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' ANSWERING BRIEF

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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 ten percent or more of the stock of United Continental Holdings, Inc.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court abused its discretion in finding that plaintiffs failed to establish the "national commercial airline industry" as a relevant market in which to analyze the competitive effects of the United/Continental merger, despite the absence of any economic evidence supporting such a market and the record evidence that there is no substitutability between flights to and from different origin and destination cities.

2. Whether the district court abused its discretion in rejecting plaintiffs' assertion that any non-trivial acquisition of a significant rival is per se violative of Section 7 of the Clayton Act.

3. Whether the district court abused its discretion in finding that plaintiffs "failed to demonstrate any irreparable harm as a result of the merger or that the balance of the equities in this case tips at all, let alone sharply, in their favor".

4. Whether an injunction would serve the public interest.

5. Whether plaintiffs' appeal has been mooted by consummation of the merger.

JURISDICTIONAL STATEMENT

Defendants do not dispute the jurisdictional basis of plaintiffs' appeal, except that the appeal has been mooted by consummation of defendants' merger.

STATEMENT OF THE CASE

I. Nature of the Case

This a private antitrust action by forty-nine alleged consumers of commercial air transportation brought pursuant to Sections 7 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 18, 26, seeking to enjoin the merger of defendants UAL and United Air Lines, Inc. (collectively, "United"), and Continental Airlines, Inc. ("Continental").

II. Course of Proceedings

On May 3, 2010, United and Continental announced that they had entered into an Agreement and Plan of Merger. Plaintiffs filed this action on June 29, 2010, seeking to enjoin the merger. On August 9, 2010, plaintiffs filed a motion for preliminary injunction. After extensive expedited discovery, the district court conducted an evidentiary hearing on August 31 and September 1, 2010.

On September 27, 2010, the district court issued an order denying plaintiffs' motion (the "September 27 Order"). On October 1, 2010, United and Continental consummated the merger, as they had previously indicated they would. Later that same day, plaintiffs filed a notice of appeal of the September 27 Order and an emergency motion in this Court for a "hold separate" order pending appeal. On October 6, 2010, the Court denied the "hold separate" motion.

III. Disposition Below

In the September 27 Order, the district court held that under either the four factor test of Winter v. Natural Resources Defense Council, 129 S. Ct. 365, 374 (2008), or the serious questions formulation reaffirmed in Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045, 1049-50 (9th Cir. 2010), plaintiffs "fail[ed] to establish a viable relevant market" within which to analyze the possible anticompetitive effects of the merger. (Excerpts of Record ("ER") 013.) The district court also found no evidence to "suggest[ ] that . . . plaintiffs will be irreparably harmed by the merger or, if so, that the balance of hardships would tip at all in their favor". (Id.)

After considering the line of Supreme Court cases from the 1950s and 1960s upon which plaintiffs relied, the district court rejected plaintiffs' proposed legal standard that "any non-trivial acquisition of a significant rival is per se violative of the Clayton Act". (Id.) Instead, the district court ruled, plaintiffs must "first show the existence of a relevant market and then establish that the pending acquisition is reasonably likely to cause anticompetitive effects in that market". (ER 009.)

The district court then considered the three purported relevant markets offered by plaintiffs: (a) a network carrier market catering to business travelers; (b) a market composed of thirteen airport pair routes in which United and

Continental offered overlapping service (e.g., San Francisco International Airport to Newark Liberty International Airport); and (c) a national airline industry market. (ER 014-022.) Noting that plaintiffs' expert, Professor Darren Bush, had "limited professional background" in economics, had conducted no "relevant quantitative or other sufficiently thorough analysis" and gave "largely unpersuasive hearing testimony", the district court accorded Professor Bush's testimony little weight. (ER 008.)

Plaintiffs contended that the network carrier market for business travelers contained only five "network carriers"—i.e., United, Continental, Delta Airlines, American Airlines and US Airways—and did not include any low cost carriers ("LCCs").[1] The district court rejected that market, finding that "the evidence presented demonstrates that LCCs do in fact compete with network carriers for the business traveler and should be included in that market". (ER 014.) Citing the testimony of defendants' expert, Dr. Daniel Rubinfeld, the district court explained that "United and Continental themselves each face significant competition from LCCs, with sixty-six percent of United's domestic passengers and seventy-one percent of Continental's domestic passengers traveling on routes

[1] The term LCCs refers to airlines such as jetBlue, Southwest, AirTran, Virgin America, Spirit, Allegiant, Frontier and Sun Country Airlines, among others.

where at least one LCC has ten percent or more market share". (ER 015; Supplemental Excerpts of Record ("SER") 362 (Rubinfeld).)

The district court also relied upon testimony from various fact witnesses showing that LCCs compete for business travelers and discipline prices charged by network carriers. (ER 016-017.) That testimony was given both by defendants' CEOs (SER 028:16-17, 031:6-9, 033:12-034:7, 135-136, 287-295 (Tilton); SER 011:24-012:5, 013:11-14 (Smisek)) and by plaintiffs themselves (e.g., SER 107:9-111:7 (Malaney) (entry of three LCCs in Grand Rapids, Michigan, caused a major decline in fares offered by network carriers)). Hence, the district court concluded, "network carriers catering to business passengers simply does not fly as a viable relevant geographic and product market for purposes of a Section 7 analysis". (ER 017.)

Similarly, the district court rejected plaintiffs' proposed airport pairs relevant market. (ER 017-020.) The district court found Professor Bush's testimony on that market unpersuasive and unsupported by any "economic or other analysis". (ER 018-019.) Additionally, the district court relied upon the fact that antitrust regulators, the Government Accountability Office ("GAO") and the courts all use city pairs, not airport pairs, as the preferred method of analyzing competition in the airline industry. (ER 017-020.)

In an airport pairs analysis, each individual airport is a beginning and end point and other neighboring airports are not considered to be reasonable alternatives. In other words, for a passenger traveling from San Francisco, California, to the New York metropolitan area, a flight from San Francisco International Airport (SFO) to Newark Liberty International Airport (EWR) would not be considered an alternative to a flight from SFO to John F. Kennedy International Airport (JFK). In contrast, a city pairs analysis accounts for competition from local airports, so that, in the example above, SFO, EWR and JFK—along with Oakland International Airport (OAK) (which is a local alternative to SFO) and LaGuardia (which is a local alternative to EWR and JFK)—are all in the same relevant market.

City pairs rather than airport pairs as the relevant market was also, in fact, supported by plaintiffs' own conduct. As the district court explained:

> Plaintiff Robinson testified that she uses alternatives to Palm Beach International Airport (the airport closest to her), even flying to the hearing in San Francisco from Fort Lauderdale-Hollywood International Airport on Virgin America (an LCC) because she was able to get a nonstop flight. [(SER 102:8-15.)] Similarly, both Ms. Brown and Mr. Malaney testified that they book business travelers into alternative airports in certain metropolitan regions (such as New York, Phoenix and Orlando). [(SER 038:8-21 (Brown); SER 109:14-18, 113:12-114:8 (Malaney).)] The upshot of this is that plaintiffs' own experiences are consistent with the position taken by defendants—that competition from adjacent airports disciplines pricing and must be considered when defining the relevant market.

(ER 020.)

Finally, the district court rejected plaintiffs' proposed national airline industry market:

> [P]laintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami. Indeed, while Professor Bush did no economic modeling to support a national market, Dr. Rubinfeld testified that, not only is a national market inappropriate in that it fails to examine individual markets involving passenger origins and destinations, but when concentration in the airline industry is measured on a national basis, taking into account all LCCs and network carriers, the Herfindahl-Hirschman Index is far below the Merger Guidelines threshold that would trigger DOJ scrutiny. [(SER 052:2-16, 455 (Rubinfeld); SER 092:9-11 (Bush))]; see Merger Guidelines § 5.3.

(ER 021; footnote omitted.)

The district court further found that any potential adverse competitive impact in the proposed national market would be quickly dissipated by "the fact that LCCs have continued to demonstrate an ability successfully to enter new routes, increase market share and discipline prices". (Id.)

With plaintiffs having failed to establish any of their three putative relevant markets, the district court concluded that "plaintiffs cannot show a likelihood of success on, or even a serious question going to, the merits of their claim". (Id.) The district court then found that plaintiffs had not satisfied their burden on two of the remaining prerequisites for injunctive relief: irreparable harm and a balance of the hardships in their favor. The district court held that, on the evidence presented, plaintiffs "failed to demonstrate any irreparable harm as a

result of the merger or that the balance of the equities in this case tips at all, let alone sharply, in their favor". (ER 023.)

The district court found that plaintiffs were not active participants in the two proposed relevant markets upon which they mainly focused—i.e., the market consisting of network carriers for business travelers and the thirteen airport pairs markets. No plaintiff traveled regularly for business, and, in the isolated instances when a plaintiff did, he or she often chose an LCC rather than a network carrier. (ER 016-017, 023-024.) "[A]ll of the plaintiffs who testified stated that they had alternate airports and LCCs available to them." (ER 023.) Moreover, only one of the forty-nine plaintiffs had ever flown any of the thirteen airport pair routes (and that was only the SFO to EWR route) or indicated any intention to do so in the future. (Id.)

More generally, the district court pointed out that none of the plaintiffs testified to having flown regularly in the past and none resided near an airport where United and Continental both serve at least ten percent of passengers. (Id.) The district court found that "[w]hile each plaintiff provided an affidavit stating an unformed hope of future air travel, this speculative and *de minim[i]s* injury (assuming there would be injury) is insufficient to establish irreparable harm or tip the scale in plaintiffs' favor". (ER 024.) Consequently, the district court concluded, although plaintiffs argued that the merger "will adversely affect

consumer choice and purchasing power", they failed to "establish that these alleged effects will be personal to them". (Id.) "Simply put, plaintiffs have not demonstrated in any way that they themselves will suffer any specific harm were preliminary relief denied." (Id.)

Accordingly, the district court held that "just as plaintiffs failed to satisfy their burden on the merits, they do not approach what is required to prove irreparable harm or a balancing of the equities in their favor". (ER 025.)

STATEMENT OF FACTS

I. The Airline Industry Is Vigorously Competitive.

A. The Long History of Price Declines.

Since deregulation in 1978 (and even after the Delta/Northwest merger in 2008), competition in the airline industry has intensified and fares have steadily declined. (SER 078:2-3 (Bush) ("Airfares have trended on the decline since—since deregulation, for a multitude of reasons"); SER 044:14-20 (Rubinfeld) ("[I]t is a highly-competitive industry, and it's one which has gotten more and more competitive over the last decade or two, ever since deregulation in 1978. And, the increased competition is due to a number of factors, but probably most important has been the growth of the low-cost carriers"); SER 045:12-21 (Rubinfeld) (fares have declined since the 2008 Delta/Northwest merger).) Indeed,

over the past two decades, domestic airfares have dropped by more than forty percent. (SER 136, 299 (Tilton); SER 419 (Rubinfeld).)

Also since deregulation, capacity has increased and airline yields have decreased (see SER 417-419 (Rubinfeld)), and the industry has been characterized by rapid LCC entry into new routes. (See SER 423-424, 452, 576-577, 584 (Rubinfeld); SER 304 (Knight) ("In addition to the existing competitors on these routes, there are a number of potential entrants for many of these routes, which further constrains pricing. For example, both jetBlue and Virgin America currently serve several destinations from Los Angeles and San Francisco and could enter the routes from those cities to Houston as they expand their networks. Similarly, Alaska Airlines currently serves several routes from the West Coast to Hawaii and is a potential competitor on the route from Los Angeles to Honolulu").) The price transparency afforded by the internet has enabled consumers to compare carriers' prices easily and directly, which exerts additional pressure on carriers to match the lower prices of their competitors. (SER 015:2-15 (Smisek); see also SER 014:14-23 (Smisek) (LCCs offer "brutal" competition).)

There is nothing in the record to suggest that the merger of United and Continental would or could reverse that trend. For example, plaintiffs' expert, Professor Bush, testified that he did no work that would indicate that, as a result of the merger, a single LCC would exit from a single route. Nor did he have any

information indicating that a single airline would exit the market altogether. (See SER 587:15-588:21.) Nor has he seen any information or done any analysis that would suggest that capacity would decline or fares on any route would increase as a result of the merger. (SER 606:23-607:5.) In other words, there is no plausible inference that the merger would cause any negative impact upon competition or consumer welfare.

B. Competition From LCCs.

LCCs have grown substantially over the past decade while network carriers have shrunk. (See SER 135, 287 (Tilton) ("The increased competition from LCCs has been dramatic as they have experienced tremendous growth over the past decade. Indeed, as depicted in Exhibit 3, the LCCs' share of domestic passengers has nearly doubled in the past 12 years, from 19.9% in 1998 to 37.7% in 2009."); SER 089:10-13 (Bush) (there has been numerous LCC entry); SER 342-343, 420-422 (Rubinfeld).) LCCs have benefited from a generally lower cost structure than network carriers, which has allowed LCCs to compete vigorously on price. (SER 439 (Rubinfeld) (comparing operating expenses for the top ten carriers).) LCCs now compete for eighty percent of all domestic travelers; and more than eighty-five percent of passengers traveling nonstop on United or Continental currently have an LCC option. (SER 135, 291, 293 (Tilton).)

LCCs have been able to enter new markets and sustain entry much more successfully than network carriers over the last ten years. (SER 343-344 (Rubinfeld); see also SER 619.) In 2000, LCCs accounted for only twenty-two percent of air passengers in the United States; in the decade since, that number has grown to thirty-eight percent, and Southwest alone now carries more domestic passengers each year—by a significant margin—than any other U.S. airline. (See SER 420 (Rubinfeld); SER 289 (Tilton).)

The share of passengers traveling on routes where LCCs compete has increased from forty-six percent at the beginning of 2000 to approximately seventy percent at the end of 2009. (SER 342-343, 422 (Rubinfeld).) LCCs are present at every United and Continental hub and at adjacent airports that compete directly with those hubs. (SER 125 (Smisek); SER 135, 295 (Tilton); SER 084:1-13, 086:22-25 (Bush) (LCCs fly to defendants' hub cities).)

The merger will not hinder LCC competition in the slightest. (SER 064:23-25 (Rubinfeld) ("when there's a route or set of routes that are offering a profit opportunity, I think smaller networks can definitely compete"); SER 028:24-029:1 (Tilton) ("I agree with Gary Kelly, the CEO of Southwest, when he said nobody should worry about Southwest in the event of a United-Continental merger").) This continuing competitive pressure from LCCs makes it unlikely that the merger will have any unilateral anticompetitive effects. (SER

046:6-11 (Rubinfeld) ("my expectation is we will continue to see competitive pressure, particularly from low-cost carriers. Q: Does that suggest to you that it's unlikely that there would be a unilateral effect as a result of this merger? A: It does."); SER 013:11-14 (Smisek) ("My own belief is that the LCCs are . . . a very disciplining factor on price and that the majority of the decrease in fares is [the] result of low-cost competitor competition").) Nor is there likely to be an increase in "coordinated effects" as a result of the merger. (SER 072:14-21 (Rubinfeld) ("[T]he industry is so volatile, and so varied in terms of ways firms compete, that I don't see coordination as a problem at all. If it was ever a problem, it would have been a problem ten or 20 years ago, where the industry was a much simpler industry. Now it's a very complex industry, with so much and [such] variety of competition, I just don't see any possibility of collusion occurring as a result of this merger.").)

C. Lack of Power Over Price.

Because the networks of United and Continental are almost entirely complementary, combining them will not significantly increase concentration. More than eight hundred nonstop city pair routes will be served by the merged carrier; only fifteen are currently overlapping routes—and in each of those overlapping routes there are other competitors besides defendants. (SER 304 (Knight).) Of the current connecting city pair routes that are overlapping, only

three (i.e., Steamboat Springs/Hayden, CO, to Houston; Montrose/Delta, CO, to New York/Newark; and Houston to Montrose/Delta, CO) will go from two competitors to one following the merger—which is far fewer than the sixty-six connecting routes that went from two competitors to one after the Delta/Northwest merger. (SER 304-305 (Knight).) And even on those routes, if the merger did result in a substantial increase in fares, other airlines, such as the LCCs, would be poised to enter and put downward pressure on price. As Continental's CEO (Jeffery Smisek) testified, entry into any market is as easy as pointing an airplane in that direction. (SER 010:2-6; see also SER 343-344, 365, 377-378, 423-424 (Rubinfeld) (describing new entry); see also SER 107:12-112:10 (Malaney) (testifying about significant airfare declines in Grand Rapids after LCC entry).) Thus, no such fare increase would be sustainable.

The bottom line is that, because of the lack of significant overlapping routes and the presence of intense LCC competition (both actual and potential) on all routes, there is no chance that the merger will give the combined airline power to raise prices or to sustain a fare increase in any market. As Mr. Smisek explained:

> Q. If the merger proceeds, will the combined entity have the power to raise prices?
>
> …

> A. …[T]his is a very competitive business. . . . [W]e're effectively price-takers. We can't unilaterally increase a price. If we were to do that, you very quickly would see customer book-away, because of the transparency of the market and the fact that consumers are, in fact, quite sensitive. As a result, we don't have the ability today, and we won't have that ability after the merger.

(SER 019:14-25.)[2]

United's CEO (Glenn Tilton) agreed. He testified that "the low-cost carriers set the price" and that "after the merger" the merged company will not "have the power to increase price in any market". (SER 028:15-17, 031:6-9; see also SER 033:12-24.) He testified that it is not the case "that market concentration in this industry actually results in pricing power" or that "pricing power comes from network consolidation". (SER 027:18-20.)

Dr. Rubinfeld summarized the situation as follows:

> [T]here's relatively little overlap, which is where you would normally be concerned about a competitive problem. And where there is overlap in those city pairs, there is very substantial competition, both

[2] See also SER 025:18-026:8 (Smisek) (when Continental has attempted to increase fares, "unless competitors as well match that fare, we very rapidly have bookings go away from us and we have to withdraw that price increase. THE COURT: Do the larger carriers … [such as] Delta/Northwest … have more ability to test the marketability of a price than the smaller carriers? THE WITNESS: I don't think so, certainly as a result of the merger, because you have such potent disciplining on the market by the low-cost competitors. If … Continental[] would want to raise a fare by $5 [i]n a Southwest-competitive market, if Southwest doesn't match it, they'll take . . . a significant amount [of Continental's customers] …. [W]hatever benefit we get from the bookings at $5 more, we forfeit significantly more than that in book-away.").

> from existing carriers that we call legacy carriers, or low-cost airlines, or other carriers.
>
> And when you put all that together, I just do not see even any real possibility of a problem.

(SER 070:8-14.)

II. Rationale for the Merger.

The CEOs of both United and Continental testified that the merger is essential to their airlines' long-term success in an increasingly competitive domestic and global aviation industry. (SER 131 (Tilton); SER 121 (Smisek).) Both CEOs testified that the merger will provide for a more financially stable company better able to withstand economic shocks (such as the 9/11 terrorist attacks, surges in the price of fuel and recessionary economies). (SER 133 (Tilton); SER 121-122 (Smisek).) A more financially stable company will also be better able to provide secure employment for its more than 80,000 employees, maintain and expand its networks (including its service to underserved small communities) and generate economic returns that will foster capital reinvestment. (SER 131-132 (Tilton); SER 121-123, 127 (Smisek).)

Professor Bush conceded that the merger will allow United and Continental to achieve benefits that they could not achieve on a standalone basis. (SER 604:16-606:13 (Bush).) For instance, as a merged entity, the airlines will integrate and optimize their fleets—enabling them to use the right sized planes on the right routes at the right times. The merger will also allow a fully-rationalized

schedule—that is, scheduling flight frequency on particular routes to meet consumer demand most efficiently. (SER 349, 353-354 (Rubinfeld); SER 303-305 (Knight).) In addition, the merger will permit the most efficient allocation of seat inventory, a single labor agreement for unionized employees, elimination of corporate redundancies and integration of purchasing organizations. (SER 347, 353-354 (Rubinfeld); SER 307-317 (Knight).)

The combination of United and Continental's highly complementary route structures will provide enormous benefits to consumers, including service to approximately 347 worldwide destinations, 148 of which are small communities or small metropolitan areas (SER 351 (Rubinfeld)) that have suffered reduced service since 2000 (SER 126-127 (Smisek)). Of those destinations, 116 will be newly available to United or Continental customers as a result of the merger (and, of those, ninety-three are small communities). (SER 302-303 (Knight); SER 600:20-601:6 (Bush).) The merger will create more than one thousand new online connections (i.e., connecting flights operated and marketed by a single carrier) and, as Professor Bush conceded, will enable service on twenty-five entirely new routes. (SER 590:24-591:14 (Bush); SER 303-304 (Knight).)

Those significant enhancements will provide travelers with an extremely appealing airline. Using "quality of service" (or "QSI") modeling accepted by the Department of Justice ("DOJ") (see SER 349, 357 (Rubinfeld)),

and a QSI model employed in the ordinary course by United (SER 355 (Rubinfeld)), defendants' expert, Dr. Rubinfeld, estimated that the merger will yield more than $400 million in annual benefits to consumers on domestic routes and additional consumer benefits on international routes (SER 348). As Dr. Rubinfeld explained, "the improvement in quality at existing fare levels is appropriately described as a reduction in 'quality adjusted fares'". (Id.)

III. Approval and Consummation of the Merger.

On August 27, 2010, the DOJ publicly announced clearance of the merger. After "conduct[ing] a thorough investigation", the DOJ found that the "proposed merger would combine the airlines' largely complementary networks, which would result in overlap on a limited number of routes where United and Continental offer competing nonstop service". (SER 646.) In other words, after reviewing the millions of pages of documents and gigabytes of data produced by defendants and after meeting with United and Continental on numerous occasions, the DOJ concluded—contrary to what plaintiffs are claiming in this lawsuit and consistent with defendants' position—that because United and Continental have highly complementary networks and few overlapping nonstop routes, there will not be a substantial lessening of competition as a result of the merger. Every other regulatory authority that scrutinized the merger (including the Department of

Transportation ("DOT"), the European Commission and other foreign competition bodies) cleared it as well. (See SER 620-621, 622-640, 647-672.)

On October 1, 2010, four days after the district court denied plaintiffs' preliminary injunction motion, United and Continental consummated the merger. As of that date, Continental's CEO became CEO of the combined entity. (SER 009:3-5 (Smisek).) Since then, a number of other management positions have been consolidated and the process of combining the carriers' operations, systems and workforces is well underway.

SUMMARY OF ARGUMENT

Plaintiffs are appealing a case that is fundamentally different from the one that they tried in the district court. There, they argued principally for two relevant markets—i.e., a market consisting of network carriers catering to business travelers and a market comprised of thirteen airport pairs where United and Continental offered overlapping service. Now, having thrown those two markets over the side, they argue that the appropriate relevant market is the "national" airline market. But having offered no facts or economic data to support such a market in the district court—indeed, having totally ignored it in their expert submissions and having made only passing reference to it in their post-hearing filing—plaintiffs can point this Court to nothing to show that the district court abused its discretion in rejecting a "national" market.

Plaintiffs' main argument is that a series of Supreme Court cases from the 1950s and 1960s support their putative "national" market. But the cases do no such thing. In fact, they eviscerate both plaintiffs' claim that there is a viable "national" relevant market and plaintiffs' contention that the United /Continental merger threatens substantially to lessen competition in that alleged market.

For example, just as in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), men's shoes did not compete with women's shoes and neither men's nor women's shoes competed with children's shoes—which meant that each type of shoe was in a different relevant market, id. at 326—so too here, as the district court found, a flight from San Francisco to Newark does not compete with a flight from Seattle to Miami. That means that the two flights are in different markets—rather than a single "national" market.

And just as in Brown Shoe the Supreme Court found 110 local geographic markets because it was within those local markets that "the most intense and important competition" occurs, id. at 337-39, so too here, as the district court found, "the most intense and important competition" for passengers wanting to fly from San Francisco to Newark cannot possibly come from flights that go from Seattle to Miami. For that reason too the flights are in different relevant markets—and there cannot be a single "national" market. The district court did not

abuse its discretion—or disregard Supreme Court precedent—in so holding, and plaintiffs cannot demonstrate otherwise.

Likewise, plaintiffs fail to raise a serious question on the substantial lessening of competition element of their Section 7 claim. Plaintiffs rely entirely upon a per se market share test to show alleged anticompetitive effects and argue that "any non-trivial acquisition of a significant rival is per se violative of the Clayton Act". (Opening Br. at 7.) But that is not the law—and the Supreme Court cases that plaintiffs cite prove it.

For example, the Supreme Court in Brown Shoe observed that Section 7 analysis "reflects a conscious avoidance of exclusively mathematical tests", 370 U.S. at 321 n.36, and emphasized "the relevance and importance of economic data" in assessing competitive effects within industry frameworks that will be "almost inevitably unique in every case", id. at 322 n.38. Similarly, in United States v. Continental Can Co., 378 U.S. 441, 458 (1964), the Supreme Court held that "judgment under Section 7 is not to be made by any single qualitative or quantitative test" but rather "[t]he merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future".

Given their single-minded reliance upon market share, plaintiffs offered no economic data in the district court of the type that the Supreme Court

has held essential to a Section 7 competitive effects analysis. And given their almost total failure below to address the so-called "national" market that they now press so vigorously in this Court, they certainly offered no such economic data (or any other competition-related evidence, for that matter) on the putative "national" market. That lacuna dooms their ability to establish a serious question on this issue.

Plaintiffs also fail to carry their burden on the other elements required for preliminary relief. They do not show that the district court abused its discretion in finding a lack of irreparable harm. They do not dispute that the gravamen of their claim is that fares will increase as a result of the merger—an alleged harm that would be fully compensable by money damages and hence cannot be irreparable. Nor do they dispute that these particular forty-nine plaintiffs can avoid any adverse impact from the merger (assuming there would be such an impact) by choosing to fly on LCCs or from alternative, substitutable airports.

Nor can plaintiffs establish that an injunction would be in the public interest. In fact, just the opposite. If the merger were enjoined, the flying public would lose the substantial benefits of the expanded networks, the improved and more efficient operations, the better scheduling and the more efficient allocation of inventory and resources that the merger will provide.

Finally, on top of all the flaws in plaintiffs' case discussed above, their appeal should be dismissed as moot. The act sought to be enjoined—i.e., the merger of United and Continental—has already occurred. It happened four days after the district court entered its order denying plaintiffs' motion—during which time plaintiffs neither sought a stay nor filed a notice of appeal. As a result, there is nothing left for this Court to do.

ARGUMENT

I. STANDARD OF REVIEW.

"A preliminary injunction is an extraordinary remedy never awarded as of right." Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045, 1049 (9th Cir. 2010) ("Alliance") (quotation marks omitted). To secure a preliminary injunction, plaintiffs had to demonstrate in the district court: (a) that they are likely to succeed on the merits of their Section 7 claim; (b) that they are likely to suffer irreparable harm in the absence of preliminary relief; (c) that the balance of equities tips in their favor; and (d) that an injunction is in the public interest. Id. In order to prevail on this appeal, 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 and its factual findings are not clearly erroneous, this Court should not find an abuse of

discretion except in the limited circumstance where "the district court reaches 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.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Failed To Raise A Serious Question That "The United States Commercial Airline Market" Is A Proper Relevant Market.

1. The standard for defining a relevant market.

The need to define a proper relevant market—i.e., a product market and a geographic market within which to measure a merger's likely competitive effect—is a "necessary predicate" to a Section 7 claim. Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978); see also, e.g., United States v. Gen. Dynamics Corp., 415 U.S. 486, 510 (1974); California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) ("[t]o establish a prima facie case under Section 7 of the Clayton Act, a plaintiff must first define the relevant market"); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974). Plaintiffs failed to satisfy that requirement. Indeed, they did not even raise a serious question that "the United States commercial airlines market" (or "national" market) is a proper relevant market.

In defining a relevant product market, "the outer boundaries are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it". United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1119 (N.D. Cal. 2004) (quoting Brown Shoe, 370 U.S. at 325). "[R]easonable interchangeability of use" refers to "products [that] have reasonable interchangeability based upon price, use and qualities", 331 F. Supp. 2d at 1131 (quotation marks omitted), whereas "cross-elasticity of demand" is "the extent to which purchasers will accept substitute products in the event of price fluctuations and other changes", 62B Am. Jur. 2d Private Franchise Contracts § 72 (2010); see also United States v. Syufy Enters., 712 F. Supp. 1386, 1398-99 (N.D. Cal. 1989) ("In analyzing cross elasticity of demand in this case, the Court must decide if consumers would choose to view motion pictures on home video, cable television, pay-per-view television, or as sub-run motion pictures rather than as first-run motion pictures if Syufy were to increase the prices it charged consumers for first- run pictures").

In addition to defining a relevant product market, plaintiffs also had "the burden of proving the proper geographic market in which to analyze the competitive effects of the proposed merger". Sutter Health, 130 F. Supp. 2d at 1120 (citing United States v. Conn. Nat'l Bank, 418 U.S. 656, 669 (1974)). "The proper geographic market is that geographic area to which consumers can

practically turn for alternative sources of the product and in which the antitrust defendants face competition". Sutter Health, 130 F. Supp. 2d at 1120 (quotation marks omitted). "A determination of the proper geographic market must be based on the 'commercial realities of the industry,' and therefore, must involve a dynamic as opposed to static analysis of 'where consumers could practicably go, not on where they actually go'". Id. (citing Brown Shoe, 370 U.S. at 336 and FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995)).[3]

2. Plaintiffs' purported "national" market has no support in the record.

In the district court, plaintiffs focused almost exclusively upon the airport pairs market and the market consisting of network carriers for business travelers. In neither his main report nor his rebuttal report did Professor Bush even mention a "national" airline market. Similarly, plaintiffs failed to mention a "national" market in the pre-hearing reply brief that they submitted the day before the evidentiary hearing. When the district court asked plaintiffs' counsel point blank to clarify whether he was advocating such a market (SER 003:1-15 (Pltfs. Opening Stmt.)), he spent six transcript pages wandering through more than a

[3] Plaintiffs' brief refers only to the standard for defining the relevant product market and ignores the need to define a relevant geographic market. (Opening Br. at 11.) In any event, the two concepts converge to some extent in the airline industry context (see O'Connell infra p. 29), and the distinction between them does not alter the reasons why plaintiffs' alleged "national" market fails.

dozen potential relevant markets—none of which was a "national" market. (SER 003:1-008:25.)

Only after Professor Bush was pressed again by the district court during cross examination at the hearing did he—reluctantly—testify about a national market. (SER 091:3-092:11.)[4] But even then, the market that he described was not the one for which plaintiffs argue on appeal. It included only network carriers—i.e., United, Continental, Delta, American and US Airways—but not LCCs.[5] Moreover, Professor Bush conceded that he had done no economic modeling to support even that market. (SER 092:9-11.) And he never offered any testimony to support a supposed market consisting of all "United States commercial airlines" or the "airline industry as a whole". Reflecting the fact that

[4] [Prof. Bush]: Whether we call that a national market, Your Honor, I—I don't know what 'national' means. But it is a competition based upon networks.

. . .

THE COURT: Correct. What's the relevant geographic market, from an economic perspective?

THE WITNESS: Networks would be competing in the United States.

(SER 091:21-092:7 (emphasis added).)

[5] Q. You also mentioned in your testimony with Counselor that you were offering an opinion that there was a—some sort of national market for network carriers. Do you remember that?

A. I don't recall using the word "national". I tend to use that there is a—there is a market for—there is a network, a market for network competition. . . . Whether we call that a national market, Your Honor, I—I don't know what "national" means. But it is a competition based upon networks.

(SER 091:3-23 (emphasis added).)

plaintiffs did not take such a market seriously in the district court, they spent less than one page in their forty-page post-hearing brief discussing it. (SER 673-674 (Pltfs. Post Hearing Mem.).)

Before this Court, plaintiffs have totally switched gears. They have abandoned the two markets upon which they spent the vast bulk of their time below—i.e., the network carrier market catering to business travelers and the airport pairs market. Their throw-away market in the district court has now become their one and only supposed relevant market in this Court. However, they offer no record evidence to support such a market—because there is none. They did not even attempt to make a record on that market below. Professor Bush said nothing about it in his expert witness reports and did not testify about it at the hearing. Indeed, such a market makes no sense. As defendants' expert, Dr. Rubinfeld, explained:

> [W]hen you're thinking about possible competitive effects, you want to talk about markets in which consumers might potentially be injured. And that would be looking at where they're flying from, and where they want to fly to. And so, you wouldn't get at this . . . by simply talking at an aggregate level about a single market. You would want to talk about individual markets involving origins and destinations.

(SER 052:8-16.)

3. Plaintiffs' purported "national" market is contrary to the approach of regulators, economists and courts in analyzing competitive issues in the airline industry.

Plaintiffs argue that, despite a lack of evidentiary basis in the record for their "national" market, the market is supported by "common sense". (Opening Br. at 17.) But whose "common sense" supports it is never identified—which is not surprising given that plaintiffs' purported "common sense" is flatly inconsistent with the way competition issues in the airline industry are analyzed by regulators, economists and the courts. Although airport pairs are occasionally mentioned in these analyses, the district court correctly observed that the overwhelming focus is on city pairs. (ER 017-018.)

As then Deputy Assistant Attorney General James O'Connell explained in a May 2008 statement before the House Subcommittee on Aviation: "In airline mergers, the definitions of product and geographic market converge: relevant airline markets are likely to consist of scheduled passenger airline service between a point of origin and a point of destination, generally referred to as city pairs."[6] When Deputy Assistant Attorney General J. Bruce McDonald made a similar point in a November 2005 speech, he specifically rejected the "national"

[6] James O'Connell, Deputy Asst. Atty Gen., Antitrust Div., U.S. Dep't of Justice, Statement Before the Subcommittee on Aviation, at 7 (May 14, 2008), available at http://www.justice.gov/atr/public/testimony/233151.pdf (emphasis added).

market that plaintiffs now posit: "The so-called 'relevant market' in which we evaluate whether a particular merger will lessen competition is not the whole industry. Rather, we have to look at the markets in which passengers buy air travel." Mr. McDonald stated that "[i]t is competition in particular city pair markets that is relevant to competition for passengers" and in "[r]eviewing any particular merger we first identify the city pairs in which the merging carriers both provide service."[7] Even the GAO report upon which plaintiffs relied to argue for an airport pairs market in the district court acknowledged that "[i]t is generally preferable, time permitting, to assess city-pair, rather than airport-pair, changes in competition". (ER 087.) Nowhere did the GAO report even hint that an appropriate relevant market for air travel was "national" in scope.

Dr. Rubinfeld testified that economists likewise look to city pair markets when analyzing competitive dynamics in the airline industry. He made the point that "[t]he conclusion that city pairs are generally the right way to look at relevant markets is not simply based on" his own analysis, but it is also "based on analysis by a lot of top economists who really study airlines". (SER 049:11-14.) See, e.g., Steven A. Morrison, Actual, Adjacent and Potential Competition:

[7] J. Bruce McDonald, Deputy Ass. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust For Airlines, at 3-4 (Nov. 3, 2005), available at http://www.justice.gov/atr/public/speeches/217987.pdf (emphasis added).

Estimating the Full Effect of Southwest Airlines, 35 J. of Transport Econ. & Pol'y 239 (2001) (finding that the presence of Southwest Airlines had a significant fare impact, even where Southwest served a particular route from a neighboring airport in the same city pair). Dr. Rubinfeld offered unrebutted testimony that plaintiffs' proposed "national" market has no "relevance or meaning" for purposes of analyzing competitive issues in the airline industry. (SER 058:15-19.)

Courts that have considered the issue also have employed city pairs in analyzing the airline industry's competitive dynamics. For example, in In re Northwest Airlines Corp. Antitrust Litigation, 197 F. Supp. 2d 908, 915 (E.D. Mich. 2002), the court admitted expert testimony based upon city pairs on the ground that city pair markets were commonly used as a frame of reference in evaluating the airline industry and comported with consumer behavior when purchasing air travel. See also United States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003) (analyzing allegations of predatory pricing in certain city pairs and airport pairs).

Plaintiffs offer nothing to counter this uniform and consistent rejection of their proposed "national" market—because there is nothing.

4. The Supreme Court cases cited by plaintiffs undermine their purported "national" market.

The Supreme Court cases upon which plaintiffs critically rely also undermine their proposed "national" market. For example, plaintiffs argue that a

"national" airline market is supported by the Supreme Court's decision in Brown Shoe, where, plaintiffs assert, the Supreme Court held that the product market "consisted of all 'footwear'" and "included within it men's, women's, and children's shoes—products that plainly do not serve perfectly interchangeable end uses for consumers". (Opening Br. at 12 (citing 370 U.S. at 326) (emphasis in original).) That description of Brown Shoe is flat out wrong—and the very page from the Brown Shoe opinion that plaintiffs cite actually disproves their contention.

The Supreme Court did not find a relevant market consisting of "all footwear", but rather held that there were three separate and distinct relevant product markets—i.e., one for "men's" shoes, one for "women's" shoes and one for "children's" shoes. 370 U.S. at 326; see also id. at 336 (holding that those same lines of commerce constitute the relevant markets for purposes of assessing the "horizontal" aspects of the merger). The Court explained that "[t]hese product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers". Id. at 326.

Thus, plaintiffs are incorrect in asserting that, in Brown Shoe, "the Court defined the overall market with respect to the broad, general purpose served

by shoes—to cover and/or protect the feet". (Opening Br. at 13.) The Court did no such thing. Nothing remotely like this sort of "broad, general purpose" approach appears anywhere in the Brown Shoe opinion—and plaintiffs cite nothing to support it. Nor is there anything in Brown Shoe that would support plaintiffs' (erroneous) contention that a "national" airline market is cognizable because "flights in the United States serve the same general purpose" of moving passengers from one place to another. (Opening Br. at 8, 16.) In fact, by breaking the market into men's, women's and children's shoes, the Supreme Court disclaimed a "broad, general purpose" test.[8]

In the present case, the district court did the same. It rejected a "broad, general purpose" "national" airline 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". (ER 021.) Plaintiffs complain that this "disregarded" Brown Shoe. (Opening Br. at 2, 8.) But Brown Shoe is in fact completely consistent with what the district court did.

[8] One thing that the Supreme Court did do in Brown Shoe was to reject a further subdivision of the product market by "price/quality" of shoes because, inter alia, "[i]t would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00". 370 U.S. at 326. Yet this kind of "price/quality" distinction is precisely what plaintiffs advocated in the district court, when they contended that network carriers do not compete with LCCs. The district court dismissed the argument—and did so correctly, based upon Brown Shoe.

In analyzing the horizontal aspects of the merger in Brown Shoe—i.e., at the retail level, where the merged entity interfaced with consumers (just as the relevant geographic market here has to be analyzed where suppliers interface with consumers)—the Supreme Court held that the relevant geographic market was not a national market, but rather a series of more than 110 local markets consisting of "every city with a population exceeding 10,000 and its immediate contiguous surrounding territory in which both Brown and Kinney sold shoes at retail through stores they either owned or controlled". 370 U.S. at 337-39. The Court listed each of those markets in multipage appendices to its opinion. See id. at 347-55 (Apps. A-D). The Court found that each local market was a relevant geographic market because "the most intense and important competition in retail sales will be confined to stores within the particular communities in [a metropolitan] area and their immediate environs". Id. at 338-39.

That is also where "the most intense and important competition" occurs in the airline industry. For example, it is within the metropolitan area and "immediate environs" of San Francisco that "the most intense and important competition" occurs to fly passengers from San Francisco to Newark; and it is within the metropolitan area and "immediate environs" of Seattle that "the most intense and important competition" occurs to fly passengers from Seattle to Miami. It is, in short, not a "national" market, but—as in Brown Shoe—a series of many

local markets (in the airline industry, a series of city pair markets, which is just what the district court correctly held).[9]

The other Supreme Court cases upon which plaintiffs rely are equally destructive of their proffered "national" market. Thus, in defining the relevant market to include both glass and metal containers in United States v. Continental Can Co., 378 U.S. 441, 449-50 (1964), the Supreme Court identified specific and discrete areas where "meaningful competition . . . is found to exist" between the two types of containers. Those areas included: "[b]aby food", which "was at one time packed entirely in metal cans" but where the acquired company had "played a significant role in inducing the shift to glass as the dominant container"; "the soft

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[9] The Supreme Court in Brown Shoe also concluded that the district court was correct in finding "that shoe stores in the outskirts of cities compete effectively with stores in central downtown areas". 370 U.S. at 338-39. That is fully supportive of defendants' position that the proper way to assess the relevant geographic market here is on a city pairs basis; and it directly undermines plaintiffs' argument in the district court that the market consists of airport pairs. Put another way, in the airline industry (as in the retail shoe industry), airports on the outskirts of metropolitan areas "compete effectively" with more centrally located airports. While some consumers may prefer leaving from SFO to travel to the New York metropolitan area, OAK is certainly a reasonable substitute—as demonstrated by the conduct of plaintiff D'Augusta herself. (SER 641-642; see also SER 098:3-100:14 (plaintiff Robinson used Fort Lauderdale-Hollywood International Airport as an alternative to Palm Beach International Airport which is closer to her home).) See Oracle Corp., 331 F. Supp. 2d at 1131 (the mere fact that a "[c]ustomer [has] preferences towards one product over another do[es] not negate interchangeability"; a product should be included in the relevant market if it is a reasonable substitute, even if it is not the consumer's first choice).

drink business, a field which has been, and is, predominantly glass" but where "the metal can industry had '[a]fter considerable initial difficulty . . . developed a can strong enough to resist the pressures generated by carbonated beverages'", with the acquiror being "a major factor in this rivalry"; the beer industry, where "at one time almost all packaged beer was sold in bottles, [but] in a relatively short period the beer can made great headway and may well have become the dominant beer container"; and "the food canning, toiletry and cosmetic, medicine and health, and household and chemical industries", where there had been "vigorous competition" between glass and metal containers. Id. at 450-52. As the Supreme Court summarized the competitive environment:

> In our view there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quantitywise very substantial. Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other . . . .

Id. at 453 (emphasis added).

Applying the Continental Can analysis here, in contrast to glass and metal containers, there is absolutely no competitive intersection between a flight from San Francisco to Newark and a flight from Seattle to Miami. For a passenger desiring to travel the former route, the latter route would never offer "meaningful competition". The latter route could never replace

the former route. Hence, under Continental Can, the two routes cannot be in the same relevant market.[10]

The principles that the Supreme Court articulated in United States v. Aluminum Co. of America ("Alcoa"), 377 U.S. 271 (1964), yield the same result. One of the issues in Alcoa was whether insulated aluminum wire and insulated copper wire were in the same relevant market for Section 7 purposes. The Supreme Court held that they were not, because "[i]nsulated aluminum conductor is so intrinsically inferior to insulated copper conductor that in most applications it has little consumer acceptance" and "aluminum and copper conductor prices do not respond to one another". Id. at 275-76 (emphasis added). Those tests applied to this case undermine the viability of a "national" airline market. For example, for a passenger wanting to go from Seattle to Miami, a flight from San Francisco to Newark

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[10] In contrast, the record in the district court identifies many instances of "meaningful competition" between LCCs and network carriers and between alternative airports in the same metropolitan area. The district court record shows that there has been a significant shift from network carriers to LCCs and "a rather general confrontation" between them "for the same end users". Their rivalry is "pervasive" and "the area of competitive overlap" between them is "broad". See Continental Can, 378 U.S. at 456. Similarly, airports like, for example, Newark, JFK and LaGuardia have been used as alternatives for a substantial number of passengers flying into and out of the New York metropolitan area. What this shows is that, under the Continental Can analysis, LCCs and network carriers are in the same relevant product market and city pairs (rather than airport pairs) is the proper way to define the relevant geographic market.

would be "so intrinsically inferior" to a flight from Seattle to Miami that it would have "little consumer acceptance" and the price of the latter flight would "not respond to" the price of the former. For those reasons, under Alcoa, the two flights are in separate relevant markets. For the same reasons, Alcoa supports a city pairs, as opposed to an airport pairs, relevant market.[11]

In the same vein, United States v. Philadelphia National Bank, 374 U.S. 321 (1963), is consistent with the district court result here—and undercuts plaintiffs' proffered "national" market. The Supreme Court in Philadelphia National Bank found a four county relevant geographic market. It concluded that this fairly represented "the geographic structure of supplier-customer relations" because "[i]n banking, as in most service industries, convenience of location is essential to effective competition" and "[t]he factor of inconvenience localizes banking competition". Id. at 358-59 (emphasis added). That is a perfect description of the airline industry too. "Convenience of location" is essential to "supplier-customer relations" for

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[11] Alcoa also supports a relevant market that includes both network carriers and LCCs. The district court record established that LCCs have broad "consumer acceptance" as alternatives to network carriers (the plaintiffs themselves so testified) and that prices charged by network carriers do respond to LCC prices (defendants' CEOs so testified). (See supra pp. 13-16; infra p. 48.) Thus, under Alcoa, network carriers and LCCs are in the same relevant market.

air travelers because a traveler wanting to go from San Francisco to the New York metropolitan area would find it unalterably inconvenient to fly from Seattle to Miami. This "factor of inconvenience" "localizes" competition for airline passengers just as much as it does for commercial banking customers.[12]

Finally, in United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956), the Supreme Court stressed that the relevant market must be defined by "cross-elasticity of demand", and "[t]his interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities". Id. at 380-81 (emphasis added). "[W]here there are market alternatives that buyers may readily use for their purposes", those alternatives are in the same market. Id. at 395 (emphasis added). Applying that principle here, the relevant market cannot be "national" in scope. For a traveler wanting to go from the San Francisco area to the New York metropolitan area, purchase of a flight from Seattle to Miami is not a ready substitute for purchase of a flight from San Francisco to Newark. Tickets

[12] By the same token, however, there is no such "inconvenience" for an airline passenger in switching from a network carrier to an LCC or from one metropolitan area airport (like JFK) to another (like Newark or LaGuardia). Thus, LCCs and network carriers are in the same relevant product market, and city pairs rather than airport pairs are the proper relevant geographic market.

on the two routes cannot be purchased "for similar uses" and are not "alternatives that buyers may readily use for their purposes". Thus, the two routes are not in the same relevant market.[13]

Other parts of the DuPont decision further undermine plaintiffs' purported "national" market. In DuPont, the Supreme Court found a relevant market of all "flexible packaging material" because, "despite cellophane's advantages it has to meet competition from other materials in every one of its uses". Id. at 399-400. The Supreme Court held that, since "a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane", "the products compete in the same market". Id. at 400.

In the airline industry, by contrast, a flight from San Francisco to Newark does not "meet competition" from a flight from Seattle to Miami. A "slight decrease in the price" of the former flight will not cause a "considerable

[13] The same principle shows why LCCs and network carriers are in the same relevant product market and why city pairs rather than airport pairs are the relevant geographic market. For a traveler wanting to go from San Francisco to the New York metropolitan area, a flight from Seattle to Miami is not a ready substitute for a flight from San Francisco to Newark; but a flight from San Francisco to JFK would be a ready substitute. Likewise, a flight on jetBlue from San Francisco or Oakland to JFK would be a ready substitute for a flight on Continental from San Francisco to Newark. Thus, LCCs and network carriers are in the same product market; and airports within the same metropolitan area are in the same geographic market.

number" of travelers who want to go from Seattle to Miami to switch to San Francisco to Newark. Consequently, under the DuPont analysis, the two routes are not in the same relevant market.[14]

The only lower court case upon which plaintiffs rely—i.e., Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986) (Opening Br. at 23)—also undercuts their "national" airline market. In Hospital Corp., Judge Posner found that the relevant geographic market for hospital services was Chattanooga, Tennessee. The defendants argued that the market should extend beyond Chattanooga, to neighboring cities. Judge Posner rejected the argument because consumers in Chattanooga who require hospital care could not "feasibly turn" to hospitals in other cities. As Judge Posner explained, "going to another city is out of the question in medical emergencies" and, even in non-emergencies, "the patient's doctor will not (at least not for reasons of price) send the patient to another city, where the doctor is unlikely to have hospital privileges". Id. at 1387-

[14] The relevant market, however, does include LCCs because, for example, network carriers like United and Continental (even if they have certain advantages) regularly "meet competition" from LCCs like jetBlue and Southwest Airlines. (See, e.g., SER 017:3-8 (Smisek) (Southwest is "a fierce ambitious competitor").) Lower cost LCC fares have caused a "considerable number" of network carrier passengers to switch to LCCs. (See infra p. 48; SER 342-343, 420-422 (Rubinfeld).) And it is a city pairs market because a lower cost flight from, for example, Oakland to Newark will cause consumers to switch from a higher cost flight from San Francisco to JFK—even if some consumers do find advantages in flying out of San Francisco or into JFK.

88 (emphasis added). For the same reasons, there is not a "national" airline market. Going to San Francisco for a flight to Newark is "out of the question" for travelers wanting to fly from Seattle to Miami. A traveler will not make that switch "for reasons of price". Therefore the two routes are not in the same relevant market—and the district court was correct in so finding.

As the foregoing demonstrates, plaintiffs are wrong in asserting that there is a "national" airline market and they are wrong in claiming that Supreme Court precedent supports such a market. In fact, just the opposite. The very Supreme Court cases upon which plaintiffs rely overwhelmingly demonstrate that their purported "national" market is not—and cannot be—a proper relevant market for purposes of Section 7 of the Clayton Act.

B. Plaintiffs Failed to Raise a Serious Question That the Merger Will Substantially Lessen Competition in Any Market.

Plaintiffs do not raise a serious question of substantial lessening of competition. The only evidence that they offer with regard to the fundamentally flawed "national" market upon which they rest their entire appeal is market share data. And they make no offer at all with regard to any other market. However, the same Supreme Court cases that are discussed above demonstrate that plaintiffs' exclusive reliance upon market share is legally insufficient.

Plaintiffs argue that the Supreme Court has established a per se rule that "any merger that results in a combined-firm market share of 30%" is

"presumptively illegal" (Opening Br. at 19) and that mergers of firms with even single digit market shares must be enjoined if the merger continues a "trend toward" concentration (id. at 21-22). Plaintiffs are wrong. The Supreme Court cases upon which they rely do not support any such market share centric view of Section 7. Rather, in all of them, the Supreme Court analyzed competitive effects by considering a broad range of economic evidence.

For example, in Brown Shoe, the Supreme Court made it clear that the "test[ ] of illegality" for mergers under Section 7 involves both qualitative and quantitative assessments of a range of market dynamics, such as whether activities that had been "a substantial factor in competition" were "eliminated", whether the merged entity had reached a size "that its advantage over competitors threatened to be 'decisive'" and whether buyers and sellers "had established relationships depriving their rivals of a fair opportunity to compete". 370 U.S. at 321 n.36; see also Gen. Dynamics, 415 U.S. at 498. None of those factors supports enjoining the merger here. The first does not apply because of the lack of significant overlap in routes between the two carriers; and the second and third do not exist given the vigorous competition from LCCs and other network carriers that will continue even after the merger.[15]

[15] In contrast, the trend toward concentration in the shoe industry had led to a "drying up" of opportunities for smaller independent competitors. Brown Shoe,

After discussing the qualitative and quantitative factors, the Supreme Court emphasized that "[e]ach of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests". 370 U.S. at 321 n.36 (emphasis added). In other words, the Supreme Court's approach in Brown Shoe is flatly inconsistent with plaintiffs' exclusive focus on market share data—i.e., their assertion that "any non-trivial acquisition of a significant rival is per se violative of the Clayton Act" and their suggestion that "market share statistics alone" can be "conclusive indicators of anticompetitive effects". (Opening Br. at 3, 7, 24.) And it is fully supportive of the district court's rejection of plaintiffs' reliance on market share as the sole test for illegality in this case.

The Supreme Court in Brown Shoe emphasized "the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case". 370 U.S. at 322 n.38 (emphasis added). Plaintiffs here offered absolutely no "economic data"

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370 U.S. at 301. Just the opposite is true in the airline industry. As legacy carriers have consolidated, it has opened the door to entry and increasingly vigorous competition from LCCs. (SER 341-344 (Rubinfeld).) Likewise, in the shoe industry, the growth of large chain stores owned by manufacturers had "insulate[d] selected outlets from the vagaries of competition" and "render[ed] independents unable to maintain competitive inventories". Brown Shoe, 370 U.S. at 344. The evidence regarding the airline industry is to the contrary—i.e., consolidation of legacy carriers has not "insulated" them from competition or rendered LCCs (and others) unable to compete.

in the district court—and certainly none on the "national" market for which they argue on appeal. Professor Bush is not a practicing economist and had to be pressed by the district court even to mention a "national" market. (See supra p. 27.) Indeed, plaintiffs' brief in this Court fails to mention Professor Bush once and does not cite any of the evidence that he presented at the hearing.

The Supreme Court explained in Brown Shoe that, although market share data are relevant, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger". 370 U.S. at 322 n.38. This includes assessment of such things as whether there has been "foreclosure" of business opportunities and whether the industry "had witnessed the ready entry of new competition or the erection of barriers to prospective entrants". Id. at 322. All this, once again, is fully supportive of the district court's rejection of a strict market share test and is inconsistent with plaintiffs' theory that any non-trivial acquisition of a significant rival is a per se Section 7 violation.

Moreover, although plaintiffs put in no evidence on these points (relying instead upon their erroneous per se market share theory), the evidence that was before the district court showed that the airline industry has been characterized by continuing significant opportunities for rivals, healthy new entry and growth (particularly by LCCs) and dynamic competition both historically and projected

into the future. As a result, domestic airfares have declined by over forty percent in the past two decades—a trend that has continued even after the Delta/Northwest merger in 2008. (See supra pp. 9-10.)

The other Supreme Court cases upon which plaintiffs rely are to the same effect. Thus, in Continental Can, the Supreme Court emphasized that "a judgment under section 7 is not to be made by any single qualitative or quantitative test", but rather "[t]he merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future". 378 U.S. at 458 (emphasis added). And the Supreme Court's last Section 7 decision—i.e., United States v. Gen. Dynamics Corp., 415 U.S. 486, 497-98 (1974)—makes clear that a "statistical showing" of "market share and concentration", by itself, is insufficient to assess the competitive effects of a merger. Such statistics are "not conclusive indicators of anticompetitive effects". Rather, "other pertinent factors affecting the . . . industry and the business of" the merged entities must be considered—including "the structure, history and probable future" of the market. Id. at 498.[16]

[16] See also United States v. Syufy Enters., 903 F.2d 659, 664-65 (9th Cir. 1990) ("low entry barriers" and "other evidence of a defendant's inability to control prices or exclude competitors" were important factors in concluding that the purchase of movie theaters did not substantially lessen competition, citing the Merger Guidelines); United States v. Baker Hughes Inc., 908 F.2d 981, 984-86 (D.C. Cir. 1990) ("The court's consideration of these factors [e.g., the General

The state of the law in this area is perhaps best summarized by Judge Posner in Hospital Corp., where he reviewed all the Supreme Court Section 7 decisions and concluded that "market share figures are not always decisive in a section 7 case". 807 F.2d at 1386. Rather, "the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act". Id. (emphasis added). Once again, this is flatly inconsistent with plaintiffs' per se market share approach and fully supportive of the district court's rejection of that approach.

Judge Posner pointed out in Hospital Corp. that, instead of a strict statistical market share test, the principle applied under Section 7 "requires the district court . . . to make a judgment whether the challenged acquisition is likely to hurt consumers" by, for example, "making it easier for the firms in the market to collude" and "thereby force price above or farther above the competitive level". Id. The "economic approach" to Section 7 teaches that "the acquisition of a

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Dynamics factors] was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects"); United States v. Waste Mgmt., Inc., 743 F.2d 976, 982 (2d Cir. 1984) ("under General Dynamics, a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect").

competitor has no economic significance in itself; the worry is that it may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price". Id. (emphasis added).

The record that plaintiffs made in the district court fails this Section 7 test—as to any proposed relevant market. Far from taking an "economic approach", plaintiffs offered no economic evidence at all—and certainly none with regard to the so-called "national" market that they posit on appeal. Moreover, the evidence that was presented in the district court demonstrates that the test articulated by Judge Posner cannot be met here. The merger will neither "hurt consumers" nor make it easier to "force price above . . . the competitive level". That is because entry and vigorous competition by LCCs has strongly disciplined airline fares—and will continue to do so. The CEOs of both airlines testified that they cannot raise prices in disregard of LCCs. (SER 025:15-026:8 (Smisek); SER 028:16-17, 031:6-9 (Tilton).) Indeed, plaintiffs themselves testified that they (and other consumers) readily switch to LCCs to take advantage of lower fares. (See, e.g., SER 094:12-095:4 (Robinson); SER 109:14-18, 112:21-113:4 (Malaney); SER 042:9-11 (Brown).) And the long history of price declines in the industry since deregulation—and despite network carrier consolidation—not only supports this testimony but indicates that these trends are likely to continue in the future.

(SER 341-344, 362-363 (Rubinfeld).) Thus, there is not even a serious question of potential anticompetitive effects in this case.[17]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS FAILED TO DEMONSTRATE IRREPARABLE HARM OR A BALANCE OF HARDSHIPS TIPPING IN THEIR FAVOR.

A. Plaintiffs Failed to Demonstrate Any Threatened Injury As a Result of the Merger.

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". (ER 024.) Among the factual findings that relate to plaintiffs' supposed "national" market, the district court found that "none of the plaintiffs testified to having flown regularly" and that they expressed only a non-specific and "unformed hope" of future air travel. (ER 023-024.) Based upon that evidence, the district court properly concluded that this "speculative and

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[17] Looking at the Herfindahl-Hirschman Index, plaintiffs' proposed "national" market remains under 1500 after the merger—which the Horizontal Merger Guidelines define as an "unconcentrated market." (SER 455 (Rubinfeld)); Merger Guidelines § 5.3. To the extent that plaintiffs assert that there are higher HHIs (Opening Br. at 28 n.4), it is the result of their not including all LCCs in their "national" market—which, of course, makes it not a "national" airline market at all. Moreover, although plaintiffs argue that the Merger Guidelines are not binding on courts (Opening Br. at 25-28), the Guidelines are relied upon as persuasive authority. See, e.g., Syufy Enters., 903 F.2d at 664, 666 n.11; Oracle Corp., 331 F. Supp. 2d at 1111-13.

deminim[i]s injury (assuming there would be injury) is insufficient to establish irreparable harm or tip the scale in plaintiffs' favor". (ER 024.)

B. Plaintiffs' Alleged Harm is Not Irreparable.

Even if plaintiffs could demonstrate some injury (and they cannot), the injury would not be irreparable. See Winter, 129 S. Ct. at 375 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction"). Irreparable injury is injury that "cannot be adequately atoned for in money" or that "the district court cannot remedy [] following a final determination on the merits". MGM Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) (quoting Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001)). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980) (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)) (internal punctuation omitted).

1. Higher prices cannot constitute irreparable harm because they are compensable by money damages.

Plaintiffs' claim is that the merger will cause them to pay higher prices for air travel, either directly through higher fares or indirectly through decreased capacity and service. (See ER 139 ("probable and planned anticompetitive effects" of the merger "are increases in prices and fares"); ER 147 ("If the merger is consummated, it will result in lower capacity; that is, fewer seats in the sky, which, in turn, will result in higher ticket fares for consumers"); ER 148 ("The new combined company's dominance . . . is substantially likely to result in higher fare prices"); ER 151 ("The defendants' proposed merger will cause harm to consumers, including the plaintiffs, by generating higher airfares").) Consistent with that claim, several plaintiffs testified that they thought the merger would lead to "increase[d] prices" or a "fare increase". (ER 035:22-25 (Brown); ER 043:25-044:2 (Stensrud) ("Q: When you say 'adverse effects,' what do you mean by that? A: I think that there could be price instances that would affect me."); ER 067:13 (Malaney) ("The costs will go up"); SER 618:1-7 (D'Augusta) ("Q: You believe that you are going to be injured because airfares on the merged airline are going to go up after the merger. Is that correct? A: Yes. Q: And that's the fare increase that you're concerned about? A: Yes.").

Higher prices, however, are classically remedied through money damages and do not constitute irreparable harm. See, e.g., Reilly v. Medianews

Group, Inc., 2006 WL 2419100, at *5 (N.D. Cal. July 28, 2006) (claims that "newspaper subscription rates will increase" and that "newspaper advertising rates will increase" did not constitute irreparable harm because "[b]oth allegations assert ways in which plaintiff will be financially injured" and "an injury that is solely financial and that is compensable by monetary damages cannot constitute irreparable injury").[18]

2. The availability of divestiture also makes plaintiffs' alleged harm not irreparable.

Plaintiffs' alleged harm is also not irreparable because divestiture of particular routes served by the combined entity remains an available remedy. See California v. Am. Stores Co., 495 U.S. 271, 281 (1990) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 [of the Clayton Act] has been found"); Midwestern Mach. Co. v.

[18] Plaintiffs contend that their alleged injury is "irreparable" because monetary damages are not available for "future threatened injuries". (See Opening Br. at 29 n.5.) The argument is a non sequitur. Under Section 4 of the Clayton Act, private plaintiffs can recover money damages for any Section 7 violation. See 15 U.S.C. § 15; see also, e.g., Blue Shield of Va. v. McCready, 457 U.S. 465, 482-83 (1982) (an "increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which section 4 potentially offers redress"); Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051 (9th Cir. 1999) (finding that authorized sellers of Yellow Pages advertising could sue under Section 4 for damages caused by higher advertising prices). That plaintiffs chose not to sue under Section 4 does not alter the fact that Section 4 was available to them.

Northwest Airlines, Inc., 392 F.3d 265, 277-78 (8th Cir. 2004) ("divestiture of acquired stock or assets" is the "usual" remedy for a Section 7 violation). Indeed, given the merger's significant benefits—to both defendants and the flying public (see supra pp. 16-18)—such a targeted approach would be preferable in the unlikely event that a trial on the merits were to establish any anticompetitive effect. See Midwestern Mach. Co., 392 F.3d at 278 (divestiture, even four years after closing, could remedy any purported anticompetitive effect of an airline merger, and the delay would allow the "parties to assess whether the new merged firm is actually enhancing efficiency or lessening competition").

As a result, plaintiffs face no irreparable harm. See, e.g., Reilly, 2006 WL 2419100, at *6-7 (because "divestiture of the [assets] at issue remains an option", the "threatened injury to plaintiff . . . is not immediate or permanent enough to constitute true irreparable injury").

C. Plaintiffs Failed to Demonstrate That the Balance of Hardships Favors an Injunction.

"To qualify for injunctive relief, the plaintiffs must establish that the balance of equities tips in their favor." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) (quotations omitted). "In assessing whether the plaintiffs have met this burden, the district court has a duty to balance the interests of all parties and weigh the damage to each." Id. Here, defendants "presented evidence 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 thousands of employees who will benefit from a more stable employer, and in continued deferral of capital and technology investments." (ER 024.) The district court correctly held that, when plaintiffs' "speculative and *de minim[i]s* injury" was weighed against that evidence, the equities tip decisively in defendants' favor. (Id.)

Plaintiffs argue that, in doing the above balancing, the district court "placed the wrong 'harms' on the plaintiffs' side of the scale"; it should have weighed, not the potential injury to these particular plaintiffs, but rather "the hardship Plaintiffs and the courts would face in trying to unwind a consummated merger". (Opening Br. at 33.) But that is not the law. As the district court correctly noted, "the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge". (ER 022-023 (citing United States v. Borden Co., 347 U.S. 514, 518 (1954)) (emphasis added).)[19]

For all these reasons, the district court's decision on the balance of hardships was not an abuse of discretion.

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[19] Moreover, plaintiffs themselves cannot believe that there would be "hardship" in "trying to unwind" the merger—because they argue that, under the DOT Order Granting Exemption to the merger (SER 647-672), defendants "have agreed to operate as separate entities". (Opening Br. at 35.)

IV. AN INJUNCTION WOULD NOT BE IN THE PUBLIC INTEREST.

An injunction in this case would not only deprive consumers of all the benefits discussed at pages 16-18, supra, but it would also cause serious damage to defendants, their employees and shareholders. As a result of increased competition from LCCs and international carriers, as well as external shocks including the 9/11 terrorist attacks, reductions in demand during public health scares such as SARS and H1N1, unstable fuel prices and the 2008-2009 recession, both Continental and United have struggled financially, with United operating in bankruptcy from December 2002 to February 2006. (SER 136-137 (Tilton); SER 121 (Smisek).) Financial instability caused United to reduce its workforce from more than 100,000 employees in 2000 to roughly 46,000 before the merger. (SER 133 (Tilton).)

The declining profitability of network carriers has forced them to abandon marginally profitable routes connecting small communities to network hubs. (SER 126 (Smisek).) Since 2000, more than one hundred small communities in the U.S. have lost all airline service. (Id.) That trend is likely to continue if network carriers like United and Continental cannot strengthen the depth and breadth of their networks. (SER 126-127 (Smisek).) In short, an injunction would be a serious blow to the traveling public.

The forty-nine individual plaintiffs here represent a miniscule percentage of all airline passengers. Against this are the tens of millions of

travelers who would be deprived of the merger's benefits if an injunction issued. The public interest demands that this not happen. The DOJ, the DOT and every relevant foreign regulatory authority have uniformly approved the merger. To them, it serves the public interest and poses no competitive concerns. Plaintiffs have failed to show why this—or any—Court should reach a different result.

V. PLAINTIFFS' APPEAL SHOULD BE DISMISSED AS MOOT.

Wholly apart from all the defects in plaintiffs' case detailed above, their appeal is in fact moot and should therefore be dismissed. An appeal from denial of a preliminary injunction motion is rendered moot when the act sought to be enjoined has already occurred. See IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., 854 F.2d 1178 (9th Cir. 1988) (an appeal from denial of an injunction against an airline merger was mooted by the merger's closing).

Here, plaintiffs sought a preliminary injunction to halt the United/Continental merger. Four days passed after the district court denied the motion without plaintiffs either seeking a stay or filing a notice of appeal. Defendants then consummated the merger, as they had previously announced they would. (See SER 118:21-22 (Defs. Closing Arg).) Because the act sought to be enjoined has already occurred, the appeal from the Order refusing to enjoin the act is moot. See Transeuro Amertrans Worldwide Moving and Relocations, Ltd. v.

Conoco, Inc., 95 F. App'x 288, 289-90 (10th Cir. 2004) (dismissing as moot an appeal from denial of an injunction against a merger that had been consummated).

Plaintiffs argue that their appeal is not moot because their motion sought to enjoin defendants from "completing and consummating the proposed merger". (Opening Br. at 36.) Plaintiffs contend that, "[a]lthough the merger has been formally consummated", it will not be "completed" until the companies' operations are entirely integrated. (Id.) This is a post hoc argument that is manufactured out of whole cloth. Indeed, the language from their motion upon which plaintiffs rely disproves it. The motion seeks to enjoin "completing" and then "consummating" the merger. If plaintiffs really believed that "consummating" came before "completing", the words would have been reversed. What this demonstrates is that "completing" and "consummating" were actually being used synonymously—and that plaintiffs were trying to prevent the legal closing of the merger. That, however, has now occurred.

This case is analogous to Transeuro. 95 F. App'x 288. There, the district court denied a motion for preliminary injunction seeking to prevent a merger. Id. at 288-90. On appeal, the plaintiff "attempted to reframe its request for relief as a request for divestiture"—just as plaintiffs here attempt to reframe their request as one for "hold separate" relief not sought in the court below. Id. The Tenth Circuit dismissed the appeal as moot because the merger had been

consummated, noting that, as here, the district court had not considered or ruled upon a motion for divestiture. The Tenth Circuit held—as this Court should too—that, with the merger consummated, there was nothing for the appellate court to do and that "[i]t would be improper for [the court] to address Transeuro's divestiture motion for the first time on appeal". Id.[20]

[20] The only case upon which plaintiffs rely—i.e., Alliance—is distinguishable. There, the relief sought in the district court—i.e., preventing the logging of trees—remained available because there were still trees to be logged. 622 F.3d at 1049. Here, the act sought to be enjoined—i.e., consummation of the merger—has already occurred. The alternative relief that plaintiffs seek for the first time on appeal—i.e., preventing the ongoing integration of defendants' operations—was not sought in, considered by or ruled upon by the district court (nor did the district court have an opportunity to evaluate the serious damage to defendants of halting the integration process midstream). As a result (as in Transeuro), the request for that relief is not properly before this Court.

CONCLUSION

For all the reasons discussed above, the September 27 Order should be affirmed in its entirety. In the alternative, this appeal should be dismissed as moot.

Dated: December 10, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Defendants-Appellees' Answering Brief uses a 14-point, proportionally spaced typeface and contains 13,998 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 10, 2010

s/ Stuart W. Gold
Stuart W. Gold

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 DEFENDANTS-APPELLEES' ANSWERING 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 December 10, 2010. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I certify that all counsel of record were also served by email on December 10, 2010.

I further certify that on December 10, 2010, the Supplemental Excerpts of Record, Volumes I through III, were served by overnight delivery to:

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Dated: December 10, 2010

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