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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Wayne Taleff *et al.*

Plaintiffs,

v.

SOUTHWEST AIRLINES CO., GUADALUPE HOLDINGS CORP., AIRTRAN HOLDINGS, INC.,

Defendants.

CASE NO.: CV-11-02179-JW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT AND OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Date: October 31, 2011
Time: 9:00 a.m.
Courtroom: Courtroom 15, 18th Floor
Judge: Hon. James Ware

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I. INTRODUCTION

This is a private action brought by 43 commercial airline passenger Plaintiffs against the Defendants under Section 16 of the Clayton Antitrust Act (15 U.S.C. § 26), alleging violations of Section 7 of the Clayton Act (15 U.S.C. § 18), on the ground that the Southwest acquisition of AirTran was an elimination of a significant rival in a non-trivial transaction which may lessen competition and tend toward a monopoly in the commercial airline industry in general and the Low Cost Carrier airline industry in particular in the United States.

The Defendants base their Motion to Dismiss on two frivolous grounds, the frivolity of which is emphasized by the fact that the Defendants have conspicuously ignored and failed to follow the controlling and binding authority of the Supreme Court of the United States in *Brown Shoe v. U.S.,* 370 U.S. 294 (1962); *U.S. v. Philadelphia National Bank,* 372 U.S. 321 (1963); *United States v. Aluminum Co. of Am.* (*Alcoa*), 377 U.S. 271 (1964), *U.S. v. Vons Grocery Co.,* 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966); *Grinnell Corporation v. U.S.,* 384 U.S. 563 (1966). These cases plainly support Plaintiffs' definition of the relevant product market, as well as demonstrating that the Plaintiffs have suffered irreparable injury by the elimination of a significant rival in the Low Cost Carrier market, that the remedies available at law are inadequate to recover lost availability, capacity, and services as well as higher prices, that the hardships between the losses to the Plaintiffs and the unlawful merger are weighed heavily in favor of the Plaintiffs, and that the public interest would not be disserved by a permanent injunction.

First, the Defendants claim that the Plaintiffs' fail to allege a "plausible relevant product market." (Motion to Dismiss at 1.) However, the Plaintiffs specifically allege that, "'Low Cost Carriers' ("LLCs"), which operate on a point-to-point basis" and fly "high

density routes" rather than "to and from small communities." Furthermore, the limited number of LCCs are specifically named. In addition, the LCCs are differentiated from the "Network" or "Legacy" carriers, which are also specifically named. Moreover, Plaintiffs specifically alleged that the Defendants were the dominant LCCs with a combined 75% of the Low Cost Carrier traffic, with Southwest having 60% and AirTran with 15%. Further still, the unique airports of the LCCs are noted as well as the market controlled by those carriers in those specific airports, many of which are not even served by the Network airlines. And, importantly, it is specifically alleged that the competition of one of the Defendants is "constrained by the actual and potential competition" of the other Defendant, and vice versa, so that super-competitive prices would be constrained by the potential competition. In addition, illustrative of their confusion, the Defendants fail to distinguish between "product" markets and "geographic" markets, or at least do not analyze them separately. By way of example, the Defendants claim that an LCC flight from San Francisco to Newark is not interchangeable with an LCC flight from Seattle to Miami, no matter how much an airline might raise the price on one of those routes. But, the Plaintiffs alleged that each Defendant was constrained by the potential as well as the actual competition of the other (FAC ¶¶ 27, 28) and that either one of them had the capability to move to different airports. (FAC ¶¶ 82-85.) Moreover, interchangeability has never been determined by the Supreme Court to mean exact substitutes: "A little boy does not wear a little girl's black patent leather pump," but they are both children's shoes. *Brown Shoe v. U.S.* 370 U.S. 294, 327. Checking accounts and home loans are not interchangeable, but they are in the same "commercial banking" market. *U.S. v. Philadelphia National Bank,* 374 U.S. 321 (1963). Meat and detergents are not interchangeable, but they are part of the grocery market. *United States v. Von's Grocery*

Co., 384 U.S. 270 (1966). Fire alarms are not interchangeable with burglar alarms but they are in the same home security market. *Grinnell Corporation v. U.S.,* 384 U.S. 563 (1966)

Second, Defendants claim that Plaintiffs are not "entitled to injunctive relief" because the Plaintiffs are *de minimis*, in other words, not important enough to be able to require the Defendants unlawful acquisition to be divested. Of course, the authority under Section 16 is not limited to powerful entities. Indeed, as two Judges of this very Court have ruled, a newspaper subscriber has the authority to challenge the merger of large metropolitan newspapers, even though the purchase of a newspaper that was less than $1. *Riley v. First Corporation,* 107 F.Supp.2nd 1192 (N.D. Cal. 2000) Judge Vaughn R. Walker; *Riley v. Media New Group,* 2007 U.S. Dist. Lexis 29419 (N.D. Cal. 2007) Judge Susan Illston.

In addition, in this case, the Defendants misconstrued irreparable injury, equating it only with increases in ticket prices, ignoring availability of flights, the capacity of flights, nonmonetary services, innovation, as well as price increases. Moreover, the remedies available at law, such as monetary damages, are inadequate to compensate for the intangibles such as capacity of aircraft, availability of flights and locations and services, including the price of tickets. The balance of the hardships is likewise clear because the public interest is always served by the competition of two significant rivals offering not only different prices but different services, different availabilities, different routes, different capacities, different aircraft, and innovation.

Finally, the Defendants' conclude their evasions of the controlling law and the facts alleged by the Plaintiffs with the disingenuous claim that the burden of discovery should be reason enough to dismiss the Plaintiffs' cause of action. Not so, and the Defendants' know it. The relevant documents have already been gathered, and indeed, already produced to the government pursuant to Hart-Scott-Rodino productions. Also, the depositions are quite

limited in that it was principally the chief executive officers who contrived the combination and negotiated it, including the expectation to curtail all of the usual benefits of competition, including capacity, availability, services, and higher prices.

Based upon the specific allegations in the Plaintiffs' Complaint and the law of the Supreme Court of the United States, the Defendants' Motion should be denied.

Furthermore, as alleged in the Complaint, which facts must be taken as true, the acquisition of AirTran by Southwest follows a trend of consolidation and concentration in the airline industry in general, and in the Low Cost Carrier airline industry, in particular in the United States. This is one of the most important considerations, enunciated time and time again by the Supreme Court. *See Brown Shoe, supra; Philadelphia National Bank, supra; Vons, supra.*

II. APPLICABLE FACTS

On September 27, 2010, the defendants announced that they had agreed to combine in an all stock transaction, valued at more than $1.4 billion. (FAC. ¶ 1.) This combination eliminated the competition between the two largest Low Cost Carriers, companies which operate on a point-to-point basis and travel high density routes rather than to and from small communities. In contrast to the LCCs are the "Network" carriers, which operate on a "hub-and-spoke" business model. (FAC. ¶ 2.)

By reason of the combination, the planned anticompetitive effects of this unlawful combination were increases in prices and fares, elimination and/or curtailment of services, elimination or curtailment of frequency of flights, curtailment of capacity of aircraft and available seats for passage, elimination of tens of thousands of jobs, the deterioration of quality of service, the addition of charges for amenities otherwise considered part and parcel of the service, the elimination or substantial cutback of traffic to hubs, the creation of

monopolies for passenger air traffic from and to major cities, and the encouragement and trend to further concentrate the industry toward ultimate monopoly. (FAC ¶ 5.)

Plaintiffs are individuals who have purchased airline tickets from one or both of the Defendants in the past, and expect to continue to do so in the future. They are threatened with loss or damage in the form of higher ticket prices and diminished service. (FAC ¶ 6.)

As of September 30, 2010, Southwest was the largest air carrier in the United States, as measured by the number of domestic passengers carried. (FAC ¶ 10.) Southwest had a market share of approximately 14.2% in 2010, the 2nd largest domestic market share, as measured by revenue passenger miles. (FAC ¶ 11.) Southwest uses the "Point to Point" flight routing system, serving 72 cities in 37 states, with more than 3,400 flights a day coast-to-coast. (FAC ¶ 13.)

AirTran is the seventh largest domestic carrier, with more than 19.5 billion RPMs in 2010. (FAC ¶ 16.) AirTran has more than 1,000 daily departures, primarily in the Eastern and Midwestern United States, serving over 70 destinations in the United States, Mexico, and the Caribbean. (FAC ¶ 17.)

Southwest and AirTran are substantial actual and potential rivals; and neither is a failing company. (FAC ¶ 22.) Furthermore, not only do Southwest and AirTran provide competing passenger service against each other on a number of passenger routes, but also they are potentially able to provide competing passenger service against each other on any route anywhere in the United States if they believe it would be profitable to do so. (FAC ¶ 24.) Both Southwest and Airtran have the capability to serve every major market in the United States. (FAC ¶ 25.) Because of this ease of entry by these experienced airlines, the behavior of each is constrained by the actual and potential competition from the other. throughout the United States. (FAC ¶¶ 27-28.)

III. APPLICABLE LAW

A. All Facts in the Complaint Must be Taken as True and Construed in the Light Most Favorable to the Plaintiff.

The basic test on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is whether the complaint, with all the well-pleaded material facts taken as true and construed in the light most favorable to the plaintiff, sets forth facts sufficient to state a legal claim. *See Frey v. U.S., 122 F.3d 1071 (9th Cir. 1997)*.

In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the complaint is liberally construed and is viewed in the light most favorable to the plaintiff. *See Bell Atlantic Corp*. v. *Twombly*, 550 U.S. 544 (2007); *See also Scheuer v. Rhodes*, 416 U.S. 232, (1974). General allegations are presumed to embrace those specific facts that are necessary to support the claim. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). In addition, the well-pleaded allegations of fact contained in the complaint and every inference fairly deducible therefrom are accepted as true for purposes of the motion. *See Bell Atlantic Corp*. v. *Twombly*, 550 U.S. 544 (2007); *Tellabs*, *Inc*. *v. Makor Issues &* Rights, Ltd., 551 U.S. 308 (2007).

B. The Facts Alleged Plainly and Unequivocally Establish Relevant Product Markets.

The relevant market, whether it be the product market or the geographic market, is a question of fact for the jury. The question presented by the Defendants in this motion, is their claim that under no circumstances could the airline industry be considered a relevant product market; nor, according to the Defendants could there ever be a Low Cost Carrier submarket of the airline industry. The Defendants make this claim notwithstanding the fact that on numerous occasions, including in the Defendants own required publication, solely refer to the airline industry and a Low Cost Carrier submarket of that industry. The Supreme

Court's decision in *Brown Shoe* set the stage for a definition of a relevant product market. According to the Supreme Court: "Congress neither adopted nor rejected specifically any particular test for measuring the relevant market….Congress indicated plainly that a merger has to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated…." *Brown Shoe v. U.S.,* 370 U.S. 294, 320-321 (1962).

Furthermore, in addition to viewing industries "functionally", the Supreme Court also defined the indicia to determine submarkets under major markets. The Supreme Court said, "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products peculiar characteristics and usage, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. 370 U.S. at 325.

Viewing the relevant product market "functionally," there is no doubt that the function of the airline industry is to transport persons from place to place through the air. It is not transportation of persons by rail, by sea, or by road. This is so because the purpose for which the airline industry exists is the carriage of airline passengers by air.

Also, under the Supreme Court's decision of a submarket, the Plaintiffs have alleged the peculiarity and particularity of the Low Cost Carrier submarket. One of the principal differences is that the LCCs fly point-to-point rather than the traditional "Network" airlines, which operate on a hub and spoke system. In addition, the Plaintiffs alleged that the LCCs are different from the Network airlines in terms of price, amenities, services, availability, and metropolitan cities serviced by different airports. Notwithstanding these specific allegations, and the Supreme Court's decisions, *supra et infra*, the Defendants boldly assert there is no such thing as the very market in which they serve. Indeed,

according to the Defendants, the only possible relevant product market are the specific routes in which these Defendants overlap. That boys shoes do not overlap with girls shoes. *Brown Shoe v. U.S.* 370 U.S. at 327. Burglar alarms do not overlap with fire alarms. *Grinnell Corporation v. U.S.,* 384 U.S. 563. Home loans do not overlap with car loans. *United States v. Philadelphia Nat'l Bank*, 372 U.S. 321 (1963). Because they would deny the existence of these markets, it is self-evident why the Defendants chose to ignore these Supreme Court decisions, but, unfortunately for the Defendants, these decisions do exist as do the product markets as the airline industry as a whole and the Low Cost Carrier as a submarket of that industry.

C. Defendants' Ignore the Binding Supreme Court Precedent which Establishes that the Combination is Presumptively Unlawful.

The Defendants attempts to sidestep the binding decisions by the Supreme Court which unequivocally show that the Defendants' combination is unlawful.

In *Brown Shoe*, the named-defendant was the 4th largest shoe manufacturer with 6% of the market, and its competitor Kinney was the 12th largest firm with only 0.5%. In the shoe retailing market, Brown Shoe was the 3rd largest firm and Kinney was number eight. When the two firms proposed to merge, their combined share of the manufacturing market would only amount to 6%, while their combined share of the retail market would only be 9.5%. 370 U.S. at 297, 303, 327, 331, 346. The Supreme Court enjoined the merger.

In the case currently before the Court, Southwest, the Largest Cow Cost carrier in the United States, with a 60% market share merged with AirTran the 2nd largest low cost airline carrier with an approximately 15% market share, market shares much greater than the merger enjoined in *Brown Shoe.*

In *United States v. Philadelphia National Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank in the market, with 36% of all assets. *U.S. v. Philadelphia National Bank,* 374 U.S. 330-31, 364.

Moreover, the merger would have resulted in intense concentration of the market: the first and second largest firms would have controlled 58% of the market, and the top four firms would have controlled 77% of the market. *Id*. at 331. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant increase of concentration in the market, were both so high as to be *presumptively* illegal. Based on the "intense congressional concern with the trend toward concentration," the Court dispensed with the plaintiffs' need for "elaborate proof of market structure, market behavior, or probable anticompetitive effects" and instead established a presumption of illegality for any merger that results in a combined-firm market share of 30%. This case provides market data more overwhelming than those deemed presumptively illegal in *Philadelphia National Bank*. The merger here has resulted in the top two low cost airlines controlling over 75% of the low cost carrier airline market.

In *United States v. Aluminum Co. of America* (*Alcoa*), 377 U.S. 271, 278 (1964), the Supreme Court ordered Aluminum Company of America to divest itself of Rome Cable Corporation where Alcoa's market share of 27.8% had been increased by merely 1.3% through the acquisition of Rome. The decision was driven by what the Supreme Court considered to be unacceptably high levels of concentration in the aluminum wiring industry. In that case, Alcoa was the leading producer of aluminum conductor, with 28% of the market. *Id*. at 278. Alcoa plus Kaiser, the second leading competitor, together controlled 50% of the market. *Id*. The top three competitors had a combined market share of 76%. *Id.* Nine firms in total – including Rome with only 1.3% of the market – controlled 95% of all aluminum created in the United States. *Id*. In the narrower submarket of insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures, the Supreme Court deemed both of these markets "highly concentrated." The market concentrations in the present case are almost identical.

In *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), the Supreme Court "not only reverse[d] the judgment below but direct[ed] the District Court to order divestiture without delay." *Id*. at 279. That case involved the acquisition by Von's, which had merely a 4.7% share of the market, of Shopping Bag, with only a 4.2% of the market. *Id*. at 281 (White, J., concurring). The pre-merger market leader had only 8% of total market sales. *Id*. But, the growing number of grocery market chains and the shrinking number of independently-owned stores, *id*. at 272-273, resulted in the Court holding that "these facts alone are enough to cause us to conclude … that the Von's-Shopping Bag merger did violate § 7." *Id*. at 273. The Supreme Court stated that "the basic purpose" of the law "was to prevent economic concentration in the American economy by keeping a large number of small competitors in business," *id*. at 275, and that "congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *Id*. at 277. In his concurring opinion, Justice White interpreted the majority decision as establishing the following rule:

> [W]here the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary.

Id. at 281 (White, J., concurring). Here, the top eight airlines, including Southwest and AirTran, control more than 90% of the market.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court again ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550. "In accord with" the cases already discussed above, the Court "h[e]ld that the evidence on competition … was sufficient to show a violation of § 7 …." *Id*. at 551-52. As in *Von's*, the Court relied heavily on evidence indicating that the merger had taken place "in an industry marked by a

steady trend toward economic concentration," *id*. at 550, and then went on to "hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." *Id*. at 552-53.

In the present case, Southwest, the Largest Low Cost carrier in the United States, with a 60% market share merged with AirTran the 2nd largest low cost airline carrier with an approximately 15% market share. Overall domestically, Southwest is the 2nd largest domestic airline, with 14.2% market share and AirTran is the 7th largest overall, with a 3.4% market share. Neither company is a failed company and both are profitable.

A review of these Supreme Court cases in light of the case currently before this Court, makes clear Plaintiffs have stated a cause of action for which relief can be granted.

D. The Southwest-AirTran Merged Entity is Presumptively Illegal.

The line of binding Supreme Court cases has never been overruled or even diminished by later opinions. Each of them was later discussed by Judge Posner in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), in which the Seventh Circuit observed that these cases, taken together, prohibited "any nontrivial acquisition of a competitor":

> [These cases] seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may … substantially … lessen competition." [¶] None of these decisions has been overruled.

There is little question that, under the authority of these cases, an order of divestiture must ultimately be mandated in this case. First, the airline industry is highly concentrated: The top 2 firms control more than half the U.S. airline sales, the top 3 firms control 67% of the market, and the top five firms have a combined 85% of all sales. Second, the industry has been marked by a pattern of ever-increasing concentration, having been distilled down to

only 5 major airlines from 34 in the last twenty-five years. (First Amended Complaint, Exhibit A.) This trend is quickly increasing in pace: in the past two years, the then-3rd largest airline, Delta, merged with the then-5th largest airline, Northwest, to create the then-largest airline in the world. Then, in 2010, United, the third largest airline in the United States combined with Continental Airlines, the fourth largest airline, with 10.7% of the market, creating the largest airline in the world. Not including the merger challenged in this appeal, the top 9 competitors concentrated into 6 – controlling a full 90% of the market – in just 24 months.

E. Section 7 of the Clayton Act was Enacted to Prevent Mergers that *May* Substantially Lessen Competition.

Plaintiffs must show under Section 7 of the Clayton Antitrust Act that defendants' merger **may** substantially lessen competition. Plaintiffs need not show that the merger is certain to lessen competition:

> Section 7 of the Clayton Act prohibits mergers or acquisitions in any line of commerce or in any activity affecting commerce in any section of the country, [where] the effect of such acquisition **may** be substantially to lessen competition or to tend to create a monopoly. **Section 7 was enacted to prevent anticompetitive mergers in their incipiency. Therefore, all that is necessary [under Section 7] is that the merger create an appreciable danger of [anticompetitive] consequences in the future.** A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.

California v. Sutter Home System, 130 F.Supp.2d 1109, 1117-18 (N.D. Cal. 2001) (emphasis added) quoting *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (quotations and other citation omitted).

> Competition is so important that mergers or acquisitions that 'may' lessen competition are prohibited. The Supreme Court has specifically recognized that by using the phrase 'may,' **Congress was concerned with probabilities, not certainties.**

Bon-Ton Stores, Inc. v. May Department Stores Co., 881 F.Supp. 860, 867 (W.D.N.Y. 1994) (granting preliminary injunction enjoining merger) (emphasis added), citing *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323 (1962).

Under Section 7 of the Clayton Act, mergers are prohibited if their result may be a substantial lessening of competition, or a tendency to create a monopoly. Since the thrust of the statute is prospective, designed "primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil. . . .," a transaction which **may** have the proscribed anticompetitive effects is prohibited. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957) ("*Cellophane*") (emphasis added); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962). Thus, if there is a "reasonable probability" that the merger will substantially lessen competition or tend to create a monopoly, it is prohibited under the Act. *Brown Shoe Co. v. United States*, 370 U.S. 294 at 323; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). By using these terms in Section 7, "which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by **arresting a trend toward concentration** in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (emphasis added).

Congress was "intense[ly]" concerned, in enacting Section 7, with increasing economic concentration in the United States' economy. *Philadelphia Nat'l Bank*, 374 U.S. at 363. In light of this Congressional concern, certain cases "warrant[] dispensing . . . with elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Id.* This is particularly true where, as in the instant case, the market is already highly concentrated:

> If concentration is already great, the importance of preventing **even slight increases** in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.

Id. at 365 n. 42 (increase of more than 33% "must be" significant; merger enjoined) (citation omitted; emphasis added); *see Id.* at n. 41 (listing treatises that describe 20% to 25% of market control by post-merger company or increase in concentration of 7% to 8% as prima facie unlawful).

It is important for the Court to be cognizant of this language from decisions interpreting Section 7 of the Clayton Act in the first half-century after its passage. These decisions recognize that Section 7 embodies a Congressional intent to preserve a multiplicitous structure in American industries, concerned perhaps not so much with alleged efficiency as with a diverse marketplace. Although such Congressional intent may not be politically popular with certain factions today, it is not for the courts, or anyone other than Congress itself, to change the law embodied in the statute. Section 7 must be construed to give effect to its purpose, which the Supreme Court has clearly articulated, notwithstanding its repugnance to particular economic or political theorists.

F. The Plaintiffs Have Standing.

Accepting the facts as true, and applying the binding decisions by the Supreme Court, it is clear that the Plaintiffs have and are suffering irreparable injury; that the remedies available at law, such as monetary damages, are inadequate to compensate for this injury; that, considering the balancing of hardships between the Plaintiffs and the Defendants, the public interest and a remedy in equity can only be achieved on the issuance of a permanent injunction.

The Plaintiffs have plainly and specifically alleged irreparable injury in that this combination may, and most probably will, result in cutbacks in availability of flights and locations, capacity and frequency, amenities and services, as well as increases in prices and a tendency with other airlines to collude. The bold statement of the Defendants will not change the facts as alleged and the law as stated by the Supreme Court.

There are no available remedies at law to guard against the cutbacks in availability, capacity, frequency of flights, new or different locations, as well as the increases in prices for tickets and other services which otherwise would be complimentary.

The balance of hardships is closely aligned with the public interest. Taking the facts as true, and applying the binding decisions by the Supreme Court, and in light of the extraordinary trend towards concentration in the airline industry as a whole and the Low Cost Carrier industry in particular, there is no hardship whatsoever to the Defendants. Both Defendants operated profitably independently. Neither one required a combination in order to survive. The shareholders may indeed get richer, but only because the profits are greater by reason of the elimination of a significant rival. On the other hand, the Plaintiffs and the public are deprived of the benefits of the Defendants competing against each other, including as alleged, more available flights, more available choices of aircraft, more available locations, greater capacity, more services, as well as lower prices.

G. Private Actions are Encouraged.

The Supreme Court has unequivocally stated that private antitrust cases should be an ever present threat to would-be violators of the antitrust laws. *Perma Life Mufflers v. Int'l Parts Corp.,* 392 U.S.134 (1968).

H. The Department of Justice Cannot Immunize Unlawful Conduct.

The Defendants make much of the notion that the Department of Justice did not object to their combination. That is of no consequence under the law. Indeed, the Department of Justice has attempted to make its own law in order to undermine and avoid the binding decisions of the Supreme Court. It is well-known that the Department of Justice has published its own criteria called Merger Guidelines. It is well-recognized that these Merger Guidelines deviate greatly from the rules embodied in the Supreme Court's major decisions. No one knows who wrote these guidelines, and certainly they were not passed by the Congress of the United States nor signed into law by the President of the United States. They

are instead, what the Supreme Court noted in *U.S. v. Socony-Vacuum Oil Co.* 310 U.S. 150, 227:

> For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.

I. Defendants' Requests for Judicial Notice are Improper.

Plaintiffs object to Defendants Request for Judicial Notice of Exhibit 1, Exhibit 2, Exhibit 4 on the following grounds:

Exhibit 1, a press release, is hearsay and is not offered for a nonhearsay purpose.

Plaintiffs object to Exhibit 2 because it is incomplete, and Plaintiffs do not object if Southwest also includes their Form 8-K.

Plaintiffs object to Exhibit 4 on the grounds that it is irrelevant because Section 16 does not provide for damages for private plaintiffs but only provides for injunctive relief. Section 4 of the Clayton Act provides for damages.

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IV. CONCLUSION

For the reasons and authorities stated-especially the decisions by the Supreme Court of the United States that the Defendants conspicuously ignored-the Plaintiffs respectfully submit that taking the evidence as true and as a whole, the Court should deny the Defendants' Motion to Dismiss.

Dated: September 12, 2011

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