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4TH DISTRICT, GEORGIA

COMMITTEES:

JUDICIARY

ARMED SERVICES

Congress of the United States
House of Representatives
Washington, DC 20515-1004

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AND THE INTERNET
SEAPOWER AND PROJECTION FORCES
INTELLIGENCE, EMERGING THREATS
AND CAPABILITIES
STRATEGIC FORCES

August 10, 2015

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

The Honorable William J. Baer
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Lynch and Assistant Attorney General Baer:

I write to express serious concerns regarding Expedia's proposed acquisition of Orbitz Worldwide ("Orbitz"), which would consolidate the largest and third largest online travel agencies in the world. I urge you to preserve choice and affordability in online travel by ensuring that this transaction does not result in further consolidation in this market or harm consumers.

On February 12, 2015, Expedia, the world's largest online travel agency,¹ announced its agreement to acquire Orbitz, an online travel agency with 8% of the global market for online travel agency booking,² for approximately \$1.6 billion.³ The proposed acquisition follows Expedia's acquisition of Travelocity earlier this year,⁴ an online travel agency with 14% market share at the time of the transaction.⁵ According to recent investment analyses, this acquisition will result in Expedia controlling as much as 80% of the domestic online travel agency market,⁶

¹ Dan Wasiolek, *Expedia's Strong June Quarter Offers Evidence of an Improving Competitive and Financial Position*, MORNINGSTAR'S TAKE (July 31, 2015), <http://analysisreport.morningstar.com/stock/research?t=EXPE®ion=USA&culture=en-US&productcode=MLE>.

² *Id.*

³ *Expedia to Acquire Orbitz Worldwide for \$12 Per Share in Cash*, ORBITZWORLDWIDE (Feb. 12, 2015), <http://press.orbitz.com/phoenix.zhtml?c=251693&p=irol-newsArticle&ID=2016175>.

⁴ Amit Chowdhry, *Expedia Has Acquired Travelocity for \$280 Million in Cash*, FORBES (Jan. 25, 2015), <http://www.forbes.com/sites/amitchowdhry/2015/01/25/expedia-has-acquired-travelocity-for-280-million-in-cash/>.

⁵ Dennis Schaal, *Expedia Will Pay Orbitz \$115 Million if Antitrust Complications Scuttle Acquisition*, SKIFT (Feb. 13, 2015), <http://skift.com/2015/02/13/expedia-will-pay-orbitz-115-million-if-antitrust-complications-scuttle-acquisition/>.

⁶ GUGGENHEIM SECURITIES, *What if the Expedia-Orbitz Deal Doesn't Fly?* BARRON'S (June 2, 2015), <http://online.barrons.com/articles/what-if-the-expedia-orbitz-deal-doesnt-fly-143326138>.

38% of the global online travel agency booking market,⁷ and roughly 6% of the overall travel-retail market,⁸ a \$1 trillion industry.⁹ Expedia has also already indicated to investors that this “deal-making streak may continue as it seeks to bolster its barriers against competitors.”¹⁰ In short, where there were four primary competitors in the online travel booking market as recently as last year, there will only be two dominant competitors following this transaction, and potentially even less should the Justice Department approve the merger and Expedia subsequently pursue other acquisitions.

The Justice Department should narrowly define the relevant market for online travel services to determine whether the proposed transaction is anticompetitive.¹¹ Consumers rely on online travel agencies for booking reservations and comparing prices of airlines, hotels, and rental cars. As the Justice Department recognized in 2011, only two types of online intermediaries exist for consumers “to search for flight prices, schedules, and seat availability on multiple airlines simultaneously: online travel agencies (“OTAs”) such as Expedia, Travelocity and Priceline, and travel meta-search engines (“Metas”) such as Kayak, TripAdvisor and Bing Travel.”¹² Of these, only OTAs offer booking services, which enable consumers to make purchases directly without clicking on a link to an airline or hotel website.¹³ Furthermore, unlike online travel agencies, which appeal to consumers ready to make a travel purchase, the Justice Department has already determined that meta-search engines appeal to consumers who are at “an earlier stage of the travel planning process.”¹⁴

The Justice Department has also observed that functionality and consumer choice are important factors for determining a relevant market for travel. In 2011, the Justice Department noted that reservation lines and other traditional services for travel are not reasonable substitutes for online services because they offer inferior functionality.¹⁵ This logic extends to viewing the online travel market based on the functionality of different services. Separating online travel agencies, which enable booking, from meta-search engines, which only offer price comparisons, is a logical outgrowth the Justice Department’s earlier decisions in this area.

⁷ Wasiolek, *supra* note 1.

⁸ Michael J. De La Merced, *Expedia to Acquire Orbitz as Travel Sites Consolidate*, N.Y. Times (Feb. 12, 2015), <http://dealbook.nytimes.com/2015/02/12/expedia-to-buy-orbitz-for-1-3-billion/>.

⁹ Samantha Nielson, *A Key Overview of Global Online Travel Company Orbitz Worldwide*, MARKET REALIST (May 8, 2014), <http://marketrealist.com/2014/05/orbitz-worldwide/>.

¹⁰ *Id.*

¹¹ See, e.g., *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 469 n.15 (1992) (“Because market power is often inferred from market share, market definition generally determines the result of the case.”).

¹² Complaint at 5, U.S. Dep’t of Justice v. Google, Inc., No: 1:11-CV-00688 (D.D.C. April 8, 2011).

¹³ See *id.*; Liz Weiss, *The Booking Battle: OTAs Break Into the Loyalty Market*, U.S. NEWS & WORLD REPORT (Aug. 4, 2014) (“The rise of metasearch sites like Kayak and Bing — which allow travelers to not only compare prices across hotels but also across OTAs — has intensified the rivalry between booking sites, leaving companies like Expedia and Orbitz fighting for repeat customers.”), <http://travel.usnews.com/features/The-Booking-Battle-OTAs-Break-into-the-Loyalty-Market/>.

¹⁴ Complaint, *supra* note 12.

¹⁵ *Id.* at 8 (“[T]hey do not allow consumers to compare prices and schedules across multiple airlines simultaneously.”).

Lastly, defining the online travel market broadly would arguably justify the future merger of Expedia and its primary competitor, Priceline. If controlling 80% of the online travel agency market is not anticompetitive, there is little upward limit on further consolidation in online travel agency market. This swift consolidation of a market would frustrate a fundamental purpose of the antitrust laws to preserve consumer choice and “arrest the trend toward consolidation.”¹⁶

Further consolidation in the online travel agency market will have three primary negative impacts. First, it will restrict choice and increase costs for consumers. Many consumers consult online travel agencies when booking hotels to ensure that they “score the best deal” through promotions and other rewards designed to increase consumer loyalty.¹⁷ While ensuring vibrant competition in online travel booking is important for consumer choice, it is also vital to preserving hotel affordability. Further consolidation of this market may increase the cost of booking by removing the incentive to provide the best deals or promotions.¹⁸ Because hotels pay commissions to online travel agencies each time a consumer books a hotel room through an agencies’ online travel service, there is also serious cause for concern that any further consolidation in online travel booking will lead to higher commissions, costs that would likely be passed on to consumers. For example, earlier this year Expedia raised the cost of the commissions it charges to hotels in Australia by 25%, according to Australian press reports.¹⁹ This price increase occurred within months of acquiring Wotif, an Australian online travel agency.²⁰ In Australia, Expedia and Priceline represent a duopoly, controlling about 85% of online hotel booking. There is little to suggest that Expedia would not follow suit in the United States with similar market power following the proposed transaction.

Second, although there are only three main competitors in the online travel agency market, consumers are often confused or unfamiliar with affiliates of online travel agencies.²¹ As Amy Hebert, a consumer education specialist at the Federal Trade Commission (FTC), noted last month, confusion associated with third-party affiliates in the online travel agency market has already resulted in consumers paying higher rates, being charged undisclosed fees, and having other difficulties in finding, cancelling, or modifying reservations.²² There has also been broad, bipartisan congressional concern with this alarming practice.²³ Increased consolidation in this

¹⁶ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 367 (1963) (“A fundamental purpose of amending [Section 7 of the Clayton Act] was to arrest the trend toward concentration, the tendency to monopoly, before the consumer’s alternatives disappeared through merger.”).

¹⁷ Weiss, *supra* note 11.

¹⁸ See Sonja Woodman, *The Curious Case of Online Travel – OTA Consolidation, Metasearch Explosion – Is There Consumer Choice?* HOSPITALITYNET (July 29, 2014), <http://www.hospitalitynet.org/news/4066361.html>; See Weiss, *supra* note 11.

¹⁹ Matt O’Sullivan, *Wotif Raises Commission Rates in Wake of Expedia Takeover*, THE SYDNEY MORNING HERALD (Feb. 24, 2015), <http://www.smh.com.au/business/wotif-raises-commission-rates-in-wake-of-expedia-takeover-20150223-13mg4g.html>.

²⁰ *Id.*

²¹ Alina Tugend, *Third-Party Hotel Booking Sites Can Mislead Consumers*, N.Y. TIMES (Mar. 21, 2014), http://www.nytimes.com/2014/03/22/your-money/third-party-hotel-booking-sites-can-mislead-consumers.html?_r=0; see Woodman, *supra* note 16.

²² Hebert, *supra* note 17.

²³ See, e.g., Letter from Sens. Amy Klobuchar (D-MN), Ranking Member, Senate Judiciary Antitrust Subcomm., and Mike Lee (R-UT), Chairman, Senate Judiciary Antitrust Subcomm., to Loretta Lynch, Attorney General, and

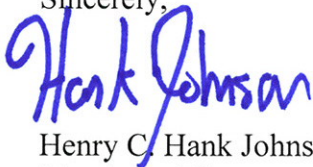
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market will only serve to undermine corporate accountability for consumer deception in this market.²⁴

Finally, further consolidation in the online travel agency market will endanger innovation and competition by new entrants. Behind Expedia, Priceline, and Orbitz—which control the majority of the global market for online travel agency booking—the market for new entrants is “highly fragmented, making it extremely challenging for smaller new entrants to gain customer traffic and supplier scale.”²⁵ To compete on the same scale as these large competitors, small new entrants would need to spend substantial human capital to build relationships with hotels, while also spending heavily on advertising (last year, the three main competitors spent over \$5 billion on marketing).²⁶ Notwithstanding the recent entry of new competitors, it is unlikely that these entrants will have the human capital and scale necessary to serve as adequate competitors to an Expedia-Priceline duopoly.

In light of these strong reservations, I urge you to take all appropriate actions to promote competition and ensure consumer affordability and choice in online travel. If you have any questions, please do not hesitate to contact me or Slade Bond on my staff at (202) 225-1605.

Sincerely,



Henry C. Hank Johnson, Jr
Member of Congress

William Baer, Assistant Attorney General (July 30, 2015), <http://www.klobuchar.senate.gov/public/news-releases?ID=5def157b-3ea9-4bd9-884c-023052c2be1f>; Letter from Sens. Bill Nelson (D-FL), Ranking Member, Senate Commerce Comm., and Marco Rubio (R-FL), Chairman, Subcomm. on Oceans, Atmosphere, Fishers, and Coast Guard, to Edith Ramirez, Chairwoman, Fed. Trade Commission (June 9, 2015) (on file with staff); Letter from Reps. Lois Frankel (D-NY) et al. to Edith Ramirez, Chairwoman, Fed. Trade Commission (June 5, 2015), <https://frankel.house.gov/sites/frankel.house.gov/files/Florida%20Delegation%20Letter%20to%20FTC%20Chairman%20re%20Fraudulent%20Hotel%20Booking%20Websites.pdf>; Letter from Sen. Charles E. Grassley (R-IA), Chairman, U.S. Senate Judiciary Comm., to Edith Ramirez, Chairwoman, Fed. Trade Commission (May 19, 2015), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-05-19%20CEG%20to%20FTC%20%28Deceptive%20Online%20Hotel%20Booking%20Practices%29.pdf>.

²⁴ See Klobuchar, *supra* note 23, at 2 (“Competition can be an effective remedy for this kind of behavior.”).

²⁵ Wasiolek, *supra* note 1.

²⁶ *Id.*