Order 2007-3-16
Served: March 20, 2007

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 20th day of March, 2007

Application of

VIRGIN AMERICA INC.

for a certificate of public convenience and necessity under 49 U.S.C. § 41102 to engage in interstate scheduled air transportation

Docket OST-2005-23307

ORDER TO SHOW CAUSE

Summary

By Order 2006-12-13, issued December 27, 2006, the Department tentatively found that the applicant, Virgin America, Inc. ("Virgin America"), had failed to establish that it was a U.S. citizen and that it would be owned by and remain under the actual control of U.S. citizens. In response to that finding, Virgin America filed a substantially revised application proposing material changes in its financial arrangements, its management, and its corporate governance. Although our decisions on air carrier fitness look at the "totality of the circumstances" surrounding the applicant, and not any single factor, it is quite apparent from the record that Virgin America has either made or offered to make fundamental and highly constructive changes in its application. These modifications, when complemented by certain additional conditions we propose to include, now support a tentative finding that the applicant can meet our stringent tests for citizenship.

The most important reforms to be undertaken by Virgin America include:

- Amending a variety of material agreements, including existing aircraft leases, so as to address concerns about the role of the applicant's largest foreign investor in the formation of the airline, by restricting the Virgin Group's power over changes in such agreements and other related matters such as capital expenditures.
- Amending the company's loan agreements with the Virgin Group and other formative documents to eliminate the latter's ability (through veto rights and the requirement of prior written consent) to control the applicant's business.
- Replacing its current Chief Executive Officer, who the record suggested might be considered "beholden" to foreign interests under DOT precedent, with a new official presumably having no prior affiliation with the non-U.S. investors of Virgin America.

- Restructuring its board of directors so as to reduce the number of Virgin Group designees.
- Establishing a voting trust to administer the Virgin Group's 25 percent equity interest in the airline.

Our review shows, however, there do remain a few areas where the revised application, as proposed by Virgin America, still falls short of the rigorous standards we apply in determining whether U.S. interests have "actual control" of the airline. Therefore, we are proposing to stipulate further conditions that the applicant must accept (or persuade us not to require) before making its certificate authority effective. Among other things, these conditions include:

- Requiring that the disinterested directors on the Virgin America board (that is, U.S. citizens) separately approve of the appointment or replacement of the trustee of Virgin Group's shareholdings.
- Amending the voting trust agreement to require that the Trustee vote its shares proportionally to the other shareholders as to any matter that, in the opinion of the U.S. investor directors, creates a conflict of interest between the interests of Virgin Group and that of U.S. shareholders.
- Modifying the Virgin Trademark License Agreement to remove certain geographic and operational restrictions on Virgin America and the requirement that it pay royalties to the Virgin Group should the applicant conduct operations independent of the Virgin name.
- Confirming that the current CEO has terminated employment with the applicant within 90 days of the certificate being issued and any follow-on consultancy within 180 days following termination of employment.
- Submitting copies of all executed and signed agreements prior to certification.
- Reporting to the Department in advance if any additional loans (or other debt funding) are to be provided to it from the Virgin Group.

As discussed further below, based on our review of the amended record of this case we now tentatively find that Virgin America will be a citizen of the United States, will be fit, willing, and able to provide interstate scheduled air transportation of persons, property, and mail, and should be issued a certificate of public convenience and necessity authorizing such operations, subject to conditions.

As is our normal practice, we will provide interested parties 21 days to comment on our tentative findings and conclusions here.[1]

[1] We direct all interested parties that wish to include confidential material (1) to file public versions with such material simply redacted, but without closing up text, so that pagination remains the same in the two versions, and (2) to indicate in the confidential filings what material has been redacted as confidential in the public versions, as some parties have already been doing.

Statutory Standard

Section 41102 of Title 49 of the United States Code ("the Transportation Code") directs us to determine that applicants for certificate authority to provide interstate scheduled air transportation of persons, property and mail are "fit, willing, and able" to perform such transportation and to ensure that all operations relating to this authority conform to the provisions of the Transportation Code and the regulations and requirements of the Department. In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to resources sufficient to commence operations without posing an undue risk to consumers, and (3) will comply with the Transportation Code and regulations imposed by Federal and State agencies. We must also find that the applicant is a U.S. citizen, which includes the requirement that U.S. citizens have actual control of the air carrier.

Background

On December 8, 2005, Virgin America filed an application in Docket OST-2005-23307 requesting a certificate under 49 U.S.C. § 41102 authorizing it to provide interstate scheduled passenger air transportation. The applicant accompanied its application with information required by section 204.3 of our regulations (14 CFR 204.3). Subsequently, Virgin America supplemented its application with additional evidentiary material on December 13, 2005, March 3, April 25, July 27, and August 15, 2006, along with several Motions for confidential treatment.

Various preliminary procedural pleadings and answers in opposition to Virgin America's application were filed by interested parties, including Continental Airlines, Inc. ("Continental"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), Allied Pilots Association ("APA"), United Air Lines, Inc. ("United"), Air Line Pilots Association ("ALPA"), and US Airways, Inc. ("US Airways").[2]

Upon review of the record and the totality of the circumstances, by Order 2006-12-13, issued December 27, 2006, the Department tentatively found that less than 75 percent of the total equity of the applicant was held by U.S. citizens and that Virgin America was under the actual control of the Virgin Group, and thus concluded that Virgin America was not a U.S. citizen as defined in 49 U.S.C. § 41102 (a)(15) and proposed to deny its application for certificate authority to provide interstate scheduled air transportation as a U.S. certificated air carrier. (Objections to the order were due by January 10, 2007, with answers to objections due within 7 business days thereafter.) Pleadings prior to the show cause order are summarized in that order.

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[2] *See* Order 2006-12-23, issued December 27, 2006, for a summary of pleadings filed prior to the Department's tentative determination in this proceeding.

Procedural Pleadings

On January 8, 2007, Virgin America filed a Motion requesting that the Department extend the due date for objections to Order 2006-12-23, from January 10 to January 16, 2007, stating that additional time would allow the applicant to submit to the Department detailed and thorough responses describing its full compliance with the variety of issues regarding its citizenship raised in that order.

By Notice dated January 10, 2007, the Department determined it appropriate to grant the applicant's request and also extended the period for the filing of answers to objections to January 30, 2007.

On January 18, 2007, Virgin America filed its objection to Order 2006-12-23, and a motion for confidential treatment of its Confidential Exhibits and Confidential documents. Along with this, the applicant filed Supplement No. 5 to its application.

In light of the substantial amount of information filed, the Department, by Notice dated January 19, 2007, found it in the public interest to extend the period for the filing of answers to Virgin America's objection and set February 1, 2007, as the due date for answers and comments on any outstanding procedural issues.

On January 19, 2007, American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and US Airways, Inc. ("US Airways") jointly filed a motion requesting the suspension of further procedures in this case. The Movants argued that Virgin America should be required to submit to the docket executed copies of all "amendments, new agreements, and other documents" described in this motion that Virgin America had only summarized and characterized in its Objections to Order 2006-12-23, served on December 27, 2006.[3] The Movants complained that executed copies of the documents had not been produced and state that the Department requires them to analyze Virgin America's new application. The Movants argue that "fairness and due process require a meaningful opportunity for interested parties to review and analyze the actual language of the purported amendments and new agreements, just as the parties were able to do in relation to the source documents underlying Virgin America's initial application."[4]

On January 22, 2007, the Air Line Pilots Association ("ALPA") filed an answer in support of the joint motion filed by America, Delta, and US Airways on January 19, 2007 "for suspension of further procedures pending submission by Virgin America of additional documents. ALPA indicated that the applicant's objections revealed its intent

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[3] Joint Motion of American Airlines, Inc., Delta Airlines, Inc., and US Airways, Inc. for Suspension of Further Procedures Pending Submission by Virgin America of Additional Documents, January 19, 2007, at 8. The Movants indicate that, among the missing documents, the amended Trademark License Agreement and the affidavits of Airbus and GECAS were listed as being included in Virgin America's exhibits filed on January 17, but "[were] not provide[d]…to the interested parties." Joint Motion of American Airlines, Inc., Delta Airlines, Inc., and US Airways, Inc. for Suspension of Further Procedures Pending Submission by Virgin America of Additional Documents, January 19, 2007, at 5.

[4] *Id.*, at 4.

"to make numerous and substantial amendments to key documents underlying its application" but that the applicant had failed to furnish the revised documents to interested parties and "appears not to have filed many of them with the Department."[5] ALPA concurred in the Movants' view that Virgin America's objections constitute a new application and with their argument that "fundamental fairness and due process dictate that the Department Suspend procedures until Virgin America has filed all of its amended documents in the docket and…" allow 21 days for responses.[6]

On January 23, 2007, Continental Airlines, Inc. ("Continental") filed an answer in support of the joint motion filed by American, Delta, and US Airways on January 19, 2007, requesting that the Department suspend further proceedings in this case "until Virgin America produces the amendments, new agreements and other documents in its January 17, 2007 response to Order 2006-12-23" and 21 days from when the record is declared complete to respond to "Virgin America's 'new application and objections to the show cause order.'"[7]

On January 25, 2007, Virgin America notified the Department of its intent to file additional evidentiary material in the record of this case, further supporting its request, including, among other things, the amended and revised agreements noted by the interested parties in their January 19 Joint Motion.

Subsequently, by Notice dated January 26, 2007, the Department provided interested parties an additional 14 days from the date that Virgin America submitted this material to file answers to the applicant's objection, and dismissing as moot the Joint Motion filed by American, Delta, and US Airways for the suspension of further procedures in this case.

On February 14, 2007, the applicant filed further evidentiary material in the record. As a result, by Notice dated February 20, 2007, the Department provided interested parties an additional seven business days to file answers addressing this new material (*i.e.,* March 1).

On March 14, 2007, Virgin America filed a Motion for Leave to File a "Final Reply" pleading. The applicant also filed the resume for Samuel Skinner as required by our regulations. We will accept the required filing of Mr. Skinner's resume. However, we will deny the Motion for Leave to File the Final Reply. We find that the Final Reply is largely duplicative of arguments on the record and provides no new facts. We are acting without waiting for answers to the Motion because it is in the public interest to move this application forward. The Department did not consider Virgin America's Final Reply in our determinations here.

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[5] Answer of Air Line Pilots Association in Support of Joint Motion for Suspension of Further Procedures Pending Submission by Virgin America of Additional Documents, January 22, 2007, at 1.

[6] *Id.,* at 1-2.

[7] Answer of Continental Airlines, Inc. in Support of Joint Motion, January 23, 2007, at 1.

Objection of Virgin America to Order 2006-12-23 and Submission of Additional Evidentiary Material

On January 18, 2007, Virgin America filed its objections to Order 2006-12-23, a motion for leave to file additional evidentiary material, and a motion for confidential treatment for certain new evidentiary submissions.[8] The applicant argues that "[t]he additional evidentiary material will demonstrate – beyond question – that Virgin America is and will remain firmly a U.S. owned and controlled company, satisfying the Department['s]…fitness and citizenship requirements.[9] In its fifth supplement to its application Virgin America included new information regarding the applicant, [redacted]

Virgin America offers extensive objections to the Department's show cause order and requests that the Department grant its motion for leave to file additional evidentiary material and reverse its determination that the company is not a U.S. citizen and grant the air carrier's application. The applicant states that the Department "never attempted to address any of Virgin America's arguments about why the opponent's arguments fall short and why the facts do not show 'actual control.'"[10] The applicant further argues, "Such conclusory disposition without analysis cannot pass muster under the most basic agency 'arbitrary and capricious' and substantial evidence' standards of review."[11]

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[8] On January 16, 2007, Virgin America submitted a letter, addressed to the Chief of the Department's Dockets section, in confirmation of its oral request for a further one-day extension of time to file its Objections. The letter did not show any evidence of having been served on the other parties to the proceeding. On January 18, 2007, Virgin America submitted a letter to the Chief of the Department's Dockets Section that it was "submitting a full and complete set of [its] Confidential and Public Objections of Virgin America Inc. to Order 2006-12-13 [sic] and Motion for Leave to File Additional Evidentiary Material," which it had filed with the Department on January 17, 2007, after having been informed "that some of the copies received by the Department were incomplete." Virgin America also requested that the Department substitute a revised copy of its filing for the copy of its public objections and attached exhibits then available on the Docket Management System and "other copies available for public inspection" because "certain information for which Virgin America is requesting confidential treatment was not properly redacted in the public version filed with the Department." This letter again did not show any evidence of having been served on the other parties to the proceeding. On January 19, 2007, the Department issued a Notice extending the period for the filing of answers to Virgin America's Objections to February 1, 2007. The Department also stated that interested parties would be permitted "until that deadline to comment on any outstanding procedural issues." On January 24, 2007, Virgin America submitted a letter addressed to the Chief of the Department's Dockets Section bringing to the Department's attention a clerical error in the public version of Exhibit 4, the affidavit of Cyrus Freidheim. Virgin America also submitted "an errata sheet and copies of the pages containing the correct information." Virgin America noted that "the confidential version of Exhibit 4, filed with the Department and provided to opposing parties, is correct."[8] Virgin America stated that it "[had] provided a copy of this letter to opposing parties."

[9] Public Objections of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 1.

[10] *Id.,* at 22.

[11] *Id.,* at 23.

The applicant complains that the Department "misapplied the same anachronistic tests to…Virgin America" that it proposed to change in its recently withdrawn rulemaking on foreign investment.[12]

Virgin America believes that Department failed to adequately explain why it did not apply the *Hawaiian Airlines* multiplying-out approach. The applicant maintains that the hedge fund investors, who relied upon the *Hawaiian* precedent in structuring their investment, are diffuse and passive. The applicant also contends that it should be viewed as meeting the numerical tests for citizenship because Virgin Group owns less than 25% of its voting equity and because all of the hedge funds have general partner entities that are U.S. entities with U.S. person owners (when one looks through to "individuals or publicly traded companies)."[13]

The applicant argues that the Department misunderstands its financing plan and the resulting terms. It states that U.S. investors had substantial bargaining power, obtained various certain favorable terms that reduce their risk and gives them power *vis a vis* Virgin Group. Virgin America states, however, that the U.S. investors "have abundant risk/reward incentives, given their significant upside opportunities and the desire to maximize them rather than a suboptimal 8% rate of return, especially for Hedge Funds accustomed to achieving much higher rates of return."[14]

Virgin America states that the stock Puts provide only partial mitigation of risk to the U.S. investors and do not show an absence of U.S. control. The First Put can only be exercised if Virgin America's certificate application is not granted within 18 months of filing, mooting the ownership issue. The Second Put only exists for "up to 15 months after commercial launch" and can only be exercised "if VX fails to satisfy certain investment tests…."[15] Virgin America points out that pursuant to the Department's regulations, specifically 14 CFR § 204.5(a), the Department would have to be notified of the Second Put's exercise and additionally notes that the Put agreement includes provisions designed to ensure continued compliance with the citizenship requirements if the Second Put is exercised.[16]

Virgin America argues that its management is actively involved in the company and independent of foreign interests.[17] Virgin America contends that Mr. Reid's past ties to the Virgin Group are not relevant in determining present actual control, that Mr. Reid was "fully vetted and approved by U.S. investors, which modified terms of employment," and that, since the U.S.-controlled board appointed Mr. Reid to the CEO position, "U.S. investors have exercised firm control over Mr. Reid and his team."[18] Virgin America

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12 *Id.,* at 34.
13 *Id.,* at 12 and 79.
14 *Id.,* at 14.
15 *Id.,* at 14.
16 *Id.,* at 95.
17 *Id.,* at 7 and 63.
18 *Id.,* at 12 and 63. Virgin America also disagrees with the Department's conclusion that 'Mr. Reid owes his appointment as CEO…to Sir Richard [Branson],' indicating that he was "elected and appointed"

further argues that the Department has not considered "the particularly unique facts concerning Mr. Reid's selection and performance as CEO of Virgin America since November 2005" or cited facts showing foreign influence over him.[19] Virgin America argues that the Chairman of the Board of Directors is a U.S. citizen appointed by the U.S. investors, that "two thirds of VX officers and directors are U.S. citizens," and that "[s]hareholder approval of initial Board members does not manifest control, just basic corporate formation."[20]

Virgin America argues that that Virgin Group's role in its creation is not relevant to determining actual control and that, under our precedent, the citizenship determination is made at the time of certification.[21] The applicant also states that the Department failed to explain its departure from the ASTAR precedent on this issue.

Virgin America also disagrees with the Department's conclusion that Virgin America's failure to modify certain commercial agreements, including aircraft leases, and that the requirement that Carola and VML give written consent to any changes, show foreign control. Virgin America argues that the "[l]eases were negotiated at arms length, and represent the best terms obtainable" and that the U.S. investors examined them in due diligence.[22] In addition, Virgin America indicates that it has "entered into or amended" many commercial agreements "under U.S. investor stewardship, including aircraft leases," and argues that this shows actual U.S. control.[23] Virgin America further states that [redacted][24]

Virgin America also rejects the idea that Virgin Group's provision of funding indicates control. Virgin America explains that "[c]urrent funding is temporary" and that a financing plan is generally sufficient at the show cause and final order stages.[25] The applicant also states that the Department failed to consider that the U.S. investors will make an additional equity investment of $78.9 million prior to launch. Virgin America also indicates that there will be other pre-launch funding from the U.S. investors and contends that the debt financing provided by Virgin Group, which has an atypically small number of covenants, does not confer foreign control.[26]

Virgin America claims that the "original covenants in debt instruments and consent rights in other transaction agreements were customary and directed toward protecting the rights

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by the U.S. investors only after substantial due diligence. Public Objections of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 62.

19 *Id.,* at 63-64.

20 *Id.,* at 12.

21 *Id.,* at 50-51.

22 *Id.,* at 12.

23 *Id.,* at 12.

24 Confidential Objections of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 69.

25 Public Objections of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 13.

26 Virgin America also points to the department's past precedent as having usually "…not considered foreign-sourced debt financing to be an indicia [sic] of foreign control." Public Objection of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 27 and n. 48.

of lenders and minority investors."[27] Virgin America argues that Virgin Group's remaining "stripped down consent requirements" are simply "good corporate governance provisions" and that not permitting certain commercially reasonable terms on debt would contradict existing Department policy.[28] Furthermore, Virgin America argues that the Department has permitted the "adoption of these supermajority provisions in prior transactions," sometimes with "veto power" in the hands of the minority shareholder alone and sometimes requiring that they obtain the support of at least one other director.[29]

Virgin America claims that the Department misinterprets the debt agreements and the Subordinated Note, that the Department's view of the Subordinated Note and the Class C-1 warrants as a convertible security that confers actual control on Virgin Group is erroneous and not adequately explained, and that it erroneously stated that it was following Virgin America's definition of convertible security. Virgin America answers the Department's concern, that the issuance of warrants for certain Class C common stock in connection with the repayment of the Subordinated Note could permit Virgin Group to choose at least some of Virgin America's future U.S. investors, by stating that such a transaction would have to comply with foreign ownership requirements and that the resulting dilution would also affect Virgin Group, leaving U.S. investors in control.

Virgin America argues that the License Agreement contains typical protections and does not indicate foreign control. Indeed, it contends that the license is unusually flexible. Moreover, Virgin America states that the Department erred in concluding "that the License Agreement restricted VX from flying overseas or code-sharing internationally with any foreign or domestic carrier other than Virgin Atlantic. VX is free to do so provided it does not use the Virgin mark, and free to code-share using the Virgin mark within the Territories…."[30] Virgin America also questions the Department's objection to a restriction preventing Virgin America from operating planes with 20 seats or less because the use of small planes are not typically used by domestic commercial airlines. Virgin America also questions the Department's objection to a restriction on flights above 85,000 feet, despite "the inability of current civilian jet aircraft to operate at such altitudes," including those that Virgin America plans to use.[31] Virgin America also states that the Virgin name may be used for code-shares with Virgin Atlantic, which is the only U.K. carrier with which Virgin America is permitted to code-share using the Virgin brand and which is its exclusive codeshare partner "in those few markets in which Virgin Atlantic operates."[32]

Virgin America indicates that the Department fails to fully explain its contention that the U.S. investors cannot transfer their initial shares in Virgin America except to an affiliate

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27 *Id.,* at 13.
28 *Id.,* at 72-73.
29 *Id.,* at 73.
30 *Id.,* at 14. Operations within the Territories are subject to the restriction that Virgin America cannot fly routes "for which all points of arrival and/or departure are within the Caribbean Territory." Public Objections of Virgin America Inc. to Order 2006-12-23, January 18, 2007, at 56.
31 *Id.,* at 60.
32 *Id.,* at 61.

unless the Virgin Group consents or how it views control with respect to this provision.[33] Virgin Group has consent rights over the transfer of only about 28% of the U.S. investor holdings in Virgin America.

Despite these objections, Virgin America indicates its willingness to make significant changes in response to the Department's concerns:

1) The "[h]edge funds will irrevocably disable, prior to certification, the very limited number of non-U.S. citizen investors from any voting rights or fund participation…."[34]
2) "[T]he parties have agreed to change, weaken or eliminate entirely almost every Virgin Group 'veto' or 'control' item,…from the parties' Subscription Agreement, Bylaws, Stockholders Agreement, and debt agreements."[35]
3) Virgin Group will give up a board seat and will place all of its Virgin America shares, as well as remaining consent and veto rights under the various transaction agreements, in a voting trust. Virgin Group will also relinquish the ability "…to exercise any rights granted to the Class B Common Stock pursuant to the Subscription Agreement or the Shareholders Agreement."[36]
4) The U.S. investors will contribute an additional $20 million loan to Virgin America.
5) The License Agreement will be amended to show "…that the airline can exist outside of the license or franchise agreement…."[37] Virgin America states that amendments and clarifications to the License agreement eliminate "any restriction on Virgin America's licensed activities if it does not use the 'Virgin' trademark."[38]
6) All officers will be appointed or reappointed, and, if the Department wishes, Virgin America will remove the CEO from the Board or replace Mr. Reid as CEO. The applicant will also "…remove or replace any officer the DOT requires."[39]
7) To address concerns about the citizenship of the Board, "…the U.S. investors have made changes to the ownership structure of VAI and…the current Board has been reapproved by U.S. citizens …"[40]

On January 30, 2007, Virgin America filed a motion for leave to file additional evidentiary material,[41] together with a motion for confidential treatment with respect to

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33 *Id.,* at 70.
34 *Id.,* at 12.
35 *Id.,* at 4.
36 *Id.,* at 16.
37 *Id.,* at 6.
38 *Id.,* at 10.
39 *Id.,* at 67.
40 *Id.,* at 62.
41 In a footnote in this motion, Virgin America requested, given the Department's grant on January 19, 2007 of a two-day extension to the opposing parties of time to file answers that it be granted "leave to file an unauthorized pleading, or, in the alternative, leave to file out of time." Motion of Virgin America Inc for Leave to File Additional Evidentiary Material, January 30, 2007, at 3 n.6.

the "Confidential Exhibits to Virgin America's Motion for Leave to File Additional Evidentiary Material. The applicant argued that it has made significant changes to address the show cause order.[42] Virgin America claims, "These changes are tailored to the precise provisions both the Department and the Opposing Carriers suggested were necessary to establish citizenship, and in many cases go even further." Virgin America states that, as it explained on page 33 of its Objections, "submission of new materials directly responsive to…citizenship does not transform…additional evidentiary materials into a new application."[43]

Virgin America states that it is providing redlined copies of various revised transactional documents, the voting trust agreement (which Virgin America states demonstrates "the commitment of the Virgin Group to place its shares with a U.S. citizen trustee, even though its holdings fall well within the voting equity limits allowed by statute"), and "a letter agreement signed by Virgin America and each of its Investors evidencing their commitment to be bound by these newly revised agreements [or "substantially similar" ones]."[44] The letter also states the parties' willingness to "accept execution of these agreements as conditions to the Department's issuance of a certificate."[45]

Virgin America notes that Continental complained that prior written consent provisions in Virgin America's documents conferred negative control upon the Virgin Group. Virgin states that "These limitations were only relevant during the first 18 months of operation" and the prior written consent provisions to which Opposing Carrier objected "have been stripped or materially altered."[46] These changes ensure "that Virgin America and its U.S. majority-controlled Board are now free to operate…in any manner they deem necessary or appropriate," and Virgin Group consent or that of its designee is not required to "declare dividends, change accounting policies, enter into, terminate, or modify material contracts, make capital expenditures, sell stock, and create subsidiaries…"[47] Consent rights retained by Virgin Group in the Subscription Agreement "will be transferred to a U.S. citizen voting trustee."[48] "Virgin America is now expressly free to conduct 'ordinary course of business' transactions to lend money or incur indebtedness, to sell options, and to dispose of or acquire material assets."[49]

Virgin America also argues that Continental's concerns about perpetual Virgin Group control of one-third of Virgin America's board and its assertion that Virgin Group "in the future likely will have the largest single voting block of representatives on Virgin

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42 *Id.,* at 3-4.
43 *Id.,* at 4 n.8.
44 *Id.,* at 4-5. Virgin America notes that "the Voting Trust Agreement will be identical to or substantially similar to the form that Virgin America is submitting with this motion, with the exception of such changes as may be required by the U.S. Trustee, or requested by the DOT and agreed to by Carola." Motion of Virgin America Inc for Leave to File Additional Evidentiary Material, January 30, 2007, at 5 n.10.
45 *Id.,* at 5.
46 *Id.,* at 7.
47 *Id.,* at 7.
48 *Id.,* at 7. These protections include protections involving "mergers and acquisitions, stock splits or other stock dilution, self-dealing in the capital stock, or bankruptcy…." Motion of Virgin America Inc for Leave to File Additional Evidentiary Material, January 30, 2007, at 7.
49 *Id.,* at 7.

America's board of directors," are more unpersuasive now than previously because of reductions to Virgin Group's "Board representation and consent rights."[50] "The redlined bylaws [demonstrate] the stripping of Virgin Group consent rights over changes to the fundamental line of Virgin America's business, the adoption of a plan of liquidation or reorganization, or any change to the size of the Board of Directors, unless the proportionality remains the same."[51] The requirement that 80% of voting stockholders consent in writing in advance to a declaration of dividends will be removed. The Stockholders Agreement has been revised to remove Virgin Group's "consent rights over any fundamental change to the nature of [the] company's business and changes to the size of the Board. The limited remaining Virgin Group consent rights will be placed into the Voting Trust with a U.S. citizen trustee."[52] The revised debt instruments delete "all Virgin Group consent rights."[53] Virgin America asserts that the remaining protections for Virgin Group "are less than [what the Department allowed] in the Air Canada/Continental case," in which it permitted a foreign investor from a non-open-skies country to hold 27.5% of the carrier's total equity and 25% of the carrier's voting equity.[54]

Virgin America asserts Don Carty's leadership and role as chairman should have allayed doubts about the board's "independence and U.S. citizenship."[55] Virgin America adds that "the…Board (…without any input, consent, or approval by Virgin or Virgin designees), has now approved the appointment of the Honorable Samuel K. Skinner, former U.S. Secretary of Transportation…as Vice Chairman of Virgin America."[56] Virgin America suggests that Mr. Skinner is particularly suited "to both understand the importance of this application on domestic competition, global capital flows, and liberalizing air service, while at the same time ensuring that Virgin America is controlled…by U.S. citizens."[57]

Virgin America urges the Department to "be wary of further airline delay tactics or 'control' complaints," contending that existing carriers are attempting to obstruct Virgin America's market entry to protect themselves from competition "and prevent the entry of a dynamic, well-financed, well-known brand name into the domestic U.S. aviation market."[58] Virgin America argues that the Department should reject "the Opposing Carrier's continuing attempts to hold this proceeding in abeyance, and should not require Virgin America to execute final deal and financing documents prior to a Final Order...To

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50 *Id.,* at 7-8.
51 *Id.,* at 8.
52 *Id.,* at 8.
53 *Id.,* at 8-9. This will be accomplished by deleting all of "section 10 of the Interim Note Agreement and Subordinated Note Agreement," so as to remove limitations on the applicant's ability to "[pay] dividends, [incur] senior indebtedness, or [make] any fundamental change to its business." Virgin America will also remove "the entire section 7 of the Senior Secured Promissory Notes and Senior Secured Promissory Notes, Series B," so as to remove limitations "on Virgin America incurring senior indebtedness, or transferring assets. In the Secured Notes, the restriction on material contracts will also be lifted."
54 *Id.,* at 9.
55 *Id.,* at 9.
56 *Id.,* at 9.
57 *Id.,* at 9-10.
58 *Id.,* at 10.

hold otherwise would constitute an unprecedented and unwise shift of air carrier fitness division practices for new entrants."[59] Virgin America contends that its submissions here, its objections, and the affidavits included with its objections demonstrate its U.S. citizenship and notes the Department's acceptance of certain documentation after granting a certificate to JetBlue, after issuing its letter of March 7, 2005 in *Hawaiian*, and after issuing an order to amend restrictions in *Wings II*.

Virgin America states that, in accordance with Department precedent, it is submitting redlined copies, "showing the proposed changes previously detailed in its Objections," of the Subscription Agreement, Stockholders Agreement, Bylaws, Trademark Agreement, Subordinated Note, Interim Note, Senior Secured Promissory Note, Senior Secured Promissory Note (Series B), and Security Agreement. [60] It also submits the new Voting Trust Agreement and "a letter agreement…confirming that all documents will be executed prior to and effective upon the Second Closing…."[61] Virgin America notes that it "is not providing copies of the Airbus purchase agreements or amendments thereto" due to confidentiality provisions in those documents and that the Department has determined that its application is substantially complete in their absence.[62] Virgin America indicates that it has already provided as description of the "new $20 million loan" from the U.S. investors, as well as an affidavit attesting "that it will not be backed by the Virgin Group."[63] Virgin America indicates that it has already provided explanations of its investment structure, including proposed changes "to exclude any and all non-citizens or corporations from [the hedge funds'] investment in Virgin America…."[64] Virgin America further states that it will submit copies of the loan and the investment structure documents, asserting there should be no delay in the proceeding or additional time granted for responses due to these documents not yet having been submitted.

On February 14, 2007, the applicant filed further evidentiary material in the record, along with a Motion for confidential treatment and a Motion for Leave to File Additional Evidentiary Material. In particular, Virgin America submitted information related to additional debt ($20.0 million) and equity ($10.0 million) financing, totaling $30.0 million, to be provided by Cyrus Capital Partners, LP ("Cyrus Capital") and Black Canyon Air Partners LLC ("Black Canyon"), its U.S. investors, a duly executed officer certificate confirming certain actions taken by Virgin America's Board, and updated citizenship information for Mr. Robert B. Weatherly, the applicant's Senior Vice President for Flight Operations.[65]

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[59] *Id.,* at 10.
[60] *Id.,* at 12.
[61] *Id.,* at 12.
[62] *Id.,* at 12.
[63] *Id.,* at 13.
[64] *Id.,* at 13.
[65] Motion of Virgin America for Leave to File Additional Evidentiary Material, dated February 14, 2007, at 1-3.

Answers to Virgin America's Objection

On February 13 and 14, 2007, American, ALPA, Delta, and US Airways filed Answers to Virgin America's Objections.

American Airlines, Inc.

American supports the finalization of the Department's tentative decision finding that Virgin America does not fulfill the U.S. citizenship criteria and the denial of its certificate application. American states that Virgin America is not a U.S. citizen under "the statutory test and the totality of the circumstances presented," circumstances which include:

> Sir Richard Branson and the Virgin Group [having] (1) conceived, designed, and funded the company (2) not only authored the business plan but also executed scores of contracts with vendors and suppliers that remain in effect, (3) recruited and hired key personnel under long term employment contracts, (4) restricted the company's scope of operations through a 30-year trademark license agreement, (5) provided $233.3 million in capital while purported U.S. citizen investors have to date paid in only $10 million, and (6) those investors (which include a number of Cayman…entities) claim to be U.S. 'owners' even though they are protected from risk of loss in the first year of operations by Put agreements obligating the Virgin Group to buy back their shares with 8% interest.[66]

American points out that Virgin America derives most of its financing from Virgin Group. This includes a recent $13 million loan, demonstrating an ongoing financing relationship and supporting the Department's conclusion that Virgin America relies on Virgin Group for financial survival, especially given the small pre-Second Closing U.S. investment and the Puts.[67] American also questions the applicant's financial fitness, indicating that there will be a shortfall of "at least $46 million at the Second Closing." and suggesting that the carrier might experience financial trouble if Virgin Group ceased funding it.[68] American also stated that Virgin America had not made available any draft documents concerning the $20 million U.S. investor loan.[69]

American supports the Department's use of the 'traditional test' to find that Virgin America's hedge fund investors did not meet the requirements for U.S. citizenship and points out that the proposed exclusion of foreign investors in the hedge funds from the Virgin America investment improperly relies on the income tax law definition of U.S. person rather than the definition of U.S. citizen in 49 U.S.C. § 40101(a)(15).[70] American argues that Virgin America does not meet the threshold criteria for the *Hawaiian*

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66 Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 2.
67 *Id.,* at 11-12.
68 *Id.,* at 3, and 12-14.
69 *Id.,* at 13.
70 *Id.,* at 3-4, and n.1.

approach, which requires 'diffuse and passive' investment on the part of any foreign investors and the absence of other 'indicia of foreign control.'[71] In Virgin America's case, Richard Branson and the Virgin Group own a 24.9% stake and are very involved in the company, and the applicant "demonstrates pervasive indicia of foreign control, including among other things the Virgin Group's influence over the applicant's management, its involvement in Virgin America's creation, the extensive funding the Virgin Group has provided, the trademark license agreement, and elements of negative control."[72]

American calls to the Department's attention to the fact that the Put agreements, allowing the U.S. investors, under certain circumstances, to recover their original investment plus 8% interest, remain in place under the proposed restructuring.[73] American argues that risk of loss is a basic component of ownership and that the Puts provide significant protection from such risk to the U.S. hedge fund investors.[74] Consequently, American contends that "the continued existence of the Puts defeats that statutory numerical requirement that 75% of a company's equity must be 'owned' by U.S. citizens."[75] Additionally, American states that, under Department precedent, "buy-back provisos are one of the key factors for determining whether an applicant is under the 'actual control' of foreign interests" and that the Puts show that Virgin Group has control of Virgin America and will retain control during the first year of the applicant's operations.[76]

American disagrees with Virgin America's contention that the Department placed an inappropriate focus on formation history, contending that formation history is "one element of the 'totality of the circumstances,'" and referencing the Department's citation of *ASTAR Air Cargo*, for the proposition that 'past circumstances could be considered where those facts are relevant to…current citizenship status….'[77] American suggests, "The Department should affirm the conclusion that the Virgin Group's pervasive involvement in Virgin America – starting with the applicant's conception and formation and continuing to this day – is a proper factor in assessing the 'totality of the circumstances' to determine 'actual control.'"[78]

American argues that the proposed voting trust for the "22.7% equity stake" of Carola Holdings is contrary to Department precedent.[79] American also expresses concern about certain provisions of the draft voting trust agreement:

[redacted]

71 *Id.,* at 3-4.
72 *Id.,* at 5-6.
73 *Id.,* at 7.
74 *Id.,* at 9-10.
75 *Id.,* at 10.
76 *Id.,* at 2, and 10-11.
77 *Id.,* at 15-16.
78 *Id.,* at 17.
79 *Id.,* at 17-18.

[redacted][80]

American contends that "Virgin America has greatly overstated the effect of the proposed amendments…." to the trademark license agreement.[81] As a practical matter, Virgin America would face [redacted][82] Also, American views the licensing agreement as permitting the Virgin Group [redacted][83] Furthermore, American contends that the revised licensing agreement [redacted][84]

American also complains that the Virgin Group continues to have certain consent rights in its Subscription Agreement, Stockholder Agreement, and by-laws,[85] including veto power with regards to:

[redacted]

[80] Confidential Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 19-20.
[81] Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 21.
[82] Confidential Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 22.
[83] *Id.,* at 22.
[84] *Id.,* at 23.
[85] Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 24.

[redacted][86]

Also, American alleges that Virgin America is attempting "to achieve by case law what the Department determined it would not do by rulemaking" when it withdrew the NPRM addressing actual control while arguing that a change in the Department's stance will facilitate the open-skies agreement with the E.U. that Virgin Group publicly opposes.[87] America argues that it would be inappropriate for the Department to alter its interpretation of the citizenship requirements "to benefit investors of a non-open skies country after withdrawal of the NPRM in deference to Congress."[88]

Further, American argues that the public benefits claimed by Virgin America in support of its application are irrelevant to the determination of its citizenship, and "such arguments should have no bearing on the Department's fitness determination here."[89] In addition, American blames "[a]ny delay…" on Virgin America's tactics in pursuing its application, as well as its submission of "an ownership and management structure that so clearly failed to meet the U.S. citizen test," rather than on "the Department or opposing parties."[90]

ALPA

ALPA supports the finalization of the department's determination that Virgin America is not a U.S. citizen and the denial of its certificate application. ALPA argues that the Virgin Group retains much influence with respect to Virgin America because of its involvement in Virgin America's formation and in "selection of the company's officers and directors."[91] ALPA states that the Department properly considered the formation history of Virgin America and notes that "Virgin America's current employees and officers were initially consultants or employees of Virgin, USA or employees of Best Air, two companies under the control of Virgin Group."[92] ALPA agrees with the Department's determination that the continuing existence of various contracts "entered into or funded by the Virgin Group and inherited by Virgin America, suggests a lack of independence on the applicant's part."[93] Additionally, Virgin Group created "Virgin America's basic business plan," "hir[ed] the officers and employees, [and] negotiate[ed]

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86 Confidential Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 24-25.
87 Answer of American Airlines, Inc. to New Application and Objections of Virgin America Inc., dated February 13, 2007, at 26.
88 *Id.,* at 27.
89 *Id.,* at 28.
90 *Id.,* at 28.
91 Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 2.
92 *Id.,* at 2.
93 *Id.,* at 2.

agreements with key suppliers all before any non-Virgin Group investors made any financial commitment."[94]

ALPA argues that Virgin America's CEO and Board of Directors are susceptible to foreign influence. ALPA contends that despite its insistence on Mr. Reid's independence from Virgin Group, Virgin America "makes no new substantive arguments in support of the argument and DOT has already rejected this contention."[95] ALPA also argues that the proposal to reduce by one Virgin America's board seats is insufficient in alleviating foreign control, since [redacted][96] allowing it "substantial influence over Virgin America's managers and employees."[97] Furthermore, Virgin Group can control the conduct of Virgin America's business because [redacted] and [redacted][98]

ALPA indicates that the "Virgin Group has provided $233 million or 96 percent of Virgin America's total funding of $243 million."[99] ALPA contends that the substantial size of the Virgin Group's funding contribution and Virgin America's history of reliance on the Virgin Group as a source of funding suggests that it will rely on Virgin America for funding in the future, including, possibly, to deal with the $46 million net outflow that will occur due to the transactions associated with the second closing.[100]

ALPA also points out that no changes have been made to the Put agreement and that certain [redacted][101] "reduce the risk of the Hedge Fund investors."[102]

ALPA contends that the revised trademark license agreement would still permit actual control by Virgin Group of Virgin America. Additionally ALPA argues, among other

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94 *Id.,* at 2-3.
95 *Id.,* at 3.
96 Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 3.
97 Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 3.
98 Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 3.
99 Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 4.
100 *Id.,* at 5.
101 Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 6.
102 Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 6.

things, that [redacted][103] ALPA states that, contrary to Virgin America's assertion that the amended license agreement allows it freedom to codeshare with 'any carrier domestically or internationally, any where with any carrier,'[104] [redacted][105] Also, ALPA argues, [redacted][107]

ALPA also argues that the proposed voting trust would not dispel the risk of foreign control. ALPA contends that our precedent "has viewed voting trusts as temporary, not permanent solutions, to control problems."[108] In most instances, the Department and the C.A.B. have required proportional voting of the trust stock, and, in fitness cases where voting trusts have been permitted to solve control problems, "DOT and CAB…have relied on the existence of both proportional voting...and hostility (which certainly does not exist in this case) between the carrier's management and those whose shares are being put in trust."[109] ALPA also objects to allowing the trustee [redacted] which it claims are [redacted][110] [redacted][111]

ALPA also states that, in the Department's previous experiment with allowing "a voting trustee to vote the economic interest of the holder, the arrangement turned out to be completely ineffective," resulting in the holder having control of the trust and the Department "revoking a carrier's service authority."[112]

ALPA asserts that there are continued citizenship issues regarding the Hedge Fund Investors ALPA contends that the applicant does not qualify for 'multiplying-out'

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[103] Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 7.
[104] Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 7-8.
[105] Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 7.
[106] ALPA refers to Virgin Group as both the indemnifier and the indemnified, but probably means Virgin America is the indemnifier.
[107] Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 9.
[108] Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc. , February 14, 2007, at 10.
[109] *Id.,* 10-11.
[110] Confidential Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America, Inc., February 14, 2007, at 11.
[111] *Id.,* at 11.
[112] Answer of Air Line Pilots Association in Opposition to the Objections of Virgin America Inc., February 14, 2007, at 11 n4 (citing Order 90-7-17, Discovery Airways, Inc.).

because it does not meet the requirements that "foreign interests [be] genuinely and obviously passive and [be] highly diffuse with no single foreign investor holding more than a very small interest" 'due to the extensive involvement of, and financial interest held by, Sir Richard Branson and the Virgin Group."[113] ALPA also claims that Virgin America has not shown that the Hedge Funds have eliminated non-U.S. citizen investors 'from any voting rights or fund participation" and states that the mechanism for doing so is unclear.[114] ALPA also objects to the proposed use of the income tax law definition of 'U.S. person' to separate out foreign investors in the hedge funds, since this definition differs from the aviation definition of U.S. citizen.[115]

ALPA also argues that alleged public benefits of Virgin America's service are irrelevant to its citizenship status.[116] Furthermore, ALPA states that, contrary to Virgin America's claims, "DOT carefully applied the longstanding 'totality of the circumstances' test and the Department's conclusions were fully supported by the record…."[117] ALPA contends that the changes proposed by Virgin America are insufficient to mitigate "the real and potential influence of Virgin Group."[118]

Delta Air Lines, Inc.

Delta supports the Department's tentative finding that Virgin America is not a U.S. citizen and contends that Virgin America still has "intractable and pervasive foreign citizen ownership and control issues" and that the show cause order should be made final.[119] Delta argues that, even with the proposed changes, Virgin America continues to have more than the statutorily permitted 25% foreign ownership, in part because its proposal for excluding foreign investors in the hedge funds "'from any voting rights or fund participation'" in the Virgin America investment relies on the income tax law definition of 'United States persons,'[120] rather than the materially different definition of "'citizen of the United States'" in the Aviation Code.[121] Further, Delta argues that, "even if these terms were interchangeable…Mr. Plaga's assertion that 98.4% of the limited partners in VRF are 'U.S. persons' does not establish [its] U.S. citizenship…because at least one of its limited partners is not shown to be a U.S. citizen, which under longstanding Department precedent taints the citizenship of the entire partnership."[122] Since VAI Partners receives much of its funding from "foreign 'feeder funds,'" "pervasive foreign ownership issues remain…."[123]

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113 *Id.,* 12-13.
114 *Id.,* at 13.
115 *Id.,* at 13.
116 *Id.,* at 14.
117 *Id.,* at 14.
118 *Id.,* at 14.
119 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 2-3.
120 "A 'U.S. person' for IRS purposes includes resident aliens and other foreign entities that would not be considered 'citizens of the United States' under the Aviation Code." Answer of Delta Air Lines, Inc., dated February 13, 2007,at 4.
121 *Id.,* at 3-4.
122 *Id.,* at 4-5.
123 *Id.,* at 5.

Delta also argues that Virgin America continues to be actually controlled by the Virgin Group and that the proposed voting trust does not remedy this problem.[124] The voting trust's alleged defects include:

[redacted][125]

[redacted][126]

3) The trustee "remains legally beholden to the interests of the foreign entity, Carola or VML, in several respects."[127] [redacted] require close communication between trustee and beneficiary.[129]
4) [redacted][130]
5) Since the economic beneficiary is foreign, "…the voting trust itself would be considered foreign for purposes of the citizenship analysis under DOT precedent."[131]
6) Department precedent does not permit the use of voting trusts to evade the "…the statutory requirements on ownership by U.S. citizens" and regards voting trusts as "'…temporary, interim measures…[not] permanent solutions.'"[132]
7) The draft voting trust agreement permits the beneficiary to [redacted][133] Also, "the trust's beneficiary's interests are represented on the Board by the Board members the beneficiary has designated."[134]

Delta claims that Virgin America's financing scheme indicates foreign control.[135] [redacted]

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124 *Id.,* at 5.
125 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 5.
126 *Id.,* at 5-6.
127 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 6.
128 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 6.
129 *Id.,* at 9; and Answer of Delta Air Lines, Inc., dated February 13, 2007, at 9.
130 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 6-7.
131 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 7.
132 *Id.,* at 7-8
133 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 8-9.
134 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 9.
135 *Id.,* at 10.

[redacted][136] [redacted][137] Delta argues that, although debt may not generally implicate foreign control, it is relevant to foreign control here because "all of the foreign links converge back to one single foreign interest, the Virgin Group, and…the Virgin Group debt is enormous."[138]

Delta also contends that the revised trademark license agreement continues to present foreign control problems [redacted][140] Delta also indicates that [redacted][141]

Delta also suggests that "concerns expressed by Virgin supporters about permitting Virgin to use the brand or trademark on a broader geographic scope given the other 'Virgin' affiliates around the world are overblown."[142] As an example, Delta indicates that, despite the Nisi affidavit's argument that "this limitation is appropriate because 'Virgin Atlantic flies throughout Europe,' "Virgin Atlantic's route map indicates it serves only two points in Europe (both in England) – London and Manchester."[143] Furthermore, "Virgin Express – a 'Virgin' airline which has operated in several European markets in apparent harmony with Virgin Atlantic over several years – recently…has been renamed Brussels Airlines Fly with a trade name of Brussels Airlines."[144]

Delta also argues that, contrary to Virgin America's claims, it is not, in practical terms, "free to operate and codeshare *free of the Virgin brand* with any carrier in the United States or internationally (subject to exceptions related to Virgin Atlantic and the U.K. market)….," because its "entire operation and its proposal…" is predicated on the Virgin name.[145] Delta claims that, to do business under another name, the applicant would have

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136 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 10. [redacted]

137 *Id.,* at 10-11.

138 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 11.

139 *Id.,* at 11.

140 Confidential Version, Answer of Delta Air Lines, Inc., dated February 13, 2007, at 12.

141 *Id.,* at 12-13.

142 Answer of Delta Air Lines, Inc., dated February 13, 2007, at 13.

143 *Id.,* at 13.

144 *Id.,* at 13.

145 *Id.,* at 14.

"to establish virtually a whole new company."[146] Also, certain "regulatory obstacles…prevent Virgin [America] from not using the Virgin name," such as the requirements in 14 CFR Part 257 that both "the trade name" and "the corporate name of the operating carrier" be disclosed in certain circumstances, including certain circumstances relating to codesharing.[147] Since the applicant's corporate name is Virgin America Inc., "[t]his alleged flexibility to market in another name is nothing more than an optical illusion with no practical business reality."[148]

Delta further argues that, given Virgin Group's extensive ties to Virgin America, including with respect to "the foreign ownership interests, the Board representation, the trademark license, the development, business plan, and creation of the airline, and the substantial and ongoing finance links," the Department must find that the applicant is under real or potential foreign control.[149] Delta argues that formation history is, contrary to Virgin America's assertions, "both relevant and important for the purposes of the fitness-citizenship determination…" and cites ASTAR.[150] With respect to the management, everyone, with the possible exception of Mr. Skinner, "was recruited and hired by representatives of the Virgin Group," and thus ought to be viewed under the Department's policy as "foreign for the purposes of the citizenship analysis," "even if [they] are U.S. citizens…."[151] Delta also contends that due to the lack of executed documents, the possibility of additional changes to the voting trust agreement, and the fact that certain U.S. investor-funding is "contingent on the Department issuing a Final Order," Virgin America is basically requesting a decision "on its future (not current) citizenship…"[152]

Delta states that Virgin America has not submitted "certain key documents and information…,"and that "it is Virgin's burden to establish citizenship."[153] These items include: (1) documentation for "a new $20 million loan," (2) the missing Subscription Application attachment to the Plaga declaration, (3) more detailed information about "'Cyrus Aviation Partners, L.P.,'" and 4) more information about "'Canpartners Investments III, L.P.,'" mentioned "as the General Partner for the Canyon Value Realization Fund, L.P., but…" missing from the Department's ownership stream diagram.[154] Delta also points out discrepancies in Virgin America's chart showing post-Second Closing investments between the sum of "the *individual line items* of 'investment' in the Post-Second Closing column…and the total…," and between the text and the chart concerning Virgin Group's amount of equity investment.[155] Also, Delta states that Virgin America does not appear to have produced "the Section 204.3 data for

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146 *Id.,* at 14.
147 *Id.,* at 14.
148 *Id.,* at 15.
149 *Id.,* at 15.
150 *Id.,* at 16.
151 *Id.,* at 17-18.
152 *Id.,* at 18 n.2.
153 *Id.,* at 19.
154 *Id.,* at 19-20.
155 *Id.,* at 20.

its newly appointed Vice Chairman,"[156] and that, given the various items of information missing from the record, "[t]he Department is not in a position to change its tentative decision."[157]

Delta argues that Congressional action in inserting "actual control" into the statutory text of § 40102(a)(15)(C), expressions of concern about the attempt to liberalize the Department's interpretation of actual control through the withdrawn rulemaking, supports "DOT's longstanding…test."[158]

US Airways

US Airways argues that Virgin America has not shown "why the Department should not finalize its tentative conclusion…that VA is not a U.S. citizen…" and that its "[a]pplication…must be denied or dismissed."[159] The company argues that Virgin America is to blame for "any delay" and points out that it has yet to provide certain information.[160]

US Airways argues that Virgin America still does not comply with the statutory numerical requirements.[161] Virgin America has not shown that it has addressed the Department's finding "that 'Cyrus I, Cyrus II, Black Canyon, and VAM do not meet the statutory definition of U.S. citizen because each has 49% of its total equity held by either Cayman Island entities or foreign limited partnerships.'"[162] US Airways states, "VA continues to misstate the true extent of foreign investment in it by claiming that there are only a 'very limited number of non-U.S. citizen investors' investing as part of the hedge funds...," indicating that Cyrus Opportunities Fund II, Ltd., for example, has 30 foreign investors out of 98.[163] US Airways urges the Department, "[g]iven the high degree of foreign participation in the hedge funds,…not [to] accept VA's general statements that the hedge funds would disable 'the very limited number of non-U.S. citizen investors from any voting rights or fund participation.'"[164] Even if the hedge funds implement this exclusion, the applicant still may not be a U.S. citizen because of its reliance on "more expansive definitions of 'U.S. persons' found in the Internal Revenue Code and SEC rules."[165]

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156 *Id.,* at 20.
157 *Id.,* at 20.
158 *Id.,* at 21.
159 Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 1.
160 This information includes "Part 204 data for its new board member or all of the documents requested by the joint motion filed by U.S. Airways, American and Delta on January 19, 2007." Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 1 n. 2.
161 *Id.,* at 2.
162 Also, "US Airways believes the permissible total foreign equity cap for the LLC's involved here was really only 25% because they are from the British Cayman Islands…." Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 2-3.
163 *Id.,* at 3.
164 *Id.,* at 3.
165 *Id.,* at 3.

US Airways rejects Virgin America's "contention that it is entitled to rely on the Hawaiian approach and structure."[166] US Airways argues that the Department's explanation that, "'[t]he foreign interests [here] are neither diffuse nor passive – due to the extensive involvement of and financial interests held by, Sir Richard Branson and the Virgin Group,'" was sufficient.[167] Furthermore, the facts here vary substantially from *Hawaiian*, and Virgin America does not meet the threshold criteria for multiplying-out: "'truly passive' foreign investors and 'no single foreign investor holding more than a very small interest.'"[168]

US Airway argues that, if the Department reverses its finding that "the hedge fund investors were not U.S. citizens," it "should address these issues [i.e. "the Virgin Group owns more than 25% of VA's equity"], as well as the contention that the hedge fund investors are not the true owners of their shares."[169] US Airways states that "based on the positions of U.S. governmental agencies and the courts, …the Virgin Group owns far more than 25% of VA's equity," in part because certain traits of the Subordinated Note make it "disguised equity."[170] [redacted][171] US Airways contends that the Subordinated Note and warrants result in "Virgin Group [owning] more than 49% of VA."[172] US Airways argues that, "the fact that [foreign holdings in Virgin America] will exceed 25% clearly violates the permitted total foreign equity test, even under VA's (erroneous) proposed standard."[173] US Airways contends, "Virgin Group is the true owner of the Hedge Fund's shares," because "the hedge fund investors do not bear 'risk of loss' on their shares,"[174] as evidenced by the Put Agreement, [redacted][175]

US Airways claims U.K. interests still control the applicant and characterizes the applicant's proposed changes as "illusory."[176] For example, US Airways argues that Virgin America states that it will place "all of the Virgin Group's shares…into the voting trust and the trustee of the voting trust will have the right to exercise all voting and consent rights…," while at the same time arguing "that it is…entitled to have and exercise all corporate governance rights."[177] In US Airways' view, "failure to give the trustee the corporate governance rights…renders the use of a voting trust…fatally defective," and the Virgin Group retains the right to appoint certain Virgin America

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166 *Id.,* at 4.
167 *Id.,* at 4.
168 *Id.,* at 4.
169 *Id.,* at 5 n. 4.
170 *Id.,* at 5.
171 Confidential Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 7.
172 Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 7.
173 *Id.,* at 7.
174 *Id.,* at 7.
175 Confidential Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 8.
176 Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 8.
177 *Id.,* at 8.

Board members.[178] US Airways also criticizes the "very limited" reach of the voting trust agreement and of the trustee's obligations.[179] The agreement fails to prevent or restrict attempts by [redacted][180] Thus, Virgin Group can "exercise substantial influence and control over the trustee and VA, its managers, board, and other shareholders …."[181] US Airways also expresses concern that the [redacted][182]

US Airways claims that, because of the restrictive U.S.-U.K. bilateral relationship, including restrictions on U.S. carrier access to Heathrow, "Department precedent requires strict application of the 25% ownership cap."[183] US Airways notes that the Virgin Group apparently supports British refusal to grant Heathrow access for more U.S. air carriers.[184] US Airways states that, despite its claims of public benefits to be provided in the U.S. market, "VA has ignored the one public interest consideration the Department finds determinative in applying liberal standards to foreign ownership interests in U.S. airlines: an open aviation relationship with the foreign owners' country."[185]

US Airways argues that the *USAir and British Airways* decision does not support Virgin America's request for a more liberal standard because that decision, although it examined "various public interest considerations," stated that the codesharing proposal was within the terms of an MOC between the U.S. and the U.K. and "'could have been initiated even without the investment transaction.'"[186] US Airways also points out that the "Northwest/Wings order cited by VA makes it clear that liberal interpretations of

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[178] Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 8-9. US Airways states, "Even if the technical vote on the appointees were to be made by the trustee, it is the fact that the Virgin Group is entitled to appoint its representatives to the VA board of directors, and the fact that the hedge fund investors are legally obligated to vote for the Virgin Group's designees, that is the decisive fact." Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 9 n. 6. According to US Airways, the Virgin Group directors will be able to "substantially influence debates in the VA boardroom, kill or revamp proposals that they believe not to be in the Virgin Group's interest, and reach agreements with the hedge funds." US Airways asserts that "[t]hese interactions are a key avenue for foreign control, not the rubberstamping approval of a trustee where the decision has in effect already been approved through the hedge funds and Virgin Group [directors], or between the hedge funds and Virgin Group directly." Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 9.

[179] *Id.,* at 9.

[180] Confidential Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 10.

[181] Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 9.

[182] Confidential Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 11.

[183] Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 11. The Cayman Islands also has a restrictive bilateral agreement with the U.S. Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 11 n.8.

[184] *Id.,* at 12.

[185] *Id.,* at 11.

[186] *Id.,* at 12.

ownership and control requirements depend on the existence of pro-competitive aviation agreements."[187] Further, US Airways argues, "Given the strong links between the Virgin Group, VA, and Virgin Atlantic, as well as Virgin Atlantic's powerful position at London Heathrow and its apparent role in the U.K.'s decisions thwarting U.S.-E.U. open skies agreements, the Department's precedents require [it] to consider access at London Heathrow a critical factor in the standards applied to its evaluation of VA's citizenship and of potential adverse impacts on U.S. airlines from granting VA's application."[188]

US Airways further argues that the new Section 3.7 of the Trademark License Agreement does not adequately remedy the control issues, that "no other substantive changes" have been made to this agreement, and that all restrictions on "use of the Virgin brand" from the existing Trademark License Agreement remain unchanged.[189] US Airways notes the following problems:

[redacted][190]

US Airways argues that "[b]ecause the whole purpose of VA is to import the Virgin brand into the U.S. market, the key issue is whether the Trademark License Agreement is an avenue for control by the Virgin Group when VA is operating under the Virgin brand, not whether VA is free from Virgin Group control when operating under some other brand."[191] US Airways contends that "the Department should summarily reject VA's claim that the addition of Section 3.7 is grounds for changing the Department's conclusions that the Trademark License Agreement and VA's use of the Virgin brand are avenues for foreign control."[192]

Submission of Additional Evidentiary Material by Virgin America

On February 14, 2007, Virgin America filed a motion for leave to file additional evidentiary material and on that same day filed a motion for confidential treatment for certain additional evidentiary material provided, including documentation relating to a $20 million loan from Cyrus Capital Partners that will be available to Virgin America once it has received approval from the Department and once the Second Closing has occurred and documentation concerning an additional $10 million equity investment that

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187 *Id.,* at 13.
188 *Id.,* at 13.
189 *Id.,* at 11 n. 7.
190 Confidential Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 12 n. 7.
191 Answer in Opposition of US Airways Group, Inc., dated February 13, 2007, at 11 n. 7.
192 *Id.,* at 11 n. 7.

the U.S. investors have agreed to make.[193] Virgin America states that, "[t]his additional equity investment will not be subject to the Put Agreement previously agreed to by the parties]"[194] and additionally argues that these new commitments, as well as the funding that the U.S. investors have already agreed to provide "[demonstrate] clear ownership and further incentive for U.S. citizens to actively control Virgin America."[195]

Virgin America also provided documentation relating to the appointment of Mr. Skinner as Vice Chairman of the Board of Directors and documentation evidencing the reappointment of the applicant's officers by the U.S. members of the Board, as well as an affidavit of Mr. Weatherly, Senior Vice President for Flight Operations, attesting to his recent naturalization as a U.S. citizen.

Answers to the Applicant's February 14 Submission

On March 1, 2007, American, Delta, and US Airways filed answers to the additional evidentiary material filed by Virgin America on February 14, 2007

American Airlines

American argues that "new evidentiary material" submitted by the applicant "does nothing to change the Department's conclusion in show-cause Order 2006-12-23…" that the applicant was not a U.S. citizen.[196] American contends that "the proposed $10 million in additional equity investment by Cyrus Capital and Black Canyon [redacted][197] noting that Virgin America's pleading "incorrectly states that Cyrus and Black Canyon 'have made' an additional investment, when in fact such an investment has merely been proposed."[198] Since the Department found that both Cyrus Capital and Black Canyon were not U.S. citizens, American argues that this "last-ditch proposal by these two entities to provide additional equity funding to Virgin America is irrelevant."[199]

Further, American states that Virgin America's claims that this funding "will not be subject to the put agreement" and "is not subject to any guarantee" "are highly misleading when the terms and conditions in the underlying documents are reviewed."[200] American indicates that "the $10 million equity investment" would instead be subject to a [redacted]

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[193] Motion of Virgin America, Inc., for leave to file additional evidentiary material, February 14, 2007, at 1-2.
[194] *Id.,* at 2.
[195] *Id.,* at 2.
[196] Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 1.
[197] Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 2.
[198] Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 2 n. 1.
[199] *Id.,* at 2.
[200] *Id.,* at 2.

American also points out that "Cyrus Capital's proposed $20 million loan [redacted][208] noting that "Virgin America's pleading misstates the facts by asserting that the applicant has 'obtained' a new $20 million loan," when "such a loan is merely proposed…."[209] Noting that "one of the loan's closing conditions is that Virgin America must [210] [redacted][211] American argues that "the terms and conditions of this supposed new loan serve to demonstrate yet again the on-going deficiencies in Virgin America's capital structure."[212] American further claims that the proposal of the $20 million loan is an acknowledgement by Virgin America of "the insufficiency of its financial plan.[213] [redacted]

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[201] Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 3.
[202] *Id.,* at 3.
[203] *Id.,* at 3.
[204] *Id.,* at 3-4.
[205] *Id.,* at 4 n. 2.
[206] *Id.,* at 4.
[207] *Id.,* at 4.
[208] *Id.,* at 5.
[209] Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 5 n. 3.
[210] *Id.,* at 5.
[211] Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 5.
[212] Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 5.
[213] *Id.,* at 5.

[redacted][214] citizen, which American believes it should not. American argues that the conditioning of the $20 million loan [redacted][215] [redacted] lends no support for the Department to find that Virgin America is a U.S. citizen, or for that matter that the applicant is financially fit."[216]

American also argues that changes to Virgin America's Board of Directors do not resolve its citizenship problem and that, in fact, they serve to "highlight the continuous presence of the Virgin Group's same three initial appointees [Ms. Farrow, Mr. Murphy, and Mr. Reid] from the very outset."[217] Although two of the U.S. members of the original Board are no longer directors of Virgin America, Ms. Farrow, Mr. Murphy, and Mr. Reid continue to sit on the Board, Mr. Reid being counted as "a non-U.S. citizen for these purposes since he was appointed by the Virgin Group."[218] American indicates that Virgin America has made changes to the Board of Directors "three time in less than a year," first expanding the membership from seven to ten, then replacing one U.S. member, Mr. Singer, with a new U.S. member, Mr. Freidheim and at the same time replacing one U.K. member, Mr. Whelan, with a new U.K. member, Mr. Peachey.[219] Later, Mr. Skinner replaced Mr. Hooks, and voting membership was reduced from nine to eight. American points out that Virgin Group has not specified which of "of its three current voting directors (each a Virgin Group insider) would leave the board" under its proposal to relinquish one of its director positions.[220]

Delta Air Lines, Inc.

Delta argues that "[n]othing in Virgin's Motion or…exhibits…resolves the fundamental defects of its application…," that the applicant still is not a U.S. citizen, and that the Department should deny its application.[221] Delta claims that "the commitment letter and accompanying term sheet for a $20 million loan from Cyrus Capital Partners LP does not change the Department's determination that Virgin is not a U.S. citizen."[222] Delta views Virgin America's submission of this loan documentation as a concession of the relevance of debt in citizenship determinations.[223]

Delta disputes Virgin America's claim "that this new funding demonstrates 'clear ownership and further incentive for U.S. citizens to actively control Virgin….,"contending that the new submissions bolster the Department's concern about

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214 *Id.,* at 5-6.
215 Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 6.
216 Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., March 1, 2007, at 6.
217 *Id.,* at 6.
218 *Id.,* at 6.
219 *Id.,* at 7.
220 *Id.,* at 7.
221 Answer of Delta Air Lines, Inc. (March 1, 2007) at 2.
222 *Id.,* at 2.
223 Delta argues that Department precedent demonstrates the relevance of debt to citizenship status.

the level of risk borne by U.S. investors before issuance of 'effective economic authority.'[224] In its proposed $20 million loan to Virgin America, Cyrus Capital is protected from "pre-certification risk" because the loan would be made "only after…the Second Closing."[225] This loan proposal "does not reduce the enormous disparity in current, *pre*-Second Closing funding between the Virgin Group and the other investors. Therefore, the Department's conclusion that Virgin's 'survival is contingent upon [Virgin Group's funding] remains correct."[226]

Delta argues that "this loan document only reinforces the dependency of Virgin on the Virgin Group,"[227] [redacted][228] [redacted][229] Delta states that "[t]he Department's precedent and the Order make clear that the devil is often in the details in fitness/citizenship reviews under the 'totality of circumstances' standard,"[230] and [redacted][231] [redacted][232] [redacted][233] [redacted][234] [redacted][235] Delta indicates that "[t]he 'term sheet' is just…a summary of terms, which must necessarily be memorialized in definitive agreements,"

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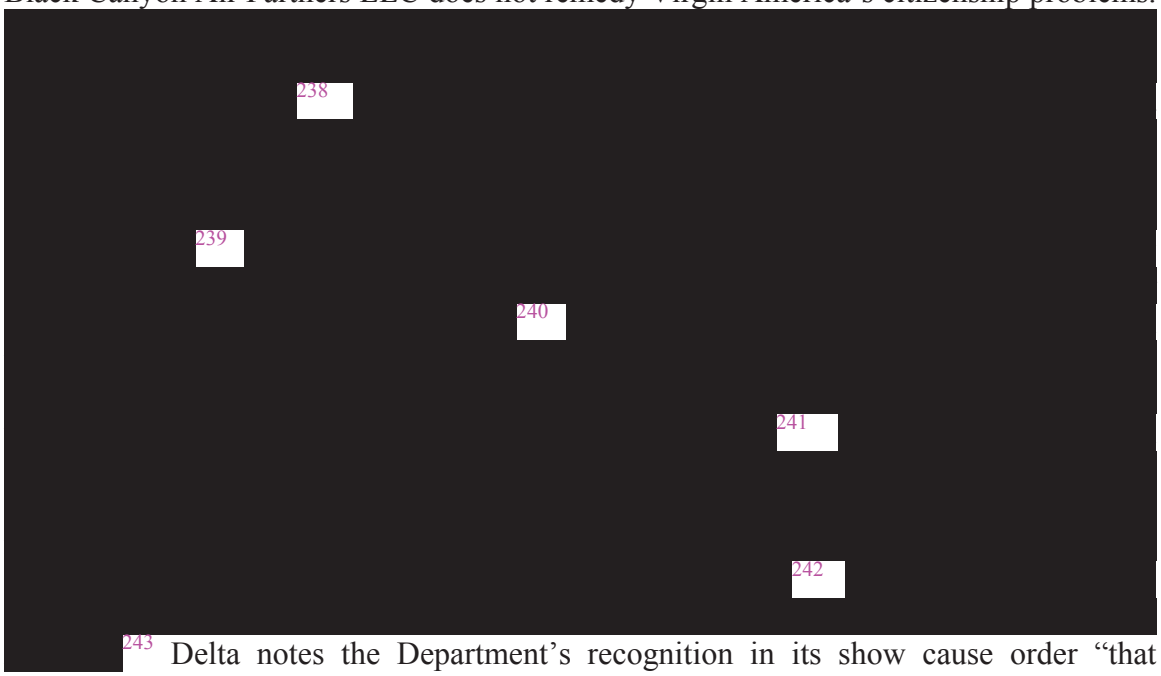
224 *Id.,* at 2-3.
225 *Id.,* at 3.
226 *Id.,* at 3-4.
227 *Id.,* at 4.
228 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 4.
229 *Id.,* at 4.
230 Answer of Delta Air Lines, Inc. (March 1, 2007) at 4.
231 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 4-5.
232 *Id.,* at 5.
233 *Id.,* at 5.
234 *Id.,* at 6.
235 *Id.,* at 6.

none of which have been submitted into the record.[236] The Department therefore is not in a position to revise its determination that Virgin is not a U.S. citizen.[237]

Delta further argues that the new $10 million equity investment from Cyrus Capital and Black Canyon Air Partners LLC does not remedy Virgin America's citizenship problems.



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[243] Delta notes the Department's recognition in its show cause order "that certain financing agreements 'provide the Virgin Group with additional leverage over Virgin's management and/or majority shareholders.'"[244]

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236 Answer of Delta Air Lines, Inc. (March 1, 2007) at 6.
237 *Id.,* at 6.
238 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 6.
239 *Id.,* at 7.
240 *Id.,* at 7.
241 *Id.,* at 8.
242 *Id.,* at 8-9.
243 *Id.,* at 9.
244 Answer of Delta Air Lines, Inc. (March 1, 2007) at 9.
245 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 9-10.
246 *Id.,* at 10.

Delta claims that "many details" are absent from the equity investment term sheet.[247]

[redacted][248][redacted][249]

Delta disputes Virgin America's claims of close involvement in the company by the 'U.S. investors and directors'[250] because [redacted][252]

Delta also notes that Virgin Group has not yet reduced its number of directors from three to two. Delta states that "the foreign ownership interests, the Board representation, the trademark license, the development, business plan, and creation of the airline and the substantial and ongoing financing investments, among others, all show a direct convergence to a foreign citizen – the Virgin Group," and that the carrier continues to be subject to actual and potential foreign control.[253]

US Airways

US Airways argues that "the hedge fund investors' proposed new $10 million equity investment …, the…$20 million loan…by Cyrus Capital, [and] the VA board resolution rubber-stamping officer appointments made by the Virgin Group" fail to remedy "either individually or collectively…the foreign ownership and control concerns identified by the Department, or the concerns described in the answers to VA's objections that were filed by US Airways and other interested parties prior to VA's latest submission."[254]

US Airways argues that "the hedge fund investors' proposed new $10 million equity investment in VA does not eliminate the Department's concerns regarding…VA's citizenship."[255] US Airways argues that "the economic terms of the Class H Common

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247 Answer of Delta Air Lines, Inc. (March 1, 2007) at 10.
248 *Id.,* at 10.
249 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 11.
250 Answer of Delta Air Lines, Inc. (March 1, 2007) at 11.
251 Confidential Version: Answer of Delta Air Lines, Inc. (March 1, 2007) at 11.
252 *Id.,* at 11.
253 Answer of Delta Air Lines, Inc. (March 1, 2007) at 13.
254 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America Inc. (March 1, 2007) at 1.
255 *Id.,* at 2.

Stock dictate that it will be short-lived at best,"[256] [redacted] [257] Also, "the class H common stock has a rapidly increasing[258] [redacted] [259] According to US Airways, "every day that [this stock] is outstanding, the value of the other VA equity becomes worth substantially less (in terms of per share value), which gives VA and its shareholders a strong incentive to quickly[260] [redacted] [261] US Airways urges the Department to "reject VA's claim that the Class H Common Stock represents an increased investment…by the hedge fund investors."[262]

US Airways claims, "the Class H Common Stock increases [Virgin Group's leverage] over VA and its hedge fund investors,"[263] [redacted] [264] Since Cyrus Capital's and Black Canyon's directors "would be[265] [redacted] [266] this decision would be entirely in the hands of the Virgin Group's directors, as the "board currently consists solely of representatives of the Virgin Group and the hedge fund investors."[267] Virgin Group's ability to "control[268] [redacted] [269] of the Class H Common Stock and its timing" provides it with "leverage over VA and the hedge funds."[270] [redacted]

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[256] *Id.,* at 2.
[257] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2.
[258] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2.
[259] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2-3. [redacted] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. at 3 n.2.
[260] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2.
[261] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
[262] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2.
[263] *Id.,* at 2.
[264] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
[265] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 2.
[266] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
[267] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. at (March 1, 2007) at 2-3.
[268] *Id.,* at 3.
[269] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
[270] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.

[redacted][271]

US Airways argues that "as with their other VA equity, the hedge funds bear little or no risk of loss on the Class H Common Stock."[272] US Airways states that "[a]ll other VA equity is[273] [redacted][274] [redacted][275] the new Class H Common Stock is, in effect, senior to[276] [redacted][277] With this atypical order of payment, "VA, the hedge funds, and the Virgin Group have designed an equity investment that has little or no risk of loss (thus making the exclusion of the Class H Common Stock from the Put Agreement irrelevant.)[278] US Airways contends that "[n]o risk of loss equals no ownership" and that "[t]he hedge fund investors should not be viewed as the true owners of the Class H Common Stock."[279]

US Airways argues that the loan demonstrates that the hedge fund investors plan "to exit VA," not maintain long-term control, given that "[t]he loan matures and is payable in full on[280] [redacted][281] which coincides with the time at which "the hedge funds have the right to[282] [redacted][283] US Airways argues that the loan reveals the flawed state "of VA's financing by expressly conditioning Cyrus Capital's obligation to make the loan upon[284] [redacted]

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271 Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4 n. 4.
272 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
273 *Id.,* at 3.
274 Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
275 *Id.,* at 4.
276 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
277 Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
278 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 3.
279 *Id.,* at 3.
280 *Id.,* at 4.
281 Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
282 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
283 Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
284 Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.

[redacted][285] Further, since "this loan is to be used for[286] [redacted][287] not to repay the Virgin Group," it "does nothing to resolve VA's huge cash deficit and continuing indebtedness to the Virgin Group."[288] Moreover, US Airways claims that "the terms of the loan," such as its being subject to[289] [redacted],[290] "suggest that Cyrus Capital is an uninvolved party in VA and not a controlling shareholder as VA claims."[291]

US Airways argues that the Board's reappointment of Virgin America's existing corporate officers, including Fred Reid in the position of CEO, fails to remedy the Department's concerns about foreign influence over Virgin America's officers. US Airways claims that "VA's paper formality of a board resolution does not alter the allegiances of those officers."[292] US Airways indicates that Virgin Group possesses a continuing ability to control Virgin America's officers "through the multiple levels of control mechanisms for the Virgin Group built into the Confidential Documents that VA has not changed, such as the Virgin Group's right to[293] [redacted][294] US Airways contends Virgin Group can also exercise "strong influence" over the officers "because they know that the hedge funds will be exiting VA, and that it is the Virgin Group that has been providing all of VA's needs (arranging planes, financing, hiring officers and personnel, providing its brand, etc.)."[295] US Airways indicates, that, despite the "various other 'proposed resolutions' that VA claimed would remove foreign control over its officers such as removal of Fred Reid and the officers . . .," it has not provided evidence that it has actually undertaken "any of these other 'resolutions.'"[296] US Airways argues, "VA's officers continue to remain an avenue for foreign control over VA."[297]

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[285] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
[286] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
[287] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
[288] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
[289] *Id.,* at 4.
[290] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
[291] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 4.
[292] *Id.,* at 4.
[293] *Id.,* at 4-5.
[294] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 6.
[295] Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. (March 1, 2007) at 5.
[296] *Id.,* at 5 n.8.
[297] *Id.,* at 5.

FITNESS

As stated previously, Virgin America filed an application in Docket OST-2005-23307 requesting a certificate under 49 U.S.C. § 41102 authorizing it to provide interstate scheduled passenger air transportation. That section directs us to determine that applicants for certificate authority are "fit, willing, and able" to perform such transportation. In making fitness findings, the Department must determine whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to resources sufficient to commence operations without posing an undue risk to consumers, and (3) will comply with the Transportation Code and regulations imposed by Federal and State agencies. We must also find that the applicant is a U.S. citizen, which includes the requirement that U.S. citizens have actual control.

The Company

Virgin America, a non-operating company, was incorporated initially as Best Air Holdings, Inc. ("Best Air"), on January 26, 2004, under the laws of the State of Delaware. At that time, Virgin USA, one of the U.K.-based Virgin group of companies, "used Best Air as a vehicle in developing a viable business plan for new, low-fare service within the United States."[298] The Virgin group of companies provided funding to Best Air and developed a business plan, assembled a team of experienced aviation executives, purchased a fleet of new aircraft, and sought U.S. investors to own and control Best Air.

On November 14, 2005, Best Air amended its Certificate of Incorporation to reflect a change in its corporate name to "Virgin America, Inc." Shortly thereafter, on November 21, 2005, Virgin America underwent an ownership change, with the majority of its voting and capital stock being acquired by a Delaware investment company, VAI Partners, LLC ("VAI") (75 percent) and the remaining 25 percent divided among three U.K. companies and/or citizens, Carola, Ms. Frances Farrow, and Mr. Mark Poole.

Ownership of VAI is divided among the following companies: (1) Cyrus New Joint Structure I, LLC ("Cyrus I") (7.08 percent); (2) Cyrus New Joint Structure II, LLC ("Cyrus II") (40.11 percent); (3) Black Canyon (47.18 percent); (4) Carty-Nickell Investments LLC ("Carty-Nickell") (5.63 percent); and (5) VAM Partners, LLC ("VAM") (0.002 percent). Cyrus I, Cyrus II, Black Canyon, and VAM are Delaware LLCs and Carty-Nickell is a Texas LLC.

VGIL, a British Virgin Islands entity, ultimately owns Carola, also a British Virgin Islands entity.[299] Carola is managed by four company directors and three alternate directors, all of whom are U.K. citizens; VGIL is managed by these same individuals with the addition of one other director, Mr. Stephen Murphy, a U.K. citizen.[300] The principal shareholders of VGIL are certain English-law trusts and Sir Richard Branson,

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[298] Virgin America, Supplement 2, filed April 25, 2006, at 2.
[299] VGIL ultimately owns Carola through a chain of its wholly owned subsidiaries. *See* Virgin America, Supplement 1, filed March 3, 2006, at 5.
[300] Virgin America Application, Exhibit 10, at 1.

who holds less than 10 percent of VGIL shares individually. The principal beneficiaries of these trusts include Mr. Branson and members of his immediate family.[301]

Ms. Frances Farrow and Mr. Mark Poole, U.K. citizens, have invested in Virgin America in exchange for stock. Ms. Farrow is the CEO of Virgin USA, a U.S. managed affiliate of VML, a Virgin Group entity.[302] She is also a Director of other Virgin group companies,[303] as well as Carola's designee to serve on Virgin America's Board. Mr. Poole is a Director of Carola[304] and VGIL, and Deputy CEO of the Virgin group of companies.[305]

Management

Virgin America's Board of Directors is comprised of the following 10 individuals:[306] Messrs. Donald J. Carty (Chairman), Samuel Skinner (Vice Chairman), Mark Lanigan, Cyrus F. Freidheim, Jr., Robert Nisi, Paras Mehta, Stephen T. Murphy, Jonathan J. Peachy, and Frederick W. Reid (non-voting),[307] and Ms. Frances Farrow. Messrs. Carty, Skinner, Lanigan, Freidheim, Nisi, and Mehta are U.S. citizens and designees of VAI; Messrs. Murphy and Peachy, and Ms. Farrow are U.K. citizens and appointed by Carola. Mr. Reid serves as a non-voting member of Virgin America's Board pursuant to the by-laws of the company and is responsible for providing information to the Board about the ongoing operations of the applicant and to be aware of the discussions and actions of the Board.[308]

Mr. Donald J. Carty was appointed Chairman of Virgin America's Board in early 2006. He currently serves on the Board of various companies and institutions, including Hawaiian Holdings, Inc., Dell, Inc., Sears Holding Corporation, and Big Brothers Big Sisters of America. Prior to his appointment with Virgin America, Mr. Carty was employed with AMR Corporation and American Airlines, holding various senior-level management positions with the companies, such as Chairman and Chief Executive Officer ("CEO"), and President.

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[301] Id.

[302] Id. VML, under the ultimate ownership of VGIL, is a private entity registered in England and Wales that acts as an investment holding company and provides corporate function support for the Virgin Group.

[303] Id., Exhibit 7.

[304] Id., Exhibit 2, at 7.

[305] Id., Exhibit 10, at 1.

[306] Virgin America states that the Virgin Group has agreed to reduce the number of directors it is entitled to appoint to the applicant's Board from three to two. This change is expected to occur prior to the applicant receiving effective authority from the Department. Objection of Virgin America, dated January 17, 2007, at 5 and 77; Motion of Virgin America for Leave to File Additional Evidentiary Material, dated January 30, 2007, at 8; VAM1383; and VAM1577-VAM1578.

[307] According to the Amended and Restated Certificate of Incorporation of Best Air Holdings, Inc., dated November 14, 2005, the CEO of Virgin America, in this case, Mr. Reid, shall not be entitled to vote on any matter brought forth before the Board unless the CEO (Mr. Reid) is elected as one of the six designees of VAI or one of the three designees of Carola. Virgin America Application, Exhibit 4, at 34.

[308] Reply of Virgin America, Public Version, filed August 16, 2006, at 10.

Mr. Samuel Skinner was recently appointed Vice Chairman of the applicant's Board, replacing Mr. Michael Hooks, on February 1, 2007. He is currently Chair at Greenberg-Traurig LLP, a Chicago government affairs practice (2003 to present). Prior to this, he held various senior-level management positions, including Chairman, President, and CEO, with USF Corp. (2000 to 2003) and Commonwealth Edison & Unicom Corp. (1993 to 1998). Mr. Skinner also served as the Chief of Staff to the President (1991 to 1992), the U.S. Secretary of Transportation (1989 to 1991), Senior Partner for Sidley & Austin LLP (1977 to 1989), and Chairman of Regional Transportation Authority of Eastern Illinois (1984 to 1988). From 1968 to 1977, he served as the Assistant U.S. Attorney (1968 to 1975) and U.S. Attorney (1975 to 1977).

Mr. Mark Lanigan was appointed by VAI to serve as a Director on Virgin America's Board. He is currently the Managing Director and Founding Partner of Black Canyon Capital LLC (2004 to present). Prior to this, he held the position of Managing Director with Credit Suisse First Boston (2000 to 2004) and Donaldson, Lufkin & Jenrette (1990 to 2000) and Vice President with Drexel Burnham Lambert (1986 to 1990).

Mr. Cyrus F. Freidheim, Jr., appointed by VAI to serve as a Director on Virgin America's Board, is Chairman and Director of Old Harbour Partners (2004 to present). Before this, he served as Chairman and Chief Executive Officer of Chiquita Brands International (2002 to 2004) and held various senior-level management positions with Booz Allen & Hamilton, Inc. (1966 to 2002). He also worked for Ford Motor Company in its Corporate Finance department (1963 to 1966), Price Waterhouse as a Consultant (1962), and Union Carbide as a Plant Engineer (1961). From 1957 to 1961, he served in the U.S. Navy.

Mr. Robert Nisi was appointed by VAI to serve as a Director on Virgin America's Board. He currently serves as Partner, General Counsel, and Head of Corporate Risk Management of Cyrus Capital Partners (2005 to present). Previously, Mr. Nisi was General Counsel for Mackay Shields LLC (1998 to 2004) and Assistant General Counsel for Salomon Smith Barney (1996 to 1998) and Prudential Insurance Company (1994 to 1996). He also served as an Attorney with White & Case (1993 to 1994) and Kramer Levin (1991 to 1993) and as an Enforcement Attorney in the Division of Investment Management and Enforcement with the Securities and Exchange Commission (1988 to 1991).

Mr. Paras Mehta was appointed by VAI to serve as a Director of Virgin America in 2006. He is currently a Principal of Black Canyon (2004 to present). Previously, Credit Suisse First Boston employed Mr. Mehta initially as an Associate and later as its Vice President of Investment Banking (2001 to 2005).

Mr. Stephen T. Murphy, a U.K. citizen appointed by Carola to serve as a Director on Virgin America's Board, is the Chief Executive Officer of the Virgin Group (2004 to present). He began his career with the Virgin Group in 1994 as its Group Finance Director (1994 to 2000), and later returned to the company in 2001 after having served as Chairman and Chief Executive Officer of IP Powerhouse Limited (2000 to 2001). Upon his return to the Virgin Group, Mr. Murphy held the position of

Executive Director-Transportation (2001 to 2005) before being promoted to his current position. From 1977 to 1994, he has held senior finance positions with various companies, including The Quaker Oats Company (1991 to 1994), The Burton Group (1986 to 1991), Mars Group (1982 to 1986), Unilever (1978 to 1982), and Ford Motors (1977 to 1978).

Mr. Jonathan J. Peachy, a U.K. citizen appointed by Carola to serve as a Director of Virgin America, currently holds the position of Vice President of Corporate Development with Virgin USA, Inc. (2006 to present). Before this, he held multiple positions with VML (1998 to 2006), and served as an Accountant with Price Waterhouse Coopers (1996 to 1998).

Mr. Frederick W. Reid is Virgin America's Chief Executive Officer and non-voting Director of its Board (2004 to present). He has over 30 years of aviation experience, having begun his career in 1976 with Pan American World Airways. Since then, Mr. Reid has held various senior-level management positions with AMR Corporation (1987 to 1991), Lufthansa German Airlines (1991 to 1998), and Delta (1998 to 2004). Before becoming involved in the aviation industry, he was the Vice President of Business Centers International (1981 to 1983) and a Management Trainee with Indian Hotels Company, LLC (1974 to 1976).

Ms. Frances Farrow, a U.K. citizen appointed by Carola to serve as a Director on the applicant's Board, has served as the Chief Executive Officer of Virgin USA, Inc. since 2001. Prior to this, she held various director positions with Virgin Atlantic Airways Limited (1993 to 2000). From 1987 to 1992, Ms. Farrow was an Attorney for Cameron McKenna.

Virgin America does not have a president. Instead, the applicant's key management personnel report to Mr. Reid, the applicant's CEO.[309] The following table lists Virgin America's key management and technical personnel.

[309] Virgin America Application, Exhibit 6.

Table 1. Virgin America's Key Management and Technical Personnel[310]

Name	Position(s)	Passport Citizenship
Frederick W. Reid	Chief Executive Officer and Director	U.S.
Robert B. Weatherly	Sr. Vice President, Flight Operations	U.S.[311]
Robert B. Dana	Sr. Vice President, Chief Financial Officer, and Treasurer	U.S.
Guy Borowski	Sr. Vice President, Technical Operations	Canadian
E. Frances Fiorillo	Sr. Vice President, People and In-Flight	Canadian
David H. Pflieger, Jr.	Secretary and General Counsel; Vice President, Operations Control Center	U.S.
Brian C. Clark	Vice President, Planning and Sales	U.S.
T. Spencer Kramer, Jr.	Vice President, Marketing and Communications	U.S.
William B. Maguire	Vice President and Chief Information Officer	U.S.
Todd Pawlowski	Vice President, Airports and Guest Services	U.S.
Joseph T. Houghton III	Vice President, Chief Pilot	U.S.
Kenneth W. Scarince	Vice President, Controller	U.S.
Joseph P. Brown, Jr.[312]	Director of Safety	U.S.
Mark Vorzimmer	Director of Security	U.S.
Joseph A. Meszaro	Chief Inspector	U.S.
Thomas Andino	Director of Maintenance	U.S.

Mr. Robert B. Weatherly, an Airline Transport Pilot, has been Virgin America's Senior Vice President of Flight Operations since 2003. Previously, he was Vice President of Atlas Air, Inc. (1999 to 2003). Mr. Weatherly has over 40 years of aviation experience, having begun his career in 1965 with Canadian Airlines/Canadian Pacific Airlines holding multiple positions, including First Officer (1965 to 1973), Chief Pilot (1976 to 1978), Director of Safety (1981 to 1982), Vice President of Operations (1985 to 1986), and Vice President of Flight Operations (1992 to 1999).

Mr. Robert Dana is Senior Vice President, Chief Financial Officer, and Treasurer of Virgin America. Before joining the company in 2002, he was employed with U.S. Bancorp Piper Jaffray as its Managing Director for Semiconductors and Enterprise Hardware and Investment Banking (2000 to 2002). From 1987 to 2000, Mr. Dana was employed with Credit Suisse First Boston, holding various positions, including Director (1995 to 2000), Vice President (1992 to 1995), and Associate (1987 to 1991), and from 1983 to 1985, he was a Research Analyst for Quantum Consultants, Inc.

Mr. Guy A. Borowski has been Virgin America's Senior Vice President of Technical Operations since 2005. He began his aviation career in 1985 as a Structures Engineer

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[310] Id., Exhibit 2, at 3-6; Virgin America, Supplement 1, filed March 3, 2006, at 2-3; and Reply of Virgin America, Public Version, filed August 16, 2006, at 11.

[311] Motion of Virgin America for Leave to File Additional Evidentiary Material, dated February 14, 2007, at 2-3, and attached Affidavit of Mr. Weatherly.

[312] According to the FAA, Mr. Brown is no longer with Virgin America; the company is currently conducting interviews to find his replacement.

with Canadair (1985 to 1987), and has, since then, held various aviation-related maintenance positions with Airtran Airways (2000 to 2005) and Canadian Airlines (1987 to 2000).

Ms. E. Frances Fiorillo holds the position of Senior Vice President of People & In-Flight with Virgin America. Before joining the company in 2005, she served as Chief Human Resource Officer of British Columbia Provincial Health Services Authority (2004 to 2005) and Senior Vice President of Human Resources and Customer Service with ZIP Airlines (2000 to 2003). Prior to this, Ms. Fiorillo held various positions with Canadian Airlines/Canadian Pacific Airlines, including Vice President of Human Resources (1997 to 2000), Vice President of In-Flight Services (1993 to 1997), Director of Onboard Services (1989 to 1993, Manager of Flight Attendant Administration and Standards and Procedures (1981 to 1989), and Flight Attendant (1974 to 1981).

Mr. David H. Pflieger, Jr., an Airline Transport Pilot, serves as the applicant's Secretary, General Counsel, and Vice President of Operations Control Center. Prior to joining the applicant in 2004, he was employed with Delta holding various positions, including Vice President of Operations for Song (2002 to 2004), Director of Flight Safety (2001 to 2002), Pilot (2000 to 2002), and Operations Attorney (1998 to 2001). Mr. Pflieger was also an Associate Attorney for King & Spalding (1997 to 1998), and a Pilot for the Air National Guard and U.S. Air Force (1985 to 1993).

Mr. Brian C. Clark joined Virgin America in 2005 as its Vice President of Planning and Sales. His aviation experience started in 1994, where he worked as an Aviation Legal Assistant with Winthrop Stimson Putnam & Roberts (1994 to 1996). After this, Mr. Clark was employed with US Airways from 1996 to 2004, holding various positions with the company, including Managing Director of Route Planning, Director and Manager of Route Planning, Manager of Operations Planning, and Analyst.

Mr. T. Spencer Kramer has been Vice President of Marketing and Communications for Virgin America since 2005. Previously, he was Vice President of Advertising and Promotion (2003 to 2005) and Director of Advertising and Marketing (1999 to 2002) for ESPN, Inc., and a substitute teacher with Teachers on Reserve (1998 to 1999). Mr. Kramer also held various management positions with Grey Entertainment and Media (1988 to 1998), The Seiniger Advertising Group (1995 to 1996), and The Public Agency Foundation (1992 to 1993).

Mr. William B. Maguire is Virgin America's Vice President and Chief Information Officer. Before joining the company in 2006, he was Senior Vice President and Chief Information Officer of Aspect Communications, Inc. (2004 to 2006), Chief Information Officer of Legato Systems, Inc. (2001 to 2003), and Vice President of Emerging Business Operations with Amdahl Corporation (2000 to 2001). He also held various positions with the United States Postal Service, including Manager of Computer Operation Service Center, Program Manager of Data Operations, and Information Systems Specialist (1977 to 2000).

Mr. Todd Pawlowski is the applicant's Vice President of Airports and Guest Services. He has over 20 years of aviation experience, having begun his career with Eastern Airlines as an Analyst and later as its Regional Manager of Administration (1986 to 1990). Since then, Mr. Pawlowski has held various management positions with Virgin Atlantic Airways (1995 to 2003) and Ogden Aviation Services (1990 to 1995).

Mr. Joseph Houghton, an Airline Transport Pilot, currently serves as Virgin America's Vice President and Chief Pilot. Prior to joining the applicant in 2004, he was employed with US Airways, holding various pilot and pilot-related positions, including Assistant Chief Pilot, Captain, and Check Airman (1985-2004). From 1982 to 2003, Mr. Houghton served in the Maryland Air National Guard.

Mr. Kenneth W. Scarince is the Vice President and Controller of Virgin America. He joined the company in 2005 after having served as the Vice President of Finance and Director of Finance for Chicago Express (2001 to 2005). Before this, Mr. Scarince worked for Skyway Airlines as its Director of Finance (2000 to 2001) and Accounting Manager (1998 to 2001), and Deloitte & Touche as its Senior and Staff Auditor (1995 to 1998).

Mr. Joseph P. Brown, Jr., an Airline Transport Pilot, has been the applicant's Director of Safety since 2004. Before this, he was the Director of Safety and Operations with SH&E, Inc. (2003 to 2004) and a Consultant and Flight Instructor with TRM Group LLC (1998 to 2004). Mr. Brown began his aviation career in 1990, having held various pilot and pilot-related positions with Eastern Aviation Services (1990 to 1993), Action Multi-Ratings (1993 to 1994), Corporate Aviators (1995 to 1996), Union Carbide Corporation (1996 to 1999), Spirit Airlines (1999 to 2000), Airborne Express (2000 to 2001), and Northwest Airlines (2001). From 1990 to 1991, he was a Correctional Officer for the Orange County Correctional Facility.

Mr. Mark Vorzimmer serves as Virgin America's Director of Security. Prior to joining the company in 2005, he was Director of Assets Protection (1997 to 2005) and Manager of Corporate Security (1984 to 1993) for Continental Airlines, Loss Prevention Manager for Tosco Corporation (1993 to 1997), and Security Representative for Neiman-Marcus (1983 to 1984).

Mr. Joseph A. Meszaro, an Airframe and Powerplant Mechanic, has been the applicant's Chief Inspector since 2005. Prior to this, Continental Airlines employed him in various aviation mechanical-related positions, such as Manager of Series Engine Maintenance, Manager of Airframe Maintenance, Supervisor of Ground Equipment and Facility Maintenance, and Airframe and Powerplant Mechanic (1986 to 2005).

Mr. Thomas Andino, an Airframe and Powerplant Mechanic, currently serves as Virgin America's Director of Maintenance (2006 to present). He has almost 20 years of aviation experience, having begun his career as an Aircraft Mechanic and Welder with Pan American World Airways (1988 to 1990). Since then, he has held various aviation maintenance-related positions, such as Aircraft Maintenance Manager, Aircraft

Maintenance Supervisor, and Aircraft Maintenance Technician with JetBlue Airways (2001 to 2005) and United Airlines (1990 to 2001). Before this, Mr. Andino was an Ironworker with B. Glazer Iron Works.

In view of the experience and background of the applicant's key personnel, we tentatively conclude that Virgin America has the management skills and technical ability to conduct its proposed certificated service.[313]

Operating Proposal and Financial Condition

Virgin America intends to provide scheduled, long-haul service between major metropolitan areas, including the San Francisco Bay area and New York City area,[314] operating 17 new Airbus aircraft (15 Airbus A320 and 2 Airbus A319 aircraft) during its first year of certificated operations. In June 2004, the applicant entered into agreements with AVSA, E.U.R.L. ("Airbus") for the delivery of 10 new A320 and 8 new A319 aircraft and the option to purchase up to 72 additional aircraft, and with GE Capital Aviation Services, Inc. ("GECAS") to lease 10 new A320 and 5 new A319 aircraft.[315]

In establishing financial fitness, the Department typically asks an applicant to demonstrate that it has access to financial resources sufficient to cover its pre-operating expenses and the expenses that are reasonably projected to be incurred during three months of operations. Because projected expenses during the first several months of operation frequently do not include all of the costs that will be incurred during a "normal" period of operations, it is our practice to base our three-month test on one quarter of the first year's operating cost forecast. In addition, in determining available resources, projected revenues may not be used.

As of January 13, 2007, Virgin America has received approximately $243.3 million in funding from its owners. Specifically, VAI and the Virgin Group have provided the applicant with $10.0 million and $3.3 million in equity financing, respectively. In addition to this, the Virgin Group has also provided Virgin America approximately "$230.0 million in debt financing to cover its working capital requirements through the issuance of the final order,"[316] which is comprised of $164.0 million in Senior Notes and $66.0 million in Interim Notes.[317]

According to the applicant, prior to it receiving effective authority, Virgin America's majority owner, VAI, will invest an additional $88.9 million in the company in exchange for equity and provide it with $20.0 million in debt financing, bringing VAI's total

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[313] Before authorizing an air carrier to conduct air transportation operations, the FAA also evaluates certain of the air carrier's key personnel with respect to the minimum qualifications for those positions as prescribed in the FARs. The FAA's evaluation of these key personnel provides an added practical and in-person test of their skills and technical ability.

[314] Virgin America Application, Exhibit 2, at 9.

[315] *Id.,* Exhibit 2, at 8.

[316] Objection of Virgin America, dated January 17, 2007, at 84-85.

[317] *Id.,* at 84.

investment in Virgin America to $118.9 million.[318] At that same time, Virgin America will also receive $29.8 million in equity and $58.6 million in subordinated debt from the Virgin Group, totaling $88.4 million.[319]

With respect to its pre-certification debt funding from the Virgin Group, Virgin America intends to repay and extinguish approximately $65.9 million and $105.4 million in Interim and Senior Notes, totaling $171.4 million.[320] Although Virgin America anticipates that its total capitalization, prior to it receiving effective authority, will consist of a combination of debt and equity financing, totaling $207.3 million,[321] this repayment of debt will leave the applicant, prior to certification, with a negative cash balance of $32.7 million.[322]

The applicant also provided forecasts of its pre-operating costs and first-year expenses for its proposed certificated operations. Specifically, it expects to incur approximately $116.7 million in pre-operating expenses and approximately $210.5 million in first year expenses.[323] Based on these forecasts, we find Virgin America's expense projections to be reasonable and estimate that the applicant will need about $202.1 million, which consists of one-fourth of its first-year expense forecast, $169.4 million, plus its negative cash balance, $32.7 million, to meet the Department's financial fitness criteria.[324]

In light of the foregoing, we tentatively conclude that should Virgin America provide evidence that the company has the necessary financial resources to support its proposed certificated operations, as well as third-party verification attesting to the availability of these funds, the applicant will have sufficient financial resources available to it to enable the air carrier to commence passenger operations without posing an undue risk to consumers or their funds.

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[318] VAI will receive approximately $67.5 million from Cyrus Partners and $46.5 million from Black Canyon, its majority owners. Virgin America Application, at 4; Objection of Virgin America, dated January 17, 2007, at 85; and Motion of Virgin America for Leave to File Additional Evidentiary Material, dated February 14, 2007, at 1-2.

[319] Virgin America Application, at 4-5.

[320] Objection of Virgin America, dated January 17, 2007, at 85.

[321] *Id.*, at 2 and 4; Objection of Virgin America, dated January 17, 2007, at 5 and attached Affidavit of Robert A. Nisi at 4; and Motion of Virgin America for Leave to File Additional Evidentiary Material, dated February 14, 2007, at 1-2.

[322] This calculation is based on the total amount of pre-certification debt funding being repaid and extinguished ($171.4 million) minus the amount of equity Virgin America will receive from VAI ($108.9 million) and the Virgin Group ($29.8 million), totaling $138.7 million.

[323] Virgin America Application, at Exhibit 13-Exhibit 15.

[324] We based our estimate on the forecasts filed in Virgin America's application and in its subsequent submissions. This estimate may no longer reflect the applicant's current anticipated pre-operating and first-year expenses or its actual pre-certification debt financing. Therefore, we intend to recalculate the funding needed by Virgin America to meet our financial fitness test upon the applicant's submission of updated expense forecasts and any additional funding documents.

Compliance Disposition

We tentatively conclude that Virgin America has the proper regard for the laws and regulations governing its services to ensure that its aircraft and personnel conform to applicable safety standards and that acceptable consumer relation practices will be followed.

The applicant states that there are no actions or outstanding judgments against it, its owners, or its key personnel, nor have there been any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations brought against any of these parties. Virgin America also states that there are no pending investigations, enforcement actions, or formal complaints filed by the Department against it, its key personnel, or persons having a substantial interest in it with respect to compliance with the Transportation Code or the Department's regulations. The FAA reports that Virgin America has a satisfactory compliance disposition and that its management team is qualified for their positions. Moreover, there are no FAA enforcement actions pending against the air carrier.

CITIZENSHIP

As stated previously, VAI, a Delaware LLC, holds 75 percent of the voting ownership of Virgin America, with the remaining 25 percent divided among Carola, Ms. Farrow, and Mr. Poole, each of which is a U.K. citizen.

Table 2. Voting Ownership Structure of Virgin America[325]

Class	Issued to	Authorized	Outstanding at Final Closing	Voting Rights	Ownership at Final Closing
Preferred	VAI	4,887,105	4,887,105	4,887,105	60.0%
A	VAI	16,454,802	1,221,777	1,221,777	15.0%
B	Carola	2,036,347	1,862,486	1,862,486	22.9%
D	F. Farrow	100	100	154,543	1.9%
F	M. Poole	100	100	19,318	0.2%
Total		**23,378,454**	**7,971,568**	**8,145,229**	**100.0%**

[325] According to Virgin America's Amended and Restated Certificate of Incorporation, holders of certain classes of stock are entitled to a particular number of votes per share. Specifically, Class D and Class F shareholders are afforded 1,545.43 and 193.18 votes, respectively, per share held. Thus, to calculate the total number of voting shares in Virgin America, we multiplied the number of issued Class D and Class F shares by their respective votes per share (154,543 votes for Class D shareholders and 19,318 votes for Class F shareholders), and added the total number of Preferred, Class A and Class B shares issued, giving Virgin America a total of 8,145,229 voting shares. The percentage of ownership at final closing is calculated by dividing the number of voting shares held by class by the total number of voting shares in the company. For example, the Class D shareholder's 1.9 percent ownership in Virgin America consists of 154,543 Class D voting shares divided by 8,145,229, the total number of voting shares in Virgin America, and then multiplying this amount by 100. Virgin America Application, Exhibit 4, at 2-3, Exhibit 8, at 1; and Virgin America, Supplement 2, filed April 25, 2006, Exhibit 24, at 1 and Objection of Virgin America, dated January 17, 2007, at 86-87.

The applicant has also authorized the issuance of non-voting common stock: (1) 5,690,108 shares of Class C stock, (2) 100 shares of Class E stock, and (3) 1,580,741 shares of Class G stock. To date, Virgin America has issued 100 shares of Class E non-voting stock to Mr. Frederick W. Reid, the applicant's Chief Executive Officer.

Further, all of Virgin America's key personnel are identified as U.S. citizens, with the exception of Messrs. Borowksi and Fiorillo, Canadian citizens, and the company has supplied an affidavit attesting that it is a citizen of the United States under the actual control of U.S. citizens.

TENTATIVE DECISION

By Order 2006-12-23 we tentatively found that Virgin America was not a U.S. citizen as defined in 49 U.S.C. § 41102 (a)(15), citing various indicia of actual and potential control over the applicant by the Virgin Group, a U.K. citizen. Virgin America objected to these tentative findings, arguing and providing additional evidence that it is indeed owned and controlled by U.S. citizens. While disagreeing with the Department's findings, the applicant also proposed making numerous changes in its ownership structure and in certain associated agreements to further bolster U.S. citizen control of the carrier, all of which it promises to implement before receiving authority to operate.

Having reviewed the record and considered the significant modifications offered by Virgin America as well as the pleadings of other parties, we believe that the totality of the circumstances surrounding Virgin America's fitness has clearly changed. Therefore, we are making a new, tentative fitness determination based on the updated record. Specifically, we have preliminarily determined that the applicant can meet our citizenship standards so long as prior to certification by us it has completed its second financial closing and satisfied several additional conditions discussed below.

A. Statutory requirements concerning ownership

Section 41102 of the Transportation Code requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. § 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting interest be owned by U.S. citizens and that the applicant must be under the actual control of U.S. citizens.

In Order 2006-12-23, we tentatively found that U.S. citizens held less than the statutorily-required percentage of Virgin America's voting equity because VAI – the limited liability corporation holding 75 percent of the voting equity -- was not itself a U.S. citizen.[326] Based upon our review of the ownership structure of VAI, we tentatively found that VAI did not meet the statutory definition of a U.S. citizen because more than 49 percent of its owners' total equity was held by Cayman Island entities or foreign

[326] *See* Order 2006-12-23, at 15.

limited partnerships.[327] In making this tentative decision, we thus applied the "traditional" approach (rather than the "multiplying out" approach) to each layer of Virgin America's ownership including VAI, because we found that on the whole the foreign interests in the applicant were "neither diffuse nor passive – due to the extensive involvement of, and financial interest held by, Sir Richard Branson and the Virgin Group."[328]

As VAI is a Delaware LLC funded largely by hedge funds, the applicant responded to our tentative finding with the submission of affidavits purportedly "establishing the diffuse and passive nature of the underlying hedge fund investors"[329] and a proposal to segregate foreign investors in the hedge funds from Virgin America, by the "creation of a separate fund or class of interests that will exclude any foreign investor from participating in any profits or losses in the VX investments…this structure takes the extraordinary step of excluding any and all "foreign" LPs from receiving any benefit/risk related to their investment in Virgin America."[330] At the same time, Virgin America continues to press its argument that we erred in not applying the *Hawaiian* standard to this case, arguing that the Virgin Group's "alleged extensive involvement" is being otherwise addressed.[331]

The Interested Parties argue that Virgin America fails to meet the statutory test for ownership by U.S. citizens. US Airways argues that the applicant "fails to articulate even one specific reason why the Hawaiian approach should be applicable here, given the substantial involvement of Sir Richard Branson and his Virgin Group."[332] The company further argues that the Virgin Group holds more than 25 percent of Virgin America's total equity and asserts that "the Virgin Group's subordinated note is really disguised equity"[333] and "[w]hen the Virgin Group's subordinated note and warrants are correctly characterized, it is readily apparent that the Virgin Group owns more than 49% of VA."[334] American also argues for application of our "traditional" test, because of the Virgin Group interests and other control indicia.[335] Delta too rejects applying the *Hawaiian* analysis to Virgin America, claiming that "Virgin's belated attempt to remedy this fundamental defect falls far short."[336] Delta also states that at least one of Canyon Value Realization Fund's limited partners "is not shown to be a U.S. citizen, which under longstanding Department precedent taints the citizenship of the entire partnership."[337] ALPA notes that the applicant has not demonstrated how foreign interests in the hedge funds will be barred from participation or voting.[338]

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327 *Id.,* at 14-15.
328 *Id.,* at 14.
329 Objection of Virgin America, dated January 17, 2007, at 11.
330 *Id.,* at 80.
331 *Id.,* at 50.
332 Answer of US Airways, dated February 13, 2007, at 4-5.
333 *Id.,* at 5.
334 *Id.,* at 7.
335 Answer of American, dated February 13, 2007, at 3-6.
336 Answer of Delta, dated February 13, 2007, at 3.
337 *Id.* at 4-5, *citing* Orders 99-8-12, 97-5-19.
338 Answer of ALPA, dated February 14, 2007, at 13.

We believe that the applicant's proposal to exclude participation by foreign citizens in VAI will allow us to conclude that 75% of the voting interest in Virgin America is owned and controlled by U.S. citizens -- provided that the following safeguards are put in place. First, all non-U.S. investors in VAI must be completely walled off from investment in Virgin America. To the degree that such foreign interests maintain investments in the hedge funds, those interests must be limited to investments unrelated to Virgin America, and they may not receive benefits from the investment in Virgin America. While U.S. investors could continue to hold an interest in both Virgin America and other investments, non-U.S. investors must be limited to the latter. Second, investors must be capable of having their citizenship identified on the basis of the criteria in Title 49—no other definition is relevant to our determinations here.[339] Third, the applicant must provide us with supporting documentation, including a diagram detailing VAI's ownership structure and information regarding the nationality and percentage of foreign investment in VAI and its owners.[340] Depending on VAI's amended equity structure, either the multiplying out or traditional approach could yield the same result, in any case.

For the following reasons we believe that these changes, particularly when combined with the comprehensive nature of the other reforms the applicant has agreed to undertake, are sufficient to ensure that U.S. citizens will retain at least 75 percent voting control of the applicant. To begin with, the structure we are proposing to require will ensure that funds actually invested by foreign interests will never be involved in VAI; they will be walled off. Conversely, the large voting interest held by the Virgin Group -- which itself was a key basis for our initial finding that the applicant could not initially quality for the liberal "multiplying-out" approach -- is being placed in an irrevocable voting trust, and the trust will be subject to further conditions (discussed below) that will ensure that in case of conflict between Virgin Group and U.S. investor interests, the latter will be protected. Moreover, our precedent does not necessarily require that limited liability corporations be disqualified from treatment as U.S. citizens simply because one single investor is foreign (a contrast, we would note, to our treatment of limited partnerships). In applying our precedent, therefore, we cannot ignore the ongoing evolution of new

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[339] As part of its argument that its financial structure complies with our statutory test, Virgin America states, "Here, each of the General Partners are U.S. domiciled entities and are therefore, U.S. persons for purposes of the statutory test. Additionally, each of the owners of each such General Partner, on a look-through basis until individuals or publicly traded companies are reached, is also a U.S. person for purposes of the statutory test." Objections of Virgin America Inc., dated January 17, 2007, at 79. As Interested Parties have pointed out, "the definition of 'U.S. person' under the Internal Revenue Code, used by Virgin America, is substantially different from the definition of 'citizen of the United States' in the aviation statutes." Answer of ALPA, dated February 14, 2007, at 13. We remind the applicant that definitions under the Internal Revenue Code or other statutes are not relevant to our citizenship determination because 49 U.S.C. § 40102(a)(15) provides its own definition of 'citizen of the United States.'

[340] Delta argues that Virgin America's "new" application fails to provide certain documents and information. Specifically, Delta maintains that Virgin America has failed to provide the record of this case with certain key documentation or other information about its ownership. Absent this information, Delta maintains that the Department cannot now make a positive citizenship determination on the applicant. Answer of Delta Air Lines, Inc., dated February 13, 2007, at 18-19.

We believe that the record is substantially complete to reach our tentative decision here, and as a prerequisite to its licensing, Virgin America will have to satisfy fully our proposed condition in this matter.

financial instruments or the realities of international finance; these matters should be accordingly considered when applying the law.[341] We stress that, in this case, the applicant appears willing to go to some lengths to avoid giving control to foreign interests, including the Virgin Group, allowing us to tentatively find that the actual, ultimate investment by foreign interests will represent no more than 25 percent of the applicant's voting stock.

The Interested Parties question the appropriateness of permitting what they call "foreign feeder funds" (the hedge funds) to invest in Virgin America.[342] The evidence presented to us, however, shows that these funds will be solely owned by U.S. citizens through offshore passive investment vehicles and will have no rights that would indicate foreign control. Given Virgin America's proposal to effectively wall off any foreign interests directly or indirectly from VAI, and the other conditions we propose throughout this order, we tentatively find that the presence of these funds does not compromise the structure the applicant is proposing.

The Interested Parties also contend that equity-conversion features of the subordinated note and the warrants held by the Virgin Group should be deemed evidence of foreign voting interest.[343] However, we generally do not consider securities of this type as constituting voting interests unless and until the notes are converted into equity or the warrants are exercised. With respect to warrants specifically, in Order 93-9-32, the Department "not[ed]… that the current non-U.S. shareholders hold warrants that would allow them to increase their equity interests in the company if they choose to do so" and required *advance notice* to the Department "of any exercise of the warrants held by its current non-U.S. citizens or prior to any equity infusion by any additional non-U.S. citizens." [344] We stated that we were imposing this condition "[s]o that we may review the impact of any future transactions on the company's citizenship…."[345] In any event, should the Virgin Group acquire an additional equity interest in the applicant, through the conversion of the notes or the exercise of the warrants, Virgin America would be required to notify the Department of any change in ownership, consistent with 14 CFR Part 204. The Department, in turn, would undertake a continuing fitness review of the air carrier as part of its responsibility under 49 U.S.C. 41110(e).

B. Actual Control

Next we deal with the question of whether U.S. citizens will be in actual control of Virgin America. We tentatively find that the applicant's proposed changes in corporate structure – including the creation of a voting trust for the Virgin Group's shares -- together with additional conditions we are imposing, will, when implemented, mitigate our concerns regarding the Virgin Group's control over the applicant through its equity investment.

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[341] *See* Order 91-1-41, In the Matter of the Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc. (1991) at *5

[342] Answer of Delta Air Lines, Inc., dated February 13, 2007, at 5.

[343] Answer of US Airways, dated February 13, 2007, at 5.

[344] *See* Order 93-9-32, Fitness Determination of Arizona Airways, Inc. as a Commuter Air Carrier under section 419(e) of the Federal Aviation Act (1993) at *4.

[345] *Id.,* at *4.

1. History of Formation

In Order 2006-12-23, we tentatively found that the Virgin Group's extensive involvement in the creation of the applicant indicated foreign control and suggested continuing influence of the Virgin Group.[346] Among other things, we stated that because certain of Virgin America's agreements that predated U.S. investment (including its aircraft lease agreements with Airbus and GECAS, entered into and negotiated by the Virgin Group prior to VAI's involvement) remained in place, and because the terms and conditions of these agreement did not appear to provide the U.S. investors the ability to alter independently or revise these agreements, Virgin Group appeared to have a degree of influence over the applicant that, given the totality of circumstances then presented to us, suggested U.S. citizens were not actually controlling the applicant.[347] The Interested Parties support the Department's initial position regarding the relevance of Virgin America's creation and formation to its current citizenship case.[348]

To establish ongoing U.S. control over Virgin America, the applicant proposes to remove the Virgin Group's "veto power over pre-existing and future material contracts or capital expenditures"[349] and has provided multiple affidavits from GECAS, Airbus, and its non-Virgin Group directors affirming that, in fact, various amendments were made to the applicant's aircraft lease agreements since Virgin America's U.S. investors joined the company.[350] According to the applicant, it has also executed various significant contracts and agreements related to airline operations, all approved by the non-Virgin Group directors.[351] Moreover, prior to certification, the non-Virgin Group directors have ratified the earlier agreements. Provided that the applicant provides us with documentation showing the amendments made to the aircraft agreements and specifying the dates the agreements were amended, we believe these actions will address our initial concerns regarding the Virgin Group's continued influence over Virgin America.[352]

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[346] *See* Order 2006-12-23, at 17-18.

[347] *Id.,* at 18. In our order, we also stated that despite the applicant's claim of sudden independence for its U.S. management, the record showed that a longstanding relationship between Virgin America's current management and the Virgin Group existed. Moreover, we found that this relationship, when reviewed as part of the totality of the circumstances in this case, affected our overall review of the independence of the applicant from the Virgin Group. Since we addressed the applicant's management in the following section of the Tentative Decision in this order, we see no reason to repeat our new tentative finding on Virgin America's management herein.

[348] Answer of American Airlines to New Application and Objection of Virgin America, dated February 13, 2007, at 17; and Answer of ALPA in Opposition to the Objection of Virgin America, dated February 14, 2007, at 2-4.

[349] Objection of Virgin America, dated January 17, 2007, at 15 (summary chart), and 71.

[350] *Id.,* at 12 (summary chart).

[351] *Id.,* Affidavit of Mr. Freidheim, at 2-3 and VAM1385; Affidavit of Mr. Hooks, at 2-4 and VAM1388-VAM1390; Affidavit of Mr. Carty, at 2-4; Affidavit of Mr. Lanigan, at 2-4 and VAM1394-VAM1396; Affidavit of Mr. Mehta, at 2-3 and VAM1398-VAM1399; Affidavit of Mr. Nisi, VAM1403; Objection of Virgin America, dated January 17, 2007, Confidential Version, at 32 and 68; and VAM1327-1329.

[352] [redacted]

2. Management

By Order 2006-12-23, the Department tentatively found that the Virgin Group had extensive influence over the applicant's management. This tentative conclusion was based on the fact that the applicant's current employees and officers were initially hired as consultants to or employees of the Virgin Group or other companies under the control of the Virgin Group.[353] In particular, we pointed to the relationship between Mr. Reid and the Virgin Group as one of several factors that, taken together, indicated that Virgin America was not actually under the control of U.S. citizens.[354] We also said that the composition of Virgin America's Board had the potential to compromise actual control of the applicant by U.S. citizens.[355]

Without conceding the validity of our tentative conclusions, Virgin America has offered to make the following changes with respect to its management structure: (1) replace Mr. Frederick Reid as CEO, if the Department found his removal necessary to ensure no semblance of foreign control over Virgin America;[356] (2) "remove or replace any officer the DOT requires;"[357] (3) permanently relinquish one of the Virgin Group's Board designees (from three to two);[358] and (4) amend its by-laws and Subscription and Stockholders Agreements to remove certain voting powers of representatives of non-U.S. interests.[359]

The Interested Parties deem Virgin America's proposals inadequate, arguing that the Virgin Group will still retain certain rights that constitute control over the applicant. For instance, they [redacted][360] They contend that several members of Virgin America's management -- with the exception of Mr. Samuel Skinner -- should be treated as beholden to foreign influence, because they were recruited and hired by representatives of the Virgin Group.[361]

We tentatively find that the changes proposed by Virgin America, if implemented, would obviate the concerns we expressed concerning the independence of its management from

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[redacted] (VAM1327-VAM1328). [redacted] (VAM1329).

353 *See* Order 2006-12-23, at 16-17.
354 *Id.,* at 16.
355 *See* Order 2006-12-23, at 16-17.
356 Objection of Virgin America, at 12 (summary chart), 66.
357 *Id.,* at 67.
358 *Id.,* at 12 (summary chart), 77.
359 *Id.,* at 15 (summary chart), 77.
360 Confidential Answer of ALPA in Opposition to the Objections of Virgin America, dated February 14, 2007, at 3; and Confidential Answer of US Airways to Additional Documents submitted by Virgin America, dated March 1, 2007, at 4-5, n.7.
361 Answer of ALPA in Opposition to the Objections of Virgin America, dated February 14, 2007, at 3; Answer of Delta Air Lines, Inc., dated February 13, 2007, at 17, *quoting* Order 91-8-15; and Answer of US Airways, dated February 13, 2007, at 10.

foreign interests.[362] For the reasons set forth in Order 2006-12-23, and as suggested by the Interested Parties, we tentatively find that the applicant's replacement of Mr. Reid as CEO and board member with a U.S. citizen who has no prior affiliation with the Virgin Group would substantially remedy our concerns over the independence of the applicant's management from the Virgin Group. Thus, we propose to condition certification of Virgin America on Mr. Reid's replacement as CEO no later than three months after the issuance of a Final Order. We do not propose to take this step lightly and acknowledge that such a transition is a difficult undertaking, especially for a new company about to launch operations. Therefore, if the applicant wishes to retain him as a consultant to facilitate an orderly transition to his replacement, we would permit him to remain as a consultant for up to six months following his replacement as CEO.[363] We do not believe, however, that removal of other officers from the applicant's management is required. We tentatively find that conditioning the applicant's authority upon its replacement of Mr. Reid as CEO and ratification of the rest of its current management by its non-Virgin Group directors will help to ensure that control over the company will be with U.S. citizens.

We tend to agree, however, with the Interested Parties' contention that the Virgin Group will still retain an ability to influence and direct the applicant's management and employees [redacted] Therefore, we tentatively propose to accept the applicant's offer to reduce the Virgin Group's representation on the Board and to terminate the Virgin Group's special voting powers. Moreover, to lessen still the possibility that the Virgin Group would accomplish indirectly, what it could not accomplish directly, we intend to condition the effectiveness of the applicant's authority upon the removal of the Virgin Group's right [redacted]

Finally, as discussed above, in Order 2006-12-23, we tentatively found that because VAI itself was not a citizen, those members of the Board who had been approved by VAI were not U.S. citizens as a technical matter under our precedent. Therefore, once VAI has been restructured so as to wall off the interests of foreign citizens, it must formally re-approve the Board.

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[362] Objections of Virgin America, at 62-67. It is not the Department's intent to "disparage" any of Virgin America's personnel, including Mr. Reid. *Id.* at 66. Our sole concern in this analysis is the degree to which these individuals' history of involvement with and continuing roles in the applicant relate to its citizenship. *See* Department's discussion in the **MANAGEMENT** section of this order.

[363] A new CEO, with no prior connection to the Virgin Group, should be appointed by the non-Virgin Group directors. The applicant is required to notify us of this change and provide a detailed resume for this individual. The resume should include a listing of all previous employment (aviation and non-aviation), including the name of employer, location (city, state), type of business, position(s) held, description of responsibilities, and dates employed (month/year).

2. Debt

In Order 2006-12-23, the Department tentatively found that the loans from the Virgin Group to Virgin America provided a degree of influence by non-U.S. citizens.[364] The record at that time showed that the Virgin Group, in addition to its approximately 25-percent equity interest in the applicant, had supplied a substantial percentage of Virgin America's capital in the form of debt, which was governed by several agreements. We tentatively found that Virgin America's financial viability was contingent upon the financing provided by the Virgin Group.[365] The record further showed that U.S. investors bore little or no risk of loss compared to the Virgin Group until the applicant received authority, that certain provisions in the debt agreements favored the Virgin Group, and that the debt provided by the Virgin Group was linked to the issuance of additional equity in the applicant.[366] Also, we pointed out several instances in which Virgin America's arrangements suggested that it could be controlled by the Virgin Group.[367]

In response to the Department's order and certain concerns raised by the Interested Parties,[368] Virgin America has agreed to remove several provisions from the various loan documents that raised control issues.[369] The applicant proposed to remove from the Interim Note Agreement and the Subordinated Note Agreement restrictions relating to "the payment of dividends…, the incurrence of senior indebtedness…and the making of a fundamental change to Virgin America's business"; thus, Virgin Group consent is no longer needed for any of those actions.[370] Virgin America also proposed to remove from the Senior Secured Promissory Notes and the Senior Secured Promissory Notes, Series B, "restrictions relating to the incurrence of certain senior indebtedness…, the transfer of certain assets of [the applicant], the maintenance of [the applicant's] corporate restriction and the notification of events or defaults or other defaults," as well as, from the Security Agreement, "covenants relating to material [Virgin America] contracts."[371]

The Interested Parties maintain that the sheer amount of debt funding provided by the Virgin Group is itself also a form of control. ALPA quotes our tentative finding that "Virgin America's 'survival is contingent on financing by the Virgin Group,'" arguing that this issue is unaddressed, and noting that, through its $230 million debt contribution combined with a small equity contribution, Virgin Group has provided the vast majority of Virgin America's funding.[372] Delta observes that, even if "debt may not normally

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364 *See* Order 2006-12-23, at 18-20. [redacted]

365 *Id.*

366 *Id.*

367 *Id.,* at 18-20.

368 Virgin America notes that "opposing parties…previously complained about a host of various provisions in the Subscription Agreement, Stockholders Agreement, Bylaws, and Debt agreements, which in their view contained 'extraordinary veto rights' or Board approval rights not in the ordinary course of business." Objections of Virgin America, dated January 17, 2007, at 70.

369 *Id.,* at 71-72.

370 *Id.,* at 71.

371 *Id.,* at 71-72.

372 Answer of ALPA, dated February 14, 2007, at 4.

raise issues of foreign control, it is a relevant control factor under the totality of circumstances in this case, because "all of the foreign [financing] links converge back to one single foreign interest, the Virgin Group," which has lent the applicant a very large sum.[373] US Airways claims that "the Virgin Group's subordinated note is really disguised equity," noting several particular features of the note and comparing these to the terms of the Senior Secured Note and the Senior Secured Note, Series B.[374]

We agree with the Interested Parties that loan covenants that are commercially standard and innocuous in most contexts can still create impermissible levels of control in the specialized context of compliance with our U.S. citizenship standards for air carriers. The mere involvement by a creditor with an airline can precipitate questions about whether the lender has any form of control over the carrier. We note, however, that the Department has generally not found that a large indebtedness subject only to the barest of creditor protections creates a legal problem under these standards.[375] Thus, while we agree that debt can serve as a potential avenue of control, our review now focuses on whether Virgin America has effectively eliminated the Virgin Group's actual ability to control it through proposed amendments to the debt instruments, and whether or to what degree the remaining provisions in the debt agreements operate to turn the Virgin Group's loans into something more than a passive investment.[376]

Based on our review, we tentatively find that so long as Virgin America takes all of its proposed steps to revise its loan agreements with the Virgin Group, the mere size of the Virgin Group's current non-voting investment by virtue of its loan to the applicant does not amount to an impermissible level of control.[377]

3. Licensing agreement

In Order 2006-12-23, the Department tentatively determined that the Virgin Trademark License Agreement ("License Agreement") represented another potential avenue by which the Virgin Group could actually control the applicant.[378] We cited several critical provisions allowing the Virgin Group effectively to dictate the scope and nature of the applicant's operations and that went beyond what was necessary to protect the legitimate interest the former might have in protecting its brand equity, but as we observed in our show cause order, franchises do not inherently confer actual control of the air carrier on

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[373] Answer of Delta Air Lines, Inc., dated February 13, 2007, at 11. In its March 1, 2007 answer addressing additional evidentiary material filed by Virgin America, Delta also states that, because the proposed $20 million loan from the U.S. investors "does not reduce the enormous disparity in current, *pre*-Second Closing funding between the Virgin Group and the other investors…., the Department's conclusion that Virgin's 'survival is contingent upon [Virgin Group's funding] remains correct." Answer of Delta Air Lines, Inc., dated March 1, 2007, at 3-4.

[374] Answer of US Airways, dated February 13, 2007, at 5-7.

[375] *See* Order 91-1-41 (*In the matter of the acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc.*) at *2, *6; and *see also* Order 89-9-51 (*In the matter of the acquisition of Northwest Airlines by Wings Holdings, Inc.*) at *3.

[376] Order 2006-12-23, at 19-20 (confidential version).

[377] *Id.,* at 3 (description and table of Virgin America's equity structure). If the warrants are converted, the resulting equity interest will be non-voting.

[378] *Id.,* at 19-20.

the franchisor.[379] To comply with the law, any such arrangement must nevertheless be structured so as to preserve the independence of the U.S. carrier's decision-making authority, as well as preserve the air carrier's ability to exist outside the franchise.[380]

In response to the Department's concerns, Virgin America proposes to amend the License Agreement so as to expressly preserve Virgin America's ability to operate "completely free of the Virgin brand and to freely code-share with any carrier domestically or internationally, anywhere and with any carrier," with the exception that "Virgin Atlantic is the only U.K. based carrier it may code-share with under the Virgin brand and in those few markets in which Virgin Atlantic operates, it may only code-share with Virgin Atlantic."[381] In addition, the applicant proposed to revise Section 3.7 of the License Agreement to read as follows: "Notwithstanding any other provision of this License nothing in this License shall prohibit the User at any time during the Term from electing to perform the Licensed Activities without in any way using the Names or Marks, so long as the User continues to pay the Royalties in full as and when due and on the basis set out in this License."[382]

The Interested Parties characterize the changes to the License Agreement as inadequate, asserting that, under the agreement, the applicant's code-sharing opportunities remain limited in both geography and choice of airline partners.[383] [redacted][384] [redacted][385] [redacted][387] [redacted][388]

[379] *Id.,* at 19.
[380] *Id.*
[381] Objection of Virgin America, dated January 17, 2007, at 61.
[382] *Id.,* at 61 n.154.
[383] Answer of American Airlines to New Application and Objection of Virgin America, dated February 13, 2007, at 23; and Answer of Delta Air Lines, Inc., dated February 13, 2007, at 13-15.
[384] Confidential Answer of ALPA, dated February 14, 2007, at 8, *quoting* License Agreement, sec. 3.7; *citing id.*, Schedule 1, sec. 4.
[385] *Id.,* at 8-9.
[386] Confidential Version: Answer of American, dated February 13, 2007, at 23.
[387] Confidential Answer of Delta, dated February 13, 2007, at 12-13.
[388] *Id.,* at 12-13.

We have reviewed the changes proposed by the applicant in light of the arguments posed by the Interested Parties, and it appears that the Interested Parties' arguments do have some merit. The draft agreement defines the Licensed Activities [redacted][389][redacted][390][redacted][391] Therefore, we propose to condition certification of the applicant on modification of the License Agreement so as to permit *any* operations (including code sharing)—even in direct competition with Virgin Atlantic—so long as the applicant does not use the "Virgin" name in those operations.

The geographic restrictions on Virgin America's operations also appear to be overly broad. While it is reasonable to prevent the applicant from operating under the licensed Virgin name in markets that directly compete with Virgin Atlantic either with its own equipment or through code-share arrangements with competitors of the Virgin Group, the structure of the license and the restrictions on the applicant go further. It appears that the effect of the license is to limit the applicant's operations in general, permitting it to operate independently only as an exception to the broad rule. Thus, we propose to condition certification of the applicant on a modification of the license such that the applicant's operations are presumptively permitted, *except* in certain limited respects such as operations that use the Virgin mark. (In this regard, we do not find the 85,000-foot ceiling unduly onerous given the Virgin Group's announced plans to mount a suborbital commercial service.)

We disagree with the Interested Parties' that the applicant's offer to include a new provision in the License Agreement that allows it the ability to operate independently of the "Virgin" brand is of illusory value. We believe that this provision does indeed constrain the Virgin Group's ability to control the applicant and accordingly propose to require that the agreement be amended in this way as a condition to certification. However, we see no reason why the applicant's operations outside of the license should still be subject to a royalty obligation to the Virgin Group. Payment of "royalties" on revenues not derived from use of the brand name would undermine the applicant's independence; therefore, we propose to condition the applicant's certificate on an amendment to the license that allows such activities to occur without royalty obligation.[392]

4. Voting Trust

Voting rights are traditionally viewed by the Department as one element in the totality of circumstances affecting corporate control. Thus, restrictions on voting rights can greatly

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[389] VAM 1743.
[390] *Id.* at secs. 2.3, 4.
[391] *Id.* at sec. 4.
[392] Objection of Virgin America, dated January 17, 2007, at 61, n.154.

affect whether a particular shareholder enjoys actual control of an air carrier irrespective of the size of its investment. In Order 2006-12-23, we did not specifically address the issue of the Virgin Group's exercise of voting rights that would be associated with its shares but rather assumed that it could exercise all rights of similarly situated shareholders without restriction.

Virgin America has responded to concerns that the Department raised about other aspects of its proposed relationship with the Virgin Group by proposing a major revision to its plans -- creating a voting trust to govern the Virgin Group's equity interest in the applicant.[393] The Interested Parties dismiss this solution as ineffective and contrary to our precedent. ALPA argues that, where we have approved voting trusts to address control concerns, the trustee has been required to vote proportionally to the other voting equity.[394] [redacted][395] Similarly, American cites our *Hutchinson* decision where we noted that we have generally regarded voting trusts as temporary rather than permanent solutions.[396] More specifically, American notes several respects in which the proposed voting trust would be deficient: [redacted][398]

We agree with the Interested Parties that if a foreign interest retains the power of selection and dismissal over the trustee, its influence is obvious, and such influence could undermine the purpose of the voting trust—to preserve the trustee's independence in voting the equity interest, but this shortcoming can be remedied. We propose, therefore, to condition the applicant's certification on the establishment of a voting trust that allows the Virgin Group to nominate the voting trustee but requires that the U.S. members of Virgin America's Board (*i.e.*, the disinterested parties) confirm the nomination. Similarly, under this proposal, the Virgin Group could remove the voting trustee only if the U.S. members of the company's Board confirmed the action. We would also require that any change in the voting trustee be reported to the Department.

The Interested Parties also contend that the usual requirement that a trustee vote in the beneficiary's best interest negates the utility of the proposed trust and would, in any case, result in the trustee's regular consultation with Virgin Group, further compromising the trustee's independence. While a trustee's fiduciary duty is obviously to the beneficiary, we tend to agree with the Interested Parties that some limitation needs to be placed on the trustee's actions in cases where the Virgin Group's interests in a matter that is subject to

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393 *Id.,* at 16 (summary chart).
394 Answer of ALPA, dated February 14, 2007, at 10.
395 Confidential Version: Answer of ALPA, dated February 14, 2007, at 11.
396 Answer of American, dated February 13, 2007, at 18-19, *quoting* Hutchinson Auto and Air Transport, Order 91-8-15, August 9, 1991, at 13-14.
397 Confidential Answer of American, dated February 13, 2007, at 19-20.
398 Confidential Answer of Delta, dated February 13, 2007, at 5-9.

shareholder approval potentially conflicts with the interests of other shareholders. For example, to the extent that shareholder approval would be required to terminate or modify the trademark license between the applicant and Virgin Group, the latter's interest in the outcome of the vote would diverge from that of the other shareholders. Thus, we propose to require that the trustee's instructions provide that whenever a majority of the directors of the Board that are appointed by the U.S. investors determines that the interests of the Virgin Group as a shareholder in a matter subject to shareholder approval potentially conflicts with those of the other shareholders, the trustee shall then vote proportionately to the non-Virgin Group shareholders.

The Interested Parties argue that permitting a voting trust under the circumstances proposed by the applicant is contrary to our precedent. The circumstances they cite, however, are entirely distinguishable from those in past cases: we are not here proposing to allow a voting trust so as to ensure compliance with the statute's 25 percent limitation on voting control. Rather, in this case, the voting trust is being established to serve a different purpose—neutralizing or mitigating the potential foreign control the Virgin Group might otherwise be in a position to exert over Virgin America through its overall equity interest, which complies with the numerical ownership limit. We tentatively believe that, assuming the conditions we are proposing here take effect, the voting trust in these circumstances will serve this function.

Under these circumstances, we tentatively find that the voting trust proposed by Virgin America to govern the voting interests and the governance rights of the Virgin Group, in addition to the conditions we propose herein and throughout this order, should mitigate issues regarding the Virgin Group's control over the applicant through its equity investment.

5. Puts

The applicant has not proposed a substantive change in the power of U.S. investors to "put" their interests to the Virgin Group under certain circumstances. Noting that such powers effectively reduce the risk to an investor, we tentatively identified the puts as raising another potential control problem for Virgin America.[399] Our previous tentative finding was premised on the notion that risk of loss is an integral aspect of a genuine ownership interest. The Interested Parties continue to press this point.[400] American then argues that "the second Put continues to protect the investors from risk of loss far beyond the issuance of DOT authority."[401] American also argues that "buy-back provisos are one of the key factors for determining whether an applicant is under the 'actual control' of

[399] *See* Order 2006-12-23, at 19.

[400] Answer of American, dated February 13, 2007, at 7-11; Answer of ALPA, dated February 14, 2007, at 5-6.

[401] *Id.* US Airways also argues that, aside from the Put Agreement, [redacted]
Confidential Answer of US Airways, dated February 13, 2007, at 8.

foreign interests," citing our *Wrangler* and *Intera* decisions.[402] ALPA agrees that the Puts support our tentative conclusion that American quotes.[403]

Several things reduce our concern on this point. First, of course, is the comprehensive array of changes Virgin America has proposed in its overall management and financing to lessen the degree of influence the Virgin Group has over the applicant. Second, we are proposing to make the applicant's authority effective only upon completion of the Second Closing (as well as the satisfaction of several conditions and the filing of relevant instruments in final, executed form reflecting the proposed changes) which can occur only after the U.S. investors have decided whether to exercise their put. Moreover, as Virgin America points out, the second Put would trigger a continuing fitness review if exercised,[404] which we propose to reinforce by imposing a specific reporting requirement on the applicant. Third, we note that our *Wrangler* and *Intera* decisions did not involve a Put power in the hands of the U.S. interests, as exists in the case of Virgin America, but rather powers to buy or sell in the hands of foreign interests.[405] In this connection, we find it reasonable that, even if viewed as one element of ownership, the risk of loss in this case has not been eliminated, but only reduced, and under the changed structure, the reduction in the risk of loss does not compromise U.S. citizen control of the air carrier.

In light of the above, we now tentatively find that, with the new total circumstances presented, including the filing of all executed and finalized agreements and notification of any changes in the applicant's ownership, our concerns on this ground have been addressed.

6. Additional Investment by U.S. Investors

In Order 2006-12-23, we tentatively found, among other things, that the significant amount of funding currently provided by the Virgin Group, when compared to the much smaller investment made by the U.S. investors, indicated that the latter bore little or no

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[402] Answer of American, dated February 13, 2007, at 10, *citing* Wrangler Aviation, Order 93-7-26, July 20, 1993; Intera Arctic Services, Order 87-8-43, August 18, 1987.

[403] Answer of ALPA, dated February 14, 2007, at 6.

[404] Objection of Virgin America, dated January 17, 2007, at 95.

[405] *See* Order 93-7-26, In the Matter of the Cancellation of the Operating Authority Issued to Wrangler Aviation, Inc. for Failure to Meet the Citizenship Requirement of Section 101(16) of the Federal Aviation Act (1993) at *4-*5 (stating "the Singapore Interests' control is further illustrated by the Buy-Sell Agreement, which allows the Singapore Interests to buy out the U.S. investor at certain set intervals." Specifically, "the Singapore Interests control who can own stock in WAC. The Singapore Interests (through ASPAC, USA (Singapore)) have the right to purchase the shares of other shareholders on the first through tenth anniversaries of a Buy-Sell Agreement or upon their death or disemployment."); *see* Order 87-8-43, In the Matter of Intera Artic Services, Inc. Commercial Operations in the United States, Application of Intera Artic Services, Inc. for a Foreign Aircraft Permit Under Part 375 of the Department's Regulations (1987) at *7(stating, "In our show-cause order, we found several indicia of control which, when taken together, led to our tentative conclusion that IAS was subject to foreign control. First, we found that the foreign owners [FN20] of IAS's nonvoting common shares had a certain amount of leverage over IAS because they could compel IAS to buy them out under so broad a range of circumstances as to confer on them virtually unconstrained discretion. IAS responds that this buy-out provision is virtually identical to that approved in Page Avjet. While we agree that the provisions quoted by IAS are extremely similar, there are differences in the surrounding circumstances, as well as in certain terms IAS did not quote.")

risk financially until the applicant received effective authority from the Department. In particular, we noted that the Virgin Group had provided approximately $131.9 million in debt financing to the applicant, whereas the U.S. investors had provided only $10.0 million.

To support its arguments that U.S. citizens own and actually control it, Virgin America has provided documentation related to an additional investment by U.S. investors of $10 million in equity (Class H Common Stock) and a $20 million loan from its U.S. investors, which will be provided prior to the applicant's launch. Virgin America states that this investment is in addition to the $78 million in equity funding its U.S. investors had already agreed to provide.[406]

Despite the exclusion of the $10 million equity component from the Put Agreement, the Interested Parties still argue that the U.S. investors are protected from much or all of the risk created by their new proposed investment in Virgin America. They also contend that the structures of these investments provide additional possible avenues for foreign control of Virgin America, demonstrate the carrier's financial dependence on the Virgin Group and call its financial fitness into question.[407]

Specifically, with respect to risk protections, [redacted][408] [redacted][409] [redacted][410]

[406] Motion of Virgin America Inc. for Leave to file Additional Evidentiary Material (February 14, 2007) at 1-2.
[407] For example, *see* Answer of ALPA, dated February 14, 2007, at 5-6.
[408] Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., dated March 1, 2007, at 3-4.
[409] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc., at 2-3. In footnote 2 on page 3 of their answer, US Airways states, [redacted] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. at 3.
[410] Confidential Answer of US Airways Group, Inc. to Additional Documents Submitted by Virgin America, Inc. at 4.

Regarding potential foreign control, American claims that that the [redacted][411] [redacted][412]

[redacted][413]

Based on our review of the additional $10 million equity investment to be made by the U.S. investors, we tentatively find that the Interested Parties have correctly characterized the nature of this additional investment. The proposed term sheet states, among other things, that [redacted][414] In addition, the term sheet indicates that [redacted][415] Thus, it could well be in the best economic interest of the Virgin Group to require Virgin America to purchase the Class H Common shares from the U.S. investors as soon as possible. While the U.S. investors would certainly benefit from the purchase, we tentatively find that Virgin America should be required to report any decision by the disinterested directors to repurchase any of the Class H Common Shares to the Department so that we may monitor the particular circumstances of such transactions for evidence of foreign control.[416]

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411 Confidential Answer of American Airlines, Inc. to New Evidentiary Material of Virgin America Inc., dated March 1, 2007, at 4.

412 *Id.,* at 4.

413 Confidential Version: Answer of Delta Air Lines, Inc. at 4.

414 VAM1770.

415 VAM1769.

416 As in the case of the other new or revised agreements that the applicant has not yet included in the record, we also intend to condition Virgin America's authority upon the delivery of all executed and signed agreements related to the additional debt financing from its U.S. investors, and the issuance of the new Class H Common Stock, including an Amended Stockholders Agreement, an Amended Certificate of Incorporation, and a new Subscription Agreement. This review condition will provide the Department with the opportunity to determine if any of these agreements would allow the Virgin Group to exercise undue influence over Virgin America. Moreover, as we have earlier noted, VAI will be required to execute its equity investment in the applicant prior to our issuing to the company an effective certificate. *See* Department's discussion in the **OPERATING PROPOSAL AND FINANCIAL CONDITION** section of this order.

OBJECTIONS

We will give interested persons 21 days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 business days thereafter. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to Virgin America's fitness and certification.

CERTIFICATE CONDITIONS & LIMITATIONS

If Virgin America is found fit and issued certificate authority to conduct interstate scheduled passenger air transportation, authority will not become effective until the company has fulfilled all requirements for effectiveness as set forth in the terms and conditions set forth in this order. Among other things, this includes our receipt of evidence that Virgin America has been certificated by the FAA to engage in passenger operations and a fully executed OST Form 6410 evidencing liability insurance coverage that meets Part 205 of our rules for passenger services, and updated fitness information.

In addition, consistent with the applicant's proposed operations, we propose to limit any authority issued to Virgin America to operations using no more than 17 aircraft. Should Virgin America propose to operate more than 17 aircraft it must first provide the Department with at least 45-days advance notice of such plans and provide updated information establishing its fitness for such expansion.

Finally, we remind Virgin America of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once an air carrier is found fit initially, it must remain fit in order to hold its authority. To be assured that certificated air carriers continue to be fit after effective authority has been issued to them, we require that they supply information describing any subsequent substantial changes they may undergo in areas affecting fitness. Therefore, should Virgin America subsequently propose other substantial changes in its ownership, management, or operations, it must first comply with the requirements of section 204.5 of our rules. [417] The compliance of the company with this requirement is essential if we are to carry out our responsibilities under the Transportation Code.[418]

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[417] The air carrier may contact our Air Carrier Fitness Division to report proposed substantial changes in its operations, ownership, or management, and to determine what additional information, if any, will be required under section 204.5. If the air carrier fails to file this updated information or if the information fails to demonstrate that the air carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's certificate authority.

[418] We also remind Virgin America about the requirements of section 204.7 of our rules. This section provides, among other things, that (1) if a company commences operations for which it was found fit and subsequently ceases such operations, it may not resume certificated operations unless its fitness has been redetermined; and (2) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions stated above and award a certificate to Virgin America Inc., authorizing it to engage in interstate scheduled air transportation of persons, property, and mail, subject to conditions.

2. We deny the Motion for Leave to File a "Final Reply" submitted by Virgin America Inc., on March 14, 2007, and accept the resume of Mr. Samuel Skinner filed on that same date.

3. We direct any interested persons having objections to the issuance of an order making final any of the proposed findings and conclusions set forth here to file them with Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Docket OST-2005-23307, and serve them upon all persons listed in Attachment A no later than 21 days after the service date of this order; answers to objections shall be filed no later than 7 business days thereafter.

4. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.[419]

5. In the event that no objections are filed, we will consider all further procedural steps to be waived, and we will enter an order making final our tentative findings and conclusions set out here.

6. We will serve a copy of this order on all interested parties.

7. We will publish a summary of this order in the Federal Register.

By:

ANDREW B. STEINBERG
Assistant Secretary for Aviation
and International Affairs

An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/search

[419] Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.