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Lisa R. Barton  
Secretary  
U.S. International Trade Commission  
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Exhibits 1, 4, 18, 19, 20  
of the attached submission

Re: **100- To 150-Seat Large Civil Aircraft from Canada:**  
Post-Hearing Brief

Dear Secretary Barton:

On behalf of Delta Air Lines, Inc. ("Delta"), we hereby submit our Post-Hearing Brief concerning 100- To 150-Seat Large Civil Aircraft from Canada.

Pursuant to 19 U.S.C. §§ 1677f(b) and (c) and 19 C.F.R. § 201.6, we request confidential treatment of business proprietary information that appears in brackets on the pages and exhibits listed on the cover page of the Post-Hearing Brief. The bracketed information was either released to us under the Administrative Protective Order in this matter and marked as business proprietary information, or consists of Delta's confidential production, purchasing, and sales information of respondents (and substantially identical information is not available to the public). Copies of these documents have been served on all interested parties as set forth in the attached certificate of service.

Please contact us if you have any questions regarding this submission or require additional information.

Respectfully submitted,



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## CERTIFICATION

100- To 150-Seat Large Civil Aircraft from Canada  
Inv. Nos. 701-TA-578 and 731-TA-1368  
(Final)CITY OF WASHINGTON )  
DISTRICT OF COLUMBIA ) SS:

In accordance with section 207.3(a) of the Commission's rules 19 C.F.R. § 207.3(a), I, Yohai Baisburd of Dentons US LLP, counsel to Delta Air Lines, Inc., certify under penalty of perjury under the laws of the United States and pursuant to the Commission's regulations:

1. I have read the foregoing submission in the above-referenced case; and
2. To the best of my knowledge and belief, the information contained therein is accurate and complete; and
3. In accordance with Section 201.6(b)(3)(iii) of the Commission's rules, that information substantially identical to that for which we request confidential treatment is not available to the general public and the public disclosure of such information would cause substantial harm to the persons, firms, and other entities from which the information was obtained.

Dated: December 28, 2017



Yohai Baisburd  
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Subscribed and sworn to before me this 28th day of December, 2017.  
Notary Public

MY COMMISSION EXPIRES:



JUANITA E. SINGLETON  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires May 14, 2022

**Certificate of Service****100- To 150-Seat Large Civil Aircraft from Canada**

Public Service List: Inv. Nos.: 701-TA-578 and 731-TA-1368 (Final)

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100- to 150-Seat Large Civil Aircraft  
from Canada

**Total Pages: 287**

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**POST-HEARING BRIEF**

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## I. Introduction

The pre-landing checklist for this investigation is simple to complete: no US produced LCA options for airlines seeking 100- to 110-seat aircraft;<sup>1</sup> no lost sale from the Delta campaign;<sup>2</sup> no lost revenue from the United campaign;<sup>3</sup> no subject imports during the POI;<sup>4</sup> no US commercial shipments;<sup>5</sup> and no imminent subject imports.<sup>6</sup> Each of these facts support a finding of no threat of material injury. Collectively, they compel it.

## II. Boeing Has No 100- to 110-Seat LCA for Purchasers Like Delta

Boeing has no product offering for purchasers like Delta<sup>7</sup> that require 100- to 110-seat LCA and, for that reason, has no answer as to how it lost the Delta sale. A fundamental flaw with Boeing's case is that Boeing has no answer as to why an airline would want to (or should be forced to) purchase an aircraft that is too big for its need.

### A. Boeing Has No Answer to the Question of How It Lost a Sale for a Product It Does Not Produce

Boeing cannot explain how it lost a sale for 100- to 110-seat aircraft when it does not produce 100- to 110-seat aircraft.<sup>8</sup> Instead, Boeing simply denies that customers want 100- to 110-seat aircraft:

COMMISSIONER WILLIAMSON: But I think the question I'm raising... {i}f

<sup>1</sup> Staff Report, V-30.

<sup>2</sup> Hr'g Tr. 199:14-17 (May).

<sup>3</sup> See Hr'g Tr. 91:4-10 (Schmidtlein); See also [ ]

<sup>4</sup> Staff Report, IV-23.

<sup>5</sup> Staff Report, I-31.

<sup>6</sup> Delta, Pre-Hearing Brief, 3.

<sup>7</sup> It is unclear why Boeing claims Delta "is not representative of the airline industry", see Hr'g Tr. 306:12 (Novick), when Delta is America's most admired airline; see *World's Most Admired Companies for 2017: Airline- Industry Rankings*, FORTUNE, <http://fortune.com/worlds-most-admired-companies/list/filtered?industry=Airlines&sortBy=industry-rank> (last accessed Dec. 26, 2017), attached as Ex. 2; and Delta is among its largest by passengers carried, revenues, flights, or destinations served. *Bureau of Transportation Statistics*, UNITED STATES DEPARTMENT OF TRANSPORTATION, <https://www.transtats.bts.gov/carriers.asp?pn=1> (last accessed Dec. 26, 2017), attached as Ex. 3.

<sup>8</sup> See Hr'g Tr. 71:21-72:1 (Williamson) ("The first question is, can you provide any examples of 737/700 or {MAX} 7 aircraft that operate between 100 and 125 seats? When you look at the table at Table 1-1 where they list all the competing aircraft, *the CS-100 is the only that's really below 120*. And so I'm just curious about that." (emphasis added)).



Delta says I want a 100- to 110-seat aircraft, you don't have one.

MR. MC ALLISTER: Yeah, *we don't see* categories in the marketplace with customers that are as finitely defined as 100- to 110 seats.... Customers look at a segment of 100 to 150 seats where we have the {138-seat MAX7} and the {126-seat} 700.<sup>9</sup>

But Kevin McAllister joined Boeing almost a year after the Delta campaign (and just months before the filing of the petition).<sup>10</sup> In contrast, Greg May led the campaign for Delta<sup>11</sup> and Joe Esposito helped identify the fleet needs.<sup>12</sup> They testified unequivocally what Delta needed:

We go to market and launch a campaign to strengthen our fleet with aircraft to specific parameters. A small gauge narrow body replacement campaign that began in 2015 and led Delta to the CS100 was driven by the need identified by our network team led by Joe, we were looking to acquire additional 100 to 110-seat aircraft.<sup>13</sup>

In recent years Delta has been pursuing the strategy of up-gauging its fleet, shifting from flying regional jets to larger mainline aircraft. . . As a result, Delta has sought to expand a number of aircraft in its fleet with 100 to 110 seats.<sup>14</sup>

It is undeniable that Delta, as the purchaser, has a better idea of what aircraft it was looking to acquire than Boeing does.<sup>15</sup> The testimony of Delta's witnesses who were actually involved in the transaction and the order for 75 *109-seat* CS100 establish that Delta sought 109-seat LCA. The entire point of the Delta campaign was to grow the 100- to 110-seat LCA portion

<sup>9</sup> Hr'g Tr. 74:12-22 (emphasis added). At the moment, Boeing is not even producing the 737-700s or MAX7s. Hr'g Tr. 79: 6-11 ("Commissioner Broadbent: Okay, the thing I was struck by {during the tour of Boeing's Renton facility} is that there is no in-scope products being produced in that plant.")

<sup>10</sup> See Hr'g Tr. 38:17-18 (McAllister). It bears noting that despite months of advance notice of the hearing date, Boeing decided to bring a single company witness who did not have direct knowledge of the United or Delta campaigns and joined Boeing only months before the Petition was filed.

<sup>11</sup> Hr'g Tr. 239:3-5 (May).

<sup>12</sup> Hr'g Tr. 196:17-20 (May).

<sup>13</sup> Hr'g Tr. 196:19-20 (May).

<sup>14</sup> Hr'g Tr. 207: 19-25 (Esposito).

<sup>15</sup> See Hr'g Tr. 198:24-25-199:1-7 (May) ("From Delta's perspective as a purchaser the 737-700 and Max 7 did not meet our mission goals. The 737-700 is well-suited for certain unique mission profiles such as takeoff and landing at airports with short runways or at high elevations. However, it is not economical at the vast majority of our routes. That's why we only have ten of these aircraft fleet and that is all we need. I can't emphasize enough, it is not a 100 to 110 seat aircraft."); See also Staff Conf. Tr. 171:1-11 (Esposito) ("But if the plane is too big for the mission, we may well have to fly with empty seats or not offer flights to that market at all. . . In that sense, it is very important to be aware that a 100-seat plane and 150-seat plane are not interchangeable for Delta's purpose. We cannot profitably fly a 150-seat aircraft on a flight with demand for only 100 passengers.")



of its fleet to facilitate Delta's network upgauging strategy.<sup>16</sup> In light of demographic growth and to take advantage of increased efficiencies, Delta's strategy was to upgauge 50-seat regional aircraft to 76-seat regional aircraft and to move those of its flights then using 76-seat regional aircraft to 100- to 110-seat LCA.<sup>17</sup>

This upgauge strategy *did not need and would not benefit from 126-seat or 138-seat LCA*.<sup>18</sup> Moving its 76-seat flights to 126-seat aircraft (737-700s) would be a 66% jump in capacity. Moving to 138-seat aircraft (MAX7s) would nearly double the available capacity on these flights—all but guaranteeing empty seats on aircraft that are undisputedly more expensive to operate.<sup>19</sup>

Boeing knew that Delta sought 100- to 110-seat LCA.<sup>20</sup> Because Boeing does not make an aircraft in the 100- to 110-seat market segment,<sup>21</sup> Boeing was reduced to offering used aircraft—from Embraer—that did fit Delta's specification.<sup>22</sup> (Delta actually purchased those used Embraer E-190s from Boeing.<sup>23</sup>) Delta could not be clearer. Delta did not go to market to

<sup>16</sup> Hr'g Tr. 207:19-25-208:1-2 (Esposito).

<sup>17</sup> Hr'g Tr. 211:3-6 (Dimitroff).

<sup>18</sup> Hr'g Tr. 197:4-9 (May); Staff Conference Tr. 183:7-20 (May); Hr'g Tr. 208:7-114 (Esposito).

<sup>19</sup> Hr'g Tr. 207:1-5 (Esposito). Indeed, as reflected in Ex. 4, Seat Cost vs. Aircraft Gauge, the 737-700 has far and away the highest operating costs of any LCA in the Delta fleet. Hr'g Tr. 208:5-6 (Esposito). Further, all things being equal, even Boeing [ ] that are 16% (-700) or 27% (MAX 7) larger than passenger demand. See Petition, 44 (Larger aircraft "forc{e} the customer to bear higher operating costs without any passenger revenue benefit. [ ] from the perspective of the manufacturer.")

<sup>20</sup> See Staff Conf. Tr. 177:1-3 (May).

<sup>21</sup> Hr'g Tr. 113:23-114:1 (Broadbent).

<sup>22</sup> Since the hearing, it has been disclosed that Boeing and Embraer are in merger talks. Dana Mattioli, Dana Cimilluca and Liz Hoffman, *Boeing Confirms Takeover Talks With Brazilian Aircraft Maker Embraer*, W.S.J., (Dec. 21, 2017), <https://www.wsj.com/articles/boeing-held-takeover-talks-with-brazilian-aircraft-maker-embraer-1513874742> (last accessed Dec. 26, 2017), attached as Ex. 5. Among the aircraft Embraer currently produces are the E190 and E195. Interestingly, this was also how Boeing acquired its last 100- to 110-seat aircraft, the 717, which was originally the McDonnell Douglas MD-95. Benjamin Zhang, *How the Boeing jet no one wanted became the plane airlines scour the planet for*, BUSINESS INSIDER (Dec. 3, 2017), <http://www.businessinsider.com/boeing-717-jet-delta-hawaiian-qantas-2017-12> (last accessed Dec. 26, 2017), attached as Ex. 6.

<sup>23</sup> Hr'g Tr. 197:10-11 (May). As Embraer's CEO John Slattery has stated, its offerings are "the only credible rival" to the CS100. Ex. 7, *Dubai Show Report: E-Jet E2 will hold its own, says Slattery*, FLIGHT

look for used aircraft at any size.<sup>24</sup> Delta sought 100- to 110-seat aircraft and Boeing only had used, foreign produced aircraft available for sale in that seat size.

Despite Boeing's trumpeting of the United campaign as an indication that the CS100 and the 737-700 compete to meet the same need, subsequent events demonstrate to the contrary. First, United has since converted the entire order, ensuring that United will not take even a single 737-700 from that purchase agreement.<sup>25</sup> Of note, Boeing [

] because, as noted in Exhibit 101 of the Petition, "United... exercised its right to convert its 737-700 orders to orders for other Boeing aircraft, [

]."<sup>27</sup> Second, as noted at the hearing,<sup>28</sup> there are now widespread reports that *United is returning to the market to launch a campaign for 100-seat aircraft*—thus, United still has a hole in its fleet between regional jets and larger LCAs (including its 737-700s) that it is trying to fill.<sup>29</sup> The United campaign merely demonstrates Boeing's determination to block Bombardier

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INTERNATIONAL (Nov. 27, 2017), 18, available at [https://issuu.com/carljohanson71/docs/flight\\_20international\\_20-20novemb](https://issuu.com/carljohanson71/docs/flight_20international_20-20novemb) (last accessed Dec. 26, 2017).

<sup>24</sup> Staff Conf. Tr. 176:23-24-177:1-3 (May).

<sup>25</sup> Ex. 8, Jerry Siebenmark, *United Changes Up Big 737 Order*, THE WICHITA EAGLE (Nov. 15, 2016), <http://www.kansas.com/news/business/aviation/article114928668.html> (last accessed Dec. 26, 2017).

<sup>26</sup> See Hr'g Tr. 91:2-92:22 (Schmidtlein), 158:17-21 (Novick).

<sup>27</sup> Petition, Ex. [ ], Affidavit of [ ], ¶ [ ] (emphasis supplied). This would also appear to put the lie to Boeing's argument that Delta's CS300 conversion rights [ ] of the CS100 purchase agreement. Here, Boeing offered what it characterizes as [ ] pricing on the 737-700s [ ]. *Id.* Ex. [ ] also [ ]

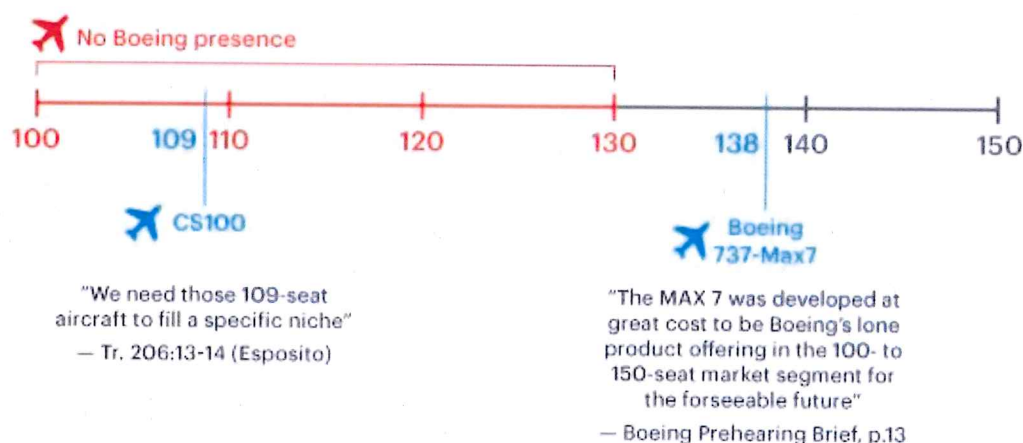
[ ]. See also Ex. 9, Richard Aboulafia, *Winners and Losers as Airbus Bails Out Bombardier's C-Series*, FORBES (Oct. 17, 2017), <https://www.forbes.com/sites/richardaboulafia/2017/10/17/bombardier-airbus-cseries-boeing/#6b5eab57491e> (last accessed Dec. 26, 2017) (CS500 would have competed with the A320); Hr'g Tr. 186:18-24 (Mitchell) (A320 competes with the Boeing MAX 7 and MAX 8).

<sup>28</sup> Hr'g Tr. 260-261:17-2 (Mitchell).

<sup>29</sup> Ex. 10, Edward Russell, *United Continues to Evaluate 100-seat Mainline Aircraft*, FLIGHTGLOBAL (Aug. 21, 2017), <https://www.flightglobal.com/news/articles/united-continues-to-evaluate-100-seat-mainline-aircr-440455/> (last accessed Dec. 26, 2017).

and the CS100 from competing in the market, whatever the cost.<sup>30</sup>

Boeing can insist that its customers do not want or need a 100- to 110-seat LCA by having a 138-seat LCA as its “lone product offering in the 100- to 150-seat market”—but the fair, market consequence of that insistence is that purchasers who want or need 100- to 110-seat LCA will not be Boeing’s customers.<sup>31</sup>



#### B. Boeing Has No Answer as to Why an Airline Should Purchase an Aircraft that Is Too Big for Its Need

Boeing cannot explain why an airline, such as Delta, should purchase an aircraft that is too big for its needs. Boeing and Delta appear to agree on basic economics: “One thing for certain, a responsible business focuses on developing the capability so that it can match its capacity to demand.”<sup>32</sup> Boeing conceded that using aircraft that are too large for the intended

<sup>30</sup> As referenced at the hearing, Delta has previously disclosed the [ ]. Hr’g Tr. 259:13-18 (Baisburd); Delta, Pre-Hearing Brief, 54.

<sup>31</sup> Further, to be clear, Boeing has not been “forced out” of the 100- to 110-seat market segment, Boeing Prehearing at 10, and no one is suggesting that “Boeing should exit this space,” Hr’g Tr. 311:7 (Novick)—Boeing abandoned production of 100- to 110-seat aircraft a decade ago since Boeing [ ]. Boeing, QR, II-15; Hr’g Tr. 197:3-4 (May).

<sup>32</sup> Hr’g Tr. 174: 2-4 (McAllister). Mr. McAllister testified, “In this industry, if we lose a sale, it’s gone forever.” Hr’g Tr. 40:12-13. The same is true for flights that take off with empty seats—each of those is a lost sale but



mission is a losing proposition for airlines, “forcing the customer to bear higher operating costs without any passenger revenue benefit.”<sup>33</sup> Boeing’s expert emphasized the challenge for airlines, “try{ing} to fill every seat on every flight they operate,” if the airlines were forced to accept a 17% increase in seating capacity between the MAX 7 and MAX 8.<sup>34</sup> He did not address the 27% increase in seating capacity between the CS100 and the MAX 7. That “jump” is even more “significant.”

Boeing puts forth an illogical and unsubstantiated exception to the basic market fundamental that businesses must match capacity to demand when it purports to insist that the 126-seat 737-700 or the 138-seat MAX 7 were viable alternatives to the 109-seat CS100. The 138-seat MAX 7 seating is 27% *larger* than the aircraft Delta wanted. The 126-seat 737-700 is 16% *larger*, more than twenty years old<sup>35</sup> and has the highest per-seat operating cost of any single-aisle LCA in Delta’s 1,300-aircraft fleet.<sup>36</sup>

### III. The Perceived Tension Between the Attenuated Competition and Domestic Like Product Analyses Is the Result of Boeing’s Gerrymandered Scope

Boeing’s proposed scope of 100- to 150-seat LCA deftly captures all Canadian LCAs while focusing on just the 737-700 and MAX7. [

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each empty seat also still incurs unrecoverable operating costs. Hr’g Tr. 207: 2-4 (Esposito); Hr’g Tr. 233-13-14 (Baisburd).

<sup>33</sup> Petition, 44. Boeing also recognized that trying to sell aircraft that are too large is a losing proposition for LCA manufacturers: “[

] from the perspective of the manufacturer.” *Id.*

<sup>34</sup> Hr’g Tr. 58:15-18 (Anderson) (“The jump from 138 to 162 is not minute. Certainly for airlines that try to fill every seat on every flight they operate, the differences between these two aircraft are significant.”).

<sup>35</sup> Ex. 11, *Boeing Historical Snapshot: 737: Commercial Transport*, BOEING, <http://www.boeing.com/history/products/737-classic.page> (last accessed Dec. 26, 2017) (“The 126- to 149-seat 737-700 was launched in November 1993 and first delivered in December 1997.”)

<sup>36</sup> Hr’g Tr. 208:5-6 (Esposito); Ex. 4, *Seat Cost vs. Aircraft Gauge*.

<sup>37</sup> See, e.g., Ex. 12, *Boeing lifts dividend, sets new \$18 billion share buyback*, REUTERS (Dec. 11, 2017), <https://www.reuters.com/article/us-boeing-dividend/boeing-lifts-dividend-by-20-percent-sets-new-18-billion-share-buyback-idUSKBN1E52NW> (last accessed Dec. 26, 2017) (Boeing’s announcement, the week before the Commission’s hearing, that it was increasing its share dividend by 20%).

].

The apparent tension between the attenuated competition and domestic like product analyses is merely a byproduct of Boeing's attempt to frame the investigation so as to exclude Boeing's [ ] from the Commission's consideration.

It is absolutely true that the attenuated competition between the CS100 and the 737-700 and MAX 7 grows more attenuated the further up the continuum of 737s one compares. This dynamic, however, neither contradicts the fact of attenuated competition between the CS100 and *any* 737 model, nor does it undermine the reality that the domestic like product is a continuum product including all single-aisle LCAs with 100 or more seats.<sup>38</sup> The Commission's first step is to define the like product. It is only after the proper like product is identified, that the Commission then turns to look at issues of attenuated competition, non-attribution and causation.

**A. Single Aisle LCAs Are a Continuum Product with No Clear Dividing Lines as Demonstrated by the Inconsistency of the Lines Market Participants Draw**

Boeing insists that 100- to 150-seat LCA are a distinct market, relying primarily on Bombardier's marketing materials.<sup>39</sup> But Boeing itself, at least as recently as 2014, trumpeted a "90 to 175 seats" market segment in its own promotional material—listing the 737-700, -800, MAX 7, and MAX 8 as all competing in the same "market sector."<sup>40</sup> Embraer's marketing materials boast of their eminence in the 70- to 130-seat market.<sup>41</sup> The Commission's own

<sup>38</sup> See *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom* (Aug. 1993) USITC Pub. 2664, 112-13.

<sup>39</sup> Hr'g Tr. 185:8-10 (Mitchell).

<sup>40</sup> Ex. 13, *Current Market Outlook 2014–2033*, BOEING, 41, available online at [http://www.gnieob.com/resources/boeingdotcom/commercial/about-our-market/assets/downloads/Boeing\\_Current\\_Market\\_Outlook\\_2014.pdf](http://www.gnieob.com/resources/boeingdotcom/commercial/about-our-market/assets/downloads/Boeing_Current_Market_Outlook_2014.pdf) (last accessed Dec. 26, 2017).

<sup>41</sup> Ex. 14, *Commercial Aviation*, EMBRAER, <https://embraer.com/global/en/commercial-aviation> (last accessed Dec. 26, 2017).



previous definitions of the market have included a “100-seat” market that was “generally defined as the market for commercial aircraft with accommodations for 70-120 passengers.”<sup>42</sup>

That so many different market actors and observers can draw *so many different lines* in the continuum demonstrates that *there is no clear dividing line*. The concept of single-aisle LCA appears well accepted and acknowledged. Likewise, the parties recognize a bottom end of the continuum, which is tied to the scope clauses in major airlines’ collective bargaining agreements with their pilots.<sup>43</sup> But any further segmentation of the single-aisle LCA market is demonstrably arbitrary. Thus, the fact that this market segments itself so inconsistently and ephemerally proves that there is no clear dividing line.

#### **B. The CS300 Is Not at Issue Here**

While Boeing’s submissions have almost universally directed the Commission’s attention to the “C Series,”<sup>44</sup> there is not a scintilla of record evidence of imminent imports of the CS300. The only allegation of future import Boeing has made is about the CS100. Delta entered into a purchase agreement for 75 CS100s. While the purchase agreement includes options for CS300s, purchase agreements in this industry nearly always have options for other aircraft.<sup>45</sup> While Boeing has insisted that Delta could exercise its options and purchase CS300s at some future date, this is pure speculation.<sup>46</sup>

<sup>42</sup> *The Changing Structure of the Global Large Civil Aircraft Industry and Market: Implications for the Competitiveness of the U.S. Industry*; Investigation No. 332-384, USITC Pub. 3143, Nov. 1998, 6-3. The claims of Boeing’s Prehearing Brief notwithstanding, the FAA likewise treats passenger jets as a continuum, merely requiring one additional flight attendant for each additional 50 passengers. See 14 C.F.R. § 121.391(a)(4).

<sup>43</sup> Hr’g Tr. 112-113:16-2 (Broadbent); “[T]he scope clause restriction in its pilot contract means that United can’t expand its 76-seat regional jet fleet any further.” Adam Levine-Weinberg, “Will United Airlines Order New Jets From Bombardier or Embraer?” *The Motley Fool* (Apr. 1, 2017), <https://www.fool.com/investing/2017/04/01/united-airlines-order-new-jets-bombardier-embraer.aspx> (last accessed Dec. 26, 2017), attached as **Ex. 15**.

<sup>44</sup> See, e.g., [

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<sup>45</sup> See Conf. Tr. 204:16-19 (Baisburd); Conf. Tr. 200:22-25, 201:1-3 (May); Staff Report, III-22 and V-6.

<sup>46</sup> Hr’g Tr. 169:22-24 (Novick).

As Delta testified at the hearing, it purchased 75 CS100s because it wanted 75 CS100s.<sup>47</sup> Boeing has never offered an explanation why Delta would not have simply purchased CS300s were CS300s the actual objective of the purchase agreement. There is no indication that Delta could not have purchased CS300s at the same time in addition to or instead of the CS100s Delta purchased. The 109-seat CS100 fits Delta's need as it expands that portion of its fleet so that it can implement its network upgauging strategy. The larger CS300s, much like Boeing's 737-700 and MAX 7, do not fit that need.

It is entirely speculative whether or not this option will ever be exercised and "conjecture or supposition" cannot be the basis of a threat of material injury determination. The option is only available after the first [ ] CS100 aircraft are delivered. At that point, Delta must consider its strategic needs as to whether it needs a larger aircraft. But, at that point, Delta must also determine that the CS300 option is a better deal than anything available from Bombardier's competitors at that future date and a better fit. Finally, Bombardier must also have the [

] . Thus, the potential CS300 substitution right is not a threat as defined by the statute:<sup>48</sup> at most, it is a possibility that at some undefined point in the middle- to distant-future, Delta may decide it wants to change course, and Bombardier may have the capacity to comply. It is speculation. And, again, the record is clear: Delta wants the CS100s it ordered and that fit the need for its network upgauging strategy.

#### **IV. Boeing Cannot Answer When—Or Even If—Subject Imports Would Arrive Or How It Is Threatened with Material Injury**

Boeing is also unable to show when (if?) subject imports will arrive or how it is threatened by a 109-seat aircraft—to the contrary, the record evidence is that no subject

<sup>47</sup> Hr'g Tr. 253:11-13 (May).

<sup>48</sup> See 19 U.S.C. § 1677(7)(F)(ii).

merchandise will be imported and Boeing is not threatened with material injury.

**A. There Have Been No Imports from Canada, the Record Evidence is that There Will Be None, and Boeing's Assertions Are Speculation**

The record shows no POI imports of subject merchandise and no imminent imports.<sup>49</sup> In this industry, purchase agreements are not reliable indicator of what aircraft, if any, will ultimately be delivered. In January 2016, Boeing had a purchase agreement with United for 40 737-700s with delivery to begin within 18 months.<sup>50</sup> United will never take delivery of a single 737-700 under that purchase agreement.<sup>51</sup> The record reflects Delta's own experiences, including a purchase agreement with [ ]<sup>52</sup> Boeing has [ ]<sup>53</sup>

A purchase agreement does not establish imminent imports.

Delta's testimony is unambiguous: Delta does not currently expect to import any Canadian-manufactured CS100s into the United States.<sup>54</sup> Even if the Commission makes a negative determination, Delta must account for the risk that Boeing could bring another petition

<sup>49</sup> This should seem uncontroversial, but the statutory framework *requires actual or imminent imports*, Boeing's argument notwithstanding. This is a result of the fact that, in the absence of imports during the period of investigation, there must be a showing of imminent imports or the Commission must find the imports to be negligible. See 19 U.S.C. § 1677(24)(iv).

<sup>50</sup> See Ex. 16, Paul R. La Monica, "United buying 40 new 737-700s to upgrade fleet," CNN (Jan. 21, 2016), <http://money.cnn.com/2016/01/21/investing/united-airlines-new-fleet-earnings-oscar-munoz/index.html> (last accessed Dec. 26, 2017).

<sup>51</sup> See Ex. 15, Adam Levine-Weinberg, "Will United Airlines Order New Jets From Bombardier or Embraer?"; Ex. 17, Alwyn Scott, "Boeing shares fall as United Airlines cancels 737 order," REUTERS (Nov. 15, 2016), <https://www.reuters.com/article/ual-strategy-boeing/boeing-shares-fall-as-united-airlines-cancels-737-order-idUSL1N1DG0WA> (last accessed Dec. 26, 2017).

<sup>52</sup> Ex. 18, Comprehensive Settlement Agreement dated [ ] between [ ] and [ ] regarding Purchase Agreement [ ] dated [ ] between [ ] and [ ]; Delta Prehearing Brief, 42. Please also note Delta's response to Commissioner Williamson's question at pages 1-3 of the attached Responses to Questions from the Commission for further examples, Ex. 1.

<sup>53</sup> [ ], QR, II-11g.

<sup>54</sup> Hr'g Tr. 297:20-21 (McClain); Ex. 19, Decl. of Gregory A. May dated Nov. 6, 2017 ("May Nov. 6 Decl."), ¶ 8; Delta, Prehearing Brief, 49.



seeking to subject those imports to AD/CVD duties.<sup>55</sup> Besides, Delta has a strong preference for taking deliveries of American-manufactured CS100s in Alabama.<sup>56</sup>

Against the sworn testimony of the sole potential<sup>57</sup> importer of CS100s in the imminent future and the demonstrable inadequacy of purchase agreements as evidence of imminent deliveries, Boeing offers only speculation. First, Boeing insists the Airbus-Bombardier partnership is a ruse that will never lead to a new facility in Mobile, Alabama, notwithstanding the record evidence of:<sup>58</sup> (1) public and repeated statements by two blue-chip, publicly traded companies;<sup>59</sup> (2) regulatory approvals already in process, with more expected each day;<sup>60</sup> and (3) public reports that such a partnership was considered even before the petition was filed.<sup>61</sup> Second, Boeing speculates that, were the Commission to reach a negative determination based on the evidence in this investigation, Delta and other airlines would quickly move to import CS100s before Boeing could secure trade relief. However, Boeing ignores record evidence that Boeing has forced domestic purchasers to incorporate trade risk into the calculus of any possible importation of aircraft.<sup>62</sup>

<sup>55</sup> Commerce can issue a CVD preliminary determination within 60 days of initiation of an investigation, 19 U.S.C. § 1671b(b)(1). If they find critical circumstances, Commerce can order *retrospective* suspension of liquidation and cash deposits up to the date on which notice of initiation of the investigation is published in the Federal Register. 19 U.S.C. § 1671b(e)(2).

<sup>56</sup> Delta's experience taking delivery of Airbus products in both Mobile, Alabama and Hamburg, Germany demonstrates the added-value to Delta of US delivery. See **Ex. 20**, Decl. of Dan Pietrzak dated Dec. 21, 2017, ¶ 4. Bombardier's facility in Quebec is, of course, nearer to Mobile than Hamburg is, so the relative scale of savings for Mobile-delivered CS100 is smaller than Mobile-delivered A320s, but the cost savings remain as do the significant operational advantages of permitting the ready involvement of senior Delta management. *Id.* ¶ 10; Hr'g Tr. 201:12-16 (May).

<sup>57</sup> All parties to the investigation have acknowledged that Republic Airline is unlikely to take delivery pursuant to its purchase agreement in the imminent future.

<sup>58</sup> Moreover, the post-petition information provision of 19 U.S.C. § 1677(7)(I) specifies the types of information the Commission may discount—a change in conditions impacting the likelihood of future imports is not among the types listed. See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“{W}here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

<sup>59</sup> Hr'g Tr. 28:5-8 (Lichtenbaum); Bombardier Prehearing Brief, 5.

<sup>60</sup> Hr'g Tr. 294:11-17 (Lichtenbaum); Bombardier Prehearing Brief, 8.

<sup>61</sup> Hr'g Tr. 191:5-9 (Levesque).

<sup>62</sup> Hr'g Tr. 297:15-20 (McClain).

Finally, there are no actual sales for import on record, and in 2017 Bombardier continued the pattern of being unable to meet even its expected production goals as it continues to work through supply chain issues.<sup>63</sup>

**B. The CS100 Has Not Caused the -700 and MAX7 Sales Slump—the -700 Stopped Selling a Decade Ago and the MAX7 Is Too Big to Serve the 100- to 110- Seat Market Segment**

Boeing has failed to demonstrate that the CS100 is the cause of the long-enduring sales slump for Boeing's 737-700 or MAX7 models.

The market for the twenty-year old 737-700 collapsed a decade ago with the final sales coming to an effective end in 2012.<sup>64</sup> As Boeing points out, it was, in its time, tremendously successful, and 1,200 737-700s have been sold<sup>65</sup>—but almost all of them before 2007. Boeing cannot plausibly blame the past decade of poor -700 sales on the CS100, which did not win its flight certification until December 2015. Further, the decline in sales is consistent with an older, less-efficient aircraft. As Delta testified at the hearing, while the -700 has a performance profile that makes it useful in a small handful<sup>66</sup> of the more than 300 destinations Delta serves,<sup>67</sup> the 737-700 also has the highest per-seat operating costs of any LCA in Delta's fleet.<sup>68</sup>

The MAX7 fares little better. By any objective account, sales of the MAX7 have fared poorly from its inception, with “[ ]”<sup>69</sup> Boeing announced Southwest as its

<sup>63</sup> [ ], QR, II-3c and II-12g; Hr’g Tr. 182:24-25-183:1-10 (Dewar).

<sup>64</sup> [ ], QR, II-8.

<sup>65</sup> Hr’g Tr. 43:23:25(McAllister).

<sup>66</sup> Boeing asserts that it is aware of [ ] airports with conditions that favor operation of the -700. Boeing, Post-Conference Brief, 12. To put that number in context, the FAA tracks data more than 500 commercial airports in the US. See Ex. 21, *Commercial Service Airports (Rank Order) based on Calendar Year 2016 Enplanements*, FAA (Oct. 5, 2017), [https://www.faa.gov/airports/planning\\_capacity/passenger\\_allcargo\\_stats/passenger/media/cyl6-commercial-service-enplanements.pdf](https://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/media/cyl6-commercial-service-enplanements.pdf) (last accessed Dec. 26, 2017).

<sup>67</sup> Hr’g Tr. 203:17-19 (Esposito); Hr’g Tr. 242:10-11 (Esposito).

<sup>68</sup> Hr’g Tr. 208:5-6 (Esposito); see also Ex. 4, Seat Cost vs. Aircraft Gauge.

<sup>69</sup> [ ].



launch customer with an order of 30 MAX 7s in May 2013.<sup>70</sup> Even as Boeing tells it in the allegations of its Petition, the earliest Boeing perceived “unfair” competition from Bombardier’s CS100 was two years later in the United campaign.<sup>71</sup> The Delta-Bombardier transaction upon which Boeing has predicated this investigation did not happen until three years later.<sup>72</sup> The intervening three years of silence in the market in response to the MAX7 speaks volumes. The lack of acceptance or appreciation in the market for the MAX7 likely arises from the open secret that the MAX7 is a shortened version of a larger airplane, in much the same manner of the 737-700, and with all the requisite compromises in performance and design that result from it being cobbled together to serve a market segment for which it was not truly designed.<sup>73</sup> It is far too big and inefficient to serve the 100- to 110-seat segment.

Boeing seeks to attribute lost sales (or opportunities for sales) to foreign competition to mask its failure to have the right size LCAs to meet market demands. It is not just that Boeing abandoned the 100- to 110-seat segment when it stopped production of the 717 and 737-600. It proudly doubled down on its bet by going even bigger from the 126-seat 737-700 to the 138-seat MAX7.<sup>74</sup> At that size, those LCAs are not viable alternatives for airlines seeking 100- to 110-seat LCA. Boeing’s efforts to acquire Embraer highlight the hole in Boeing’s product offerings.

Even setting the above problems aside, it is worth remembering that any aircraft is inducted into the fleet of an airline in the context of that airline’s network. In the final analysis, the profitability—and therefore the desirability—of any aircraft is driven by how the aircraft fits into that airline’s network. Delta’s needs did not provide a fit for the -700 or the MAX7. Given

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<sup>70</sup> *Ex. 22, Boeing, Southwest Airlines Announce Launch of 737 MAX 7*, BOEING, <http://boeing.mediaroom.com/2013-05-15-Boeing-Southwest-Airlines-Announce-Launch-of-737-MAX-7> (last accessed Dec. 26, 2017).

<sup>71</sup> Petition, 14.

<sup>72</sup> Petition, 3.

<sup>73</sup> See Hr’g Tr. 228:16-19 (Mitchell).

<sup>74</sup> Hr’g Tr. 114:2-8 (McAllister).

their significantly greater seat capacity, either could draw potentially significant more revenue.

(All things being equal, higher seating capacity translates to higher per-trip revenues for that aircraft if you determine that there is demand to fill those seats.) That is why the pricing complaints that Boeing reports [

]. The point is

not, ultimately, whether any particular network strategy or aircraft is better than another, but whether a particular aircraft is a good fit for the particular network strategy.

### **C. The Effects of Rumors of Sales Terms Are Not Cognizable Trade Injury**

Finally, it is important to distinguish price effects from purchasers' attempt to leverage rumors to seek an advantage in negotiations. Scrutiny of Boeing's price transmission arguments reveals the recurring pattern—what Boeing is offering is evidence that [

].<sup>75</sup> At most, this would mean that [

].<sup>77</sup> Thus, the record evidence is that Boeing [

]. Boeing's strident insistence aside,

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<sup>75</sup> See Boeing, Pre-Hearing Brief, 49-51.

<sup>76</sup> In the ordinary course, it would go without saying that it seems unlikely that any producer would perceive it had an economic incentive to disclose the pricing of other producers it perceived as competitors if that pricing was lower than the pricing offered.

<sup>77</sup> See Questionnaire Responses III-5a of [

].

the record evidence is that this is an industry marked by price opacity—at least, from the perspective of potential purchasers.<sup>78</sup>

At most, purchasers here rumors, “whispers,”<sup>79</sup> of the pricing that another airline may have secured—and those rumors are often contradictory.<sup>80</sup> Each of the parties involved in a transaction has a strong incentive that the pricing not be disclosed: producers want to avoid having purchasers use it as leverage; purchasers want to avoid other purchasers having insight into their operations. No one actually “in the know” regarding the details of any transaction would voluntarily share them. As a result, most purchasers recognize the rumors for what they are—speculation.<sup>81</sup>

Moreover, Boeing’s generic assertions about the impact of aircraft acquisition price on fares do not comport with actual pricing behavior. Delta sets “fares on each route without reference to aircraft acquisition cost, and our inventory management systems allocate seat inventory without reference to aircraft acquisition cost.”<sup>82</sup> Boeing has not provided any direct evidence of how acquisition price impacts fares.

## V. Conclusion

Boeing did not lose a sale—it long ago decided not to compete in the 100- to 110-seat market—and cannot explain why Delta should be forced to buy a 138-seat LCA to fill a 109-seat need. Boeing has not been injured by Bombardier’s production of an aircraft in a market segment in which Boeing does not compete, and the record demonstrates there will be no imminent imports of subject imports. For the foregoing reasons, as well as those in Delta’s previous submissions to the Commission, the Commission should make a negative threat determination.

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<sup>78</sup> Staff Report, V-20.

<sup>79</sup> Hr’g Tr. 239:16-17 (May).

<sup>80</sup> Hr’g Tr. 287:6-7 (Dimitroff).

<sup>81</sup> See Staff Conference Tr. 178:14-18 (May); Staff Conference Tr. 179-16-19 (May).

<sup>82</sup> Ex. 23, Decl. of Paul Baldoni dated Dec. 20, 2017 (“Baldoni Decl.”), ¶ 5.

Respectfully submitted,



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