Exxon Corp. v. Federal Trade Comm'n*, 476 F. Supp. 713, 718 (D.D.C. 1979)]. They are not "purely factual material that contains no opinions or strategic thinking of the [entity] who prepared them, or the attorney for whom they were prepared," [*Cause of Action v. F.T.C.*, 2013 U.S. Dist. LEXIS 116791 at *56 (D.D.C. Aug. 19, 2013)], but, rather, "material which might disclose" the drafting attorneys' or economists' "appraisal of factual evidence." [*Mervin v. F.T.C.* , 591 F.2d 821, 826 (D.C. Cir. 1978)]. Indeed, the major value of these memoranda and reports lies not in the basic factual material, but in how Plaintiffs' economists and attorneys used that data. The assessment of the data using models selected by Plaintiffs and their agents is precisely the type of work product that the doctrine is intended to protect.

The Special Master therefore concludes that the work product doctrine protects the models, forecasts, and analyses as privileged opinion work product that need not be disclosed. Defendants are correct that the work product privilege theoretically is a qualified privilege. In practice, however, opinion work product is "virtually undiscoverable." (*Office of Thrift Supervision*, 124 F.3d at 1307). While it theoretically may be possible to envision a situation of extreme need or extraordinary justification, Defendants have failed to demonstrate that such a situation is present here. As noted in the discussion of "substantial need" as it pertains to the deliberative process privilege, Plaintiffs have indicated a willingness to provide Defendants with the "basic factual materials." (Opp. at 1). Using this material, Defendants may prepare their own analyses of prior mergers, and may use those analyses to defend against Plaintiffs' claims.[14]

[14] To the extent that Defendants argue that Rule 26 (b)(2)(D) should be interpreted to permit access to the analyses of the economists engaged in the preparation material for earlier, unrelated litigation (see Mot. at 8), Rule 26 (b)(2)(D) applies to non-testifying experts retained for the litigation at hand, and not for prior litigation. [*See U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, 288 F.R.D. 222, 227-28 (D.D.C. 2012)]. It is therefore inapplicable to these circumstances. Even if it were applicable here, the rule provides that a party may only obtain, by interrogatory or deposition, an opinion held by a non-testifying expert retained by the opposing party upon a showing of "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on

Finally, the Special Master concludes Defendants have not met the lower standard of "substantial need" and "undue hardship" that would apply if the material in question were considered to be fact, rather than opinion, work product. [*See* FED. R. CIV. P. 26(b)(3)]. "In evaluating whether there is a substantial need, courts have considered factors including: '(1) [the] importance of the materials to the party seeking them for case preparation; (2) the difficulty the party will have obtaining them by other means; and (3) the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks.'" [*Yeda,* 2013 U.S. Dist. LEXIS 84948 at *28-29 (quoting *MeadWestvaco Corp. v. Rexam PLC*, 2011 U.S. Dist. LEXIS 78028 at *4 (E.D. Va. July 18, 2011))].

While the materials sought are important to Defendants in that they would assist Defendants' efforts to support the "soundness" of their economic models and to disprove Plaintiffs' arguments opposing the merger, Defendants have not shown that they are unable to obtain substantially similar material. To the contrary, Plaintiffs have or are in the process of providing to Defendants all of the basic factual material that Plaintiffs considered when assessing the earlier mergers. Using this material, Defendants may develop their own models assessing the earlier mergers and may use these models to show that the use of particular factors would have correctly predicted the outcome of those mergers, and that any anticompetitive outcomes

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the same subject by other means." [FED. R. CIV. P. 26 (b)(2)(D)]. Factors to be considered in evaluating whether the "exceptional circumstances" test has been met include: "(1) the interest in allowing counsel to obtain the expert advice they need in order [to] properly evaluate and present their clients' positions without fear… .; (2) the view that each side should prepare its own case at its own expense; (3) the concern that it would be unfair to the expert to compel its testimony and also the concern that experts might become unwilling to serve as consultants if they suspected their testimony would be compelled; and (4) the risk of prejudice to the party who retained the expert as a result of the mere fact of retention." [*Westrick*, 228 F.R.D. at 228 (quoting *Long Term Capital Holdings, L.P. v. U.S.*, 2003 U.S. Dist. LEXIS 14579 at *2 (D. Conn. May 6, 2003))]. As noted, Defendants may use the basic factual information provided by Plaintiffs to independently obtain expert opinions to support their defenses. There is, therefore, very little reason to mandate production under this rule. Defendants have not shown that "exceptional circumstances" warrant disclosure in these circumstances.

stemming from those outcomes were the result of outside factors, and not due to the consolidation resulting from the mergers.

Likewise, Defendants have put forth no evidence that independently developing this information would cause them any type of "undue hardship," or that they lack the resources to generate their own models based on the factual material provided. To the contrary, Defendants appear to have means equal to those of the government that will enable them to obtain the information they seek. [*See* Pl. Exh. B, "Order Denying BCBS's Motion to Compel Responses to Interrogatories," *United States v. Blue Cross Blue Shield of Michigan*, Civ. No. 10-14155-DPH-MKM , Doc. No. 178 at 5 (D. Mich. 2012)]. In any event, the burden is on Defendants to show that they lack such resources, and Defendants have not put forth a persuasive showing here. (*See Yeda*, 2013 LEXIS 84948 at *26-27). Accordingly, even if the material were simply "fact" work product, Defendants would not be entitled to discover it in these circumstances.

c. Attorney-Client Privilege

Plaintiffs claim that DOJ Document Nos. 1-3, 6, 8, 10-12, 13, and 16-18, and State Document Nos. DC-01, DC-02, MI-01, and TN-01 are protected by the attorney-client privilege.

The attorney-client privilege is designed to protect "confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." [*Tax Analysts*, 117 F.3d at 618 (D.C. Cir. 1997) (citing *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984))]. The privilege only protects communications between attorneys and clients if those communications "rest on confidential information obtained from the client." (*In re Sealed Case*, 737 F.2d at 98-99).

This privilege is not implicated here. Even assuming, as Plaintiffs aver, that the "client" for purposes of these documents are "employees at varying levels of seniority" at DOJ and at the

Plaintiff States' attorney general offices, (Opp. at 7), a review of the material at issue makes clear that the documents in question do not rest on confidential material obtained from those supervisors. To the contrary, the documents rely on data obtained from the airlines, but the airlines were certainly never the "clients" of the attorneys involved. The Special Master therefore concludes that the attorney-client privilege does not protect this discovery. (*See Citizens for Responsibility and Ethics in Washington*, 249 F.R.D. at 4).

d. Investigatory Files Privilege

Plaintiffs claim that all of the DOJ documents, and Plaintiff State documents DC-01, DC-02, MI-01, and TN-01 are protected by the law enforcement investigatory files privilege. Of note, Plaintiffs claim that DOJ Doc. No. 15 is *only* protected by this privilege.

The investigatory files privilege is intended to prevent disclosure of law enforcement material when such disclosure would be "contrary to the public interest in the effective functioning of law enforcement. The privilege serves to preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations." [*Tuite v. Henry*, 181 F.R.D. 175, 176 (D.D.C. 1998), aff'd 203 F.3d 53 (D.C. Cir. 1999)]. "To sustain the claim, three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." [*In re Sealed Case*, 856 F.2d

268, 271 (D.C. Cir. 1988) (citing *Black v. Sheraton Corp. of America*, 564 F.2d 531, 542-43 (D.C. Cir. 1977); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341-42 (D.C. Cir. 1984))].

Plaintiffs have satisfied the second requirement, but have failed to either expressly claim the investigatory files privilege or to designate the privileged material with adequate specificity. Plaintiffs have submitted declarations from William Stallings, Chief of the Transportation, Energy and Agriculture Section at the DOJ's Antitrust Division, and from various senior attorneys with the Plaintiff States' attorney general offices. In each, the declarant states that he or she reviewed the material over which a privilege has been claimed. (*See* Stallings Decl. at ¶ 5; Rushkoff Decl. at ¶ 4; Pascoe Decl. at ¶¶ 7-8; Domen Decl. at ¶ 6).[15] In none of the declarations, however, does the declarant formally assert a claim that the materials are privileged under the investigatory files privilege. Likewise, none of the declarations either delineate the particular material to be specified or explain why that material should be protected.

Plaintiffs' privilege logs do purport to claim that the investigatory files privilege applies to these documents. The logs, however, simply include this privilege as one of many for each document, and suggest that the privilege should apply to the entire document. This is at odds with the purpose of the privilege, which is to preserve the integrity of law enforcement techniques and investigations. (*See Tuite*, 181 F.R.D at 176). It is difficult to see how releasing information regarding economic analyses may hamper future law enforcement efforts, and Plaintiffs have not provided any suggestion as to how disclosure of these documents may have such an effect.

[15] It is not immediately apparent from the Domen declaration that Mr. Domen is the "head of a department having control over the requested information." This discrepancy is immaterial, however. The investigatory files privilege may be found to apply as long as the individual asserting the privilege is a "supervisory personnel of sufficient rank." [*Landry v. FDIC*, 204 F.3d 1125, 1136 (D.C. Cir. 2000)].

Moreover, the privilege itself is qualified, and "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." [*In re Sealed Case*, 856 F.2d at 272 (citing *Black*, 564 F.2d at 545; *Friedman*, 738 F.2d at 1341)]. In balancing these interests, a court must consider,

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources: (10) the importance of the information sought to the plaintiff's case.

[*In re Sealed Case*, 856 F.2d at 272 (quoting *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa 1973); *Friedman*, 738 F.2d at 1342-43)].

Plaintiffs contend that the privilege should apply because "if the requested materials are compelled here to allow Defendants to argue inconsistency, nothing would prevent future litigants from raising the same argument." (Opp. at 8). Plaintiffs' argument ignores the fact that Defendants have not asserted a need for the arguments in order to "argue inconsistency" of enforcement, but rather to defend their own economic modeling and to refute certain claims made in the Amended Complaint. (*See* Mot. at 3-4). Regardless, the investigatory files privilege is not concerned with the type of arguments that may be made by these or future litigants, but with the risk of "chilling" future investigations. Plaintiffs have not provided any reasons that disclosure here would have such an effect on ongoing or future law enforcement investigations.

By contrast, as discussed in § II (b), *supra*, Defendants have put forth numerous reasonable bases for which they need access to this material. The balancing test required by the investigatory files privilege therefore weighs in Defendants' favor, and the Special Master finds that this privilege does not protect the material at issue.

However, because the material is protected by the deliberative process privilege and work product doctrine, this finding should not be construed as a determination that Plaintiffs must disclose this material. The exception is DOJ Document 15, as to which Plaintiffs have not asserted any privilege other than investigatory files. For the reasons outlined above, Plaintiffs have not provided a sufficient reasons that the investigatory files privilege should protect this document, and the Special Master therefore concludes that this document should be disclosed.

e. Waiver

Defendants contend that, even if the material is privileged, Plaintiffs have waived that privilege by releasing public statements about the prior mergers and by permitting its economists to publish an article describing the mergers. (Mot. at 9).

Waiver of the deliberative process privilege occurs when "'specific documents or information' withheld as privileged" were previously disclosed to "'unnecessary third parties.'" [*Elec. Frontier Found. v. U.S. DOJ*, 890 F. Supp. 2d 35, 46-47 (D.D.C. 2012) (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)]. Waivers "should not be lightly inferred," and "release of a document only waives these privileges for the document or information specifically released, and not for related materials." (*In re Sealed Case*, 121 F.3d at 741).

With regard to the work product doctrine, "the party seeking to pierce the privilege must show that the holder of the privilege disclosed work product to a third party under circumstances 'inconsistent with the maintenance of secrecy from the disclosing party's adversary.'" (*Judicial*

Watch, Inc. v. Dep't of Homeland Security, 841 F. Supp. 2d 142, 158 (D.D.C. 2012) (quoting *Deloitte*, 610 F.3d at 140)].

Defendants bear the burden of proving waiver of both the work-product doctrine (*see Judicial Watch,* 841 F. Supp. 2d at 158) and deliberative process privileges. [*See Elec. Frontier Found*., 890 F. Supp. 2d at 46-47]. They have not carried their burden in this case.

The DOJ press releases are brief documents which state DOJ's decision regarding each respective merger and provide brief synopses of the merger, the parties, and the reasoning behind the DOJ decisions. With regard to this reasoning, DOJ provided three sentences explaining its decision not to challenge the Southwest-Airtran merger (*see* Mot. Exh. C at 53); four sentences regarding its decision on the United Airlines – Continental merger (*see* Mot. Exh. C at 54); four sentences regarding its decision in the Delta Airlines – Northwest merger (*see* Mot. Exh. C at 56); and six sentences explaining its decision in the America West – US Airways merger (*see* Mot. Exh. C at 58). Each press release provides only a very broad overview of the agency's reasoning, and in no case do the documents provide any of the analytic or economic modeling information that Defendants have requested. Under these circumstances, the press releases can hardly be said to constitute a waiver of either the work product doctrine or deliberative process privilege.

While the DOJ economists' article "The Year in Review: Economics at the Antitrust Division 2008-2009" does go into greater detail regarding the analytic methods relied upon by the antitrust division, Defendants have not demonstrated that this article creates a waiver. First, the article only discusses the Delta-Northwest merger, so any waiver would be confined to that merger alone. Second, while the article broadly discusses the type of economic modeling used, an *in camera* review of the documents makes clear that the actual analyses were far more

complex than those described in this article. For example, while the article explains the "in conducting [the] analysis [DOJ economists] worked with a number of different hypothetical post-merger schedules" (Mot. Exh. D at 65), the protected documents provide specific examples of these schedules.

While waiver may have occurred as to the specific information discussed in this document, which has already been disclosed to Defendants by virtue of having been included in the article, that waiver does not extend to the more extensive analysis discussed in the actual protected material. Likewise, the discussion of this merger is not "inconsistent with the maintenance of secrecy from the disclosing party's adversary." (*Deloitte*, 610 F.3d at 140). Rather, the decision to withhold more extensive details and formulas from this article suggests an intent to protect the secrecy of that information.

For these reasons, the Special Master recommends against a finding of waiver in these circumstances.

f. Interrogatory No. 2

Finally, to the extent that Interrogatory No. 2 "asks for the same factual material [as in RFPs 15-19] directly," (Mot. at 2), the Special Master finds no reason to recommend that Defendants be permitted to discover directly this material. For the reasons outlined above, while the material is relevant to Defendants' defenses, it is also protected by the deliberative process privilege and work product doctrine. Rule 26 expressly provides that parties are entitled only to "any **nonprivileged** matter that is relevant to any party's claim or defense." [Fed. R. Civ. P. 26(b)(1) (emphasis added)]. The material at issue is plainly privileged, and therefore undiscoverable.

III. Conclusion

For the foregoing reasons, the Special Master recommends that the Court grant Defendants' motion with respect to DOJ Doc. No. 15, and deny Defendants' motion with respect to all of the remaining documents. The Special Master recommends that Plaintiffs be ordered to produce DOJ Doc. No. 15 no later than three calendar days after entry of the Court's Order.

_____/s/ Hon. Richard A. Levie (Ret.)_____
Hon. Richard A. Levie (Ret.)
Special Master