



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

Issued by the Department of Transportation
on the 27th day of December, 2006

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 of persons, property, and mail

Docket OST-2005-23307

ORDER TO SHOW CAUSE

Summary

After a careful review of the record now before us, we tentatively find that: (1) less than 75 percent of the total equity of the applicant, Virgin America, Inc. (“Virgin America”), is held by U.S. citizens, and (2) Virgin America is under the actual control of Carola Holdings Limited (“Carola”), Virgin Management Limited (“VML”), Virgin Group Investments Limited (“VGIL”), and Virgin USA, Inc. (“Virgin USA”), collectively referred to herein as the “Virgin Group” or the “Virgin group of companies,” and Sir Richard Branson, all of whom are U.K. citizens.¹ We emphasize that U.S. aviation law does not prohibit U.S. citizens from entering into arms-length franchise arrangements with foreign airlines; but the totality of circumstances presented in this matter persuades us that, at this stage, the applicant has not shown that it is or will remain sufficiently independent of foreign control to satisfy our citizenship requirement. Therefore, by this order, we propose to conclude that Virgin America is not a U.S. citizen as defined in 49 U.S.C. § 40102(a)(15) and hence to deny its application for interstate scheduled air transportation of persons, property, and mail under 49 U.S.C. § 41102. As is our practice, we provide a period of 14 days to the applicant and other interested persons to comment on this proposed decision.

¹ The parties have exhaustively addressed the various issues in this case, but many of their arguments, and most of the evidence, have been submitted under cover of motions for confidential treatment. As we rely on this material in reaching our tentative decision here, we are issuing this order in two versions: a public version, with discussion of confidential material redacted, and a confidential version that includes all such discussion. The confidential version will be available only to the various parties that have filed appropriate affidavits.

Statutory Standard

An applicant for a certificate to be a U.S. air carrier must show it is a U.S. citizen, as defined in section 40102(a)(15). That provision defines a U.S. citizen as: (A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States. In making the determination of actual control, we look at the totality of the circumstances of applicant's financial and operational structure. We look to see whether under those circumstances, a foreign person has the substantial ability to influence the activities of the applicant.²

Application

On December 8, 2005, Virgin America filed an application for a certificate to engage in interstate scheduled air transportation of persons, property, and mail. The applicant accompanied its application with information required by section 204.3 of our regulations for an examination of its fitness to hold such authority. (In accordance with 14 CFR 302.204, answers to the application were due by December 29, 2005.)

Subsequently, on December 13, 2005, Virgin America filed additional evidentiary material, along with a Motion under 14 CFR 302.12 ("Rule 12") seeking confidential treatment for certain evidentiary material, including the Subscription, Virgin License, Stockholders, Interim Series Note, Put, and Investor Subscription Agreements. In its Rule 12 submission, the applicant redacted or omitted material from the confidential record that it deemed not relevant to the Department's determination in this case, and instead provided limited descriptions of the redacted or omitted material. Virgin America supplemented its application with additional information on March 3, April 25, July 27, and August 15, 2006, and accompanied these filings with several Motions for confidential treatment.

The Company

Virgin America was initially incorporated 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."³ 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.

² See Order 2004-5-10, issued May 13, 2004, at 8; Order 89-9-51, issued September 29, 1989, at 5; Order 93-3-17, issued March 15, 1993, at 19; Order 89-12-41, issued December 22, 1989, at 10.

³ Virgin America, Supplement 2, filed April 25, 2006, at 2.

On November 14, 2005, Best Air amended its Certificate of Incorporation to reflect a change in its corporate name to “Virgin America, Inc.”

Ownership

According to the applicant, on November 21, 2005, Virgin America came under the control of VAI Partners LLC (“VAI”),⁴ a Delaware investment company that holds 75 percent of the capital stock and voting interest in the applicant. The remaining 25 percent of the capital stock and voting interest in Virgin America is held among Carola, Ms. Frances Farrow, and Mr. Mark Poole, each of whom is a U.K. citizen.⁵

Table 1. Voting Ownership Structure of Virgin America⁶

Class	Issued to	Authorized	Issued to Date	Voting Rights	Current Ownership	Outstanding at Final Closing	Voting Rights	Ownership at Final Closing
Preferred	VAI	4,887,105	681,482	681,482	60.0%	4,887,105	4,887,105	59.5%
A	VAI	16,454,802	170,371	170,371	15.0%	1,221,777	1,221,777	14.9%
A	D. Carty		0	0	0.0%	65,106	65,106	0.8%
B	Carola	2,036,347	110,090	110,090	9.7%	1,862,486	1,862,486	22.7%
D	F. Farrow	100	100	154,543	13.6%	100	154,543	1.9%
F	M. Poole	100	100	19,318	1.7%	100	19,318	0.2%
Total		23,378,454	962,143	1,135,804	100.0%	8,036,674	8,210,335	100.0%

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 (“CEO”).

⁴ Virgin America Application, at 5.

⁵ Id., at 4, Exhibit 5, Exhibit 8, at 1, and Exhibit 10, at 1; and Virgin America, Supplement 2, filed April 25, 2006, Exhibit 24, at 1.

⁶ 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 1,135,804 voting shares. The percentage of current ownership and 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 13.6 percent current ownership in Virgin America consists of 154,543 Class D voting shares divided by 1,135,804, the total number of voting shares in Virgin America. 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.

Investors

Ownership of VAI⁷ – and thus 75 percent of the applicant – 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 Air Partners LLC (“Black Canyon”) (47.18 percent); (4) Carty-Nickell Investments LLC (“Carty-Nickell”) (5.63 percent); and (5) VAM Partners, LLC (“VAM”) (0.002 percent). The following table illustrates the current and anticipated final capital investment from the owners of VAI to Virgin America.

Table 2: Current and Proposed Financial Investment from VAI to Virgin America⁸

Investor	Current Investment		Proposed Final Investment	
	Value	Shares Held in VAI	Value	Shares Held in VAI
Cyrus I	\$707,782	60,293	\$6,289,143	432,383
Cyrus II	\$4,010,762	341,658	\$35,638,469	2,450,172
Black Canyon	\$4,718,544	401,950	\$41,927,611	2,882,555
Carty-Nickell	\$562,712	47,935	\$5,000,000	343,754
VAM	\$200	17	\$200	17
TOTAL	\$10,000,000	851,853	\$88,855,422	6,108,882

Carola, a British Virgin Islands entity, is ultimately owned by VGIL, also a British Virgin Islands entity.⁹ 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.¹⁰ The principal shareholders of VGIL are certain English-law trusts and Sir Richard Branson, 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.¹¹

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.¹² She is also a Director of other Virgin group companies,¹³ as well as Carola’s designee to serve on Virgin America’s Board. Mr. Poole is a Director of Carola¹⁴ and VGIL, and Deputy CEO of the Virgin group of companies.¹⁵

⁷ See Appendix A for detailed information regarding the ownership structure of VAI.

⁸ Virgin America, Supplement 1, filed March 3, 2006, at 5; and Virgin America, Supplement 2, filed April 25, 2006, Exhibit 24, at 1.

⁹ VGIL ultimately owns Carola through a chain of its wholly owned subsidiaries. See Virgin America, Supplement 1, filed March 3, 2006, at 5.

¹⁰ Virgin America Application, Exhibit 10, at 1.

¹¹ Id.

¹² 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.

¹³ Id., Exhibit 7.

¹⁴ Id., Exhibit 2, at 7.

¹⁵ Id., Exhibit 10, at 1.

Management

Virgin America's Board of Directors is comprised of the following 10 individuals: Messrs. Donald J. Carty (Chairman), Mark Lanigan, Michael Hooks, Cyrus F. Freidheim, Jr., Robert Nisi, Paras Mehta, Stephen T. Murphy, Jonathan J. Peachy, and Frederick W. Reid (non-voting),¹⁶ and Ms. Frances Farrow. Messrs. Carty, Lanigan, Hooks, 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.¹⁷

Virgin America does not have a president. Instead, the applicant's key management personnel report to Mr. Reid, the applicant's CEO.¹⁸ The following table lists Virgin America's key management and technical personnel.

Table 3. Virgin America's Key Management and Technical Personnel¹⁹

Name	Position(s)	Citizenship
Frederick W. Reid	Chief Executive Officer and Director	U.S.
Robert B. Weatherly	Sr. Vice President, Flight Operations	Canadian
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 Acting 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.	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.

¹⁶ 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. *Id.*, Exhibit 4, at 34.

¹⁷ Reply of Virgin America, Public Version, filed August 16, 2006, at 10.

¹⁸ Virgin America Application, Exhibit 6.

¹⁹ *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.

Preliminary Procedural Pleadings²⁰

On December 16, 2005, Continental Airlines, Inc. (“Continental”) filed a Motion requesting that the Department require the applicant to supplement the record of this proceeding by submitting certain documents and information described in an attached request for information and documents. Continental maintains that without such supplementary material, it and other interested parties would be unable to evaluate or comment fully on the Virgin America’s pending request and its relationships with Virgin Atlantic Airways (“Virgin Atlantic”), including its founder Sir Richard Branson, and other members of the Virgin Group. Moreover, Continental urged the Department to suspend the procedural dates in this proceeding pending Virgin America’s submission of the requested supplementary material and to provide access to the confidential record of this case.

In support of its Motion, Continental argued that the requested supplementary material is needed to address questions that undermine the applicant’s assertions that it qualifies as a U.S. citizen under 49 U.S.C. § 40102(a)(15) and existing Department policy interpreting that statute, regardless of the foreign country involved. Accordingly, the company noted that the applicant gives great weight in its explaining its business model to the marketing power of the Virgin brand and that the Virgin brand constituted one of Virgin America’s initial resources. Continental noted that the applicant had licensed the Virgin brand and that it will incorporate Virgin’s service innovations in many areas.

Moreover, Continental recognized that various companies from the Virgin group of companies were providing funding for Virgin America, and that one company was licensing the Virgin brand to the applicant. Continental stated that the record showed that a Virgin group company and other British citizens held at least 25 percent of the voting and total equity interest of Virgin America and that the Virgin group had designated one-third of the voting members of the applicant’s board of directors. Continental stated that the record showed that the Virgin group of companies includes four foreign airlines, including Virgin Atlantic of the United Kingdom, in which interests of the Virgin group of companies hold a 51 percent ownership interest.

Continental argued that the agreements and arrangements between Virgin America and Sir Richard Branson and the foreign companies with the Virgin Group and using the Virgin brand are critical to evaluating the foreign control issues raised by this application. Continental argued that it is apparent that Sir Richard Branson and Virgin Atlantic developed the Virgin America concept, made fundamental decisions about the applicant, including which aircraft it would use, where its headquarters would be located, and who would be selected as its managers. Continental is of the view that the initial record of this case showed that Virgin America will depend on managerial, financial, systems, market branding and other support from foreign companies and persons within the Virgin Group and flying aircraft originally contracted for before Virgin America existed or was funded. For these reasons, Continental maintained that interested parties lacked sufficient information to analyze the citizenship issue and to prepare comments on the application.

²⁰ Although several interested parties have filed various preliminary procedural pleadings in the record of this case, we have summarized those pleadings that raise specific issues regarding Virgin America’s compliance with the statute’s citizenship requirements. See Appendix B for a complete list of all the preliminary procedural pleadings.

On December 19, 2005, American Airlines, Inc. (“American”) and the Air Line Pilots Association (“ALPA”) filed in support of Continental’s Motion for additional information and for the suspension of further procedures. Both parties agreed that the information outlined in Continental’s Motion is essential to allow interested parties a meaningful opportunity to analyze and answer Virgin America’s application. The parties maintained that further documents and information were needed for the Department to explore fully the relationship of Virgin America to Sir Richard Branson and the Virgin group of companies. Moreover, American maintained that the Department should not allow the type of investment at issue here absent an open-skies accord affecting the United Kingdom.

On December 20 and December 21, 2005, Delta Air Lines, Inc. (“Delta”) and the Allied Pilots Association (“APA”), respectively, filed in support of Continental’s Motion for additional information and for the suspension of further procedures, arguing that the role of the Virgin Group in the key decisions of the applicant, including its fundamental organizational structure and the hiring of its key managers must be fully explored. Specifically, Delta claimed that Virgin America’s application described a confusing and highly complex web of debt and equity investments that foreign entities appear to have principally funded and that it appears that the Virgin Group provided most of the combined debt and equity of the applicant at startup.

Moreover, Delta stated that the principal presumed U.S. owner, VAI, appeared to be funded largely by foreign entities, *i.e.*, Cayman Islands “feeder funds,” through a series of structured investment companies. Delta noted Exhibit 9 of the application referred to “self-disclosures” of the status of these funds as a “U.S. person” for Internal Revenue purposes. Delta argued that those characterizations of citizenship status under the IRS definition of “U.S. person” do not suffice to establish U.S. citizenship under the definition contained in the aviation statute. Therefore, Delta argued that the application failed to establish whether the “feeder funds” are, in fact, U.S. citizens.²¹

Delta stated that, in its view, it appeared that the Virgin Group both owned and controlled the applicant, prior to November 15, 2005, and that Virgin America was the “brain-child” of Sir Richard Branson and the Virgin Group.²² Moreover, Delta stated that representatives of the Virgin Group appear to have made all of the key decisions with respect to the applicant’s structure, management and operations, including the hiring of Virgin America’s key managers. Delta questioned the applicant’s view that the Department should now consider the applicant a U.S. citizen, instead of a foreign-controlled entity because VAI “affirmed the employment of the current staff” (which were hired by the Virgin Group).²³

On December 22, 2005, Virgin America filed an answer to Continental’s Motion. As an initial matter, Virgin America urged the Department to provide to counsel and outside experts for interested parties immediate access to the confidential record of this case. However, the applicant objected to interested parties’ requests for additional information and a stay to these proceedings. The applicant stated that it fully intends to address all substantive responses in its reply to answers. The applicant maintained that its application provided sufficient information to support the fitness

²¹ Delta noted that some of the “feeder funds” appear to be structured as partnerships.

²² Answer of Delta, filed December 20, 2005, at 3.

²³ In this connection, Delta noted the Department’s position that U.S. citizens appointed by, or otherwise beholden to, a foreigner would be considered foreign.

and citizenship finding required of a new entrant. Against this background, the applicant asked the Department to let stand the December 29 deadline for answers to the application and grant access on affidavit to the confidential materials.

By Order 2005-12-13, issued December 23, 2005, the Department deferred the 21-day deadline for the filing of answers set forth in 14 CFR Part 302.204 and granted immediate interim access to all documents covered by Virgin America's Rule 12 Motion to counsel and outside experts for interested parties who filed appropriate affidavits with the Department in advance.²⁴

On December 28, 2005, United Air Lines, Inc. ("United") filed an answer supporting Continental's Motion requesting the submission of additional evidentiary information regarding the applicant's ownership and control structure. United noted that the homeland of a substantial number of the foreign investors in Virgin America is the United Kingdom. It also contended that under existing precedent there is no basis on which the Department could approve the issuance of a certificate of public convenience and necessity to an air carrier found to be owned or controlled by citizens of the United Kingdom.

On January 26, 2006, the Department completed its initial review of Virgin America's December 13 confidential filing and issued Order 2006-1-21 requiring Virgin America to make available for *in camera* review all of the redacted or omitted documents in that confidential filing. In that order, the Department also informed the applicant that the review would be limited to a determination of whether the redacted or omitted materials were relevant to our determinations in this proceeding.²⁵

On February 10, 2006, Virgin America filed a Motion requesting the Department to set a date for interested parties to file answers to its application.

On February 21 and February 22, 2006, Delta, American, ALPA, Continental, and Northwest Airlines, Inc. filed answers opposing Virgin America's request for the Department to set an answer date to its application.

By Order 2006-4-15, issued April 13, 2006, the Department directed Virgin America to submit additional information to facilitate our review of its application. At the same time, based on our *in camera* review, we also directed Virgin America to provide for the record certain redacted or omitted materials that we found to be relevant to our fitness determination.

On April 24, April 25, and April 26, 2006, in response to our order, Virgin America filed a Petition for Partial Reconsideration of Order 2006-4-15, additional evidentiary material, and a Motion for confidential treatment for its responses to certain questions posed in Order 2006-4-15.

By Order 2006-7-14, issued July 12, 2006, the Department determined that the application was substantially complete and established procedural dates for deciding this case, with answers due by August 2, 2006, and replies due by August 16, 2006.

²⁴ At that time, we also granted interim access to any subsequent materials that may be filed in this case under a Rule 12 Motion to counsel and outside experts for interested parties who file appropriate affidavits with the Department in advance, unless the party filing the Motion objected.

²⁵ On January 27, 2006, Virgin America provided the Department with an unredacted version of its confidentially filed documents.

Substantive Pleadings

On July 28, 2006, the City and County of San Francisco and the San Francisco Airport Commission filed an answer in support of Virgin America's application, citing the substantial benefits the applicant will bring to the area.

On August 2, 2006, American,²⁶ Continental, Delta, US Airways, and ALPA (collectively referred to herein as "Interested Parties") filed answers in opposition to Virgin America's application, along with Motions for confidential treatment for certain material filed in their answers. The Interested Parties stated, in general, that Virgin America is not a U.S. citizen as defined in 49 U.S.C. § 40102 (a)(15).

American

American states that Virgin America is under the ownership and control of Sir Richard Branson and the Virgin Group, given the pervasive presence of his and the Virgin Group's interests in the applicant, and argues that its application should be denied. In support of its position, American points out that Virgin America was "conceived, designed, staffed, equipped, and funded by Sir Richard and the Virgin Group."²⁷ In addition, American asserts that Sir Richard and the Virgin Group have (1) provided Virgin America with at least \$134.5 million in start-up capital while the applicant's U.S. investors have contributed only \$9.5 million, (2) installed Ms. Frances Farrow, a director of Virgin Atlantic and U.K. citizen, as president of Virgin USA, a Virgin Group affiliate, to lay the groundwork for Virgin America, (3) selected Mr. Frederick Reid as President and Chief Executive Officer of Virgin America, (4) appointed Virgin Group executives to the applicant's Board of Directors, (4) devised a business plan for the applicant, (5) entered into a Trademark License Agreement with Virgin America, (6) negotiated firm orders for aircraft to be used in Virgin America's proposed operations, and (7) selected California as the site for Virgin America's corporate headquarters after meeting the Governor.²⁸ Further, the company claims that Virgin America has not established the source of funds from its U.S. investors, including information regarding whether these investors have ties with Sir Richard or the Virgin Group.

²⁶ Along with its answer, American filed two Motions requesting that the Department dismiss, or in the alternative, hold in abeyance Virgin America's application. On August 8, 2006, Virgin America filed a Motion requesting that the Department extend the due date for answers to American's Motion to coincide with the due date for replies to the answers filed to its application, *i.e.*, by August 16, 2006, and shorten the answer period to its motion to August 10, 2006. Virgin America noted that American did not object to its motion. Thus, on August 10, 2006, the Department granted Virgin America's request.

In Virgin America's Reply, filed August 16, 2006, the applicant requested that the Department deny American's Motions on the basis that the Department has already determined that Virgin America's application is substantially complete and that its request to hold in abeyance is prohibited by 14 CFR 302.11(a).

²⁷ Answer of American Airlines, Public Version, at 12.

²⁸ *Id.*, at 12-15.

Continental

Continental argues that Virgin America fails the U.S. citizenship test and thus, its application should be denied. According to Continental, Virgin America does not meet the Department's citizenship requirements in at least four respects: (1) Sir Richard and the Virgin Group have "actual control" of Virgin America through, among other things, significant contracts, including the Trademark License Agreement, and by limiting the ability of its management and other employees to act without the consent of the Virgin Group;²⁹ (2) a majority of Virgin America's equity is owned by foreign citizens under both the Department's traditional analysis and the "multiplying out" approach;³⁰ (3) Virgin America's president/CEO, Mr. Reid, does not qualify as a U.S. citizen under existing Department policy since he "was hired by and is clearly beholden to the Virgin Group, a United Kingdom citizen,"³¹ and (4) less than two-thirds of Virgin America's board of directors are U.S. citizens since four of the ten directors, three of which are appointed by the Virgin Group, and Mr. Reid, are or must be counted as foreign citizens.³²

Delta

Delta claims that Virgin America has failed to meet its burden of demonstrating that it a citizen of the United States, and that the record shows that Virgin America "has been, currently is, and will be in the future funded and controlled principally by foreign entities."³³ In support of its position, Delta asserts that less than 75 percent of the applicant's voting stock is held by U.S. citizens given that the ownership of its U.S. shareholder, VAI, is comprised of Delaware limited partnerships with at least one foreign limited partner.³⁴

In addition, Delta maintains that Virgin America's management team should be deemed foreign because Mr. Reid was appointed by the Virgin Group as the applicant's CEO in June 2004 and that representatives of the Virgin Group "recruited and hired most of Virgin America's management team."³⁵ Finally, Delta argues that Virgin America is under the actual control of the Virgin Group because the applicant has received the majority of its start-up capital from the Virgin Group, is dependent upon the "Virgin" brand "for its core market identification," its U.S. investors were solicited by the Virgin Group, and its business plan, management team, and aircraft were developed, assembled, and purchased, respectively, by the Virgin Group.³⁶

²⁹ Answer of Continental Airlines, Public Version, at 12-17.

³⁰ *Id.*, at 33-35. To reflect the ultimate foreign ownership in a U.S. air carrier, rather than examining each entity in the hierarchy separately to determine its citizenship based on actual control, the Department has, in the past, applied a "multiplying out" approach to determine the percentage of total beneficial interests held by foreign citizens. However, this approach is applied only in cases where (1) foreign interests are genuinely passive, that is, none of the new investors demonstrates any incentive, or indicium of ability, to exercise actual control of the airline, and (2) foreign interests are highly diffuse, with no single foreign investor holding more than a very small interest.

³¹ *Id.*, at 41-42.

³² *Id.*, at 42-43.

³³ Answer of Delta, Public Version, at 1.

³⁴ *Id.*, at 9-10.

³⁵ *Id.*, at 12-13.

³⁶ *Id.*, at 14-19.

US Airways

US Airways states that Virgin America's application should be denied or dismissed because the applicant neither "meets the statutory test for non-U.S. equity" nor provides unambiguous proof that Virgin America "will be substantially controlled by U.S. citizens."³⁷ The company contends that the applicant fails to meet the statutory threshold that at least 75 percent of the applicant's total equity be owned by U.S. citizens,³⁸ among other things, since it "improperly characterized the subordinated notes as debt" instead of equity.³⁹ Additionally, US Airways states Virgin America's application is an attempt by U.K. citizens and/or investors to use the ownership provisions "to circumvent their inability to otherwise access the U.S. aviation market."⁴⁰

ALPA

ALPA argues that Virgin America is under the control of the Virgin Group. In support of its position, ALPA states that the Virgin Group planned and created Virgin America by developing its business plan, hiring its officers and employees, and negotiating key agreements with suppliers before the applicant's U.S. investors made any financial contributions to the company.⁴¹ Also, ALPA contends that the composition of Virgin America's Board of Directors is more than the Statute allows, given that three of the ten directors have been appointed by the Virgin Group and Mr. Reid, also a director, is "deemed a foreign citizen as he was originally hired by a Virgin Group company."⁴² Lastly, ALPA asserts that the applicant's capital structure, which is majority funded by the Virgin Group, shows the Virgin Group's ability to exercise influence over Virgin America since the Virgin Group "is the dominant investor and has assumed by far the greatest risk in connection with Virgin America's startup operations."⁴³

Virgin America

On August 16, 2006, Virgin America submitted a consolidated reply to the answers filed by Interested Parties, asserting that it fully complies with all aspects of the Department's citizenship requirements and is under the actual control of U.S. citizens. Virgin America claims that it satisfies the statutory definition of a citizen of the United States in that: (1) it is formally organized under the laws of the State of Delaware; (2) 75 percent of its voting interest is held by VAI, a Delaware limited liability company; (3) at least two-thirds of its Board and managing officers are U.S. citizens; and (4) VAI controls Virgin America.⁴⁴

³⁷ Answer of US Airways, Public Version, at 2.

³⁸ Id., at 7.

³⁹ Id., at 6.

⁴⁰ Id., at 12.

⁴¹ Answer of ALPA, Public Version, at 6.

⁴² Id., at 6-7.

⁴³ Id., at 10-11.

⁴⁴ Reply of Virgin America, Public Version, filed August 16, 2006, at 10-11.

In response to answers filed regarding the voting interests held by VAI, Virgin America argues that VAI's structure offers no avenue for a foreign investor to exert control over the company.⁴⁵ The applicant points out that VAI is comprised of four limited liability companies ("LLCs") organized under the laws of Texas or Delaware. According to Virgin America, the Texas LLC is a U.S. citizen because it is owned by Messrs. Carty and Nickell, each of whom is a U.S. citizen, and the three Delaware LLCs are U.S. citizens because they are structured consistent with Department precedent, *i.e.*, they are based in the United States, have U.S. citizen appointed managers as their presidents holding 100 percent of their voting stock, and have "an array of diffuse, passive investors that are predominately U.S. citizens" holding all their non-voting stock.⁴⁶ All of the voting interests in VAI are held and managed by VAM, a U.S.-based company managed by Messrs. Lanigan and Nisi, both U.S. citizens, and according to the applicant, this "consolidation of voting power will enable the U.S. interests to overwhelm the influence of the Virgin interests during the management of the airline."⁴⁷

Concerning the composition of its Board, the applicant contends that it is in full compliance with the statute and applicable precedent. According to Virgin America, its Board consists of nine voting directors, six of which are designated by VAI, with the remaining three designated by the Virgin Group. The applicant states that Mr. Reid's presence, as a Board member, has no bearing on the Board's overall composition, since he is deemed not a full member because of his non-voting status and because his role is limited to providing the voting members of the Board information concerning the ongoing operations of Virgin America.⁴⁸

With respect to the citizenship of Mr. Reid, Virgin America claims that he is in fact a U.S. citizen beholden to the applicant's U.S.-controlled Board.⁴⁹ The applicant states that, despite his initial recruitment by the Virgin Group, Mr. Reid currently serves as CEO because Virgin America's *U.S. investors*, which have owned and controlled the applicant since November 2005, after carefully vetting him over a 10-month period, were satisfied that he should serve in that position with the applicant.⁵⁰ Moreover, Virgin America maintains that no evidence exists that supports the assertion that Mr. Reid "has been or will be, in fact controlled by the Virgin Group."⁵¹

In response to concerns raised about its capital structure, Virgin America contends that its current structure "was created to maintain compliance with applicable statutory requirements."⁵² Moreover, the applicant argues that attempts made "to characterize the debt provided by the Virgin Group as equity and the equity held by the U.S. Investors as debt is misconstrued and erroneous."⁵³

⁴⁵ *Id.*, at 8.

⁴⁶ *Id.*, at 11.

⁴⁷ *Id.*, at 8.

⁴⁸ *Id.*, at 10.

⁴⁹ *Id.*, at 11 and 13.

⁵⁰ *Id.*, at 12.

⁵¹ *Id.*, at 13.

⁵² *Id.*, at 14.

⁵³ *Id.*, at 14.

Further, Virgin America maintains that the totality of the circumstances proves that it is under the actual control of U.S. citizens. The applicant reiterates that (1) its most senior corporate officers are U.S. citizens; (2) VAI, a U.S. citizen, holds 75 percent of its voting stock; (3) VAI is controlled by two U.S. citizens, Messrs. Lanigan and Nisi; and (4) Mr. Carty, its Chairman of the Board, also holds an equity stake in VAI.⁵⁴ In addition, Virgin America states that “this concentration of U.S. authority will enable U.S. interests to prevent any attempt by the Virgin Group to exercise overriding influence or control over it.”⁵⁵ In addition, the applicant argues that it has operated and continues to operate as an “independent enterprise” and makes decisions that are autonomous from the Virgin Group since November 2005.⁵⁶ Further, it asserts its “conceptual formation” is neither relevant nor inconsistent with prior Department precedent.⁵⁷

Lastly, the applicant requests that the Department process its application using non-hearing procedures, states that U.S. airline access to Heathrow is irrelevant in this proceeding, and claims that the service and fares to be offered will provide important public benefits.^{58 59}

TENTATIVE DECISION

Section 41102 of the Transportation Code requires that authority to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. § 40102(a)(15). As stated previously, that section defines a citizen of the United States as: (A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

After careful review of the record and the issues raised in the pleadings, we propose to decide the issue of the applicant’s fitness based on the extensive written record, much of which was filed confidentially.⁶⁰ The totality of circumstances presented in that record requires that we tentatively conclude that Virgin America is not a U.S. citizen as defined in 49 U.S.C. § 40101(a)(15), principally because the applicant’s affairs are structured so as to give their actual control to a foreign citizen. We also tentatively conclude that less than 75 percent of the total equity of Virgin America is held by U.S. citizens. Therefore, we propose to deny its application for certificate authority. However, we are giving interested parties an opportunity to show cause why we should not adopt as final the tentative conclusions and findings in this order.

⁵⁴ Id., at 17.

⁵⁵ Id., at 17.

⁵⁶ Id., at 20.

⁵⁷ Id., at 20.

⁵⁸ Id., at 28, 33, and 37.

⁵⁹ Interested parties also filed subsequent pleadings in the record of this case. See Appendix C for a complete list of the subsequent pleadings.

⁶⁰ As noted above, we are issuing this order in two versions: a public version, with discussion of confidential material redacted, and a confidential version that includes all such discussion.

A. Application of statutory numerical tests

The detailed information provided by Virgin America about its ownership includes considerable background on its majority owner, VAI. The applicant maintains that VAI is structured “to allow only U.S. investment managers the ability to control the entity and therefore, the investment in the airline,”⁶¹ thus making VAI a U.S. citizen in a manner consistent with the Department’s precedent. In contrast, Continental, Delta, and US Airways argue that a majority of Virgin America’s total equity is owned by non-U.S. citizens.⁶²

In determining whether an air carrier is owned and controlled by U.S. citizens, the Department uses either the “traditional” or the more liberal “multiplying-out” approach. At the outset, we tentatively find that Virgin America fails to qualify for the “multiplying-out” approach as recently articulated in addressing the citizenship of Hawaiian Airlines.⁶³ Under this approach, a company may pass muster as a U.S. citizen even when it would fail under the traditional test. We have used this approach in very limited circumstances – where foreign interests are genuinely and obviously passive (that is, none of the new investors demonstrates any incentive, or indicium of ability, to exercise actual control of the airline), foreign interests are highly diffuse with no single foreign investor holding more than a very small interest, and the interposed limited liability companies (“LLCs”), interposed between the corporation and the existing offshore investment entities, are structured like corporations with independent U.S. managers holding all the voting stock. Here, however, we tentatively find that foreign interests are neither diffuse nor passive – due to the extensive involvement of, and financial interest held by, Sir Richard Branson and the Virgin Group – as explained further in this tentative decision.

Accordingly, we turn to our traditional analysis, which applies the statutory definition of a U.S. citizen to each layer of an air carrier’s ownership so that each successive “parent” entity must be found to be either a U.S. citizen or not. (In cases where, as here, there are several layers of ownership by different entities, information on the citizenship of each entity must also be provided until the ultimate individual owners are reached.) Under existing precedent, the Department treats both limited partnerships and LLCs structured like limited partnerships as foreign entities if any partner, including a limited partner, is not a U.S. citizen.

Because Virgin America’s citizenship is dependent upon the citizenship of its majority owner, VAI, we have reviewed VAI’s ownership structure, which is diagramed in Appendix A, to determine whether or not the company meets the statutory definition of a U.S. citizen. As stated previously, VAI’s ownership is divided among Cyrus I (7.08 percent), Cyrus II (40.11 percent), Black Canyon (47.18 percent), Carty-Nickell (5.63 percent), and VAM (0.002 percent). Although each of these companies are structured as LLCs organized in the U.S. (*i.e.*, Cyrus I, Cyrus II, Black Canyon, and VAM are Delaware LLCs, and Carty-Nickell is a Texas LLC), we tentatively find that Cyrus I, Cyrus II, Black Canyon, and VAM each do not meet the statutory definition of a U.S. citizen

⁶¹ Virgin America Application, Exhibit 9, at 1.

⁶² See Answer of Continental, Public Version, filed August 2, 2006, at 15; Answer of US Airways, filed August 2, 2006, at 8; and Answer of Delta, Public Version, filed August 2, 2006, at 11.

⁶³ See Conclusions of the Department of Transportation regarding the citizenship of Hawaiian Airlines, available at Issues and Events, at <http://ostpxweb.dot.gov/aviation/index.html>.

because each has more than 49 percent of its total equity held by either Cayman Island entities or foreign limited partnerships.

- **Cyrus I** is majority owned by CRS Fund, Ltd. (“CRS Fund”) (99.9 percent), a Cayman entity. CRS Fund is in turn, managed by Cyrus Capital Partners, LP (“Cyrus LP”), a Delaware limited partnership. Because Cyrus LP’s ownership includes at least one foreign limited partner, we must regard Cyrus LP as a foreign limited partnership. Therefore, since the majority of Cyrus I’s equity is held by a Cayman entity, and that same Cayman entity is managed by a foreign limited partnership, we tentatively conclude that Cyrus I is not a U.S. citizen.
- **Cyrus II** is majority owned by Cyrus Opportunities Master Fund II, Ltd. (“Cyrus OMF II”) (99.9 percent), a Cayman entity, and managed by Cyrus LP, which, as explained above, we regard as a foreign limited partnership. In addition, Cyrus OMF II is majority owned (77.0 percent) by Cyrus Opportunities Fund II, Ltd., a Cayman entity. Therefore, because the majority of Cyrus II’s equity is held by a Cayman entity and that same Cayman entity is managed by a foreign limited partnership, we tentatively conclude that Cyrus II is not a U.S. citizen.
- **Black Canyon** is majority owned by PCP Air Partners, LLC (99.9 percent), a Delaware LLC. PCP Air is, in turn, majority owned by Canyon Value Realization Fund, LP (“Canyon Value”) (98.0 percent). Because Canyon Value’s ownership includes foreign limited partners, we regard Canyon Value as a foreign limited partnership. Therefore, we tentatively find that PCP Air is not a U.S. citizen because the majority of its equity is held by a foreign limited partnership, and that Black Canyon must also be deemed not a U.S. citizen.
- **VAM**’s ownership is divided among Cyrus I (7.51 percent), Cyrus II (42.49 percent), and Black Canyon (50.0 percent). Since we tentatively conclude that Cyrus I, Cyrus II, and Black Canyon are not U.S. citizens, it follows that we tentatively conclude that VAM is not a U.S. citizen.

Given that the majority of VAI’s owners are tentatively regarded as foreign, we must tentatively conclude that VAI is not a U.S. citizen, that less than 75 percent of Virgin America’s voting equity is held by U.S. citizens, and that Virgin America does not meet the statutory citizenship requirements.

Some parties questioned the citizenship of the applicant’s President and officers and directors because of their past or present connections to the Virgin Group, contending that these persons are beholden to the Virgin Group or Sir Richard Branson. Nevertheless, the record shows that each of these individuals, with the exceptions of Messrs. Robert Weatherly, Guy Borowski, and E. Frances Fiorillo, each of whom is a Canadian citizen, holds a U.S. passport and is a U.S. citizen. Therefore, we tentatively find that Virgin America satisfies the explicit statutory requirement that the applicant’s President and two-thirds of the officers and directors are U.S. citizens, given the

nationality of the relevant personnel.⁶⁴ The question of the relationships between these individuals and the Virgin Group, however, is still relevant to the issue of whether the applicant is *actually controlled* by U.S. or foreign citizens. We discuss the claims concerning these relationships in the following section on actual control.⁶⁵

B. Actual control

In determining actual control, the Department reviews the totality of the circumstances surrounding the relationship between the air carrier and the foreign entity or entities involved. No single factor dictates a finding of foreign or domestic control; rather, all factors are reviewed in combination to determine a foreign entity's ability to influence the actions of an air carrier.⁶⁶ We have thoroughly reviewed the record of this case and identified numerous relationships between the applicant and the Virgin Group. Based on our review of the totality of the circumstances and the various indicia of control, we tentatively find that Virgin America is under the actual control of the Virgin Group and Sir Richard Branson.

1. Virgin Group's extensive influence over the applicant's management

The Interested Parties contend that Mr. Reid, Virgin America's CEO, was appointed by the Virgin Group to serve in his current position. In response, Virgin America claims that, despite his initial recruitment by the Virgin Group, Mr. Reid currently holds that position only after having been independently and carefully vetted by VAI, Virgin America's majority shareholder. The applicant further points out that as Mr. Reid has a duty to the company's U.S.-controlled Board, he should not be considered as beholden to the Virgin Group for purposes of our actual control test.⁶⁷

Our review of the record confirms that Mr. Reid has been significantly involved with the applicant, having been appointed by Sir Richard Branson in April 2004 to serve as Virgin America's chief executive during its developmental stage, more than a year before U.S. investors became involved in Virgin America company matters.⁶⁸ It appears that Mr. Reid owes his appointment as CEO of Virgin America to Sir Richard, the applicant's largest foreign minority owner. While this fact alone does not in itself disqualify him from serving as President/CEO -- as he remains a U.S. citizen -- the long and intricate association of Mr. Reid with the Virgin Group constitutes one of several circumstances that, taken together, persuade us tentatively that Virgin America is not actually under the control of U.S. citizens.

We also tentatively find that the composition of Virgin America's Board would compromise the actual control of Virgin America by U.S. citizens. As indicated previously, Virgin America's Board

⁶⁴ Virgin America Application, Exhibit 6. In instances where an air carrier does not have a president, it has been the Department's policy to review the citizenship of the air carrier's official exercising those responsibilities, generally its most senior executive officer, in this case, Mr. Reid.

⁶⁵ Given our tentative finding here, we need not address party arguments regarding Mr. Reid's status as a non-voting Board member.

⁶⁶ See Order 93-7-26, issued July 15, 1993, at 7; Order 91-1-41, issued January 23, 1991, at 9; *How to Become a Certificated Air Carrier*, available at <http://ostpxweb.dot.gov/aviation/index.html>, at 15.

⁶⁷ Virgin America Application, at 5, and Reply of Virgin America, Public Version, filed August 16, 2006, at 12-13.

⁶⁸ Virgin America, Supplement 2, Exhibit 19, at 5, and Confidential Exhibit F, at 1. [redacted]

consists of ten members, nine voting directors and one non-voting director, Mr. Reid. Of the voting directors, VAI is authorized to appoint six (which includes the Chairman), with the remaining three appointed by the Virgin Group. Given our tentative conclusion that VAI itself is not a U.S. citizen,⁶⁹ it follows that Virgin America's Board, and hence the applicant, are not really controlled by United States citizens.

2. Virgin Group's pervasive involvement in the creation of Virgin America

The Virgin Group's involvement in Virgin America's creation offers further indication of foreign control. The Interested Parties argue that, because the Virgin Group created the applicant and provided it with funding to develop a business plan, recruited and hired experienced aviation executives, purchased a fleet of new aircraft, and solicited its current group of U.S. investors, the Virgin Group actually controls Virgin America. We tentatively agree.

Virgin America fully acknowledges that these activities were undertaken by the Virgin Group "to expedite the creation and launch of the airline,"⁷⁰ but contends that, once U.S. investors entered the picture, the "strategic business concept developed by the Virgin group of companies was altered significantly, and the major business decisions necessary to implement the airline's business plan were made and continued to be made, by the U.S.-controlled Board and shareholders."⁷¹

In spite of Virgin America's claim of sudden independence for its U.S. management, the facts surrounding the applicant's creation cannot be ignored under our precedent – they are part of the totality of circumstances that must be considered in determining its present citizenship.⁷² The record shows that Virgin America's current employees and officers were initially consultants to or employees of Virgin USA, a company within the Virgin Group of companies, or employees of Best Air, which was, at that time, indisputably under the control of the Virgin Group.⁷³ This longstanding relationship between its current management and the Virgin Group affects our overall view of the independence of the applicant from the Virgin Group.

Similarly, the applicant's continued reliance on pre-existing agreements entered into and/or funded by the Virgin Group also have a bearing on the relationship between the U.K. citizens who conceived of and set up the company and the applicant; the record shows that Virgin America simply acceded to many critical commercial agreements without modification, suggesting a lack of independence on its part.⁷⁴

⁶⁹ See VAM00584-586. [redacted]

⁷⁰ Virgin America, Supplement 2, at 2.

⁷¹ *Id.*, at 2 (emphasis in original).

⁷² See Order 2004-5-10, issued May 13, 2004, at 14.

⁷³ Virgin America Application, Exhibit 2, at 2.

⁷⁴ See Order 2004-5-10, issued May 13, 2004, at 14. In the ASTAR case, the Administrative Law Judge determined that pre-existing arrangements were irrelevant to the question of whether U.S. citizens currently controlled ASTAR because most of those agreements did not survive the transition. This is not the case here. Since certain of Virgin America's pre-existing agreements entered into and negotiated by the Virgin Group prior to VAI's involvement continue to survive in force, we have tentatively determined that this material is relevant to determining whether Virgin America is currently under the actual control of the Virgin Group.

For example, Virgin America reports that it has entered into lease agreements with Airbus and GECAS for aircraft to be used in its proposed operations. However, these agreements appear essentially identical to the ones that Best Air, a company that was under the control of the Virgin Group, first negotiated and entered into in June 2004.⁷⁵ Moreover, it does not appear that the terms and conditions of these aircraft agreements can now be independently altered or revised substantially to reflect any interests of U.S. investors.⁷⁶

3. Funding provided by the Virgin Group

Virgin America has provided a detailed funding plan that consists of a combination of debt and equity financing, totaling \$177.3 million.⁷⁷ According to the applicant, its majority owner, VAI, will provide Virgin America with \$88.9 million in exchange for equity in the company.⁷⁸ 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.⁷⁹

The Interested Parties point out that, to date, a majority of Virgin America's start-up capital has been obtained through debt agreements with the Virgin Group. In particular, American and Delta argue that the Virgin Group's significant financial investment, approximately \$131.9 million in debt financing, compared to VAI's \$10.0 million investment⁸⁰ in the applicant is another indication of the Virgin Group's actual control over Virgin America.⁸¹ In response, Virgin America asserts that its capital structure is consistent with the statutory requirements.⁸²

We have reviewed the debt agreements between Virgin America and the Virgin Group, which show that Virgin America's survival is contingent upon the financing provided by the Virgin Group. Our review of the debt agreements shows this to be the case.⁸³ Our review also indicates that the U.S. investors bear little or no risk, compared to the Virgin Group, until such time as the Department issues the applicant effective economic authority.⁸⁴ This certainly suggests that U.S. investors were brought in for the purpose of creating an impression of U.S. citizenship. Moreover, the record shows that certain provisions in the applicant's debt agreements favor the Virgin Group, allowing them to veto certain decisions by Virgin America.⁸⁵ Further, repayment of the \$58.6 million in

⁷⁵ See VAM 00021-VAM 00022; VAM 00033-VAM00034; VAM 00165; Virgin America, Supplement 2, filed April 25, 2006, Confidential Version, Confidential Exhibit E, at 2; and VAM 01164-VAM 01183. [redacted]

⁷⁶ See VAM 00021-VAM 00022; VAM 00033-VAM00034; VAM 00165; Virgin America, Supplement 2, filed April 25, 2006, Confidential Version, Confidential Exhibit E, at 2; and VAM 01164-VAM 01183. [redacted]

⁷⁷ Virgin America Application, at 2.

⁷⁸ VAI will receive approximately \$44.0 million each from Black Canyon and Cyrus Partners.

⁷⁹ Virgin America Application, at 4-5.

⁸⁰ Virgin America, Supplement 2, Exhibit 24, at 2.

⁸¹ Answer of American, Confidential Version, filed August 2, 2006, at 12.
Answer of Delta, Confidential Version, filed August 2, 2006, at 14-16.

⁸² Reply of Virgin America, Confidential Version, filed August 16, 2006, at 54. [redacted]

⁸³ See VAM00015, at 7; Virgin America Application, at Exhibit 8, at 1; and VAM1201. [redacted]

⁸⁴ See VAM00391-2. [redacted]

⁸⁵ See VAM1206-07 and VAM1225 and VAM00063. [redacted]

subordinated debt held by the Virgin group of companies is inextricably linked to the issuance of Virgin America's Class C Common Stock.⁸⁶ The relevant agreements provide the Virgin Group with additional leverage over Virgin America's management and/or majority shareholders.

4. The Virgin Trademark License Agreement

At the very heart of this matter is the contractual arrangement that will govern Virgin America's commercial operations – its licensing agreement with the Virgin Group. There is no doubt from the undisputed record in this proceeding that Virgin America's business plan rests entirely on its ability to implement this agreement, essentially importing the powerful Virgin trademark into the U.S. market. American, Continental, and Delta state that the License Agreement between Virgin America and the Virgin Group further supports their position that the Virgin Group controls the applicant.⁸⁷ Delta further states that use of the Virgin brand itself is not a problem, instead pointing to “the fact that the brand and license are inextricably linked with Virgin's principal foreign investor which has other influencing connections to the applicant.”

We tentatively agree.

According to the record, Virgin America entered into the License Agreement to conduct its proposed operations using the “Virgin” name and to build on the brand and add to “its well-recognized attributes of quality, service, value, and innovation.”⁸⁸ However, our review of the License Agreement identified several conditions, detailed in the confidential record, that significantly restrict Virgin America's commercial decision-making authority and essentially prevent Virgin America from acting as an independent air carrier.⁸⁹ Therefore based on the foregoing, we must tentatively find that this agreement, including its terms and conditions, represents another significant avenue of control for the Virgin Group over Virgin America's proposed operations.

Although the terms of this license agreement thus play a major part in our tentative decision in this case, our tentative finding does not mean that U.S. air carriers may not enter into franchise or similar marketing arrangements with foreign carriers. We do not believe that U.S. citizenship law necessarily prevents a U.S. air carrier from licensing the trademark of a foreign carrier, as part of an arms-length franchising agreement or from sharing the revenues of the resulting operations with the licensor; we also recognize that a legitimate commercial agreement of this sort would inevitably involve some degree of influence by the licensor over the U.S. carrier's operations. Any such arrangement, however, must be structured so as to preserve fully the independence of the U.S. carrier's decision-making authority — and of its management — as well as preserve the air carrier's ability to exist outside of the franchise. Such arrangements could pass muster if they avoid the

⁸⁶ See VAM00088-90. [redacted]

⁸⁷ Answer of American, filed August 2, 2006, at 14; and Answer of American, Confidential Version, filed August 2, 2006, at 25-26.

Answer of Delta, filed August 2, 2006, at 16.

Answer of Continental, filed August 2, 2006, at 13-14; and Answer of Continental, Confidential Version, filed August 2, 2006, at 18-20.

⁸⁸ Virgin America Application, at 3.

⁸⁹ See VAM00144 and VAM00154. [redacted]

appearance, and reality, of foreign control over the purported U.S. air carrier. Independent franchises are permissible; U.S. outlets of foreign air carriers are not under current law. What Virgin America has proposed in its application in this matter, which we must tentatively reject, appears to involve restrictions that make the applicant almost completely under the influence of a foreign citizen.

5. The approval and/or consent of the Virgin Group must be obtained prior to certain changes contemplated by Virgin America and VAI

The Virgin Group has also entered into several agreements to facilitate the sale of Virgin America to VAI and its members, while retaining a 25 percent minority interest in the company. We tentatively find that these agreements through various provisions give the Virgin Group, the minority owner of Virgin America, the ability to block and influence particular decisions of the applicant, its Board of Directors, and VAI in ways that give Virgin Group impermissible negative control over the applicant.⁹⁰

Conclusion

We tentatively find that, when taken together, the factors set out above put Virgin America under the actual control of the Virgin Group. Therefore, based on our review and the totality of the circumstances, we must tentatively conclude that Virgin America is not a U.S. citizen as required by 49 U.S.C. § 40102 (a)(15).

OBJECTIONS

We will give interested persons 14 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 expect such persons to direct their objections, if any, to the application and to our tentative findings, and to support such objections with detailed analyses. If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to resolve through a hearing or discovery that cannot be established in written evidence and pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified (See Part 302, Rules 19 and 20); if not, the reasons why not should be explained. 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 U.S citizenship and will deny its application in Docket OST-2005-23307 for interstate scheduled certificate authority. If, however, objectors are able to demonstrate that Virgin America is, in fact, owned and controlled by U.S. citizens, we will reconsider our proposed actions.

⁹⁰ See VAM00871; VAM00864; VAM00866; VAM00695-696; and VAM00505. [redacted]

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order finding that Virgin America Inc., does not meet the U.S. citizenship requirements set forth in 49 U.S.C. § 40102 (a)(15) and denying it the section 41102 certificate authority it seeks.
2. 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 14 days after the service date of this order; answers to objections shall be filed no later than 7 days thereafter.
3. 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.⁹¹
4. 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.
5. We will serve a copy of this order on all interested parties.
6. We will publish a summary of this order in the Federal Register.

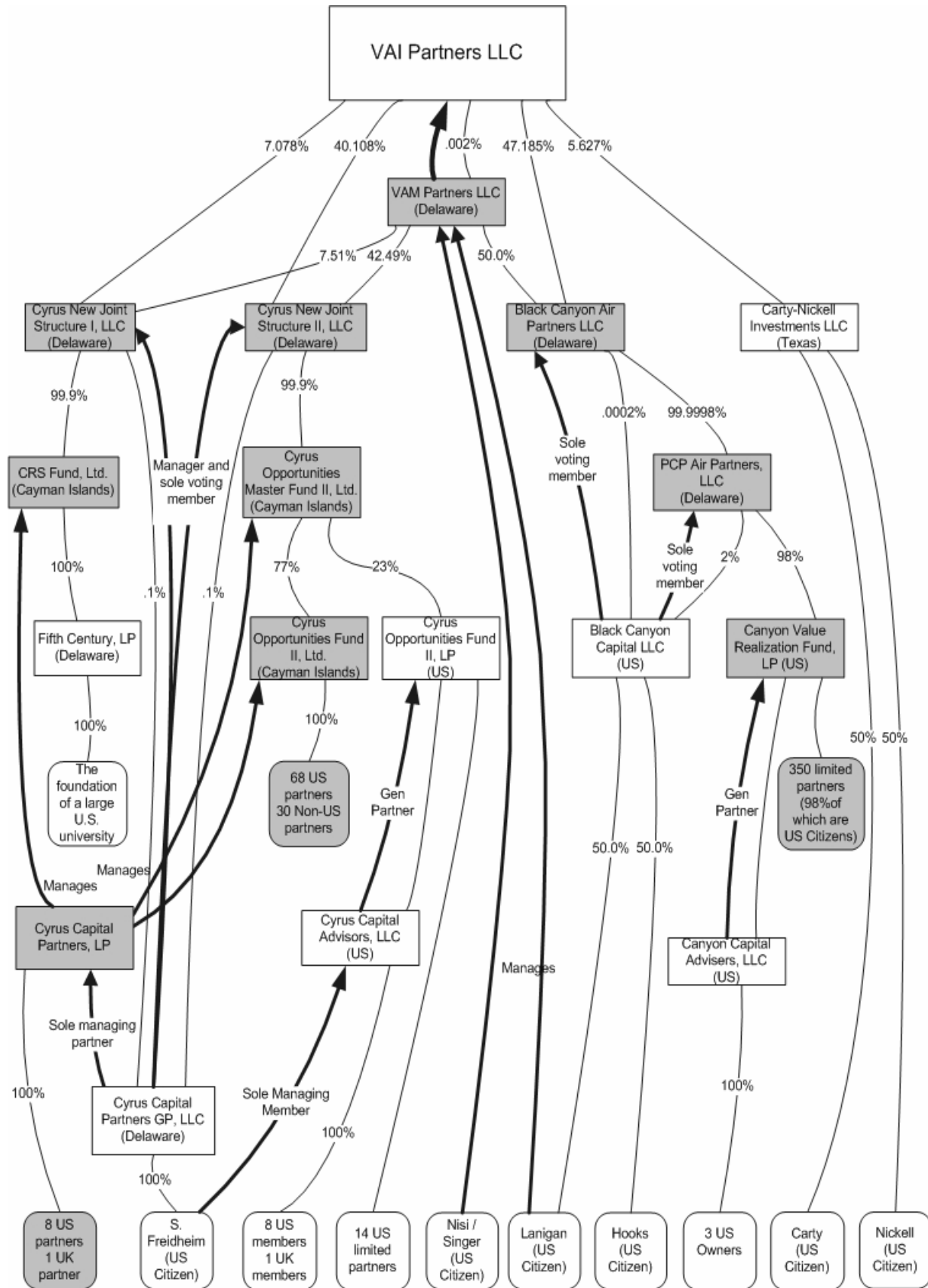
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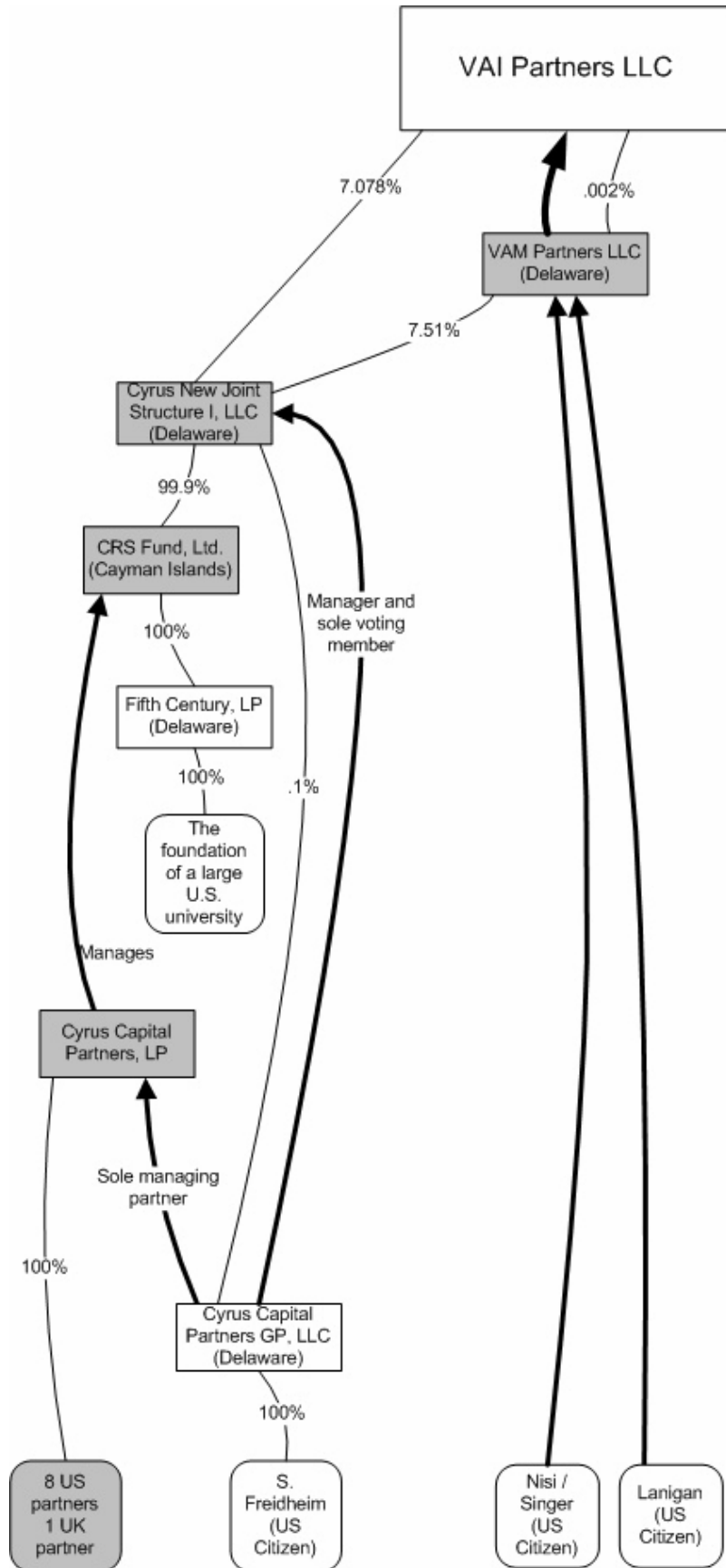
ANDREW B. STEINBERG
Assistant Secretary for Aviation
and International Affairs

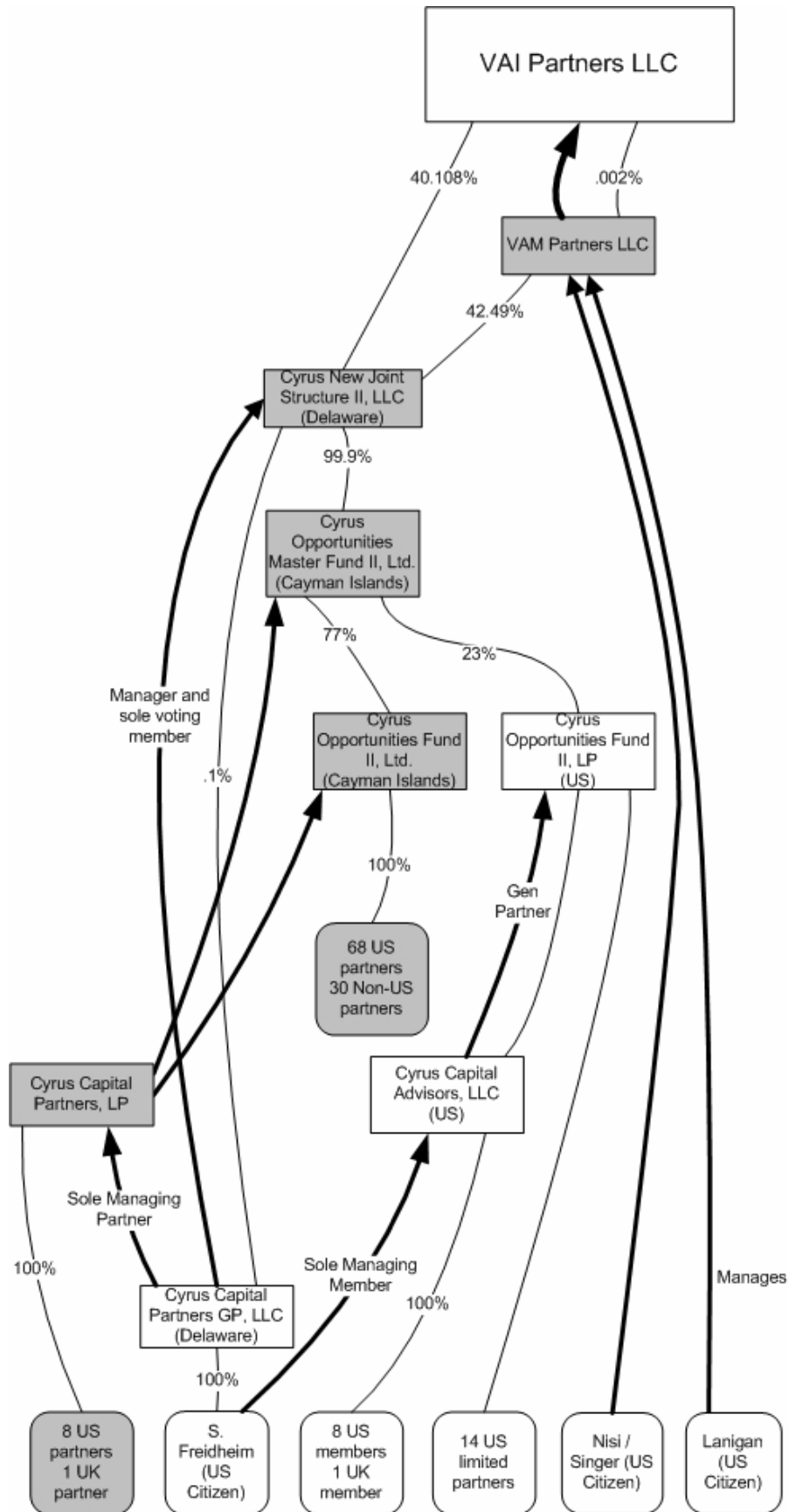
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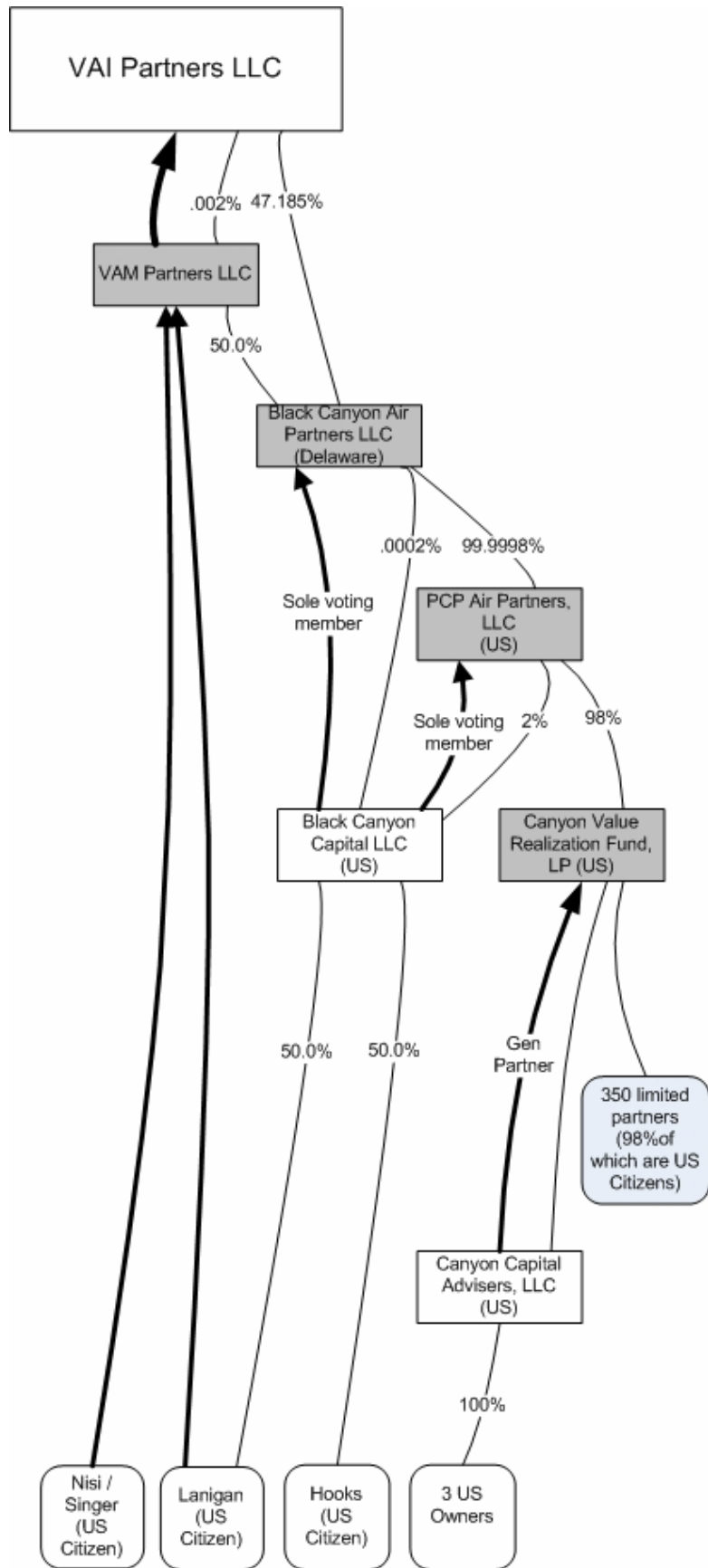
⁹¹ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

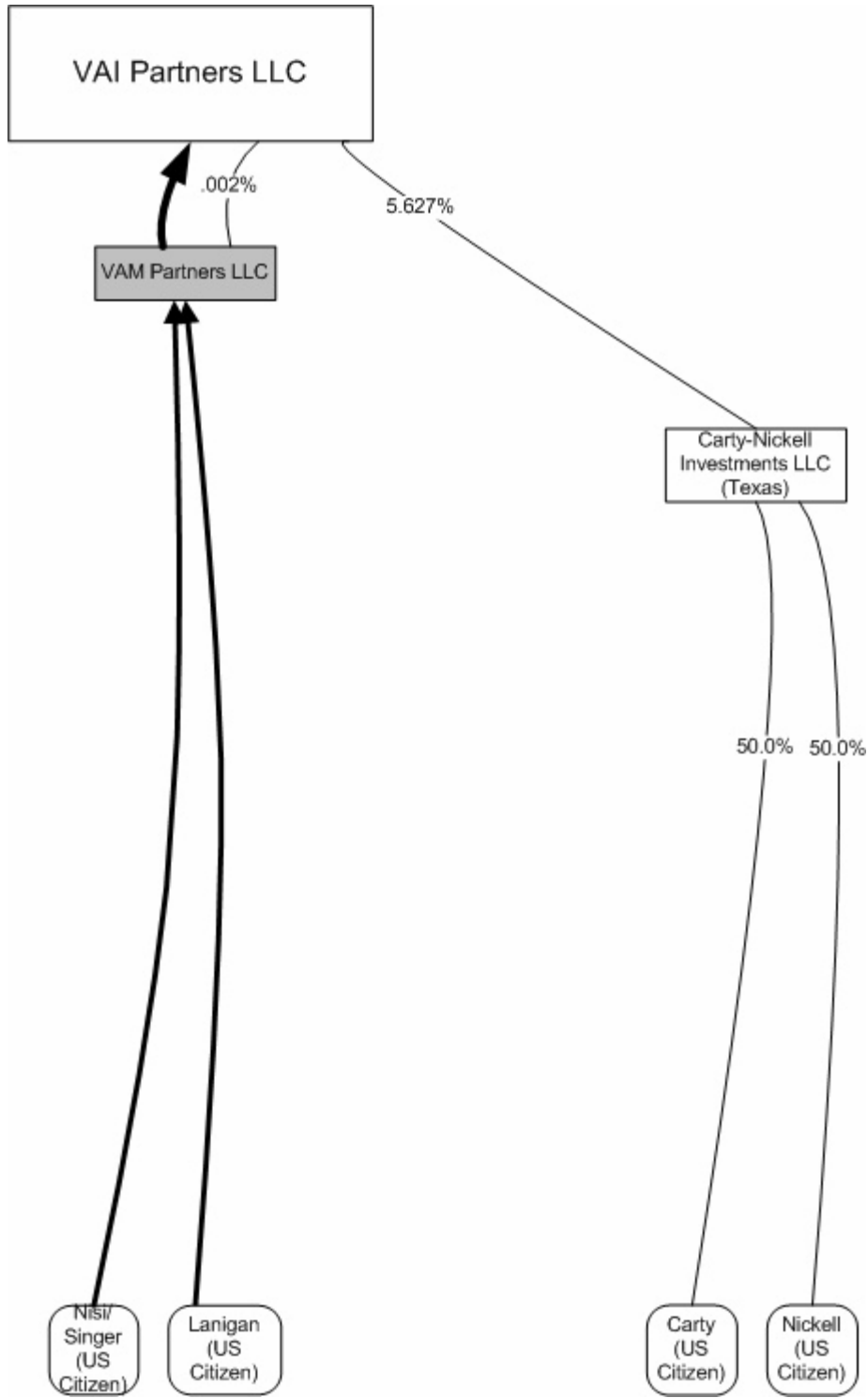
Appendix A











Appendix B

DATE	PRELIMINARY PROCEDURAL PLEADINGS
December 16, 2005	Motion of Continental to require submission of additional information and documents and to suspend further proceedings
December 19, 2005	Answer of American in support of Continental's Motion
December 19, 2005	Answer of ALPA in support of Continental's Motion
December 19, 2005	Answer of John P.T. Gilmore
December 20, 2005	Answer of Delta in support of Continental's Motion
December 21, 2005	Answer of APA in support of Continental's Motion
December 21, 2005	Answer of the Transportation Trades Department in support of Continental's Motion
December 22, 2005	Answer of Virgin America to Continental's Motion
December 22, 2005	Answer of ALPA to Virgin America's Motion for confidential treatment
December 23, 2005	Reply of Continental and Motion for leave to file an unauthorized document
December 27, 2005	Motion of Virgin America for leave to file an unauthorized document and reply to answer of ALPA
December 28, 2005	Answer of United in support of Continental's Motion
December 29, 2005	Answer of Port Authority of New York and New Jersey in support of Virgin America's application for certificate authority
January 11, 2006	Motion of Virgin America to enforce Order 2005-12-13 and suspend the access of Edward Wytkind to the confidential documents
January 17, 2006	Answer of the Transportation Trades Department to Virgin America's Motion to deny access to the confidential documents to Edward Wytkind
February 10, 2006	Motion of Virgin America to set an answer date
February 13, 2006	Public Supplement of Continental to Motion for additional information and documents
February 13, 2006	Motion of Continental for confidential treatment
February 21, 2006	Answer of Delta in opposition to Virgin America's Motion to set an answer date and in support of Continental's supplement for additional information and documents
February 22, 2006	Answer of American to Motion of Virgin America to set an answer date
February 22, 2006	Answer of ALPA to Motion of Virgin America to set an answer date
February 22, 2006	Answer of Continental to Motion of Virgin America to set an answer date
February 22, 2006	Answer of Northwest to Motion of Virgin America to set an answer date
February 23, 2006	Answer of American to supplemental Motion of Continental for additional information and documents
February 23, 2006	Answer of Northwest to supplemental Motion of Continental for additional information and documents
February 23, 2006	Answer of Delta to supplemental Motion of Continental for additional information and documents
March 3, 2006	Supplement No. 1 to application of Virgin America
March 3, 2006	Motion of Virgin America for confidential treatment
April 4, 2006	Public Supplement No. 2 of Continental to Motion for additional information and documents
April 4, 2006	Motion of Continental for confidential treatment
April 13, 2006	Answer of Delta in support of Supplement No. 2 to Motion of Continental for additional information and documents
April 24, 2006	Petition of Virgin America for Partial Reconsideration of Order 2006-4-15
April 25, 2006	Supplement No. 2 to application of Virgin America
April 26, 2006	Motion of Virgin America for confidential treatment

DATE	PRELIMINARY PROCEDURAL PLEADINGS
May 4, 2006	Answer of America to Petition of Virgin America for reconsideration of Order 2006-4-15
May 4, 2006	Answer of Delta to Petition of Virgin America for reconsideration of Order 2006-4-15
May 4, 2006	Public Answer to Petition of Virgin America for partial reconsideration of Order 2006-4-15 and Motion for clarification and additional evidence
May 4, 2006	Motion of Continental for confidential treatment
May 10, 2006	Motion of Virgin America to strike material filed by Continental
May 15, 2006	Consolidated answer of Northwest supporting Continental's Motion for clarification and additional evidence and opposing Virgin America's Motion to strike material filed by Continental
May 15, 2006	Answer of American supporting Continental's Motion for clarification and additional evidence and opposing Virgin America's Motion to strike material filed by Continental
May 15, 2006	Motion and Reply of Virgin America to May 4, 2006, answers and answer to Continental's Motion for clarification and additional evidence
May 16, 2006	Answer of Delta to Motion of Virgin America to strike material filed by Continental
May 19, 2006	Answer of ALPA to Motion of Virgin America to strike material filed by Continental
May 19, 2006	Answer of Continental to Motion of Virgin America to strike material filed by Continental

Appendix C

DATE	SUBSEQUENT PLEADINGS
August 16, 2006	Consolidated Answer and Reply of Continental
August 24, 2006	Motion of Virgin America for leave to file an unauthorized document and reply to answer of Continental
August 25, 2006	Public Motion of American for leave to file an unauthorized document and response to reply of Virgin America
August 25, 2006	Motion of American for confidential treatment
August 25, 2006	Motion of Delta for leave to file an unauthorized document and response
August 25, 2006	Motion of Delta for confidential treatment
August 28, 2006	Motion of US Airways for leave to file an unauthorized document and response to consolidated reply of Virgin America
August 30, 2006	Answer of Virgin America to Motions for leave to file an unauthorized document by Delta, American, and US Airways
August 30, 2006	Motion of Virgin America for confidential treatment
August 30, 2006	Public Surreply of Continental and Motion for leave to file an unauthorized document
August 30, 2006	Motion of Continental for confidential treatment
September 7, 2006	Motion of Virgin America to strike and immediate action
September 11, 2006	Motion of Virgin America for confidential treatment
September 12, 2006	Motion of Virgin America for leave to file an unauthorized document and public response to Continental's surreply
September 15, 2006	Answer of Continental to Motion of Virgin America to strike