No. 10-17208

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL MALANEY, *et al.*

*Plaintiffs-Appellants,*

*vs.*

UAL CORPORATION, UNITED AIR LINES, INC. and
CONTINENTAL AIRLINES, INC.

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

# DEFENDANTS-APPELLEES' JOINT MOTION TO DISMISS APPEAL AND OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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## CORPORATE DISCLOSURE STATEMENT

Defendants United Air Lines, Inc. and Continental Airlines, Inc. are each wholly-owned subsidiaries of United Continental Holdings, Inc. (formerly known as UAL Corporation). There is no parent corporation or publicly-held corporation that owns 10% or more of the stock of United Continental Holdings, Inc.

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## PRELIMINARY STATEMENT

Every regulatory authority that has scrutinized the merger between defendants-appellees United Airlines ("United") and Continental Airlines ("Continental") (hereinafter, collectively, "defendants")—including the Department of Justice, the Department of Transportation, the European Commission and other foreign competition bodies—has approved it. The companies' shareholders have voted in favor of the merger by a margin of more than 98%.[1] The attempt by plaintiffs-appellants (hereinafter, "plaintiffs") to challenge the merger under Section 7 of the Clayton Act has likewise failed. On Monday, September 27, 2010, the district court denied plaintiffs' preliminary injunction motion on the grounds that: (a) "their failure to establish a viable relevant market dooms any effort to show this merger will substantially lessen competition, thereby negating their ability to raise even serious questions, let alone a likelihood of success on the merits"; and (b) "nothing in the record presented to the Court suggests that these forty-nine individual plaintiffs will be irreparably harmed by the merger or, if so, that the balance of hardships would tip at all in

[1] Tr. at 683:13-17 (shareholder vote); Defendants' Exhibits 1073 (DOJ press release); 1076 (DOT route transfer order); 1041 (European Commission approval); 1038 (Russian Federal AntiMonopoly Service decision). References to "Tr. at __" are to the transcript of the proceedings before the district court on August 31, September 1 and September 17, 2010. Relevant transcript pages are included in the Appendix attached hereto.

their favor". (Order Denying Motion for Preliminary Injunction, September 27, 2010, at 13 (the "Order") (included in the Appendix attached hereto and cited hereinafter as "App. at __").)

For four days after the district court entered its Order, plaintiffs sat on their hands. Knowing that defendants intended to close the merger on Friday, October 1, 2010—because defendants had publicly so stated (*see* App. at 2)—plaintiffs did nothing. They failed to seek a stay of the Order in the district court. They failed to notice an appeal to this Court. Only after the merger closed on October 1 (as defendants had said it would) did plaintiffs—having manufactured a supposed "emergency" through their own delay—file a purported "emergency" motion here seeking a "hold separate" order.

The articulated basis for the motion is a fiction. Plaintiffs contend that there was "insufficient time to move the district court" for the requested relief (Emergency Motion for Injunction Pending Appeal Seeking Temporary "Hold Separate" Order ("Pls. Mot.") at 4)—when that clearly is untrue because they had a full four days to do so. And they contend that it would have been "impracticable" to move first in the district court since that court had already "denied plaintiffs' motion for a preliminary injunction" (*id.* at 3-4)—which cannot be a valid justification because, if it were, the requirement initially to seek relief in the district court would *always* be excused.

For these reasons, as discussed more fully below, plaintiffs' so-called "emergency" motion should be denied. But it should be denied for other reasons as well (also discussed below). The entire theory of plaintiffs' appeal is that the district court "declined to follow" a series of early Supreme Court decisions and that "[t]he district court did not dispute that under these decisions the merger here should be enjoined". (Pls. Mot. at 9.)[2] Neither part of that argument is correct.

The district court explicitly held that plaintiffs had "failed to satisfy their burden of demonstrating a viable relevant market" (as the Supreme Court cases require) and "without a viable relevant market by which to measure any purported anticompetitive effects of the merger, the Court cannot address whether it does in fact substantially lessen competition or tend to create a monopoly". (App. at 21.) Plaintiffs do not challenge that finding. In other words, the district court did not "decline" to follow Supreme Court precedent. Rather, because plaintiffs failed on the threshold relevant market requirement, the district court did not have to reach the issue of competitive impact that the Supreme Court cases address.

[2] The decisions in question are *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); and *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

Moreover, the district court's Order makes clear that it was actually plaintiffs who failed to follow the old Supreme Court cases (and are continuing to do so) by arguing that, under them, plaintiffs "need only demonstrate that the merger between United and Continental is a non-trivial acquisition of a significant competitor". (App. at 11-12.) The district court correctly pointed out that this ignores Supreme Court precedent (including the cases cited by plaintiffs) holding that "[a]lthough market share and the overall concentration level of the industry are relevant in an antitrust review, these factors are 'not conclusive indicators of anticompetitive effects.' *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974)." (*Id.* at 11.) Contrary to plaintiffs' sole reliance upon market share data, the district court explained, "an analysis of the acquisition must include" examination of the "structure, history and probable future" of the particular market in question—including "looking into such factors as the characteristics of the customers, trends towards competition or concentration in the industry, the existence of small but significant competitors, or the barriers to entry into the market". (*Id.* (citations and internal quotations marks omitted).) Plaintiffs' analysis did none of that—and plaintiffs do not now contend otherwise.

Furthermore, having mischaracterized how the district court assessed the early Supreme Court cases, plaintiffs then add to the problem by positing a series of market share numbers that, they argue, reflect shares "of the United States

network airline market" and that supposedly justify enjoining the merger. (Pls. Mot. at 9.) But "the United States network airline market" is wholly unsupported. The district court held that the so-called "network market" "does not fly as a viable relevant geographic or product market for purposes of a Section 7 analysis" because it excludes LCCs (*i.e.*, low cost carriers) and "[p]laintiffs presented no evidence suggesting that the ability of LCCs to discipline prices would not continue". (App. at 16-17.) And the district court further held that "nothing put forth by the plaintiffs establishes the national airline industry as a viable relevant market against which to evaluate an antitrust claim under the Clayton Act"—because "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami". (*Id.* at 21.) Plaintiffs do not challenge those conclusions. Their presentation of market share numbers for something that is not a viable relevant market is, in short, completely meaningless.

Finally, at bottom, plaintiffs' delay has rendered their entire appeal moot. They are appealing the denial of a preliminary injunction motion seeking to halt a merger. However, while they sat on their hands, the merger closed. There is, therefore, nothing left to enjoin. They had plenty of time to appeal before that happened—but they failed to do so. Because they waited too long, their own inaction has mooted the appeal.

For all these reasons, plaintiffs' "emergency" motion should be denied and their appeal should be dismissed.

## ARGUMENT

"[A]n injunction pending appeal is 'an extraordinary remedy that should be granted sparingly'". *Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d 1204, 1206 (E.D. Cal. 2010). As with a preliminary injunction, an injunction pending appeal requires plaintiffs to demonstrate: (1) that they are likely to succeed on the merits of their appeal; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Id.* In order to succeed on their appeal from the denial of their preliminary injunction motion, plaintiffs must show that the district court's findings on the factors enumerated above constitute an abuse of discretion. *See N. D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010). So long as the district court applied the correct legal standard, this Court should not find an abuse of discretion except in the limited circumstance where "the district court reache[d] a result that is illogical, implausible, or without support in the inferences that may be drawn from the record". *Id.* Plaintiffs do not come close to making such a showing.

## I. PLAINTIFFS' APPEAL SHOULD BE DISMISSED AS MOOT.

An appeal from denial of a preliminary injunction motion is rendered moot when the act sought to be enjoined has already occurred. *See IBTCHWA, Local Union No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178 (9th Cir. 1988) (an appeal from the denial of an injunction against an airline merger was mooted by the merger's closing). Here plaintiffs sought a preliminary injunction to enjoin the United/Continental merger. Four days after the district court denied the motion, defendants consummated the merger, as they had previously announced they would (*see* App. at 2). Because the act sought to be enjoined has already occurred, the appeal of the Order refusing to enjoin the act is moot—and that is true even though plaintiffs are now seeking a "hold separate" order that is different from what they sought below. *See Transeuro Amertrans Worldwide Moving & Relocations, Ltd. v. Conoco, Inc.*, 95 Fed. Appx. 288, 289-90 (10th Cir. 2004) (dismissing as moot an appeal from the denial of an injunction against a merger that was then consummated and rejecting the plaintiff's attempt to seek alternative relief not previously addressed by the district court).

Plaintiffs could have avoided this result by filing their appeal and motion promptly after the district court entered the Order—and before the date on which they knew that the merger would close. They have only themselves to blame for not doing so.

## II. PLAINTIFFS' MOTION SHOULD BE DENIED FOR FAILURE TO SEEK RELIEF IN THE DISTRICT COURT.

Plaintiffs' motion should be denied because it violates the "cardinal principle" of Fed. R. App. P. 8(a)—*i.e.*, that "relief ordinarily must first be sought in the lower court". 16A Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure § 3954 (4th ed. 2010) (footnote omitted); *see also* Fed. R. App. P. 8(a)(1). Plaintiffs' attempt to establish that it would have been "impracticable" to move initially in the district court (*see* Fed. R. App. P. 8(a)(2)(A)(i)) is meritless.

*First*, any supposed "emergency" is wholly of plaintiffs' own making. Plaintiffs knew that they had four full days after the district court entered its Order before the merger was scheduled to close. But they did nothing. They cannot now establish that it was "impracticable" to move in the district court when the alleged "urgency" is of their own creation. *See Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (the appellant could not justify its failure to move for a stay first in district court when it waited until the last minute to move in the appellate court); *Chem. Weapons Working Grp. v. Dep't of the Army*, 101 F.3d 1360, 1361 (10th Cir. 1996) (same).

*Second*, plaintiffs' argument that moving in the district court would have been "impracticable" because that court had denied their preliminary injunction motion (*see* Pls. Mot. at 3-4) is nonsense. If that were the law (and it is

not), the loser below would always be excused from moving first in the district court—which would render Rule 8(a)(1) a nullity. *See, e.g., Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal"). Moreover, if plaintiffs truly thought that it was futile to apply to the district court for relief, they could have filed their fourteen page motion in this Court well before October 1.

Because plaintiffs cannot justify their failure to seek relief first from the district court, their motion is procedurally defective and should be denied.

## III. PLAINTIFFS' MOTION SHOULD BE DENIED FOR FAILURE TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs spend the bulk of their motion arguing that market share statistics in a mythical "United States network airline market" justify enjoining the merger. (*See* Pls. Mot. at 6-10.) As discussed above, their sole focus on market share is wrong as a matter of law. But there is an equally fundamental flaw in plaintiffs' approach. Although they fail to mention it, the district court held that the mythical "United States network airline market" is not a proper relevant market for purposes of Section 7 of the Clayton Act. (*See* App. at 20-21.) Plaintiffs do not challenge that conclusion. This dooms their current motion—because, as the district court correctly held, "without a viable relevant market by which to measure any purported anticompetitive effects of the merger, the Court cannot address

whether it does in fact substantially lessen competition or tend to create a monopoly". (*Id.* at 21.)

The need to define a proper relevant market—*i.e.*, a product market and a geographic market within which to measure the merger's supposed competitive effects—is a threshold Section 7 requirement. *See, e.g., Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) (on a motion for a preliminary injunction, "[t]o establish a prima facie case under Section 7 of the Clayton Act, a plaintiff must first define the relevant market"). Demonstrating the existence of a relevant market is a "necessary predicate" to such a claim. *See, e.g., Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978); *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974).

After extensive briefing and lay and expert testimony, the district court held that "plaintiffs have not carried their burden, under any injunctive relief merits standard, of demonstrating the existence of a viable relevant geographic and product market". (App. at 13-14.) The court observed that, "in light of his limited professional background" and "his largely unpersuasive hearing testimony", the court would give the opinion of plaintiffs' expert, Professor Darren Bush, "little weight, particularly with regards to his identification of applicable relevant markets". (App. at 8 n.10.) Based upon their failure to establish a relevant market, the district court held that plaintiffs could not "show a likelihood of success on, or

even a serious question going to, the merits of their claim". (App. at 21.) Plaintiffs offer no reason on this motion to disturb that conclusion.

## IV. PLAINTIFFS' MOTION SHOULD BE DENIED FOR FAILURE TO DEMONSTRATE IRREPARABLE HARM OR A BALANCE OF EQUITIES TIPPING IN THEIR FAVOR.

Plaintiffs argue that the district court erroneously applied a "heightened standard" for "irreparable harm". (Pls. Mot. at 11.) Plaintiffs are wrong. The district court held that, "[s]imply put, plaintiffs have not demonstrated in any way that they themselves will suffer *any* specific harm were preliminary relief denied". (App. at 24; *see also id.* at 23 (plaintiffs "failed to demonstrate *any* irreparable harm as a result of the merger"); *id.* at 25 n.20 ("Moreover, plaintiffs' failure to demonstrate *any* injury personal to them obviates the need to consider whether their alleged harm could be addressed through a monetary award") (emphasis added in all the above).)

A finding that plaintiffs failed to demonstrate *any* harm at all obviously does not reflect a "heightened standard" for irreparable harm. In fact, it reflects the precise opposite. It is a holding that plaintiffs did not make even the most minimal showing of irreparable harm. And plaintiffs offer nothing on the present motion to establish that the district court's factual finding in this regard constitutes an abuse of discretion.

Plaintiffs argue that the district court's conclusion that they have antitrust standing is tantamount to a finding of irreparable harm. (*See* Pls. Mot. at 11.) That is a *non sequitur*. The district court held merely that plaintiffs had met the "low threshold for standing under the Clayton Act" because they alleged that they were "consumers of airline tickets". (App. at 22.) But the court went on to say (although not mentioned by plaintiffs) that the evidence at the hearing failed to demonstrate that any of this alleged "antitrust injury" was more than nominal or that it was or would be "irreparable". (App. at 23-24.)

Plaintiffs' further argue that their alleged harm is "not compensable in money damages" because they are suing under Section 16 of the Clayton Act, which "provides *only* for injunctive relief", and not under Section 4, 15 U.S.C. § 15 (which allows private individuals to recover money damages for Section 7 violations). (Pls. Mot. at 11-12 (emphasis in original).) That is absurd. The issue is not governed by the choice of remedy that plaintiffs might make for their own tactical reasons; rather it is governed by the options that are available to them. And Section 4 is clearly one such option.

Although plaintiffs take the district court to task for referring to the fact that plaintiffs failed to establish "any *significant* harm" (App. at 22 (emphasis added)) (*see* Pls. Mot. at 11), an assessment of the relative *degree* of alleged harm is clearly necessary when considering the issue of the balance of equities. *See Los*

*Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203-04 (9th Cir. 1980); *see, e.g.*, 11A Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure § 2948.2 (2d ed. 2010) (the court balances "the severity of the impact on defendant should the temporary injunction be granted and the hardship that would occur to plaintiff if the injunction should be denied"). The district court concluded that the evidence offered by plaintiffs at the hearing showed, at best, "speculative and *de minimis* injury", which was "insufficient to . . . tip the scale in plaintiffs' favor". (App. at 24.) Plaintiffs fail to make even the slightest showing that this finding was an abuse of discretion.

In contrast to the "speculative and *de minimis* injury" to plaintiffs, the district court pointed to evidence presented by defendants that "delaying the merger would result, among other things, in the loss of significant revenue synergies and cost savings, in their continued vulnerability to exogenous shocks that a merged entity could withstand, in threatened job security for tens of thousands of employees who will benefit from a more stable employer, and in the continued deferral of capital and technology investments". (App. at 24.) Although not formally weighing those harms against plaintiffs', the court stated that "it is fair to observe, as did then-Justice O'Connor, sitting as Circuit Justice, in reversing the Ninth Circuit's stay of an airline merger, '[t]he cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering

in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality.' *Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1309 (1987)." (*Id.* at 24-25.)

Plaintiffs attempt to counter this with the conclusory argument that formal consummation of the merger has now caused "[t]he defendants' side of the scale" to grow "lighter". (Pls. Mot. at 13.) Plaintiffs are wrong. The harm to defendants that the district court identified will increase each and every day that the operational aspects of the merger are delayed. (*See* Tr. at 206:14-209:6; 684:3-21.) Plaintiffs fail to show otherwise. A "hold separate" order would, in short, be no less drastic than the preliminary injunction that the district court has already denied.[3]

[3] Plaintiffs' reliance on *Federal Trade Comm'n v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981), is inapposite. There, the FTC had shown "a likelihood of success on the merits" in the district court, *id.* at 1075—which plaintiffs failed to do here. There, the district court itself, based upon the FTC's merits showing, had "granted interim relief in the form of a hold separate order" and the D.C. Circuit merely affirmed what the district court had done, *id.* at 1074-75—whereas here, based upon plaintiffs' failure on the merits, the district court denied any interim relief. And there, the FTC had "immediately" applied to the district court for further interim relief and, "less than three hours after the district court had refused", filed an emergency motion in the appellate court, *id.* at 1076—whereas here, plaintiffs filed nothing in the district court, despite plenty of time to do so, and waited four days before seeking relief in this Court. In all these ways, *Weyerhaeuser* actually highlights why plaintiffs' motion should be denied.

## CONCLUSION

For all (or any of) the reasons discussed above, this Court should deny plaintiffs' "emergency" motion and should dismiss their appeal as moot.

Dated: October 5, 2010

Respectfully submitted,

By: /s/ Max R. Shulman
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**CERTIFICATE OF SERVICE**

*Michael Malaney, et al. v. UAL Corporation, et al.*
Case No. 10-17208

I hereby certify that I electronically filed the foregoing brief and appendix with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 5, 2010. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all counsel of record were served by email on October 5, 2010.

/s/ Max R. Shulman
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