No. 12-15182

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 a Final Order of the United States District Court for the Northern District of California (Case No. 3:10-CV-02858-RS)

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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. Plaintiffs later amended their Complaint to request damages. The District Court had subject matter jurisdiction under §§ 4 and 16 of the Clayton Act (15 U.S.C. § 15, 26), and 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce and antitrust regulation).

Defendants filed a Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6). The lower court dismissed Plaintiffs' First Amended Complaint and entered final judgment on December 29, 2011, disposing of all Plaintiffs' claims. (Volume I Excerpts of Record ("ER") 2-3.) Plaintiffs filed a timely Notice of Appeal on January 26, 2012. (II ER 9.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Defendants' reliance on a national market for air transportation in *In re Air Passenger Computer Reservations Systems* and subsequently in *Continental v. American Airlines*, demonstrates the "plausibility" of Plaintiffs' proposed market definition—the national market for air transportation?

2. Whether this Court's previous decision in *Malaney v. UAL Corp.,* No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011), which rejected Plaintiffs' proposed definition of a national relevant market for air transportation should be reconsidered based upon 1) Defendants' admissions in *In re Air Passenger Computer Reservations Systems* and *Continental v. American Airlines;* and 2) *Brown Shoe Co. v. U.S.* and the prior authority of this Court which call for analysis of cross-elasticity of supply in defining a relevant market?

3. Whether this Court is free to ignore a line of Supreme Court decisions interpreting § 7 of the Clayton Act, which taken together, mandate divestiture in this case?

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action brought by forty-nine commercial airline consumers seeking damages, enjoinment of 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. (II ER 58; FAC ¶ 39.) Plaintiffs filed their complaint on June 29, 2010, seeking to preliminarily enjoin United and Continental from merging. (II ER 78.) On September 27, 2010, the district court entered an order denying Plaintiffs' Motion for a Preliminary Injunction. (II ER 123; Dkt. Doc. 135.) Plaintiffs appealed that decision, and this Court affirmed the lower court's decision on May 20, 2011, in *Malaney v. UAL Corp.,* No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011).

Following disposition of the appeal in the district court, Plaintiffs filed their First Amended Complaint on November 2, 2011, adding a prayer for damages and demand for a jury trial. (II ER 51.) On November 23, 2011, Plaintiffs filed a Supplemental Complaint with additional factual averments, leave having been granted to do so. (II ER 47.)

Defendants moved to dismiss the First Amended Complaint under Rule of Civil Procedure 12(b)(6) on November 16, 2011, arguing that it failed to allege under *Twombly* a plausible relevant market. (II ER 131; Defendants' Motion to Dismiss First Amended Complaint, November 16, 2011, (Dkt. Doc. 192), p. 6-7.) Following briefing, a hearing on Defendants' Motion to Dismiss was held on December 22, 2011. (II ER 12.)

C. Disposition Below

The lower court entered an order on December 29, 2011, granting Defendants' Motion to Dismiss. (I ER 2.) The court based its decision on two conclusions. In the briefing on the Motion to Dismiss, Plaintiffs argued that the doctrine of judicial estoppel should be applied in light of Defendants' inconsistent position adopted in *In re Air Passenger Computer Reservations Systems* (CD Cal. 1988) 694 F.Supp. 1443, (hereinafter "CRS" or "*In re Air Passenger CRS")*. First, the court held that *CRS* did not provide a basis for the application of judicial estoppel. (I ER 6:23-24; Order at 5:23-24.) The lower court did not address whether Defendants' contentions regarding a national market for air transportation in *CRS* met the "plausibility" standard of *Twombly*. Second, relying on this Court's previous decision in *Malaney,* the lower court held that Plaintiffs had failed to state a viable market, holding that the, "national market for air transportation does [not] meet *Brown Shoe's* standard because flight's between distant cities are simply not reasonably interchangeable. A passenger would never choose a flight

from San Francisco to Newark as an alternative to a flight from Seattle to Miami, regardless of price." (I ER 7:21-24; Order 6:21-24.)

STATEMENT OF FACTS

United and Continental are major U.S. airline carriers. (II ER 55-56; FAC ¶¶ 9, 22.) Both are considered "network carriers," characterized as airlines operating on a "hub-and-spoke" business model. (II ER 55-56; FAC ¶¶ 12, 25.) Before Defendants' merger there were six major U.S. network carriers: United, Continental, American Airlines[1], Delta Airlines, US Airways, and Alaska Airlines. (II ER 73; FAC Exhibit A.) In contrast to network carriers, "low cost carriers" (LLCs) operate on a point-to-point basis and travel high density routes rather than to and from small communities. The largest U.S. LLCs are Southwest Airlines/AirTran[2], JetBlue, Spirit Airlines, Virgin Airlines, Allegiant, Frontier, and Sun Country Airlines. (Order Denying Motion for Preliminary Injunction, Dkt. Doc. 135, p. 3.)

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[1] It has been widely reported that American Airlines and US Airway are discussing merger. This would reduce the number of network carriers to four. (II ER 61; FAC ¶ 74-75.)

[2] Southwest Airlines and AirTran airlines consummated their merger on May 2, 2011. (II ER 71; FAC ¶ 73.)

Plaintiffs are forty-nine individual purchasers of commercial passenger airline travel for their personal use. Each plaintiff has purchased such travel in the past five years and anticipates continuing to purchase air travel in the future. (II ER 53-53; FAC ¶ 6.)

Prior to Defendants' merger, United operated the world's fourth largest airline and the third largest domestic carrier, with more than 108 billion revenue passenger miles ("RPMs") in 2008. (II ER 55; FAC ¶ 9.) Defendant Continental was the fourth largest domestic carrier and the fifth largest airline in the world, with more than 80 billion RPMs in 2008. (II ER 56; FAC ¶ 22.) Combined, United/Continental is the largest domestic carrier in the United States. (II ER 59-60; FAC ¶ 60.)

On May 3, 2010, United and Continental announced an agreement in which the two carriers would combine to form a new company with an equity value of $8.3 billion. (II ER 58; FAC ¶ 39.) On September 17, 2010, United and Continental announced that both company's stockholders had approved a merger of the two airlines. (II ER 58; FAC ¶ 40.) On or about October 1, 2010, United

and Continental announced that they had closed their merger. (II ER 58; FAC ¶41.)

Prior to the merger, United and Continental were both actual competitors and potential competitors in the transportation of airline passengers in the United States. (II ER 57-58; FAC ¶ 29-38.) United and Continental had the wherewithal-financial and otherwise—potentially to provide competing passenger service against each other on any route anywhere in the United States if they believed it would be profitable to do so. (II ER 57; FAC ¶ 32.) The behavior of United is constrained by the actual and potential competition from Continental throughout the entire relevant market and submarkets. (II ER 57; FAC ¶ 35.) The behavior of Continental is constrained by the actual and potential competition from United throughout the entire relevant market and submarkets. (II ER 57; FAC ¶ 36.)

The anticompetitive effects of the merger alleged by Plaintiffs are evident. Since the closing of defendants' merger, there have been countrywide airfare increases. (II ER 65; FAC ¶ 104.) On October 18, 2011, Defendants United/Continental had matched a price hike initiated by Delta earlier that day. The next day all airlines had

matched the price increase. That was estimated to be the seventeenth attempted price hike by U.S. airlines in 2011, and the ninth to succeed. (II ER 58; Supp. Compl. ¶ 1.) These price increases affected prices "across the bulk of their [the airlines] domestic route system" and "across much of the USA." (II ER 48; Supp. Compl. ¶ 3.)

Airlines are in a better position to raise fares because they've cut flights or the seats they make available aggressively so their planes fly close to full. With the cuts, analysts expect airlines to continue raising prices to post a profit. (II ER 48; Supp. Compl. ¶ 4.)

The succession of price increases following Continental's merger with United, across the entire national airline market was without cost or other justification. In fact, the October 18, 2011, fare increase "occur[red] as most U.S. airlines [were] set to announce third-quarter profits." United/Continental announced a third-quarter net profit of $653,000,000 on October 27, 2011. Although the company's net profit was down from a year ago due to an additional roughly $1 billion in fuel costs (not taking into account the benefit of UAL's fuel hedges), its revenues for the quarter increased 8.7% to $10.1 billion, year on year. (II ER 48-49; Supp. Compl. ¶ 5.)

Defendants' merger has further concentrated an already highly concentrated market, characterized by mergers, including the merger of Delta and Northwest Airlines in 2006, which made Delta the world's largest carrier, a title has passed to the new combined United. (II ER 60; FAC ¶ 67.) After Defendants' merger, Southwest and AirTran airlines merged in 2011 and American Airlines is currently considering a merger with US Airways. (II ER 61; FAC ¶¶ 73-75.) Defendants themselves are the products of mergers and acquisitions. (II ER 60; FAC ¶ 68.)

SUMMARY OF ARGUMENT

The national market for air transportation is a viable market for antitrust purposes and is not "facially-unsustainable." The national market for air transportation is recognized industry-wide. In fact, Defendants and other airlines, in prior proceedings have argued that it is the "only" relevant air transportation market.

In *Malaney v. UAL Corp.,* No. 10-17208, 2011 WL 1979870, at *4 (9th Cir. May 23, 2011), this Court held that Plaintiffs failed to demonstrate that the national market in air travel satisfied the standard set forth in *Brown Shoe.* In the district court, Defendants

filed a Motion to Dismiss, and relying on this Court's previous decision in *Malaney,* argued that the national air transportation market was not a facially sustainable market.

In granting the Defendants' Motion to Dismiss, the lower court relied substantially on this Court's previous decision. However, in *In re Air Passenger CRS*, Defendants and other airlines relied on the national market for air transportation, with United arguing it is the *only* relevant market for antitrust purposes. Defendants' admissions in *CRS* were never considered by this Court in its previous decision. The lower court erred by failing to apply the admissions of Defendants in *CRS* to the "plausibility" standard articulated in *Twombly*.

Further, relevant market analysis does not stop with the interchangeabilty and cross-elasticity of demand standard set forth in *Brown Shoe*. *Brown Shoe* and the prior authority of this Circuit mandate that cross-elasticity of supply must also be considered in defining a relevant market. A relevant market that accounts for cross-elasticity of supply recognizes that airlines are constrained by the potential of other airlines to enter markets where it would be

profitable to do so. When cross-elasticity of supply is taken into account in market definition, the plausibility of a national market for air transportation is clear.

The line of Supreme Court cases, which have never been overruled and established a resolute intolerance for mergers that result in over-concentration of the United States markets, was not addressed by the lower court and was not addressed by this Court in its prior decision. These holdings broadly defining markets cannot be reconciled with the rejection of Plaintiffs' proposed market definition. Under the authority of these cases, divestiture should ultimately be mandated in this case.

Lastly, the district court erred by refusing to apply the doctrine of judicial estoppel. Defendants' positions in *CRS* were clearly inconsistent with the position they are taking in these current proceedings. United prevailed in previous litigation on that position and Defendants gained an unfair advantage in these proceedings by failing to bring adverse authority of the attention of the Court.

Plaintiffs have pled a plausible relevant market. Accordingly, the Complaint survives and the decision of the district court must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews de novo the dismissal of a complaint under Rule 12(b)(6). *Kendall v. Visa U.S.A., Inc.* (9th Cir. 2008) 518 F.3d 1042, 1046. On a motion to dismiss, the Court is required to accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., v. Twombly* (2007) 550 U.S. 544, 555-556. A complaint attacked for failure to state a claim "does not need detailed factual allegations." *Id.* at 555. "Specific facts are not necessary; the statement need only give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Erickson v. Pardus* (2007) 551 U.S. 89, 93 (citing *Twombly*, 550 U.S. at 555).

The complaint must state a claim that is "plausible on its face." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Id.* "[D]etermining whether" such an inference may reasonably be drawn is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

While a plaintiff must "allege … that a 'relevant market' exists," *Newcal Indus., Inc. v. Ikon Office Solution* (9th Cir. 2008) 513 F.3d 1038, "the definition of the relevant market is a factual inquiry for the jury …." *Rebel Oil Co. v. Atlantic Richfield Co.* (9th Cir. 1995) 51 F.3d 1421, 1435. Thus, even post-*Twombly*, "[t]here is no requirement that [relevant market] be pled with specificity." *Newcal*, 513 F.3d at 1045. "An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id.*

II. NO LEGAL DEFECT HAS BEEN SHOWN IN THE RELEVANT MARKET ALLEGED IN THE FIRST AMENDED COMPLAINT

A. A National Market for Air Transportation, Admitted by Defendants and Other Airlines in *In Re Air Passenger Computer Reservations Systems,* is "Plausible"

The lower court never considered the plausibility of a

national relevant market for air transportation in light of the admissions and positions adopted by Defendants in the *CRS* case. Defendant United not only admitted the existence of a national market for air transportation in previous proceedings but actually prevailed in previous litigation in reliance on it. See *In re Air Passenger Computer Reservations Systems Antitrust Litigation* (C.D. Cal. 1988) 694 F.Supp. 1443. Continental's expert testimony supported a national market for air transportation, acknowledging that a city pair could not be a relevant market absent unusual circumstances. *Id.* at 1468. USAir also admitted that the only relevant market for air transportation was the national market. *Id.* at 1472.

The lower court erroneously limited its analysis of the airlines' admissions in *CRS* to the doctrine of judicial estoppel and failed to apply Defendants' admissions to the "plausibility" standard of *Twombly.* Plaintiffs have pled a "plausible" relevant market within the meaning of *Twombly.* It is the very same antitrust market relied upon by Defendants in *In re Air Passenger CRS,* 694 F.Supp. 1443.

1. *In Re Air Passenger Computer Reservations Systems*

In *In re Air Passenger CRS*, 694 F.Supp. 1443, Continental and other airlines brought an action against United and other competitors alleging antitrust violations and attempts to monopolize certain air transportation markets and computerized reservation systems. In that case, Defendant United moved for summary judgment against Plaintiff Continental, arguing that, "the *only* relevant air transportation market is the national market." *Id.* at 1472. [Emphasis added.] The Court granted United's Motion for Summary Judgment re: monopolization of national air transportation market, various local air transportation markets and certain local CRS markets, and noted that, "In this case there is no dispute that the national CRS market and the national air transportation market are distinct markets for antitrust purposes." *Id.* at 1474.

In *CRS*, United adopted the position that the only relevant market was a national market for air transportation--the very same relevant market that they claim cannot support a § 7 claim in this case. Defendants seek to gain an unfair advantage in this case by deliberately changing positions according to the exigencies of the

moment. A national market for air transportation is "plausible" as it is the same position adopted by United in *CRS*.

2. United Adopted the Position that the National Market for Air Transportation was the Only Relevant Market

Defendants, through their own admissions, acknowledge that a national market for air transportation is a plausible. In *In re Air Passenger Computer Reservation Systems,* Defendant United and other airlines adopted the national market for air transportation as the relevant market.

United moved for summary judgment on Continental's claims regarding attempted monopolization of the Local CRS markets and the local air transportation markets. The court held that:

> The evidence submitted supports *[United's] contention that the only relevant air transportation market is the national market*. Continental's own expert (Fischer) supports this conclusion…Thus, summary judgment should be granted for failure to establish that the local air transportation markets are relevant markets for antitrust purposes. *In re Air Passenger CRS,* 694 F.Supp. at 1472. [Emphasis added.]

The court expressly noted that while Continental argued the existence of various local air transportation markets in addition to a national market, United argued that the *only* relevant air transportation market was the national market. In these

proceedings, however, Defendants contend that the national airline market is facially unsustainable. Defendants' previous position validates the plausibility of Plaintiffs' claims.

3. Continental's Expert Acknowledged that A City Pair Could Not Constitute a Relevant Market Absent Unusual Circumstances

In *In re Air Passenger CRS*, Continental claimed that United monopolized and attempted to monopolize the national market for air transportation among other markets, including local markets. *In re Air Passenger CRS,* 694 F.Supp. at 1466,1470. Like United, Continental also relied on the national market for transportation in its arguments in *CRS* (though it also asserted other local markets), and Continental's expert supported that claim, as noted by the court:

> Continental has failed to present any evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry. *In fact, Continental's own expert (Franklin Fischer) has testified that a city pair cannot be a relevant market absent unusual circumstances, such as slot-constrained airports and the absence of a market for slots at those airports. Plaintiffs' expert Fischer has also stated that a city or hub cannot constitute a relevant market either. Id.* at 1468. [Emphasis added.]

CRS makes clear that one of the positions Continental adopted was that United had monopolized and attempted to monopolize the national market for air transportation.

4. USAir Acknowledged that the National Market was the Only Relevant Air Transportation Market

Another airline, USAir, also acknowledged that the only relevant market for antitrust purposes was the national air transportation market. In *CRS,* the court also noted in its opinion that:

> The USAir plaintiffs have acknowledged that the national market is the only relevant air transportation market in this case. USAir Plaintiffs' Statement of the Case, Dec. 30, 1985 at 7. ("the air transportation market is national in scope…); PSA's Brief in Opposition to American's Motion for Summary Judgment, April 22, 1985 at 3-4. *In Re Air Passenger CRS*, 694 F.Supp. at 1467.

This admission by another competitor airline further supports the "plausibility" of Plaintiffs' claim that the relevant market in this case is the national market for air transportation.

B. In *Continental Airlines v. American Airlines,* Both Airlines Took the Position that the Relevant Market for Air Transportation was the National Market

Defendants' reliance on a national market for air

transportation is not limited to the *In re Air Passenger* case. In *Continental Airlines v. American Airlines* (S.D. Tex. 1993) Civ Nos. G-92-259, G-92-266, plaintiffs Continental Airlines and Northwest Airlines brought claims under the Sherman Antitrust Act against American Airlines and AMC Corporation. The airlines positions on the issue relevant market are summarized in the jury instructions in that case:

> *In this case, the relevant service market is the market for air transportation services at issue in this case.* The geographic market is the geographic area in which the challenged pricing actions took place where airlines actually or potentially compete with American. The parties disagree about the relevant geographic market in this case, and you must decide this issue…*Plaintiffs claim that there are different relevant geographic markets for air passenger service. They contend that, in addition to the national market, there are other relevant geographic markets, including hub and regional markets….Defendants claim that the national United States market is the only geographic market relevant to this case. Defendants claim that the national United States air passenger service market includes all air passenger service within the United States. Defendants also claim that, for purposes of analyzing their national pricing actions, hubs and regions are not relevant markets separate from the national market that contains them...*
>
> You may also consider how readily airlines shift from selling in one location to selling in another. Evidence that airlines tend to shift readily among different locations in response to price changes may be considered by you in determining whether the different locations are in the same geographic market.

> Evidence that airlines do not tend to shift readily among different locations in response to changes in price may be considered by you in determining whether the locations are in different geographic markets.
>
> *Under the criteria I have given you, you may conclude that a relevant market exists only for the entire United States, or you may conclude that relevant markets exist both for the entire United States and for particular hubs within or regions of the United States.* (*Continental Airlines v. American Airlines* (S.D.Tex) 1993 WL 379396 *2; Request for Judicial Notice, Exhibit A, p. 2.) [Emphasis added.]

The positions of the parties in the *Continental* case are clearly set forth in the above jury instructions. Both parties agreed that the product or service market was the market for air transportation in the United States. Both parties also adopted the position that the geographic market was the national market, though Continental also alleged additional regional markets. In either event, the jury was instructed that they could find that the geographic market was either national in scope or that it was national in scope in addition to other regional markets.

Earlier in those proceedings, defendant American brought a motion for summary judgment against Plaintiffs Northwest and Continental, arguing that the airlines were collaterally estopped from relitigating the relevant market issue—since they had both

taken positions in the previous *CRS* litigation that the relevant market was the national market for air transportation. The district court noted that, "In particular, [Northwest] was fully aware of American's claim that the national market is the only relevant air transportation market." *Continental Airlines v. American Airlines* (S.D.Tex. 1993) 824 F.Supp. 689,711. There the court held that a genuine issue of material fact existed as to whether Plaintiffs should be estopped from relitigating the relevant market issue. *Id.*

The Defendants positions in *CRS* and *Continental v. American Airlines* cannot be reconciled with the position they adopt in these proceedings. The national market for air transportation is a viable market for antitrust purposes.

C. Defendants' Reliance on the National Market for Air Transportation in the *In Re Air Passenger Computer Reservations Systems* and *Continental v. American Airlines* Cases was Never Brought to the Attention of this Court

In *Malaney v. UAL Corp.,* No. 10-17208, 2011 WL 1979870, at *1 (9th Cir. May 23, 2011), this Court previously held that the national market for air transportation is not a viable market for antitrust purposes. In its Order Granting the Motion to Dismiss, the

lower court held that it was bound by that decision. (I ER 7; Order at 6.) *CRS* and *Continental Airlines v. American Airlines* and Defendants' positions in those cases were never brought to this Court's attention in its previous decision. Plaintiffs were not aware of these cases until after the case had been decided by this Court. That decision should be revisited by this Court in light of the Defendants' admissions in *In re Air Passenger CRS* and *Continental v. American Airlines.*

D. This Court's Decision in *Malaney* Should be Reconsidered Because Defining a Market on the Basis of Demand Considerations Alone is Erroneous

It is erroneous to define a market by looking at demand considerations alone. Cross-elasticity of supply must also be analyzed. This approach to relevant market analysis is supported by *Brown Shoe* and the prior authority of this Circuit. A national market for air transportation is "plausible" when cross-elasticity of demand *and* supply are analyzed to recognize competition where it exists.

1. *Brown Shoe* Mandates Analysis of Cross-Elasticity of Supply in Defining a Relevant Market

[D]efining a market…on the basis of demand considerations alone is erroneous. The function of defining a market is to determine that grouping of sales which, if controlled by a single firm…could charge noncompetitive prices. *In re Air Passenger Computer Reservations Systems Antitrust Litigation* 694 F.Supp. at 1458, citing P. Areeda & H. Hovenkamp, at 319.

In *Malaney v. UAL Corp.,* No. 10-17208, 2011 WL 1979870, at *4 (9th Cir. May 23, 2011), this Court did just that. It affirmed a lower court decision that analyzed relevant market by looking at demand considerations alone. This Court held that the national market for air travel does not satisfy the interchangeability standard set forth in *Brown Shoe* and quoting the district court, held that, "a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami. No matter how much an airline raised the price of the San-Francisco-Newark flight, a passenger would not respond by switching to the Seattle-Miami flight." *Id.* Relevant market analysis does not end here.

In *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 325, the Supreme Court held that:

> 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.

It continued in its footnote to hold that:

> FN42 *The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed*…(citations omitted) However, the District Court made but limited findings concerning the feasibility of interchanging equipment in the manufacture of nonrubber footwear. *Id.* [Emphasis added.]

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." *Brown Shoe,* 370 U.S. at 326.

Brown Shoe makes clear that interchangeability and cross-elasticity of demand are not the end points of a relevant market analysis. The court in *Brown Shoe* also considered the cross-elasticity of production facilities—the ease with which equipment could be changed to manufacture different footwear. This Court and the lower court never considered cross-elasticity of supply and the ease with which airlines can enter other markets in analyzing the relevant market.

The Supreme Court has prohibited acquisitions where the acquiring firm is a potential entrant and competitor in the market of the acquired firm. In *United States v. Falstaff Brewing Corporation* (1973) 410 U.S. 526, the government brought an action under § 7 of the Clayton Act to enjoin the acquisition by defendant Falstaff Brewing Corp. of Narragansett Brewing Co. The Supreme Court reversed judgment for defendant brewer Falstaff holding that separate consideration should have been given to whether brewer was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market. *Id.* at 532. The Supreme Court expressly held that:

> The District Court erred as a matter of law. The error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market de novo, it could in no sense be considered a potential competitor…The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. *Id.*

Cross-elasticity of supply must be considered in defining a relevant market. In this case, potential competition from airlines,

i.e., slot availability, the mobility of airlines, and the ability of airlines to compete anywhere it would be profitable to do so, constrains the price-raising power of other airlines. Potential competition and the ability of airlines to compete on routes they do not currently offer must be considered in a relevant market analysis.

2. Prior Authority of this Circuit Requires Review of Cross-Elasticity of Supply in Defining a Relevant Market

This Court has held that cross-elasticity of supply must be considered in defining a relevant market. A relevant market that takes into account the mobility of airlines and slot availability, i.e., the ability of airlines to compete where it would be profitable to do so, is supported by the prior authority of this Circuit.

In *Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc.* (9th Cir. 1975) 512 F.2d 1264, Twin City Sportservice ("Sportservice"), a holder of an exclusive franchise contract for events at a major baseball stadium brought an action to recover for alleged breach of contract, in which the owner of the ball club, Charles O. Finley & Company, Inc. ("Finley"), filed a counterclaim seeking treble damages for alleged violations of §§ 1 and 2 of the Sherman

Act. This court reviewed the trial court judgment awarding treble damages, attorney's fees and costs to Finley.

After first considering the rule of "reasonable interchangeability," this Court continued its analysis holding:

> A like analysis applies when the market is viewed from the production rather than the consumption standpoint; the degree of substitutability in production is measured by cross-elasticity of supply. Substitutability in production refers to the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarities in technology between them. Where the degree of substitutability in production is high, cross-elasticities of supply will also be high, and again the two commodities in question should be treated as part of the same market. *While the majority of the decided cases in which the rule of reasonable interchangeability is employed deal with the "use" side of the market, the courts have not been unaware of the importance of substitutability on the "production" side as well. Twin City Sportservice,* 512 F.2d at 1271, citing *Brown Shoe Co. v. US,* 370 U.S. 294, 235 n.42, 82 S.Ct. 1502, 8 L.Ed.3d 510 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948). [Emphasis added.]

In *Twin City,* this Court held that the lower court erred in its conclusion that the sale of concession services to major league baseball was the relevant market. *Twin City Sportservice,* 512 F.2d at 1272. In its reversal, this Court analyzed the substitutability in production in designating the relevant market: "The evidence before the trial court strongly suggests that there is a high degree of

'substitutability in production.' That is, the evidence was sufficient to support a finding that many aspects of the concession operations at the various facilities presenting leisure time events other than major league baseball are the same or similar enough to each other and to those existing at major baseball parks to be considered substitutable or transferable…There exists evidence of inter-facility transferability as well." *Id.* at 1273.

In citing *Twin City,* this Court later held that, "It is well settled that cross-elasticity of supply is a valid basis for determining that two commodities should be within the same market." *Equifax, Inc. v. Federal Trade Commission* (9th Cir. 1980) 618 F.2d 63, 67; See also *Calnetics Corporation v. Volkswagon of America* (9th Cir. 1976) 532 F.2d 674, 691 (held that the district court's failure to consider production cross-elasticity in defining a relevant product market was inconsistent with the views of the Supreme Court and of this circuit.)

3. Continental's Expert in *In re Air Passenger Computer Reservations Systems* Testified that a City Pair Cannot be a Relevant Market Absent Unusual Circumstances because of Potential Competition from Other Airlines

When cross-elasticity of supply in the air transportation

market is taken into consideration, a national relevant market for air transportation is "plausible" within the meaning of *Twombly.*

Continental's expert in the *In re Air Passenger* case, discussed above, admitted that the mobility of airlines and their ability to enter slots at airports supported the conclusion there is a national market for air transportation because airlines are constrained by the potential competition from other airlines' ability to move to slots at airports if it would be profitable to do so. The district court in *CRS* held that:

> Continental has failed to present any evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry. In fact, Continental's own expert (Franklin Fischer) has testified that a city pair cannot be a relevant market absent unusual circumstances, such as slot-constrained airports and the absence of a market for slots at those airports. Plaintiffs' expert Fischer has also stated that a city or hub cannot constitute a relevant market either. *In re Air Passenger CRS,* 694 F.Supp. at 1468.

Here, Continental's expert admits that airlines' mobility and slot availability cannot support city-pair relevant markets, unless there are unusual circumstances.

The proposition that a flight from San Francisco to Newark does not compete with a flight from Seattle to Miami is plainly false

when cross-elasticity of supply is evaluated as required by *Brown Shoe.* As admitted by Continental's expert, airlines can compete wherever it would be profitable to do so and a national market for air transportation is "plausible."

In *United Air Lines, Inc. v. Civil Aeronautics Board* (7th Cir. 1985) 766 F.2d 1107, 1115, Judge Posner recognized that flights that are not perfectly interchangeable do in fact compete with one another:

> From a consumer standpoint the airline market consists of a number of discrete city pairs, each consisting of the consumer's desired origin and destination; and there are of course fewer airlines serving any particular city pair than there are airlines in the nation as a whole. However, the airplanes and other capital equipment of the airline industry are highly mobile, and now that the industry has been deregulated there no longer are legal barriers to airlines' redeploying their equipment, and swiftly too, to any city pair in which ticket prices are above marginal costs. See Bailey & Panzar, *The Contestability of Airline Markets During the Transition to Deregulation,* 44 Law & Contemp.Prob. 125 (Winter 1981). When the elasticity of supply is high (meaning that a slight increase in price will evoke a large increase in output, in this case of airline service between particular city pairs), potential supply must be included in estimating market shares. *Thus airplanes flying between Des Moines and Salt Lake are in the "market" for air transportation between Newark and Atlanta.* [Emphasis added.]

When cross-elasticity of supply is evaluated in the air

transportation industry, as called for by *Brown Shoe* and the authority of this Circuit, coupled with the acknowledgements by Continental's expert in *CRS* and Judge Posner's analysis in the *United Air Lines* case, the "plausibility" a national relevant market for air transportation is clear.

E. Defendants Raise Prices on a National Level and the Commercial Realities of the Industry are that Defendants Operate on a National Level

In *Brown Shoe,* the Supreme Court recognized the importance of "examining such practical indicia as industry or public recognition" in determining market definitions. *Brown Shoe Co. v. U.S.* (1962) 370 U.S. 294, 325.

United, Continental and other airlines have relied on a national relevant market for air transportation. In *CRS*, the court held that, "The USAir plaintiffs have acknowledged that the national market is the only relevant air transportation market in this case." *In re Air Passenger CRS,* 694 F.Supp. at 1467.

In the *Continental* case, both Continental and American Airlines relied on a national market for air transportation. In *CRS,* as discussed above, Continental's expert testified that a city-pair

cannot be a relevant market absent unusual circumstances. *In re Air Passenger CRS,* 694 F.Supp. at 1468. Defendant Continental's expert recognized the ability of airlines to compete anywhere it would be profitable to do so through the availability of slots at airports. The national market for air transportation is recognized through out the industry.

The commercial realities of the industry are the major factors in determining the relevant geographic market. *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.* (9th Cir. 1986) 794 F.2d 1359, 1963. The commercial realities of the airline industry are such that Defendants operate on a national level—including national planning, marketing, and fare increases.

Defendants raise prices on a national level. As alleged in Plaintiffs' FAC and Supplemental Complaint, air fares have increased countrywide since the closing of Defendants' merger. (II ER 65; FAC ¶ 104.) On October 19, 2011, all airlines had matched a price hike instituted by Delta the previous day. That fare increase was estimated to be the seventeenth attempted price hike by U.S. airlines in 2011 and the ninth to succeed. (II ER 48; Supp. Compl. ¶

1.) Those price increases affected prices, "across the bulk of [the airlines] domestic route system" and "across much of the USA." (II ER 48; Supp. Compl. ¶ 3.)

Further, in *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 576, the defendant was accused of monopolizing a local market for the provision of home security services. The Court, rejecting the argument that the relevant geographic market was local recognized, "that the business of providing such a service [home security services] is operated on a national level." *Id.* They further considered the fact that Defendant engaged in national planning, was subject to inspection, certification and rate-making by national insurers, and had a national schedule of prices, rates, and terms, although such rates could be varied to meet local conditions, and it dealt with multistate businesses on the basis of multistate contracts. *Id.* at 576. And just as Defendants in this case operate on a national level, the appropriate relevant market is the national air transportation market.

F. A National Market for the Transportation of Air Passengers is Consistent with a Line of Binding Supreme Court Precedent Applying Broad Relevant Market Definitions

In its prior decision in *Malaney,* this Court did not address the line of Supreme Court precedent which has never been overruled. 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*) (1956) 351 U.S. 377, 395. "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* (1962) 370 U.S. 294, 325. 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. 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* (1963) 372 U.S. 321 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* (E.D. Pa. 1962) 201 F.Supp. 348, 361. 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*) (1964) 377 U.S. 271, 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.* (1964) 378 U.S. 441, 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. (S.D.N.Y. 1963) 217 F.Supp. 761, 780. 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. 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.* (1966) 384 U.S. 563, 571-72, 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 directly contradict the proposition 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 general purpose of commercial air carriage--the long-distance transportation of passengers—should be considered. But, requiring overly-detailed specificity within the airline market violates 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 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.

G. The Lower Court Erred in Failing to Apply the Doctrine of Judicial Estoppel

[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *Davis v. Wakelee* (1895) 156 U.S. 680, 689. This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of

a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich* (2000) 530 U.S. 211, 227, n. 8; see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"). *New Hampshire v. Maine* (2001) 532 U.S. 742, 749.

The Supreme Court recognizes several factors in determining whether to apply the doctrine of judicial estoppel in a particular case, including: 1) a party's later position must be "clearly inconsistent" with its earlier position; 2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court

was mislead"; and 3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire,* 532 U.S. at 750-751.

In *CRS,* both United and Continental relied upon a national market for air transportation as a relevant market in those proceedings. United contended in its motion for summary judgment that the national air transportation market was the only relevant market and United's motion for summary judgment was granted. Defendants had an obligation to bring this case to the Court's attention and failed to do so, and Plaintiffs were prejudiced by the late discovery of this case.

1. United's Position is "Clearly Inconsistent" with Earlier Proceedings

This Court has held that judicial estoppel bars assertion of inconsistent positions in two different cases. *Hamilton v. State Farm Fire & Casualty Company* (9th Cir. 2001) 270 F.3d 778, 783. Though the lower court held that Plaintiffs had failed to establish that Defendants had taken a clearly inconsistent position in *In re Air*

Passenger Computer Reservations Systems, a closer look at the case reveals otherwise.

In *In re Air Passenger CRS,* Defendant United moved for summary judgment against plaintiffs' claims that it monopolized and attempted to monopolize the national market for air transportation, local air transportation markets and others. The court in granting summary judgment for United held that plaintiffs' failed to establish that local air transportation markets are relevant markets and noted that, "the evidence submitted supports defendant's contention that the *only* relevant air transportation market is the national market." *Id.* at 1472. [Emphasis added.] This statement makes clear that United's position in *CRS,* that the national market was the *only* relevant market for antitrust purposes, is clearly inconsistent with their position in these proceedings that Plaintiffs proposed market definition, the national market for air transportation, is facially unsustainable. (I ER 2:18-20; 4:9-11.)

2. In *CRS*, the Court Accepted United's Position Because Summary Judgment was Granted in United's Favor

The court in *CRS* accepted United's position that the only relevant market for air transportation was the national market:

> *The evidence submitted supports [United's] contention that the only relevant air transportation market is the national market.* Continental's own expert (Fischer) supports this conclusion…Plaintiff has failed to provide evidence suggesting entry barriers such as slot limitations would support the finding of a local market. Thus, summary judgment should be granted for failure to establish that local air transportation markets are relevant markets for antitrust purposes. *In re Air Passenger CRS,* 694 F.Supp. at 1472.

Though the lower court in this case held that Plaintiffs, "failed to show that United maintained its purported prior position with success," (I ER 6:22-23; Order at 5:22-23), the court in *CRS* held that the evidence submitted supported United's argument that the national market for air transportation was the only relevant market. The court accepted United's position and the arguments and submissions of United in support of that position. .

3. Defendants Gain an Unfair Advantage in Asserting a Position Inconsistent with *In re Air Passenger Computer Reservations Systems*

Defendants had a duty to bring adverse authority to the attention of the district court and this Court in its prior decision in *Malaney* and failed to do so. Had *CRS* been disclosed earlier in the proceedings, Plaintiffs would have had the opportunity to utilize the case in briefing on the motion for preliminary injunction and in

cross-examination of Defendants' experts. Defendants' failure to disclose adverse authority, in which they took a position completely inconsistent with the current case, unfairly prejudiced Plaintiffs. This Court recognizes the duty to disclose adverse authority:

> Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so ..." EC 7-23…The standards of the Model Code are substantially followed in the Model Rules of Professional Conduct of the American Bar Association. Rule 3.3 under the heading, "Candor Toward the Tribunal" makes it a black letter rule that a lawyer should not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly diverse to the position of the client and not disclosed by opposing counsel." Model Rules 3.3(a)(3). *Golden Eagle Distributing Corp. v. Burroughs Corp.* (9th Cir. 1987) 809 F.2d 584, 588.

Defendants had a duty to disclose *CRS* as required by the local rules of the district court, the Rules of Professional Conduct and the prior authority of this Circuit--and they failed to do so.

Moreover, Plaintiffs were prejudiced by the late discovery of the case, which was brought to the lower court's attention at the hearing on the Motion to Dismiss:

> It certainly can be used as evidence to impeach any expert…I mean, what would he have done with that? Plus, the fact that you have---according to Fisher, there is no such thing as a city pair market. There is no such thing as a city market. All of the

> markets that their expert was talking about were repudiated by them, by their expert, by Continental's expert in that case and by United itself in its opposition to Continental. (II ER 30:22-23; 31:8-14.)

Defendants had a duty to bring *CRS* to the attention of this Court and the lower court and they failed to do so. Plaintiffs were prejudiced by the late discovery of this case and the Defendants' admissions therein. Accordingly, the lower court erred in refusing to apply the doctrine of judicial estoppel in the case presently before the Court.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed.

August 1, 2012

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 9,494 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

August 1, 2012

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STATEMENT OF RELATED CASES

1. *Taleff, et al. v. Southwest Airlines, et al.,* in the United States Court of Appeals for the Ninth Circuit, Case No. 11-17995.

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 August 1, 2012.

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.

August 1, 2012

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Joseph M. Alioto, certify that this brief is identical to the version submitted electronically on August 1, 2012.

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