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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20590

In the Matter of	:
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.	:
and	:
JOSEPH L. GALLOWAY	:
Complainants	:
v.	: **Docket OST-99-6410-20**
UNITED AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., CONTINENTAL AIRLINES, INC., US AIRWAYS, INC., TRANS WORLD AIRLINES, INC., AMERICA WEST AIRLINES, INC., ALASKA AIRLINES, INC., AMERICAN TRANS AIR, HORIZON AIR INDUSTRIES, INC., MIDWEST EXPRESS, INC., AIR CANADA, KLM ROYAL DUTCH AIRLINES, TACA INTERNATIONAL AIRLINE& INC. and AIR FRANCE	:
Respondents	:

MOTION FOR LEAVE TO FILE AND REPLY TO ANSWERS TO COMPLAINT
of the
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.
and
JOSEPH L. GALLOWAY

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MOTION FOR LEAVE TO FILE LATE REPLY TO ANSWERS

The American Society of Travel Agents, Inc. ("ASTA"), and Joseph L. Galloway, the Complainants, move for leave to file this reply late. The volume of the answers coming in the middle to of the holiday period (pursuant to an agreed extension of time between ASTA and the airline respondents), combined with an unusual number of other time- critical matters arising

from the most recent reduction of commissions by most of the respondents, prevented the earlier filing of this reply. The completion of the record in this complex matter involving the entire industry and millions of consumers makes it all the more important that the Department receive rebuttal to the claims of the airlines that would, if upheld, prevent on-the-merits consideration of these important questions.

REPLY OF THE AMERICAN SOCIETY OF TRAVEL AGENTS TO ANSWERS

I. Introduction

After review of the largely duplicative answers of the airline respondents, ASTA believes their defense rests upon six core arguments. We address each of these below.

As a. preliminary observation, if this dispute were just about who gets the money (travel agents or airlines), as some airlines claim, ASTA would not have bothered to file the complaint. The airline respondents would, of course, like the Department to take that narrowest possible few of the issues and essentially disclaim jurisdiction over what is portrayed as a simple squabble between private parties about money.

ASTA understands well enough that the Department is not going to adjudicate that question. There is money involved, of course, but the presence of money does not by itself make this a mere private dispute to be resolved, if at all, in the marketplace. The money involved here represents the abusive exercise of market power because without that, this much money could not have been "redistributed" from one sector to the other overnight.[1] Moreover, the power the

[1] The October, 1999 commission cut was, of course, not the first but the fourth consecutive annual reduction, representing in four years' time an overall reduction of 50 percent in the rate of commission paid to travel agents.

airlines have exercised here is not directed only at the short term goal they assert of just thinning down to be more cost competitive in a tough marketplace. This exercise of power is instead intended to pave the way for a very different marketplace, one in which the airlines control the information available to consumers in ways that lead to higher prices and less optimal purchases. In the guise of providing more power to consumers through direct dealing, the airlines seek to set the stage for a market in which consumers have less comparative information and make more poorly informed choices. That, we respectfully submit, is plainly a matter of serious public interest concern and brings this proceeding squarely within the guiding principle of "protection of the public interest" as set forth in American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85.

It also gives the Department ample legal authority to investigate under Section 41712 of the Federal Aviation Act. To commence a public interest focused investigation under that statute, the Secretary does not have to find at the outset that actual unfair methods of competition are being used. That finding is the end of the investigation, not the beginning. The concept of 'unfair methods of competition' is broader than the common law idea of 'unfair competition.' "The provision was designed to supplement the Sherman Act by stopping in their incipiency those methods of competition which fall within the meaning of the word 'unfair." Pan American World Airways, Inc. v. U.S., 371 U.S. 307, 483 (1963) (emphasis added). The Secretary, therefore, need only determine that there are serious matters of public interest at stake to justify an investigation. The ultimate findings must await the development of the record in full. The Secretary's (decision should also be informed by this observation of Justice Brandeis regarding Section 5 of Federal Trade Commission Act, upon which Sec. 41712 is based:

> To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong.[2]

A. ASTA and Joseph Galloway Have All the Standing Needed to Bring This Action.

Among the technical defenses offered by some respondents is that neither ASTA nor Joseph Galloway is a "ticket agent" under the Federal Aviation Act and therefore lack standing to complain under Section 41712. Since both ASTA's travel agency members and Mr. Galloway are active participants in the competitive process surrounding the sale of air travel services, and thus are affected directly by impairments of that process by the actions complained of, the argument is wrong is both cases.

ASTA has a long history of appearances before the Civil Aeronautics Board and the Department in its representative capacity on behalf of "ticket agents" who comprise the vast majority of its membership. Government agencies and the Congress have welcomed ASTA's role in this regard, even when occasionally disagreeing with our point of view. It cannot serve the public interest to require ASTA to nominally remain in the background, using an individual travel agency as a "front" for the presentation of industry views on matters of such importance as these.[3] Collective representation of large industries has always been encouraged and there is nothing in Section 41712 or its history to indicate that representational participation in the complaint process was barred by the enumeration of potential complainants in the statute.

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[2] FTC v. Klesner, 280 U.S. 19, 28 (1929).

[3] The Respondents would then likely argue that there is only one or two complaining parties and thus no evidence of widespread harm to public rather than private interests.

ASTA's participation in this complaint falls squarely within well established principles of associational standing laid down by the Supreme Court in Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), in that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested

In any event, the statute recognizes four categories of parties who can ask the Secretary to initiate an investigation. They include the Secretary himself. Clearly, an investigation may be initiated by the Secretary on his own initiative. In the exercise of its and its members' Constitutional right to petition the Government for a redress of grievances, ASTA could have informally requested the Secretary to initiate an investigation "[O]n the initiative of the Secretary" and, had he done so, no issue of standing would have arisen.

As to Mr. Galloway, while he spends most of his business time plying the trade of retail seller of travel services for airlines and other travel suppliers, we will not engage in the esoteric argument whether he individually is an agent within the technical meaning of Section 41712. We will shortly file a motion to amend the complaint to add Trans-Continental Travel, the agency owned by Mr. Galloway, and indisputably a "ticket agent" under the Act, as a complainant in this case.

B. Travel Agents May and Do Compete with Airline Principals.

It will certainly come as a surprise to travel agents, and most everyone else, if the Department determines in this proceeding that travel agents are not allowed to compete with their principals (a point repeatedly made by the airlines) and that travel agents and airlines are not engaged in actual economic competition with each other (also argued by many of the

respondents). A finding of jurisdiction or standing under Section 41712 is not dependent on finding the existence of such competition, in view of the purpose of the statute discussed in Section I above, but if we are wrong about that, the Department will have no difficulty in finding as a matter of factual reality that the requisite competition does exist.

In the current market, this argument about competition between airlines and agents actually seems pretty silly. Whatever the court may have meant or intended in the case of Illinois Travel, Inc. v. American Airlines, Inc., 700 F. Supp. 1485, 1491-92 (ND Ill. 1988), aff' d, 889 F.2d 75 1 (7th Cir. 1989) by the statement that "there is no true competition between the airline and the agent," there can be no question in the year 2000 that there is rampant cut-throat competition. between airlines and agents throughout the marketplace.

On the face of it, every sale made by a travel agent is one for the airline will not itself make a sale directly for the same transportation. Conversely, every sale made directly by an airline is one that will not be made by a travel agent and one for which a travel agent will not be paid. The "either-or" nature of the outcome is the very essence of competition in its commonly understood sense.

Beyond that, the marketplace behavior of the airlines makes as clear as it is possible to be that they are seeking to increase direct sales at the expense of sales through travel agents. Every day the airlines spend huge sums through advertising and other practices to induce consumers to deal directly with them rather than coming through travel agents. For this very purpose, for example, airline web-sites, and advertisements promoting them, routinely offer frequent-flyer miles bonuses as well as prices that travel agents may not sell. The typical advertisement set out in Exhibit A., by itself, puts to rest the absurd proposition that airlines are not trying to take

business from travel agents. If this rivalry for the business of each consumer is not "competition," what is it?[4]

Acceptance of the airlines' interpretation of the Illinois Cornorate Travel case leads inevitably to the conclusion that airlines also don't compete with each other, a proposition we are sure they will vigorously deny. Travel agents also compete with carriers by offering customers alternative options that enable the customer to leverage among the carriers providing competitive service. They provide consumers with a one-stop, neutral source of comprehensive information and counseling about an incredibly complex, constantly changing array of fares and services. Every airline that offers a service option for carrying out the customer's desired itinerary is in competition with the airline and the agent who offer the customer an alternative to that choice.

It is clear to all that the airlines have now entered travel agents' traditional market for travel information and advice and have been, and are, competing with travel agents there. As stated by United, in its answer, "consumers can go to Travelocity.com, Expedia.msn, Priceline.com, the United connection [sic], and hundreds of other sources to obtain information and even bargain with the airlines for the lowest fares."[5] "[T]he traveling public now has access to fare and schedule information which only a few years ago was available only to travel agents and the airlines?

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[4] The airlines' argument calls to mind "'When I use a word,' Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean- neither more or less."' The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be master- that's all.'" Lewis Carroll, "Alice in Wonderland.

[5] Answer of United Airlines at 5.

[6] Answer of Continental Airlines at 5.

C. The Matters in Dispute Are Issues of Public and Not Merely Private Interest

We addressed this issue preliminarily in the Introduction. While travel agents may individually benefit from the granting of the relief requested in this case, or such other relief as the Secretary finds is required by the public interest, the real issues raised in this proceeding relate to the continued viability of competitive forces and consumer choice in the air travel marketplace. As outlined in the Complaint, the presence of neutral, independent retailers of travel information and transactions is essential to facilitate entry, exit and price and service competition among existing and new entrant airlines. Agents provide every carrier, in every market, an instant professional distribution system ready and able to inform the public of service and price options and to sell all of the inventory available at any moment. Travel agency retailers also promote the use of air transportation services, providing the expanding universe of customers necessary to support a healthy air transportation system. Sustained growth stimulated by the ubiquity of the professional agent is of special importance to new and potential entrants.

While the Internet and other direct dealing solicitations by airlines have had some impact on the business of travel agencies, it is still true, as most of the Respondents admit, that the vast majority of consumers still prefer dealing with travel agencies rather than airlines when purchasing air transportation. The Internet hype notwithstanding, nothing on the technology horizon appears likely to change this as long as travel agents have a fair opportunity to compete and not are squeezed out of the market by unfair airline practices.

If, in the end, consumers change their buying preferences and come to prefer direct dealing with the airlines through the Internet or otherwise, and this change occurs without inappropriate interference with the process of consumer choice by the airlines, there will be no

one left to complain. The marketplace will have spoken. On the other hand, if the result is influenced by airline actions designed to impair the competitive viability of intermediary distributors like travel agents, then intervention by the Department under Section 41712 is not only justified but required by the public interest.

There is, therefore, much more at stake here than who gets what share of the money. At issue is the long-term competitive viability of the airline industry which is rapidly taking on the characteristics of a global cartel.

The airlines would like the Department to proceed on the assumption, which is all it is, that the Internet is the all-encompassing answer to any issues of consumer welfare that might be raised by their behavior. Before the Department accepts the restructuring of consumer information sources in this industry, it should at least take a close look to be sure that the "self service" distribution model, which is what the Internet offers, is not going to soon be controlled by the airlines themselves as the result of practices designed to drive out their competition. Between the current wave of non-merger mergers (called 'marketing alliances'), antitrust immunity, predatory practices against smaller competitors and the assault on consumer access to information represented by the practices outlined in the Complaint, there is a clear and present danger to the viability of competition in the airline industry and most certainly to consumer welfare.

One of the themes of some of the answers is that because the Internet is the perfect distribution solution, travel agents are doomed anyway, so don't waste resources on an investigation. The idea here is that technology has passed the agents by and destroyed their market value.

It is interesting that this idea is suggested at the same time that reports are appearing of a move to "click and mortar" operations by the pure-Internet companies.[7] Producers in other industries and in the travel industry as well are learning the lesson that while you can reduce unit distribution costs to almost nothing by dumping the goods in a tent outside of town, consumers may find that approach too inconvenient and spend their money elsewhere. Achieving the absolute lowest distribution costs does not always produce an optimum, or even acceptable, outcome for consumers. Since consumer interests are supposed to control the outcome in a competitive marketplace, the Department should be leery of any automatic "solutions" proffered by the airlines that are based on one vision of the Internet-based future of retail air travel distribution.

It is premature to make assumptions about the shape and role of the Internet in any distribution system, but particularly one as volatile as air transportation. Internet sales of travel are growing rapidly, of course, but so is the involvement of the so-called 'traditional brick-and-mortar' travel agency. The public still shows a marked preference for having human beings as professional assisters in their quest for a good travel experience, and many successful travel agencies are: seeking places on the Web. The question is whether they will have a fair chance to compete or will the airlines be allowed to snuff them out.

The airlines argue in a related vein that there is nothing to address here because airlines are always free to eliminate intermediary distributors altogether and, therefore, anything less than

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[7] See, e.g. "AOL, Microsoft Set Alliances with Retailers," Washington Post, December 17, 1999, p. E3; "AOL Deal Could Weaken Market's Love for Online Stocks," Washington Post, January 15, 2000, p. El.

total elimination must be alright. It is true, we suppose, that any airline has the right to go out of business. That does not imply, however, that while still in business, any airline is free to engage in any practice, including, for example, violations of the antitrust or labor laws. The freedom to move to entirely direct dealings, if it exists, does not imply the right to use unfair practices to eliminate competition from distributors. Moreover, any airline, acting on its own, that chose the no-distributors path would be taking the full marketplace risk of its action, unless it could through a longer-term process of slow step-wise attrition, ensure that its competitors would match its practices step by step on the road to destroying the intermediaries' role in the market. That, we allege, is exactly what is happening in air transportation today and that is, we submit, the reason that the Department should investigate the allegations in the Complaint.

To close this point, we call the Department's attention to the following observations on the commission cuts by a recognized authority on the changing marketplace:

> ... the last thing airlines want is on-line travel agencies. While airlines publicly praise their agents, in reality airline executives wonder whether agents provide any value to them beyond physical presence. If the airlines could drive on-line agents out of the business and use only the Internet for direct bookings, so much the better.[8]

Airlines took another giant step in this direction recently when four of them announced their intention to create a joint Web-site to sell Internet-only fares not available to others. On

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[8] NOW OR NEVER, Mary Modahl, Vice President of Research, Forrester Research, Inc., at 115 (1999). While Modahl later (id. at 118) suggests that the very low commission rates paid for Internet-originating bookings may have the effect, by restricting entry of on-line agencies, of creating a "future travel agency oligopoly on the Internet," the members of the putative oligopoly, with one exception, are now all owned by airlines.

January 13, the site developer announced that almost two dozen other airlines are joining the project.

> By having 27 carriers make available comprehensive seat inventories at fares as low as or lower than those available from any other source, the new site will raise the bar for one-stop shopping....[9]

Indeed the bar will be raised so high that no one can compete. And if the goal is to eliminate on-line agency competitors, why would they not also seek to emasculate the traditional agencies?

D. The Airlines Themselves Are the Market Force To Which They Claim They Are Responding

A common theme among the answers is that each airline is just responding to market forces mysteriously appearing that compel it to reduce commissions below agency cost levels and shift distribution expense directly to consumers. But as the recent reports of a multi-airline Web-site with special low fare inventory shows, the "market" is being created by the very firms that claim the need to respond to it. In this case the airlines themselves are the market to which they claim to be forced inexorably to respond.

Nothing about the Internet compels the airlines to reduce commissions below the distributors' cost of doing business, any more than it compels the other practices enumerated in the Complaint that have the foreseeable effect of raising agent costs, disadvantaging their competitive effectiveness and directly damaging their relationship with the customer. The need to compete is, in any event, not an excuse for directly harming the ability of competitors to compete. If unchecked, the airlines will succeed in combining their massive economic power through joint Web-sites, the Airlines Reporting Corporation, and exploitation of GDS

[9] Wall Street Journal, January 13, 2000, at B4.

relationships to make it impossible for anyone to compete. They will then do what all predators do – restrict information, raise prices and reduce output, the hallmarks of a cartelized industry with no effective outside competitive pressure.

E. ARC and Individual Carrier "Agreements" With Travel Agencies Do Not Justify the Airlines' i o n s

Some respondents argue that there is no issue here because the travel agency community has entered into agreements that by their terms permit airlines to set any commission they want and to change it anytime they want with or without notice. While some of the individual carrier "addenda" to the ARC Agent Reporting Agreement appear to say that, the Department must be aware that these "agreements" are like credit card contracts – offered on a "take it or leave it basis" with no negotiation whatever. Airlines are so dominant in the distribution of travel (despite their assertion that they don't compete with their agents) that they can dictate any terms they want. Each of the addenda to the ARC agreement is a classic model of an adhesion contract imposed by a powerful party on those without power. Since the airlines maintain that Section 41712 of the Act is limited to public interest disputes, surely they don't mean to say that the Department's power to inquire into their conduct is defeated by a private contract imposed by them on their travel agents.

F. The Lawfulness of Individual Carrier Practices, Even if Presumed, Cannot Defeat An Inquiry Into the Effect on the Public Interest of the Totality of Their Conduct.

The: Respondents maintain that the practices enumerated in the "Cost Squeeze" section of the Complaint are, viewed separately, lawful and therefore are of no relevance to the public interest issues raised in the rest of the Complaint. This illustrates well the choice the Department must make here. The gravamen of the Complaint is that the identified practices, including

commission reductions below cost and use of proprietary information from agent-generated transactions on other airlines, threaten the long-term availability of independent, neutral comparative price and service information for consumers. That is the 'public interest' question presented. ASTA is not asking that the Department adjudicate in this proceeding the lawfulness of, for example, ARC's decision to accredit travel agency customers as "agents" and provide them with agents' standard ticket stock. Rather we ask the Department to examine in a formal investigation the conduct of the airlines in the identified areas, and others which might come to light during the investigation, to determine if there is indeed a threat to the public interest. The Department of Transportation is probably the only agency of government equipped legally and otherwise to investigate such issues. If the Department doesn't do it, it will not be done.

Conclusion

In view of the foregoing, ASTA and Joseph Galloway respectfully request that the Secretary initiate a formal investigation of the airline respondents as requested in the Complaint.

Respectfully submitted,

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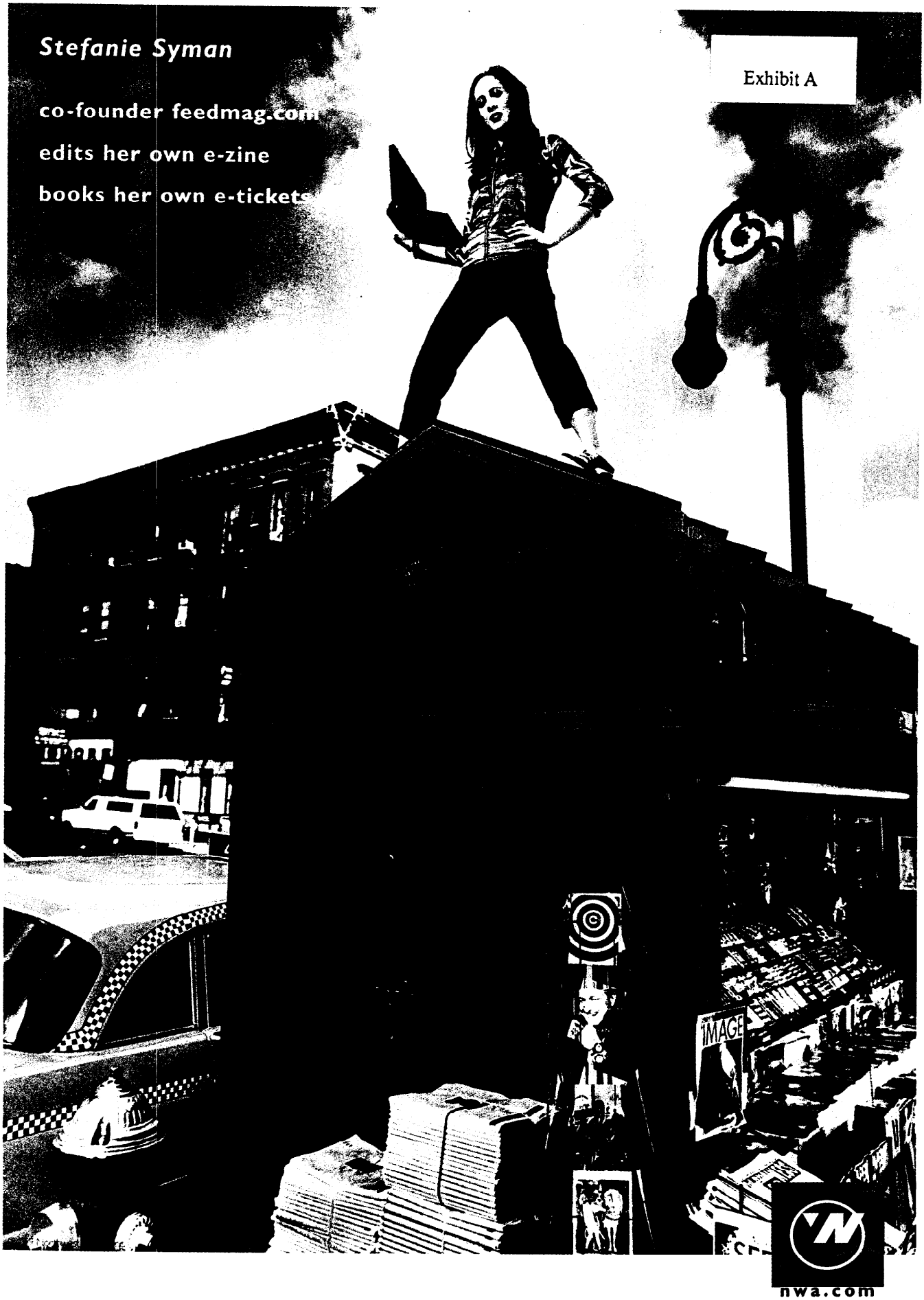
CERTIFICATE OF SERVICE

I certify that I have this January 20, 2000 served a copy of the above Motion for Leave to File and Reply to Answers to Complaint of the American Society of Travel Agents, Inc. and Joseph L. Galloway by first class mail upon counsel identified on the answers filed by each of the Respondent air carriers and foreign air carriers in this proceeding.

Paul M. Ruden



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