No. 10-17208

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL MALANEY., *et al.*
Plaintiffs-Appellants,

v.

UAL CORPORATION, UNITED AIR LINES, INC. and CONTINENTAL AIRLINES, INC.,
Defendants-Appellees.

On Appeal of an Interlocutory Order of the United States District Court for the Northern District of California (Case No. 3:10-CV-02858-RS)

PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANTS-APPELLEES' MOTION TO DISMISS AND REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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SUMMARY OF ARGUMENT

This appeal involves a very matter-of-fact rejection, on the part of a district court, of over two decades of Supreme Court precedent that is dispositive of almost every issue in this case. The Supreme Court cases explain that a relevant market is not set definitively by "metes and bounds" and that it often includes within it products that are not substitutes in the eyes of consumers. These same cases further explain that in an industry experiencing rapid concentration, as the present industry is, even a "slight" increase in market share resulting from a merger of competitors will be enjoined. These cases, regardless of what economic theories may have been espoused by the district court, have not been overruled. They are binding authority. And, by specifically declining to follow them, the court below has abused its discretion.

The defendants have little to say of these cases. Instead, they offer in defense a garden variety of distractions. They assert that the appeal is moot, that the merger has passed a variety of regulatory hurdles, and that plaintiffs inexcusably delayed the filing of the instant motion. None of these things is persuasive. The complaint has prayed for divestiture – relief which is still available – thus, the appeal is not moot under the very case the defendants cite. The regulatory approval of the Department of Justice is not dispositive of the legality of a merger; its discretion in filing a case is based on policy, available resources, or other factors, and not on a strict application of Supreme Court precedent.

Applying Supreme Court precedent, the plaintiffs in this case have shown a relevant market, the trend toward concentration in that market, and a merger resulting in the elimination of a competitor and substantial further concentration. Having shown themselves to be past, present and future consumers of airline tickets, plaintiffs have legally demonstrated irreparable harm.

Plaintiffs do not seek a lengthy stay. They ask merely for sufficient time to fully brief these important issues. The motion for injunction pending appeal should be granted.

ARGUMENT

I. THE UNDERLYING APPEAL IS NOT MOOT SINCE RELIEF SOUGHT IN THE COMPLAINT IS STILL AVAILABLE

Airlines argue that the underlying appeal should be dismissed as moot, since the "act sought to be enjoined has already occurred." Opp. 7. In support they cite *IBTCHWA, Local Union No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178, 1178 (9th Cir. 1988). But in that case, the appeal was deemed moot because "none of the relief sought in the original complaint is now available." *Id.* That is not the case here. Here, the complaint's prayer for relief demands that the court "declar[e], find[], adjudge[e], and decree[] that the agreement of the defendants to merge violates Section 7 of the Clayton Act, 15 U.S.C. § 18," and that the court "grant[] to plaintiffs such other and further relief to which they may be entitled which the Court finds to be just and appropriate." Compl. 17. This prayer for relief necessarily includes an order for divestiture, since if the merger is "declar[ed]" violative of

Section 7, plaintiffs would "be entitled" to an order of divestiture. *See Cal. v. Am. Stores Co.*, 495 U.S. 271, 283-85 (1990) (construing Section 16 of the Clayton Act "to authorize a private divestiture remedy" when appropriate, since doing so "fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger"). Therefore, since relief demanded in the complaint is still available, the appeal is not moot.

II. MOVING FIRST IN THE DISTRICT COURT WOULD HAVE BEEN IMPRACTICABLE

Defendants assert that the motion should first have been brought in the district court, since moving there was not "impracticable" as required by Federal Rules of Appellate Procedure 8(a)(2)(A)(i).

They begin their argument by echoing a criticism scattered throughout their opposition that plaintiffs "sat on their hands" in the three days spanning the issuance of the district court's order and the motion filed in this court. Opp. 2, 5, 7, 8. But, by filing their own opposition brief 4 ½ days after being served with plaintiffs' motion, they defeat their own argument. The district court's order was filed in the evening (at 5:57 pm) on September 27 and it was not reviewed until the following morning. Thus, plaintiffs did not have "four full days" Opp. 8, but rather three full days (September 28, 29, and 30) to analyze their options, discuss the matter with their clients, analyze the order, research its errors, and draft their motion, which they filed first thing on the morning of October 1. Defendants, on the other hand, were served with plaintiffs' motion by email at 10:51 am on Friday October 1, 2010 (before the motion was filed). Defendants filed their opposition more than 4 days later, on October 5, at 6:25 pm.[1] These timeframes are radically more advanced that those even contemplated by Circuit Rule 3-3, which outlines the rules regarding the briefing schedule in appeals of preliminary injunction orders as well as "motion[s] to grant or stay the injunction pending appeal …." 9th Cir. R. 3-3(b), (c). Thus, plaintiffs cannot be fairly criticized for "sitting on their hands" when through their own filing, defendants concede that three days is not unnecessary delay. Simply put, plaintiffs filed the instant motion at the soonest possible time.

Second, defendants label as "nonsense" plaintiffs' reliance on the district court's denial of their preliminary injunction motion as grounds for showing that first moving below was impracticable. Opp. 8. They argue that "if that were the law …, the loser below would always be excused from moving first in the district court – which would render Rule 8(a)(1) a nullity." Opp. 8-9. Their logic is flawed. Not *every* motion for a stay pending appeal under Rule 8 concerns an appeal of the denial of a preliminary injunction. But where the district court has already denied plaintiffs' motion for preliminary injunction on the grounds that plaintiffs are "unlikely to succeed on the merits," it is highly unlikely that the district court would change its mind on a motion to stay pending appeal, which also requires a showing of "likelihood of success on the merits." *See Walker v. Lockhart*, 678 F.2d

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[1] Due to time constraints in the filing of this reply, plaintiffs have not filed a declaration outlining the filing and service dates noted here. Should the Court require, a declaration will be prepared and filed immediately.

68, 70 (8^{th} Cir. 1982) (proper to secure injunction pending appeal without first moving in district court where decision below suggested that district court would not grant relief); see also 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3954, p. 598, n.39 (4th ed. 2008).

III. SUPREME COURT PRECEDENT IS BINDING ON THE LOWER COURTS, AND UNDER ITS AUTHORITY, PLAINTIFFS' SUCCESS IS NOT ONLY "LIKELY" BUT CERTAIN

Defendants challenge the likelihood of plaintiffs' success because, they argue, it relies on the establishment of a "mythical 'United States *network* airline market'" which according to the district court "does not fly as a viable" market, "because it excludes LCCs (i.e. low cost carriers)" such as Southwest Airlines. Opp. 5, 9 (emphasis added). However, the *overall* United States Airline Market *does* include the LCCs, like Southwest, and analyzing that market under the Supreme Court case law rejected by the district court, the merger here is plainly illegal, as the structural evidence indicates:

U.S. AIRLINE MARKET & SHARES (OPERATING REVENUES ($000s))

Pre-Merger

Rank	*Airline*	*Rev's*	*Share*
1	Delta	28,910	27.7%
2	Amer.	19,898	19.1%
3	Unit.*	16,335	15.7%
4	Cont.*	12,586	12.1%
5	US Air.	10,781	10.3%
6	S'west	10,350	9.9%
7	Alaska	3,006	2.9%
8	Airtran	2,341	2.2%

Post-Merger

Rank	*Airline*	*Rev's*	*Share*
1	Delta	28,910	27.7%
2	Unit./Cont.	28,721	27.6%
3	Amer.	19,898	19.1%
4	US Air.	10,781	10.3%
5	S'west	10,350	9.9%
6	Alaska	3,006	2.9%
7	Airtran	2,341	2.2%
	Total	104,007	

* figures from Pls.' Ex. 108, p. 9; all other figures from Pls.' Ex. 71, p.13.

According to the defendants, the district court rejected the overall United States Airline Market as a viable relevant market because "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami." Opp. 5 (citing App. 21). But, *the district court's conclusion in rejecting this overall national market is grounded on its very rejection of the Supreme Court cases*. There is no requirement within this precedent that every product be a perfect substitute for every other product in the market.

The Supreme Court decisions have consistently defined the relevant market by determining the existence of "reasonably interchangeable" substitutes which would serve the general purpose of the product market alleged. When the product market alleged is broad, as it is in this case, then it will certainly include products that do not serve *precisely* the same purpose for the consumer. And, in almost every Supreme Court decision on this issue, the product markets defined include within them products that have *patently non-interchangeable end uses*, such as flights from San Francisco to Newark, and from Seattle to Miami.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) the Supreme Court established the standard for defining the relevant market, as well as the permissibility of relying on "submarkets" for purposes of antitrust review:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. 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 product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325.

The "outer boundaries of the product market" in *Brown Shoe* consisted of *all* "footwear," including men's, women's, and children's shoes. This market plainly consisted of products that do not serve interchangeable end uses, since, for example – just as a flight from San Francisco to Newark is not a substitute for a flight from Seattle to Miami – a grown man faced with escalating men's shoe prices cannot turn to infants' boots as a substitute. But, this overall "footwear" market was nevertheless defined with respect to "the reasonable interchangeability of use or the cross-elasticity of demand." *Id.* Although unstated in the opinion, the rationale of the holding demonstrates that the Court defined the overall market with respect to the broad, general purpose served by shoes – to cover and/or protect the feet.

Moreover, within this overall "footwear" market, *Brown Shoe* identified submarkets of "Men's," "Women's," and "Children's" shoes. *Brown Shoe*, 370 U.S. at 326. But even these submarkets included non-interchangeable substitutes. For instance, the defendant argued that "children's shoes [does not] constitute[ ] a single line of commerce" since "a little boy does not wear a little girl's black patent leather pump," and "a male baby cannot wear a growing boy's shoes." *Id.* at 327. The Supreme Court rejected these arguments, reasoning that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Id.* at 326.

Similarly, the relevant product market in *United States v. Philadelphia Nat'l Bank*, 372 U.S. 321 (1963) also consisted of non-interchangeable products. There, the Supreme Court held that the proper market for Section 7 analysis was "commercial banking," *id.* at 356, which consisted of various products (e.g., personal and business loans, mortgages, automobile loans, tuition financing, and credit cards) *and* services (e.g., estate planning, safe-deposit boxes, and investment advice). 374 U.S. at 326 and n. 5. Since a customer looking for a safe-deposit box cannot turn to an automobile loan as a substitute, this broadly defined market clearly contained non-interchangeable products – an observation not lost on the defendant banks who argued that "commercial banking in its entirety is not a product line" because as to each product or service "there are different types of customers, different market areas, and, most importantly, different types of competitors and competition." *United States v. Philadelphia Nat'l Bank*, 201 F.Supp. 348, 361 (E.D.Pa. 1962). Again, the Supreme Court rejected these arguments, determining with "no difficulty" that the relevant market included all the non-interchangeable products and services denoted by the general term "commercial banking." 374 U.S. at 356.

The practice of defining markets not exclusively made up of interchangeable substitutes continued in *United States v. Aluminum Co. of Am.* (*Alcoa*), 377 U.S. 271 (1964), which defined a broader market of "aluminum conductor" wiring. *Id.* at 277. The aluminum conductor market, in turn, consisted of two submarkets: "bare" and "insulated" wiring for use in overhead and underground electrical transmission, respectively. *Id.* at 274-275. Since underground wiring "must be heavily insulated," *id.* at 274, bare wiring *cannot as a physical matter* be used underground and is therefore categorically non-interchangeable with insulated wiring.[2] The Supreme Court nevertheless classified both products as part of the same market because substitutability must be judged by the *general* purpose served by the product at issue, in *Alcoa*, "the purpose of conducting electricity." *Id.* at 277.

Similar reasoning was applied in *United States v. Continental Can Co.*, 378 U.S. 441 (1964), a Section 7 challenge concerning an illegal merger of a glass bottle manufacturer and a maker of tin cans. In that case, the district court had held that the markets for glass containers

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[2] The dissent also noted that "different equipment and engineering skills are required for their manufacture and sale …." *Alcoa,* 377 U.S. at 286 (Stewart, J., dissenting).

and tin cans served different purposes and were therefore separate; thus, the merger did not threaten to lessen competition in any market. *Id.* at 444. The Supreme Court reversed, finding that both markets were part of the overall container market. *Id.* at 457. But, most important for present purposes was the existence of *thousands* of idiosyncratic end uses of glass and tin containers. As the district court noted:

> The different types of containers manufactured by these different industries are of wide varieties of sizes and shapes and are put to hundreds, if not thousands, of different end uses.

United States v. Continental Can Co., 217 F.Supp. 761, 780 (S.D.N.Y. 1963). These "thousands" of different uses for containers were found in industries as varied as soft drinks, canning, toiletry, cosmetics, medicines and health, and chemicals. 378 U.S. at 447. But, even though a soda-pop bottle is not a possible substitute vessel for a sardine canner, the Supreme Court had no trouble placing both containers into the overall market for purposes of judging the legality of the merger. The Supreme Court held, "we think the District Court employed an unduly narrow construction of … 'reasonable interchangeability of use or the cross-elasticity of demand' in judging the facts of this case." *Id.* at 452. Then, in an explanation seemingly directed at the district court in this case, the Court continued:

> We reject the opinion below insofar as it holds that these terms as used in the statute or in *Brown Shoe* were intended to limit the competition protected by § 7 to competition between identical products …. Certainly, that the competition here involved … is between products with

> distinctive characteristics does not automatically remove it from the reach of § 7.

Id. at 452-453. The Supreme Court admonished lower courts not to use the "interchangeability" standard to thwart enforcement of the Clayton Act: "[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition, but to 'recognize competition where, in fact, competition exists.'" *Id.* at 453 (quoting *Brown Shoe*, 370 U.S. at 326).

Finally, in the monopoly case *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the Supreme Court determined the scope of the relevant product market in which three alarm businesses operated. One of the firms operated exclusively burglar alarm systems. Another offered only fire alarm services. A third provided alarm services for both fire and burglary protection. The defendant there, as here, argued that "the different [alarm] services offered are so diverse that they cannot … be lumped together to make up the relevant market." *Id.* at 571-572. Notably, the Court conceded the non-interchangeability of the products, admitting that "[b]urglar alarm service is in a sense different from fire alarm service; from waterflow service; and so on …." *Id.* at 572. However, it reasoned, "it would be unrealistic on this record to break down the market into the various kinds of [alarm] services that are available." *Id.* Rather than require the plaintiff to establish layers of submarkets made of fire or burglary protection services, the Court recognized the *overall* market which "here [served] a single use, *i.e.*, the protection of property …." *Id.* Thus, just as it did in *Alcoa*, the Court required *Brown Shoe*'s interchangeability standard to be applied with respect to the *general purpose* served by the product at issue. *Grinnell* explained its inclusion of non-substitutable products into the same market on the grounds that it reflected the market's "commercial realities":

> We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service – the protection of property … – that must be compared with all other forms of property protection.

Grinnell, 384 U.S. at 572.

Properly applying these cases, the district court should have concluded that the existence of the United States Airline Market was proper, and that the resulting increase in concentration – as depicted in the table above – mandated injunction of the defendants' merger.

IV. THE DISTRICT COURT'S CONCLUSION THAT PLAINTIFFS SUFFERED NO IRREPARABLE HARM IS PLAINLY ERRONEOUS

Defendants finally contend that the district court properly "[found] that plaintiffs failed to demonstrate *any* harm at all …." Opp. 11 (emphasis added). But the point of the motion is that this conclusion is not feasible, since at the same time the district court ruled that plaintiffs suffered no irreparable harm at all, it found that one of the plaintiffs (of only four plaintiffs who testified) "[flies] regularly," "is likely to use United and Continental," and has flown "an overlap route" where United and Continental both directly compete. App. 23. If a plaintiff has demonstrated that she flies regularly, that she regularly uses the defendants' airlines, and that she will continue to do so in the future, she has shown a threat of injury – the future payment of anticompetitive prices. If the district court's determination that the future payment of illegally high prices is *de minimis* because it is only involves one person, then it has gone directly contrary not only to the pronouncements of the Supreme Court but also of the Congress, which in writing Section 7 sought specifically to protect consumers.

CONCLUSION

Plaintiffs seek only a temporary stay to allow this Court the opportunity to hear the underlying appeal on an expedited basis. The emergency motion for injunction pending appeal should be granted. The motion to dismiss the appeal should be denied.

October 7, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 7, 2010 I electronically filed the foregoing reply brief 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 7, 2010. I further certify that I served this brief on counsel for defendants by send a .pdf version of this brief to the following persons at the following email addresses:

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