

COMPETITION TRIBUNAL/TRIBUNAL DE LA CONCURRENCE

CT-88/1

IN THE MATTER OF an application by the Director of Investigation and Research under subsection 64(1) of the *Competition Act*, R.S.C. 1970, c. C-23, as amended;

AND IN THE MATTER OF a Limited Partnership formed to combine the operations of the Reservec and Pegasus computer reservation systems;

AND IN THE MATTER OF The Gemini Group Automated Distribution Systems Inc.;

AND IN THE MATTER OF an application by the Director of Investigation and Research under section 106 of the *Competition Act*, R.S. 1985, c. C-34 to vary the Consent Order of the Tribunal dated July 7, 1989.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

FILED	COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	PRODUIT
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REGISTRAR - REGISTRAIRE		
OTTAWA, ONT.	#639	CANADIAN AIRLINES INTERNATIONAL LTD.

APPLICANT

- and -

AIR CANADA
PWA CORPORATION
CANADIAN AIRLINES INTERNATIONAL LTD.

THE GEMINI GROUP LIMITED PARTNERSHIP
THE GEMINI GROUP AUTOMATED DISTRIBUTION SYSTEMS INC.
COVIA CANADA CORP.
COVIA CANADA PARTNERSHIP CORP.

RESPONDENTS

- and -

CONSUMERS' ASSOCIATION OF CANADA
AMERICAN AIRLINES, INC.
ATTORNEY GENERAL OF MANITOBA
ALLIANCE OF CANADIAN TRAVEL ASSOCIATIONS
BIOS COMPUTING CORPORATION

INTERVENORS

**RESPONSE OF
THE GEMINI GROUP AUTOMATED DISTRIBUTION SYSTEMS INC.
AND
THE GEMINI GROUP LIMITED PARTNERSHIP**

A. GROUND ON WHICH THE APPLICATION IS OPPOSED

The Gemini Group Automated Distribution Systems Inc. ("Gemini") and The Gemini Group Limited Partnership (the "Gemini Partnership") (sometimes referred to collectively as "Gemini") oppose the Application of the Director of Investigation and Research (the "Director") to vary the consent order issued by the Competition Tribunal on July 7, 1989 (the "Consent Order") on the following grounds:

1. The circumstances which were relevant to the making of the Consent Order have not changed.
2. In the present circumstances, the Consent Order would still have been made.
3. The Consent Order is effective to achieve its intended purpose.
4. The Director's Application represents another attempt by PWA Corporation ("PWA") to extricate Canadian Airlines International Ltd. ("CDN") from the hosting agreement among the Gemini Partnership, Air Canada ("AC") and CDN dated as of June 30, 1989 (the "Gemini Hosting Contract").

5. The Director's Application is premature.
6. In making the Application, the Director acted improperly, for improper purposes and based on irrelevant considerations.
7. The reasons for the Director's Application are solely related to concerns about competition in the airline market. These concerns are unrelated to the intended purpose of the Consent Order and do not provide a proper basis for varying the Consent Order.
8. The demand of AMR Corporation ("AMR") that CDN move its hosting to the Sabre computer reservation system ("CRS") of American Airlines, Inc. ("AA") is unrelated to the intended purpose of the Consent Order and is an improper basis for varying the Consent Order.
9. The provisions of the Gemini Hosting Contract were not in issue before the Competition Tribunal when the Consent Order was issued. They are not related to the Consent Order and are not a proper basis for varying the Consent Order.
10. The Competition Tribunal lacks the jurisdiction to grant the orders sought by the Director, terminating the hosting contracts and dissolving Gemini:

- (a) the Director asks the Competition Tribunal to vary the Consent Order by adding terms completely irrelevant to the Consent Order, and for a purpose wholly unrelated to the intended purpose of the Consent Order; and
 - (b) the orders sought by the Director, including dissolution of the Gemini Partnership, go beyond rescission or variation of the Consent Order.
11. Granting the orders requested by the Director would be contrary to the purpose of the *Competition Act* as a whole, and contrary to the purpose of section 106 of the *Act* in particular.
12. The demand by AMR, that CDN be hosted on Sabre as a prerequisite to an equity investment by AMR in CDN, is unreasonable and unnecessary.
13. If the orders requested are granted, Gemini will be significantly and adversely affected, and likely will be forced to cease operations. The result will be a substantial lessening of competition in the Canadian CRS market and it will be severely detrimental to Gemini's employees, users and suppliers.

B. MATERIAL FACTS RELIED ON

Gemini

1. Gemini provides a Canadian-based CRS throughout Canada. One part of its business provides travel information and booking services through a telecommunications network across Canada. This network is the primary channel used by airlines and other travel-related suppliers to distribute products to travel agents. Travel agents subscribe to the Gemini CRS in order to access information on travel services for their customers and make reservations and issue tickets.

2. The other part of Gemini's business is the management or "hosting" of the internal reservations systems of inventory of available seats for Air Canada and its affiliates (Air Canada Vacations, Air Nova Inc., Air B.C. Ltd., Air Ontario Inc., Northwest Territorial Airways Ltd. and Air Alliance Inc.), Canadian Airlines and its affiliates (Canadian Regional Airlines Ltd., Canadian Holidays Ltd., Transpacific Tours (Canada) Limited, Time Air Corporation, Ontario Express Ltd. and Inter-Canadien Inc.) and non-affiliates (Air Atlantic Ltd. and Calm Air International Ltd.), and other smaller and non-affiliated Canadian airlines and organizations. These non-affiliated carriers and organizations include Via Rail, Nationair, Helijet, Norontair, Bearskin Airways, First Air, Air Creebec, Wilderness Airlines, Waglisla Air, Air Manitoba, Central Mountain Airways, Skycraft, Pem Air, Ptarmigan

Airways, Pacific Coastal, Air Laurentian, Roadair, the Department of National Defence and Marine Atlantic.

3. Gemini employs 700 people throughout Canada and has invested over \$100 million in its system. It is a major purchaser of computer and telecommunications products and services in Canada. Its operations, customers, investment, suppliers and employees will be significantly adversely affected if this Application is granted.

Intended Purpose of the Consent Order

4. The Consent Order was intended to address three major concerns of the Director:
 - (a) an apprehended substantial lessening of competition in the CRS service business as a consequence of the merger, having adverse implications primarily for travel agents (subscriber market) and other airlines (participating carrier market);
 - (b) the possibility that Gemini could be used by its airline owners, AC and CDN (through PWA) to achieve and exercise market power in the passenger airline business in Canada (thereby lessening competition in that market) through giving themselves advantages and

disadvantaging their rivals in the display of information, etc. in Gemini; and

(c) the involvement of the airlines in Gemini might facilitate collusion among them in the passenger airline market.

5. The Consent Order is not concerned with regulating the general state of competition in the passenger airline market. The Consent Order is concerned with eliminating the potential for the exercise of market power in the CRS and passenger airline markets through the ownership and control of a CRS by the two principal domestic air carriers.
6. The provisions of the Gemini Hosting Contract, which the Director now seeks to vary, were never at issue or relevant to the concerns addressed by the Consent Order.

The Consent Order is Effective to Achieve Its Intended Purpose

7. The Consent Order is functioning effectively to achieve its intended purpose.
8. The Consent Order (including the CRS Rules) addressed each of the three concerns of the Director listed above:

- (a) The Consent Order dealt with competition in the CRS service business by: (i) requiring the airlines to provide direct access links to their seat inventories hosted in Gemini to any CRS which wished such links; (ii) prohibiting the owning carriers of Gemini (AC and CDN through PWA) from tying the granting of travel agency commissions to the use of a particular CRS system; (iii) making rules limiting the terms, etc. of subscription agreements that Gemini might enter into; and (iv) requiring the airlines to provide equal information to all competing CRSs.

- (b) The concern regarding the possible exercise of market power in the passenger airline business was addressed by: (i) rules forbidding price discrimination; (ii) requiring Gemini to carry the product of any carrier which wished to enter into a participating carrier agreement; (iii) provisions to eliminate bias in the operation of Gemini's CRS; and (iv) the anticipated shared ownership of Gemini with a third non-airline investor (Covia Canada Partnership Corp., hereinafter "Covia") which would have no interest in distorting competition in the airline business.

- (c) The concern over possible collusion was addressed by precluding access through Gemini by each airline to any competitively sensitive information concerning any other airline. The involvement of Covia

(which clearly has no interest in facilitating such collusion) was considered a positive development in this respect.

9. The structural and behavioral remedies in the Consent Order have been implemented. The Director's Application does not allege any violation of the Consent Order. The Application does not allege any defect in the Consent Order.

10. There is substantial competition in the CRS market at the present time. Sabre's market share, in terms of the numbers of terminals installed and travel agency locations, has increased from approximately 20% at the time of the Consent Order to approximately 40% today.

Circumstances That Led to the Making of the Consent Order Have Not Changed

11. The circumstances that were relevant to the making of the Consent Order have not changed. The financial condition of PWA and CDN was not a relevant consideration leading to the making of the Consent Order. The current alleged financial circumstances of PWA and CDN were not caused by the Consent Order, by CDN's hosting arrangements with the Gemini Partnership, or by any relevant change in circumstances in the CRS market. The current financial condition of PWA and CDN is wholly unrelated to the Consent Order.

12. The changed circumstance set out in the Director's Application is CDN's desire to obtain early termination of the Gemini Hosting Contract at the demand of AMR, a prospective purchaser of a 25% equity interest in CDN.
13. The Gemini Hosting Contract is a valid and binding agreement among sophisticated commercial parties. It was entered into by CDN freely and without compulsion, and with the benefit of legal advice.
14. It is inappropriate for the Director or the Competition Tribunal to assist CDN in its objective of obtaining a release from the Gemini Hosting Contract.

The Consent Order Would Still Have Been Made

15. The Consent Order was made in relation to a merger of the CRS businesses of AC and CDN which occurred on June 1, 1987. If instead AC and CDN had sought to effect a merger of their CRS businesses and hosting arrangements at the present time, the Consent Order would still have been made.

Purpose of this Application

16. The sole purpose of the Director's Application is to assist CDN in its efforts to obtain early termination of its obligations under the Gemini Hosting Contract.

17. The Director is attempting to remedy a perceived competition problem in one market (the airline market) by creating a virtual monopoly in another market (the CRS market). He is attempting to accomplish these results by securing a variation of a consent order which was designed primarily to preserve competition in the CRS market.
18. In 1991, the partners of the Gemini Partnership examined various proposals related to the partnership's operations. All partners, including PWA, specifically rejected, as uneconomic for the Gemini Partnership, a proposal to transfer hosting functions out of the partnership.
19. As part of this process, on March 9, 1992 the partners agreed to sign a Memorandum of Understanding. When implemented, this document would have amended the partnership's charges for hosting AC and CDN.
20. On March 10, 1992 PWA and CDN refused to sign the Memorandum of Understanding, and shortly thereafter PWA announced that it was negotiating a merger transaction with AMR.
21. Since at least March 10, 1992, PWA and AMR have been engaged in a plan to terminate CDN's contractual obligations under the Gemini Hosting Contract and to transfer CDN's hosting requirements to AMR's Sabre system.

22. On the understanding that a merger between CDN and AMR would likely involve the transfer of CDN's hosting functions to the Sabre CRS, Gemini acted reasonably and prudently and in the best interests of the Gemini Partnership by advising CDN and AA that it would diligently enforce contractual obligations and by taking such actions as are necessary to preserve and protect its business and its existence.
23. On August 31, 1992 PWA commenced legal action in the Alberta Court of Queen's Bench for a declaration that Gemini is insolvent. The effect of such a declaration would be the termination of the Gemini Partnership and the resultant termination of the Gemini Hosting Contract. CDN would then be free to pursue a hosting contract with Sabre.
24. In November, 1992 the Alberta action was stayed. PWA has recommenced that action in Ontario. In the same month PWA and AMR induced the Director to bring this Application to further their plan to transfer hosting services to Sabre.

Director's Conduct

25. Notwithstanding PWA's ability to make this Application in its own right, the Director at AMR's and PWA's request made this Application without prior

discussion or notice to Gemini. Having advised Gemini that the Application was being filed, the Director then refused to discuss it or to meet with Gemini.

26. The Director's Application states that PWA and CDN have advised the Director that their financial position has deteriorated to the point that they cannot survive on their own. The Application indicates that the Director has not made an independent determination of the financial condition of PWA and CDN, but has instead relied upon the advice of PWA and CDN.
27. The Director seeks to add wholly irrelevant terms to the Consent Order. The termination provisions of the Gemini Hosting Contract were never considered by the Competition Tribunal when it made the Consent Order, nor were such provisions in any way related to the intended purpose of the Consent Order.
28. The Director acted improperly in making the Application by taking a position with respect to AMR's demand that CDN transfer its hosting functions to AA's Sabre. The Director has thereby precluded himself from properly assessing the likely anti-competitive effects which implementation of the demand would have in the CRS market, and has failed to consider whether a substantial lessening of competition is likely to result in the CRS market from a "merger" of AMR and CDN.

29. The Competition Tribunal is not the appropriate forum for the relief sought by the Director. The relief sought by the Director is also being sought by PWA in private litigation. In making the Application, the Director has improperly intervened in a private dispute which is wholly irrelevant to the intended purpose of the Consent Order.

30. The Application also seeks an order permitting early termination of the hosting arrangements between the Gemini Partnership and AC and its affiliates. There is no reasonable basis for the Director's request for such an order, even on the misconceived grounds alleged by the Director in his Application.

Prematurity

31. The Application of the Director is premature. There is no definitive merger agreement between PWA and AMR containing a condition requiring the early termination of the Gemini Hosting Contract. The Director is requesting the Competition Tribunal to act in a vacuum. Even if the Competition Tribunal were to grant the relief sought by the Director, there is no assurance that AMR's investment in CDN will occur.

32. The *Competition Act* permits the Director to address his concerns regarding competition in the airline market in other proceedings at the appropriate time.

AMR's Demand is Unnecessary and Unreasonable

33. There is no technical, business or operational basis for AMR's demand that CDN be hosted on Sabre. AMR's request is unnecessary and unreasonable.

34. AA intervened in the proceedings leading to the making of the Consent Order, and did not object to either the previous hosting agreement or to the termination provisions thereof.

35. The Director's Application provides no proper reason for the Competition Tribunal to accept AMR's demand that CDN transfer its hosting to Sabre.

36. A transfer or merger of hosting functions between carriers has not been a customary feature of recent investments in major airlines in North America or elsewhere.

Application Creates an Artificial Advantage for Sabre

37. The Application has created considerable uncertainty among travel agencies and their customers as to the long-term future of the Gemini Partnership. The uncertainty already has caused a migration of business to Sabre. The Application has given Sabre an unfair, artificial advantage which is not based on competitive merit.

Effects of Early Termination on Gemini

38. If the Competition Tribunal grants the orders requested by the Director in his Application, the result will be anti-competitive and contrary to the purposes of the *Competition Act*.
39. The participation of CDN in the Gemini Hosting Contract and its support of the Gemini CRS is fundamental to the overall profitability and viability of the Gemini Partnership.
40. Termination of the Gemini Hosting Contract with CDN will also mean termination of all hosting arrangements between the Gemini Partnership and CDN's affiliated and related airlines.
41. Early termination of the Gemini Hosting Contract is likely to result in a significant loss in revenue (which could not be matched by a corresponding reduction in costs, the bulk of which are fixed), significant losses, higher costs per CRS transaction, and reduced capability to maintain and improve the Gemini CRS.
42. A transfer of CDN's hosting services to Sabre is likely to result in a significant loss of distribution revenues for the Gemini CRS. This loss would be particularly acute in Western Canada where there is a large concentration of activities by CDN.

43. The loss of CDN's hosting services to Sabre (and the consequent erosion of the Gemini Partnership's existing subscriber base) is likely to result in the Gemini Partnership being forced to cease operation. This will involve not only the demise of a Canadian-based CRS, but also the loss of a successful Canadian business in the high technology sector. The demise of the Gemini Partnership will also have a severe adverse impact on its suppliers in the high technology sector and its customers in the travel industry.

44. With the weakening and potential demise of Gemini, AC, other carriers and non-airline organizations which are hosted in or participate in the Gemini CRS, and CRS subscribers (travel agents) would be compelled to rely on the Sabre CRS. The transition period would be extremely disruptive and costly for these users. After becoming dependent on Sabre, these users would thereafter lack any practical alternatives if Sabre abused its dominant market position.

45. Although Sabre would become virtually the sole CRS in Canada, it would operate without the constraints currently imposed on Gemini by the Consent Order and the CRS Rules. In addition, AA and CDN would not be subject to the anti-collusion provisions of the Consent Order.

46. If the Gemini Partnership is forced to exit the CRS market, it is unlikely that Sabre's virtual monopoly could be successfully challenged by other CRSs to prevent a substantial lessening of competition. Since the Consent Order was issued, there has been no new entry of a CRS, or expansion of an existing CRS (other than Sabre) in the Canadian CRS market. The other two CRSs operating in Canada, Worldspan and SystemOne, each represent less than 1% of the Canadian CRS market.

AMR's Strategy

47. AMR is using its negotiating position with PWA to secure dominance in the CRS market and put the Gemini Partnership out of business. In considering its investment in CDN, AMR has factored in not only the prospective profits on the CDN hosting business and profits on hosting contracts from other carriers that AMR could attract with a prestigious client such as CDN, but also the increased profitability of Sabre's Canadian operations from additional booking fees secured through dominance of the Canadian CRS market.

Admissions, Denials, No Knowledge

48. Gemini admits paragraphs 1 to 11 inclusive and paragraphs 18-19 of the Statement of Material Facts, but otherwise denies the balance of the Application as pleaded or has no knowledge thereof.

49. In particular, Gemini has no knowledge of:
- (a) the merger discussions between AC and PWA, or the merger discussions between PWA and AMR;
 - (b) whether PWA has sought out all reasonable investors for CDN;
 - (c) whether the Director has determined that PWA or CDN is a failing firm under the *Merger Enforcement Guidelines*;
 - (d) whether PWA's investment bankers' searches for alternative purchasers have been conducted in accordance with the Director's *Merger Enforcement Guidelines*; and
 - (e) the nature and extent of the Director's analysis of the competitive effects of the transfer of CDN's hosting functions to Sabre.

C. **CONCLUSION**

1. In making the Application, the Director acted improperly by failing to hear and consider Gemini's interests. The Director had no reasonable basis to bring the Application. The Director acted for improper purposes and for

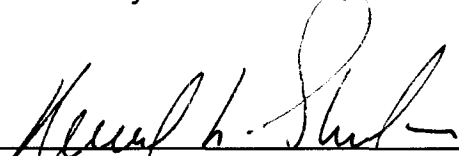
irrelevant considerations. The Director failed in his duty to consider the substantial lessening of competition likely to result in the CRS market.

2. Early termination of the Gemini Hosting Contract and the transfer of CDN's hosting to Sabre will create an anti-competitive result. It is likely that Gemini will be forced to cease operations. The Sabre CRS will consequently enjoy a virtual monopoly in the Canadian CRS market.
3. The Competition Tribunal lacks the jurisdiction to grant the relief sought by the Director.
4. The orders requested are contrary to the purpose of the *Competition Act* set out in section 1.1 of the *Act*, in that the relief sought by the Director, if granted, will (among other things) effectively deprive Canadian users of CRS services of competitive prices and any choice in CRS services.
5. The orders requested are contrary to the purpose of section 106 of the *Competition Act*, and will undermine public confidence in settlements incorporated in consent orders and the consent order process itself.

D. **RELIEF SOUGHT**

1. Gemini respectfully requests an order dismissing the Application, or such other relief as counsel may advise.

All of which is respectfully submitted this 9th day of December, 1992.



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