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)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of the stock of any plaintiff.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Mike Malaney, *et al.* are purchasers and users of airline travel services sold and furnished by defendants United Airlines, Inc. and Continental Airlines, Inc., (collectively "Airlines") as well as other major United States passenger airline carriers. Plaintiffs commenced this action to obtain injunctive relief preventing the Airlines from merging in violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. The District Court had subject matter jurisdiction under Section 16 of the Clayton Act (15 U.S.C. § 26), and 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce and antitrust regulation).

Plaintiffs moved the district court for a preliminary injunction preventing Airlines "from completing and consummating" the proposed merger. (Volume II Excerpts of Record ("ER") 135.) The district court denied the motion on September 27, 2010. (I ER 1.) Plaintiffs filed a timely notice of appeal on October 1, 2010. (II ER 27.) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action brought by forty-nine commercial airline consumers seeking to enjoin further completion, and ultimately divestiture, of the merger between United and Continental as violative of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18.

B. Course of Proceedings

Airlines announced their plan to merge on May 3, 2010. Plaintiffs filed their complaint on June 29, 2010. (II ER 138.) On August 9, 2010, Plaintiffs moved the district court to preliminarily enjoin the proposed merger. (II ER 135.) After expedited and limited discovery, the district court conducted a two-day evidentiary hearing on August 31 and September 1, 2010. (II ER 186.) The parties each filed opening and reply memoranda, as well as various exhibits, affidavits, expert reports and designations of deposition transcripts. Oral argument and summation were conducted on September 17, 2010. (II ER 188.)

C. Disposition Below

On September 27, 2010, the district court entered an order denying Plaintiffs' motion for preliminary injunction. (I ER 1.) The court based its decision on three conclusions. First, the court identified – and then disregarded – an entire line of Supreme Court cases relied on by Plaintiffs. (I ER 11-13.) As a result, it determined that Plaintiffs failed to establish the United States commercial passenger air travel market as a relevant market for antitrust purposes. The court ruled, "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami." (I ER 21.)

Second, the district court further rejected the central thrust of the discarded Supreme Court cases, which hold that any significant merger between major competitors in a market showing a trend toward concentration establishes a prima facie violation of Section 7.

Disregarding this binding precedent, the district court held that "plaintiffs' proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong."

Finally, the court ruled that Plaintiffs "failed to demonstrate any irreparable harm as a result of the merger or that the balance of equities in this case tips at all, let alone sharply, in their favor." (I ER 23.)

STATEMENT OF FACTS

United and Continental are major U.S. airline carriers. Both are considered "network carriers," characterized as airlines operating on a "hub-and-spoke" business model. (I ER 2.) There are six major U.S. network carriers: United, Continental, American Airlines, Delta Airlines,[1] US Airways, and Alaska Airlines. (*Id.*) In contrast to network carriers, "low cost carriers" (LCCs) operate on a point-to-point basis and travel high density routes rather than to and from small communities. (I ER 3.) The largest U.S. LCCs are Southwest Airlines, JetBlue, Spirit Airlines, Virgin Airlines, Allegiant, AirTran, Frontier, and Sun Country Airlines. (*Id.*) However, only one of these LCC airlines is comparable to the major network carriers in generating revenue. As shown in the table below, besides Southwest, the largest LCC has only 2% of the national airline market.

The U.S. airline market has been trending rapidly toward greater and greater concentration, having been distilled down to five major

[1] Delta Airlines includes Northwest Airlines, with which it merged in 2009, creating the then-largest airline in the world.

airlines from thirty-four in the past twenty-five years. (II ER 75, 98.) In fact, the trend toward concentration is presently quickening. Last year, Delta, then the 3rd largest airline, merged with Northwest, then the 5th largest airline, to become the largest airline in the world (II ER 121); meanwhile, Southwest, the 5th largest airline, has announced its intention to merge with AirTran, the 7th largest airline. (I ER 3, n.2.) Combined with the merger of United and Continental, the top 9 largest airlines will have merged into 6 firms – controlling a full 90% of the market – within less than 24 months. The following table indicates the top eight airlines – including network carriers and LCCs – in the United States commercial airline market, as well as their market shares before and after the merger:

U.S. AIRLINE MARKET
(Operating Revenues, All U.S. Carriers, All U.S. Airports ($000s))

Pre-Merger

Rank	*Airline*	*Rev's*	*Share*
1	Delta	28,910	25.1%
2	Amer.	19,898	17.3%
3	Unit.*	16,359	14.2%
4	Cont.*	12,361	10.7%
5	US Air.	10,781	9.4%
6	S'west	10,350	9.0%
7	Alaska	3,006	2.6%
8	Airtran	2,341	2.0%
	Total*	115,051	

Post-Merger

Rank	*Airline*	*Rev's*	*Share*
1	Delta	28,910	25.1%
2	Unit./Cont.	28,720	25.0%
3	Amer.	19,898	17.3%
4	US Air.	10,781	9.4%
5	S'west	10,350	9.0%
6	Alaska	3,006	2.6%
7	Airtran	2,341	2.0%
	Total*	115,051	

Sources: figures marked by an asterisk from Bureau of Transportation Statistics, T1 Data, 2009; all other figures from II ER 84.

Thus, as a result of the merger, the top 2 firms now control over 50% of the market, the top 3 firms control 67%, and the top 5 major airlines now dominate the market with over 85%.

Plaintiffs are forty-nine individual purchasers of commercial passenger airline travel for their personal use. (I ER 5 (quoting Malaney Aff).) Each plaintiff has purchased such travel in the past five years and anticipates continuing to purchase air travel in the future. (*Id.*) Of the forty-nine plaintiffs, four gave live testimony at the hearing: Jan Marie Brown, Clyde Stensrud, Dana Robinson, and Michael Malaney.

Jan Marie Brown resides in Carson City, Nevada and has been a travel agent, has owned a travel agency, and has consulted for travel agencies for the past 23 or 24 years. (II ER 32:13-15; 32:18-33:5.) In the past five years, Ms. Brown has taken 17 flights on 9 separate trips. (II ER 132.) Ms. Brown travels by air to visit family and vacation in Ontario, California, Mexico, Tulsa, Wichita, Chicago, and Los Angeles. (II ER 39:5-11.) She anticipates flying to Los Angeles, and possibly Miami, Galveston, New Orleans, New York, and San Francisco in the near future. (II ER 39:11-25.) Ms. Brown testified that "it is 100 percent for sure that [she] will be" "traveling in the future to cities around the United States" by airplane. (II ER 40:8-11.) Ms. Brown brought this action out of a "fear[] that … the bigger, stronger, more powerful airline will increase prices, reduce flights, reduce services and, also, I fear that customer service will get even worse." (II ER 35:24-36:2.)

Clyde Stensrud resides in Kirkland Washington and has owned his own travel agency for the past 25 years. (II ER 41:22-24; 42:13-

17.) Mr. Stensrud takes golf vacations, arriving and returning by air, in Phoenix, Tucson, Palm Springs, and Hawaii, and is likely to return to these locations, as well as locations in Alabama and Florida, in the future. (II ER 44:18-45:17.) Mr. Stensrud is also a sports enthusiast and attends professional and collegiate football, basketball and baseball games throughout the country, including most recently, an NFL football playoff game in Green Bay and the NCAA Final Four basketball tournament in San Antonio. (II ER 45:21-46:2.) He anticipates traveling by air to various places throughout the country, including tours of major league baseball parks in Boston and New York, as well as other sporting events whose locations are yet to be determined. (II ER 46:12-23.) In the past five years, Mr. Stensrud has taken 28 flights on 12 separate trips. (II ER 151.) He brought suit out of a concern that the merger would adversely affect his personal travel, by increasing fares, increasing baggage and other fees, and would adversely affect service and flight availability. (II ER 43:22-44:8.) For the same reasons, Mr. Stensrud testified that his travel agency customers, and therefore his business, will likely be affected by the merger. (II ER 44:9-17.)

Dana Robinson resides in Palm Beach Gardens, Florida and previously owned a travel agency in Colorado for 23 years. (II ER 49:16-17; 50:6-11.) Ms. Robinson travels extensively, and within the past 18 months had 263,000 miles in her United Airlines frequent flyer account. (II ER 53:7-13.) Although now retired, Ms. Robinson continues to travel by air extensively for personal reasons. (II ER 57:6-7.) In the last five years, Ms. Robinson has taken 59 flights on 30 trips to Chicago; Denver; Harrisburg, Pennsylvania; Portland, Maine; Phoenix; Las Vegas; Cleveland, Fort Lauderdale; and Little Rock. (II ER 133.) 75% of those flights were on United or Continental. (*Id.*) Ms. Robinson also has extensive future air travel planned to Chicago and Pennsylvania. (II ER 57:19-58:2.)

Mike Malaney resides in Grand Rapids, Michigan where he has owned and operated a travel agency for 30 years. (II ER 60:17-61:2.) In the past five years, Mr. Malaney has traveled by commercial air carrier to Orlando, Phoenix, Palm Springs, Milwaukee, Los Angeles, New York and San Francisco. (II ER 61:11-19.) Mr. Malaney has a trip planned in February, 2011 and anticipates traveling to Seattle and elsewhere in the future. (II ER 67:15-24.)

SUMMARY OF ARGUMENT

This appeal concerns the district court's refusal to follow authoritative Supreme Court precedent – precedent that, absent special proof, binds courts to enjoin, and even require divestiture, of any merger between significant rivals in a market trending toward concentration. The district court's refusal to follow the law was made stark by the powerful language of its decision. There, specifically identifying the cases at issue (I ER 11-12) the court simply declined to follow them, holding that the "approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong." (I ER 13.) This fateful conclusion is the single reason behind the court's denial of the Plaintiffs' motion for preliminary injunction. That is to say, the holdings of the Supreme Court cases are dispositive on this appeal and mandate reversal.

The court's rejection of the Supreme Court cases manifest itself in three abuses of discretion. First, the district court applied the wrong standard in defining the relevant market. It concluded that the United States passenger air travel market was not cognizable because the Plaintiffs failed to demonstrate that all flights in the nation are competitive substitutes for all other flights, e.g., that "a flight from San Francisco to Newark" is a substitute for a flight "from Seattle to Miami." (I ER 21.) Under the Supreme Court cases, however, a plaintiff is under no obligation to demonstrate such specificity; rather, as long as it has been shown that flights in the United States serve the same general purpose, the plaintiffs have established a cognizable market.

Second, the court applied the wrong legal standard for determining the concentration levels in the U.S. airline market. Instead of applying the Supreme Court precedent, the court instead relied on the contrary tools published in the government's Horizontal Merger Guidelines. While the Merger Guidelines is an important and useful document for firms seeking to predict whether the government will exercise its prosecutorial discretion, it does not constitute the law. As the Guidelines themselves make clear, they are policy benchmarks that merely reflect the government's prosecutorial decision-making; they do not purport to establish the law, nor do they have the power to do so. Where the Merger Guidelines differ from binding Supreme Court authority, a district court's reliance on the former to the exclusion of the latter constitutes a *per se* abuse of discretion.

Third and finally, by applying the incorrect standard for defining the relevant market, the district court infected its own analysis of the Plaintiffs' irreparable harm in this case. When analyzed with respect to the proper relevant market, the record plainly reflects that Plaintiffs are threatened with significant harm.

By applying the wrong legal standards to each of the decisive issues in this case, the district court erred as a matter of law and therefore abused its discretion. The decision below must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A district court's denial of a preliminary injunction is reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960, ___, Case No. 09-35756, slip op. 10855, 10864 (9th Cir. Jul. 28, 2010). "An abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous findings of fact.'" *Id.* (citation omitted).

The standard governing the underlying motion for preliminary injunction requires a plaintiff to establish "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. ___, 129 S.Ct. 365, 374 (2008). This Circuit applies the "serious questions" approach to the preliminary injunction standard. Under this approach, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies*, 613 F.3d at ___, slip op. 10855 at 10865.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO FOLLOW A LINE OF BINDING SUPREME COURT CASES, BASING ITS DECISION INSTEAD ON ERRONEOUS LEGAL STANDARDS

A. The United States Commercial Airline Market Is A Relevant Antitrust Market

The rules governing the definition of the relevant market in an antitrust case are well-established. "[C]ommodities reasonably interchangeable by consumers for the same purposes make up [the relevant market]." *United States v. E. I. duPont de Nemours & Co.* (*Cellophane*), 351 U.S. 377, 395 (1956). "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." *Brown Shoe, Co. v. United States*, 370 U.S. 294, 325 (1962). Defining a relevant market is not an end in itself, but rather the means for deducing the effect of the merger on competition within the market or markets identified.

Here, the district court misapprehended and misapplied the *Cellophane-Brown Shoe* rule, erroneously requiring the plaintiffs to demonstrate that every product in the market is a substitute for every other product in the market. The district court stated it this way:

> First, "[t]he 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," *Brown Shoe*, 370 U.S. at 325, and plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami.

I ER 20-21. In other words, the district court held that plaintiffs' market failed because it included products that were not substitutes for one another. But, in fact, the Supreme Court has never demanded such specificity in defining a relevant market, and there is *no* requirement that every product within the market be a substitute for every other product from the perspective of the consumer. This fundamental guiding principle is apparent in almost every Supreme Court decision since the Clayton Act's amendment in 1950.

The earliest Supreme Court decision applying the market definition standard is the 1956 *Cellophane* case, 351 U.S. 377. There, the government alleged that duPont monopolized the cellophane market. *Id.* at 379. DuPont argued it had no monopoly, since the relevant market was not cellophane but "all flexible packaging material." *Id.* The government sought to distinguish the end-uses of the various forms of "flexible wrapping" – such as paper and aluminum foil – which do not serve the same purpose as cellophane, which is "moistureproof." *Id.* at 394, *see id.* at 384. The government argued – just as the district court reasoned here – that only those substitutes which are "substantially fungible with the . . . product" should be included in the market. *Id.* at 394. However, the Supreme Court rejected this proposed rule, holding that "it is [not] a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market." *Id*.

Next, in *Brown Shoe*, 370 U.S. 294, the Supreme Court reiterated the *Cellophane* standard; however, it also established, for the first time, 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.

Brown Shoe, 370 U.S. at 325.

The "outer boundaries of the product market" in *Brown Shoe* consisted of *all* "footwear." 370 U.S. at 326 (holding that submarkets consist of men's, women's, and children's shoes implies per force that the overall market is all footwear). This market included within it men's, women's, and children's shoes – products that plainly do not serve perfectly interchangeable end uses for consumers. For instance, 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 between the product itself and substitutes for it." 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.

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 broadly for purposes of Section 7 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. However, 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. 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 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 *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966), burglar alarms were considered part of the same market as fire alarms because they both served the same purpose of protecting property, even though they are plainly not substitutes for one another. The Supreme Court explained:

> 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.

These cases, all of which were presented to and disregarded by the district court, directly contradict the ruling below that the United States airline market cannot exist because a "flight from San Francisco to Newark" is not a competitive substitute for a flight "from Seattle to Miami." The district court erred by failing to consider and analyze the general purpose of commercial air carriage: the long-distance transportation of passengers. Had the court properly analyzed this product and its "interchangeable" substitutes, it would have considered, and then excluded, all other forms of transportation such as bus, car, rail, or boat. But, by requiring overly-detailed specificity within the airline market, the court abused its discretion and, in fact, violated the Supreme court's direct admonition that "[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.'" *Continental Can*, 378 U.S. at 453 (quoting *Brown Shoe*, 370 U.S. at 326.) The district court's conclusion that United, Continental, American, Delta, US Airways, Southwest and other airlines do not compete against one another in the United States is as unsupportable under the law as it is belied by common sense.

B. The U.S. Airline Industry Is Highly Concentrated, It Is Trending Toward Further Concentration, And The Merged Entity Is Presumptively Illegal

In the same decisions creating the rules for defining relevant markets, the Supreme Court simultaneously established a resolute intolerance for mergers that result in over-concentration of United States markets. The district court here specifically refused to follow these decisions. (I ER 11-13.) Instead, it placed authority in the government's Horizontal Merger Guidelines. As a result, it applied the incorrect legal standard and abused its discretion.

The Supreme Court cases previously cited establish two fundamental themes with respect to merger legality. First, they adamantly strive to prevent any "trend toward concentration," as forcefully explained by the Court in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966):

> 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.

Thus, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers." *Id.* As the Court put it in *Philadelphia Nat'l Bank*, 374 U.S. at 365, n.42, where market "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Second, the cases not only enjoined, but required divestiture, of mergers involving two direct competitors in concentrated industries, even where the increases in market share of the combined entity were *slight*, in some cases, less than 2%. These two fundamental principles clearly establishing the law are echoed through each case.

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 *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. 374 U.S. at 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 almost identical market data as those deemed presumptively illegal in *Philadelphia National Bank*. Just as in that case, the merger here has resulted in the top two airlines (Delta and United/Continental) controlling over 50% of the market, while the top four firms (American and U.S. Airways) control 77%.

In *Alcoa*, 377 U.S. 271, 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.

Continental Can, 378 U.S. 441, concerned the market for glass and metal containers with the following competitive positions: American Can (26.8% market share), Continental Can (21.9%), Owens-Illinois Glass (11.2%), Anchor-Hocking Glass (3.8%), National Can (3.3%) and Hazel-Atlas Glass (3.1%). 378 U.S. at 461, n.11. Some 125 other firms manufactured the remaining 30% of the market units. *Id.* at 445-446 (75 to 90 other firms manufacturing metal containers; 39 other firms manufacturing glass containers). The 2nd largest competitor, Continental Can, acquired the 6th competitor, Hazel-Atlas. The acquisition would have only increased Continental's market share from 21.9% to 25%, and it still would not have become the largest player in the market. Nevertheless, the Supreme Court ordered divestiture. It reasoned that the acquisition not only increased Continental's market share by 14%,[2] it also "reduced from five to four the most significant competitors who might have threatened its dominant position." 378 U.S. at 461. The resulting percentage of the combined firm of 25% "approaches that held presumptively bad" in *Philadelphia National Bank*, "and is almost the same as that involved in [*Alcoa*]." *Id.* Thus, the Court held, "[t]he case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 346). The trend toward concentration and the resultant market shares in the present appeal dwarf those found in *Alcoa*.

In *Von's*, 384 U.S. 270, 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

[2] In this case, the acquisition resulted in United and Continental's market shares almost doubling.

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 firms, including United and Continental, 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.

None of these Supreme Court cases has 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. (II ER 75, 97.) This trend is quickly increasing in pace: in the past year, the then-3rd largest airline, Delta, merged with the then-5th largest airline, Northwest, to create the then-largest airline in the world. (II ER

121.) Furthermore, the current-5th largest airline, Southwest, has announced its intention to merger with the current-7th largest airline, AirTran. (I ER 3, n.2.) Including the merger challenged in this appeal, the top 9 competitors will have concentrated into 6 – controlling a full 90% of the market – in just 24 months. Third, the proposed merger further concentrates the market with an acquisition of major participants: United is the third largest airline in the United States measured by 2009 operating revenue, with 14.2% of the market, while Continental is the fourth largest airline, with 10.7% of the market. (*Id.*) The combined airline, with 25.0% share of the market, is now effectively the largest airline in the world, along with Delta. (*Id.*) (For a graphic representation of the Supreme Court cases discussed here as compared to the market shares in this appeal, see II ER 114-120.)

Of course, the district court could not, and did not, dispute that under these decisions, the merger here should be enjoined. Instead, it identified each of these Supreme Court cases and then specifically declined to follow them, stating that "plaintiffs' proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong." (I ER 13.)

In support of its conclusion, the district court relied on only one Supreme Court decision, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). The district court stated that "*General Dynamics* separately held that market share statistics alone are 'not conclusive indicators of anticompetitive effects.'" (I ER 12 (citing *Gen. Dynamics*, 415 U.S. at 498).) But this out-of-context dictum is easily rebutted.

First, in *General Dynamics*, the Supreme Court never overruled, or even questioned, its earlier decisions. Second, the district court did not quote the entire passage from *General Dynamics*, which states that market share and concentration statistics are "of great importance":

> In *Brown Shoe v. United States*, we cautioned that statistics concerning market share and concentration, *while of great significance*, were not conclusive indicators of anticompetitive effects.

415 U.S. at 498 (emphasis added). Third, *General Dynamics*' discount of the market shares was based on evidence of the "structure, history and probable future" of the coal industry, which included: (1) coal was losing market share to other sources of energy (*id*. at 499); (2) the electrical utility industry was becoming an ever-increasingly important consumer of coal (*id*.); and (3) most important, "nearly all coal" sold to those utilities was under long-term requirements contracts. *Id*. Thus, the market shares were discounted in *General Dynamics* because they were overblown by the utility purchases made under long-term contracts entered into long ago. In direct contrast, here: (1) the airline industry is growing; (Pls.' Ex. 105, ex. 1); (2) it is concentrating at an ever-increasing rate; and (3) there are none of the long-term requirement contracts or other facts present here, as there were in *General Dynamics*, that resulted in Judge Posner distinguishing that case for its "highly unusual facts." *Hospital Corp.*, 807 F.2d at 1385.

Instead of applying the Supreme Court law, the district court instead relied on statements from the Airlines' expert which, in turn, were based on analyses done under tools collected from the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. (I ER 21). Accordingly, the district court reasoned that the national airline market was not cognizable because "when concentration in the airline industry is measured on a national basis, taking into account all LCCs and network carriers, the Herfindahl-Hirschman Index[3] is far below the Merger Guidelines threshold that would trigger DOJ scrutiny." (*Id.*) But private plaintiffs are not required to show that a merger "would trigger DOJ scrutiny," and where the Merger Guidelines conflict with Supreme Court precedent, as they do here, they cease to be even persuasive authority.

The origin of the Merger Guidelines is the 1982 Statement of Federal Trade Commission Concerning Horizontal Mergers, and the Merger Guidelines issued by the U.S. Department of Justice in 1984. In 1992, the two agencies jointly issued the Horizontal Merger Guidelines, which were then revised in 1997. Then, in 2010, the agencies issued their most recent revision.

The Merger Guidelines were never written or intended by the government to be used by courts of law as a substitute for legal precedent. This is manifest in the guidelines themselves. The 1997 revision describes the "purpose" of the guidelines as follows:

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[3] The Herfindahl-Hirschman Index ("HHI") is used by the government to measure market concentration. Concentration is calculated by squaring the sums of the participants' market shares. Thus, the HHI in a market with 5 competitors, each with 20% of the market would be: $20^2+20^2+20^2+20^2+20^2=2000$.

> These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the 'Agency') .... They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers.

U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 0, p. 1 (Apr. 2, 1992 as revised Apr. 8, 1997). Moreover, the 1997 Guidelines state that they "may be revised from time to time as necessary to reflect any significant *changes in enforcement policy* or to clarify aspects of existing policy." *Id.* at 1 n.4 (emphasis added). The 2010 Guidelines issue an almost identical explanation. U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 1, p. 1 (Aug. 19, 2010). Thus, the guidelines merely reflect prosecutorial discretion; they do not even purport to reflect the law. As further indication of this, the occasional guideline revisions are not necessarily grounded in case law development. For instance, until the 2010 Merger Guideline revisions, the government considered an HHI of 1,800 or higher to reflect a "highly concentrated" market that triggered enhanced scrutiny, even a presumption of illegality. 1997 MERGER GUIDELINES, § 1.51, p. 16. However, in 2010, the HHI threshold for presumptive illegality was increased by 40% to 2,500. 2010 MERGER GUIDELINES, § 5.3, p. 19. This drastic change in allowable concentration may reflect a change in the government's prosecution policy, but it is not reflective of any development in the law. Notably, neither the HHI, nor the Merger Guidelines themselves, has ever been adopted by the Supreme Court.

In fact, at least as to their legal concentration thresholds, the Merger Guidelines directly conflict with the Supreme Court cases discussed above. As a result, neither the merger in *Alcoa* or *Continental Can*, for example, would even be challenged under the government's guidelines: the market shares in *Alcoa* would have resulted in an HHI value of only approximately 1,200 in the insulated aluminum conductor market, *Alcoa*, 377 U.S. at 278; while the HHI in the container market analyzed in *Continental Can* would have yielded a pre-merger HHI of, at most, 1,450 and a post-merger HHI of less than 1,600.[4] *Continental Can*, 378 U.S. at 462, n.11. In short, the standards developed by the Supreme Court cases directly conflict with those incorporated by the Merger Guidelines. So, which of these mutually-exclusive standards must a district court apply? Between an internally-created policy statement reflecting governmental prosecutorial discretion – and a line of Supreme Court case law supported by detailed references to Congressional intent – the answer is clear. Where a district court disregards the latter in deference to the former, it has by definition abused its discretion.

[4] In contrast, the post-merger HHI in this case, according to the Airlines' expert, is between approximately 1,900 and 2,450. (Pls.' Ex. 104, Ex. 29.)

III. THE DISTRICT COURT'S ERROR IN REJECTING THE BINDING SUPREME COURT CASES INFECTED ITS ANALYSIS OF PLAINTIFFS' IRREPARABLE HARM

The district court ruled the Plaintiffs failed to prove they would be irreparably harmed by the merger.[5] However, since a plaintiff's harm must be analyzed with respect to a specific relevant market, a properly defined market is prerequisite. Here, since the district court rejected the U.S. airline market, it failed to analyze the Plaintiffs' harm with respect to the correct market. Thus, the court's error in analyzing the Plaintiffs' harm is a result of its refusal to recognize the binding Supreme Court authority.

There are forty-nine plaintiffs in this case, but only four testified at the preliminary injunction hearing. Of those four, three provided lists of leisure flights they had taken in the past five years. According to those lists, Mr. Stensrud took 28 flights on 12 trips; Ms. Brown took 17 flights on 9 trips; and Ms. Robinson took 59 flights on 30 trips. (II ER 131-134.) Thus, these three plaintiffs have flown a

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[5] The Airlines have argued at various times in this proceeding that whatever harm experienced by the plaintiffs is not "irreparable" because it is compensable in money damages. This argument fails to account for the simple legal principle that money damages are not available for *future* threatened injuries. The injunction is necessary here to prevent the merger from causing future harm. 2A PHILLIP E. AREEDA, ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 326, p.21 (3rd ed. 2007) ("one receives damages for the consequences of previous violations and an injunction for threatened future violations, which are never recompensed by the damages award to the extent that the latter covers only the past"). Because there is no remedy at law for future threatened injury, Plaintiffs' harm is irreparable.

total of 104 flights on 51 separate leisure trips or an average of 35 flights on 17 trips in the past five years. Using these numbers to extrapolate an estimate for the total number of flights taken by the entire group of forty-nine plaintiffs in the past five years yields extraordinary figures: 1,715 flights on 833 trips.[6] Or, as stated on an annualized basis, the plaintiffs in this case take 343 leisure flights on 167 trips every year. Each and every one of these plaintiffs either testified or stated in a sworn affidavit that they would continue to use air travel in the future. (I ER 5.)

Notwithstanding that showing, the district court ruled that plaintiffs "failed to demonstrate any irreparable harm as a result of the merger …." (I ER 23.) In support of its conclusion, the court made eight factual findings. However, none of these findings (even if true) can legally support the court's conclusion. Each is irrelevant as a matter of law. The findings are as follows:

(1) None of the plaintiffs flies regularly (I ER 23);

(2) Only one of the four plaintiffs who testified (out of forty-nine total plaintiffs) is likely to fly United or Continental (*id.*);

(3) None of the forty-nine plaintiffs resides near an airport with at least ten percent of the passengers served by United or Continental (*id.*);

(4) Seven of the forty-nine plaintiffs have flown on a United/Continental "overlap route," but only one plaintiff has taken such a flight more than once (*id.*);

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[6] Average of 35 flights and 17 trips multiplied by 49 plaintiffs.

(5) Only one plaintiff has flown or expressed a future intent to fly on one of the "thirteen airport-pairs" (*id.*);

(6) None of the plaintiffs travel regularly for business (*id.*);

(7) None of the plaintiffs, all current or former travel agents or travel agency owners, testified to specific effects the merger would have on their clients (*id.*); and

(8) Each of the plaintiffs who testified had an alternate airport and LCC-option available to them. (*Id.*)

First, six of these eight findings are legally irrelevant because they relate to harms within specific markets that are *narrower* than the legally cognizable U.S. airline market. Thus, Finding No. 3 concerns plaintiffs' proximity to an airport where "at least ten percent" of the passengers are served by the Airlines, and the supporting evidence is paragraph 98 of the Airlines' experts' report. (I ER 23.) However, paragraph 98 of the expert's report states an opinion as to harm in the "plaintiffs' home airport" markets, not harm within the United States airline market. Similarly, Finding No. 4 concerns the frequency of travel over United/Continental "overlap routes" and is supported with reference to paragraph 106 of the expert's report. (*Id.*) That paragraph concerns plaintiffs' harm over specific "city-pair routes," not harm in the U.S. airline market. Finding No. 5 is defective for the same reason; it concerns plaintiffs' harm specific to only "thirteen airport-pairs." Finding No. 6, concerning the frequency of plaintiffs' business travel is also legally irrelevant, since the U.S. airline market includes both business and leisure travel, and the record indicates that plaintiffs' leisure travel is extensive. (II ER 131-134.) Finding No. 7 concerns the merger's effect on Plaintiffs' clients. However, as the district court itself conceded, Plaintiffs' standing in this case is as consumers, not resellers or travel agents. (I ER 22 ("[a]s consumers of airline tickets, then plaintiffs have established standing …").) Finally, Finding No. 8 concerns the availability to Plaintiffs of "alternate airports and LLCs." To the extent the district court relied on this fact to show that Plaintiffs would not be captive to a United/Continental monopoly at their home airport, it again fails to account for the harm Plaintiffs would encounter as consumers of flights throughout the United States.

Second, Finding No. 1 states that "none of the plaintiffs testified to having flown regularly." While this may be technically true (though vague as to "regular"), the documentary evidence proves that Plaintiffs indeed take very regular leisure airplane trips. As calculated above, the forty-nine plaintiffs in this case take a total of approximately 343 leisure flights on 167 trips every year. On average, that comes out to approximately 7 flights and 3.5 trips annually per plaintiff. This, according to the district court, is insufficiently "regular" to demonstrate harm. But, it is difficult to imagine any full-time working American taking more than 3 vacations per year. While this number certainly does not compare to the number of trips taken by business travelers who commute by plane, a finding that 3 annual leisure airplane trips is "de minimus" (I ER 24) would act as a complete legal bar for any leisure airplane traveler seeking to bring suit under Section 7. This cannot be the law. The problem with the district court's Finding No. 1 is that it fails to define the term "regular," and without some benchmark, the finding is literally meaningless. In the presence of such a benchmark – some reasonable standard for leisure airplane travel in the United States – it would seem uncontestable that plaintiffs have established extensive travel habits and certain future travel.

Finally, Finding No. 2 states that only one of four plaintiffs is likely to fly United or Continental. While this fact cuts both ways (that 25% of the plaintiffs are likely to fly United or Continental irrefutably establishes harm under the district court's reasoning), it is nevertheless legally irrelevant. The relevant fact is that Plaintiffs will likely fly on *any* airline in the future. The danger of a merger is not only that it will eliminate direct competition between the two entities and raise the price of air fares on the merged airline. Rather, the danger from anticompetitive mergers is also that through overconcentration it facilitates collusion, even tacit collusion, among the remaining firms in the market, thereby tending to increase prices charged by *every* competitor. A consumer therefore suffers harm from an anticompetitive merger irrespective of the producer from which it purchases.

The district court also found that the balance of equities did not tip in plaintiffs' favor. (I ER 23.) But in its balancing, the district court placed the wrong "harms" on the plaintiffs' side of the scale. Rather than consider the hardship Plaintiffs and the courts would face in trying to unwind a consummated merger later found to be illegal, the district court instead weighed the injuries a plaintiff might later expect from transacting with a merged company – harms like the payment of higher prices for fares. The district court dismissed these harms totally out-of-hand, describing them as so "insufficient[ly] show[n]" that "the Court need not address" the issue at all. (I ER 23.) But, the district court was incorrectly analyzing Plaintiffs' possible future *damages*, not the hardship associated with having to dismantle a multi-billion dollar merger involving tens of thousands of employees.[7]

The district court should have weighed the hardship to plaintiffs of not enjoining a merger before trial – that is, the difficulty the courts and plaintiffs would face in having to *unscramble* a merger later found to be illegal. *Alliance for the Wild Rockies*, 613 F.3d at ___, slip. op. at 10876 ("[o]nce those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost"). Congress itself has identified the monumental hardship of unscrambling an anticompetitive merger, describing a pre-merger injunction as

> often the only effective and realistic remedy against large, illegal mergers – before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2637, 2627. The merger in this case

[7] Of course, even the court's improper balancing of plaintiffs' future damages must be rejected on its own terms, since its logical conclusion – that a group of consumers threatened with paying small increases in prices would never outweigh the cost of enjoining a multi-billion dollar merger – would thwart the Congressional intent that drove the creation of consumer actions under Section 16 of the Clayton Act.

involves "tens of thousands of employees" as well as the substantial comingling of each airline's "capital and technology." (I ER 24.) The hardship in unscrambling such a merger would be substantial.

The Airlines' side of the scale has grown lighter. While their merger has been consummated, they are waiting for final approval from the Department of Transportation, and in the meantime have agreed to operate as separate entities. (Defs.' Ex. 1076; II ER 186 (Dkt. Doc. No. 109-1).) That is, right now, the Airlines have already agreed with the government to indefinitely maintain their entities separate. Plaintiffs seek merely a continuation of the status quo until their claim can be resolved at a trail on the merits.

In sum, the district court's failed analysis of the proper relevant market infected its analysis of the Plaintiffs' harm. None of the factual findings relied on by the court are relevant to a proper anaylsis of the Plaintiffs' harm in the U.S. airline market. Further, by confusing Plaintiffs' potential future harm with the hardship of unscrambling a major merger, the district court failed to properly analyze the balance of hardships, thereby abusing its discretion.

IV. THIS APPEAL PRESENTS A LIVE CONTROVERSY

Airlines have argued this appeal is moot because they have formally consummated the proposed merger. (Defs.-Appellees' Mot. Dismiss Appeal and Opp'n to Emergency Mot. for Inj. 7.) However, the motion below requested an injunction preventing Airlines from not just consummating, but also from "completing," the proposed merger:

> Plaintiffs above-named, by and through their undersigned attorneys, hereby move this Court for an order enjoining defendants above-named, their officers, directors, employees, agents, and all persons acting in concert with them or subject to their direction or control, *from completing and consummating* the proposed merger described in the Complaint herein, pending a final determination by the Court after trial as to whether a permanent injunction should issue, notwithstanding any interim approval by any government or regulatory agency or department.

(II ER 136 (emphasis added).) Although the merger has been formally consummated through the execution of written documents, it will not be fully "completed" – i.e. the operations will not be integrated as a practical matter – for many months. In fact, according to an Order Granting Exemption issued by the Department of Transportation on August 30, 2010, the Airlines represented to the government that, pending a final order on their transfer application, "upon consummation of the transaction, United and Continental will remain separate entities and will operate as separate brands." (Defs.' Ex. 1076; II ER 186 (Dkt. Doc. No. 109-1).) Relying on this representation, the Department of Transportation stated that "[a]s long as Continental and United remain separate entities, should we disapprove the proposed transfer either in whole or in part, United Continental Holdings could divest itself of Continental." *Id.* Thus, until the merger is completed as both a legal and practical matter, this appeal presents a live controversy. *See Alliance for the Wild Rockies*. 613 F.3d at ___, slip op. 10855 at 10864 (appeal not moot where district court refused injunction, but only "49% of the planned logging was completed" at time of oral argument.)

CONCLUSION

The decision of the district court should be reversed with direction to enjoin further completion of the merger pending trial on the merits.

October 29, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to FED.R.APP.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 9,361 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES

No known case related to the instant appeal is currently pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 29, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on October 29, 2010 I served the Excerpts of Record, Volumes I and II for this appeal by overnight delivery or U.S. mail to the following persons:

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Joseph M. Alioto, Jr., certify that this brief is identical to the version submitted electronically on October 29, 2010.

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