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 From 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

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

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STATEMENT OF THE ISSUES

A. Did the District Court properly dismiss Plaintiffs' First Amended Complaint for re-alleging the same antitrust relevant market previously rejected by the District Court and this Court because it failed to meet the required elements of reasonable interchangeability of use or cross-elasticity of demand?

B. Did the District Court abuse its discretion by declining to apply judicial estoppel to relieve Plaintiffs of the obligation to allege a viable relevant market?

JURISDICTIONAL STATEMENT

United does not dispute the statutory basis of jurisdiction for this appeal.

STATEMENT OF THE CASE AND RELEVANT FACTS

I. NATURE OF THE CASE

For the second time in this action, Plaintiffs-Appellants ("Plaintiffs") ask this Court to allow their antitrust challenge to the United-Continental airline merger to go forward in the absence of a proper relevant market. Throughout this case, Plaintiffs have clung to a relevant market they defined as the national market for air transportation. The District Court denied Plaintiffs' motion to enjoin the merger primarily on the ground that, after a full evidentiary hearing and substantial briefing and argument, Plaintiffs failed to show that their proposed national market satisfied the required standards of reasonable interchangeability of use or cross-elasticity of demand. This Court affirmed the District Court's ruling on that exact ground. Despite these rulings, Plaintiffs filed an amended complaint that repeated verbatim and without any changes whatsoever the same alleged national market found inadequate by the District Court and this Court. As the District Court held in dismissing the amended complaint with prejudice, Plaintiffs have simply refused to cure the defects in their relevant market definition and sought instead to re-litigate the viability of the national market concept. The District Court denied Plaintiffs' request to proceed without a viable relevant market. This Court should affirm the District Court's order of dismissal.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action began on June 29, 2010, when Plaintiffs -- 49 individuals -- filed a Complaint for Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act. *See* Excerpts of Record ("ER") 78. Plaintiffs' stated aim was "to enjoin and prohibit the merger of the defendants United and Continental," which had been announced on May 3, 2010. ER 79, ¶ 1. Plaintiffs defined "the relevant product and geographic markets for purposes of this action" as "the transportation of airline passengers in the United States, and the transportation of airline passengers to and from the United States on international flights." ER 84, ¶ 29.

Plaintiffs moved for a preliminary injunction on August 9, 2010. ER 106. The District Court held two full days of evidentiary hearings on Plaintiffs' preliminary injunction motion on August 31 and September 1, 2010, which included live testimony from fact and expert witnesses. The District Court received extensive pre- and post-hearing briefing from the parties, and heard post-hearing closing arguments on September 17, 2010. ER 120, 123.

A key issue in the proceedings was the adequacy of Plaintiffs' definition of the relevant market for their Section 7 claim. Plaintiffs proffered several alternative markets consisting of network carriers competing for business travelers, thirteen airport pairs, and the national air transportation market alleged in their complaint. Supplemental Excerpts of Record ("SER") 36 (Order Denying Motion

for Preliminary Injunction dated September 27, 2010 (the "September 27 Order")). United contended that Plaintiffs had failed to meet their burden of defining a relevant market and that none of these purported markets were viable or proper for Section 7 purposes. *See* SER 36-44.

After the evidentiary hearing and post-hearing briefing and argument by the parties, the District Court denied Plaintiffs' motion for a preliminary injunction on September 27, 2010. SER 24-49. The primary ground for the District Court's denial of the motion was that Plaintiffs had "fail[ed] to establish a viable relevant market" within which to analyze the possible anticompetitive effects of the merger. SER 36. Citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) and other well-established precedents from the United States Supreme Court and this Court, the District Court held that Plaintiffs were obligated to identify a relevant product market "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." SER 33. The District Court found that the alleged national airline market failed to satisfy the requirements of reasonable interchangeability of use or cross-elasticity of demand because "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami." SER 44. The District Court also found, among other deficiencies, that Plaintiffs' expert witness "did no economic modeling to support a national market," and that

Plaintiffs' proposed national market would in fact show a level of concentration in the airline industry "far below" the level that would trigger scrutiny by the Department of Justice. SER 44. "In short," as the District Court held, "nothing put forth by the plaintiffs establishes the national airline industry as a viable relevant market against which to evaluate an antitrust claim under the Clayton Act." SER 44. Instead, the District Court noted that the only potentially cognizable market might be a city-pairs market (SER 43), which Plaintiffs repeatedly rejected and declined to use as the basis of their Section 7 claim (*see, e.g.*, SER 21-22).

The District Court also found no evidence of potential harm to any of the Plaintiffs and concluded that their potential injuries were "speculative" and *de minimis*. SER 47. This conclusion was based on evidence in the motion hearing, including that "[n]one of plaintiffs testified to having flown regularly" and "not one of the forty-nine reside near an airport with at least ten percent of the passengers served by United or Continental." SER 46. Accordingly, the District Court found no evidence that "plaintiffs will be irreparably harmed by the merger or, if so, that the balance of hardships would tip at all in their favor." SER 36.

On October 1, 2010, the merger was consummated. ER 3.[1] That same day, Plaintiffs filed their first appeal with this Court, namely an appeal of the September 27 Order denying the injunction. *See* ER 124. Plaintiffs' primary contention was that the national market for airline travel was the proper relevant market in which to evaluate the effects of the merger, and that the District Court erred by failing to recognize it. SER 66-73.

After briefing and argument, on May 23, 2011, this Court affirmed the District Court's September 27 Order denying the injunction, and specifically affirmed the District Court's finding that Plaintiffs had failed to show that the national market was a viable antitrust relevant market. SER 100-02 (the "May 23 Order"). This Court affirmed the District Court's holding that the legal standard governing a properly defined antitrust market requires "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." SER 101. (quoting *Brown Shoe*, 370 U.S. at 325). As this Court held, "Plaintiffs have failed to demonstrate that the national market in air travel satisfies this standard." SER 102. This Court expressly concluded that "Plaintiffs failed to establish a relevant market for antitrust analysis, a necessary predicate for making a claim under § 7 of the Clayton Act." SER 102. This Court

[1] After conducting a "thorough investigation," on August 27, 2010, the U.S. Department of Justice approved the proposed merger, finding that the "proposed merger would combine the airlines' largely complementary networks." SER 191, 25.

noted that "[t]he city-pair market endorsed by the district court does satisfy the reasonable interchangeability standard," and that Appellants' proposed "national market" does not. SER 102. On July 18, 2011, this Court issued a formal mandate giving effect to its May 23 Decision. SER 130.

On August 22, 2011, Plaintiffs filed a motion to amend the complaint along with a proposed First Amended Complaint ("FAC"). ER 51. Despite the prior rulings on the relevant market by the District Court and this Court, the FAC repeated verbatim and without any change whatsoever the allegations in the original complaint that "[t]he relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States, and the transportation of airline passengers to and from the United States on international flights." ER 57, ¶ 29.

United opposed Plaintiffs' motion to amend because the FAC re-alleged the same purported relevant market definition already held to be deficient under the governing legal standard. SER 5-6. The District Court acknowledged the defect in Plaintiffs' relevant market definition and found that "the market theories plaintiffs have chosen to adopt lack both evidentiary and legal support" and that "[a]bsent a change in the plaintiffs' theory of the case, it is difficult to see how they can ultimately prevail." SER 6. The District Court granted Plaintiffs leave to file the

FAC because, "[a]lthough this motion presents a close call, the proper vehicle for [United's] arguments on the merits is a motion to dismiss." SER 6.

On October 21, 2011, Plaintiffs petitioned the Supreme Court of the United States for a writ of certiorari concerning the May 23 Order. SER 104, ER 4.[2] Among other things, Plaintiffs contended that the District Court and this Court disregarded Supreme Court precedent "by requiring overly-detailed specificity within the airline market." SER 128. The Supreme Court denied Plaintiffs' writ of certiorari on December 12, 2011. SER 237.

On November 2, 2011, Plaintiffs filed the FAC, and on November 4, 2011, filed a motion for leave to file a supplemental complaint. ER 130. The supplemental complaint added statements about alleged harms from price increases and other airline conduct but did not change the national market definition.[3] In the motion for leave to file the supplemental complaint, Plaintiffs expressly repeated and underscored their reliance on "the national airline market which, plaintiffs have contended -- and continue to contend -- is the relevant market in this case." SER 14.

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[2] Plaintiffs' petition for rehearing and rehearing *en banc* by this Court was denied. ER 4, 129.

[3] The District Court subsequently found that Plaintiffs' new allegations of harm "are irrelevant in light of their failure to establish, first, a relevant market within which these harmful effects may be analyzed." ER 8 (*citing Sutter Health Systems*, 130 F. Supp. 2d at 1118).

On November 16, 2011, United moved to dismiss the FAC for failure to identify a viable relevant market. ER 131. The gravamen of United's motion was straightforward: by clinging to exactly the same national market allegation previously found deficient by the District Court and this Court, Plaintiffs failed to allege the "necessary predicate" of a proper relevant market in which to bring a Section 7 claim. ER 7.

In opposition to United's motion to dismiss, Plaintiffs repeated their prior arguments to contend, once again, that the national market for air transportation was the proper relevant market in which to analyze possible anticompetitive effects of the merger. SER 141-61. Plaintiffs also argued, for the first time in this case, that United should be judicially estopped from challenging the viability of a putative national market for air transportation on the basis of a 1988 summary judgment decision from the Central District of California relating to airline computer reservation systems -- *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443 (C.D. Cal. 1988) (hereinafter "*CRS*"). SER 149-52.

On December 29, 2011, the District Court granted United's motion to dismiss (the "December 29 Order"). ER 2-8. The court noted that the FAC avers the same relevant market definition held to be deficient in the original complaint. ER 3. The District Court held that "plaintiffs have already enjoyed ample

opportunity to develop a substantial record on this question, yet both this Court and the Ninth Circuit have held their pleadings, at least in their current form, fail to state a viable market. As both courts have explained, the national market for air transportation does not meet *Brown Shoe's* standard because flights 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." ER 7. The District Court declined Plaintiffs' request to "re-litigate" the national market argument because "the Ninth Circuit's articulation of the relevant market standard . . . is now the binding law of this case" and Plaintiffs' arguments have "already been considered, discussed at length, and rejected." ER 7-8.

The District Court also concluded that United should not be judicially estopped by the 1988 *CRS* decision. ER 6. The District Court found that "Plaintiffs' argument . . . does not accurately reflect the position of the parties in *CRS*, or the court's ultimate holding." ER 6. Specifically, the District Court found that Plaintiffs: (1) "failed to establish that United took a clearly inconsistent position" in *CRS*; and (2) "failed to show that United maintained its purported prior position with success." ER 6. In addition, the District Court held that, even assuming only for argument that judicial estoppel might apply, it could not save

the FAC from dismissal because "plaintiffs simply could not proceed on a legally deficient complaint." ER 6.

The District Court dismissed the FAC with prejudice. The court concluded that Plaintiffs had "already been granted an opportunity to amend, and yet have expressly refused to alter their averment that the relevant antitrust market is national in scope." ER 8.

Plaintiffs now appeal the District Court's dismissal of the FAC on the same previously traveled ground that the District Court and this Court applied the wrong legal standard and improperly rejected the proffered national air transportation market. Appellants' Opening Brief ("Op. Br.") 13-33. The only superficially new twist is Plaintiffs' claim that judicial estoppel should allow them to proceed with a Section 7 claim in the total absence of a proper relevant market. Op. Br. 42-47. Otherwise, Plaintiffs raise mainly the same points they unsuccessfully made to the District Court prior to the September 27 Order, the Ninth Circuit prior to the May 23 Order, and the District Court (for the second time) prior to the December 29 Order at issue in this appeal.

STATEMENT OF THE STANDARD OF REVIEW

The District Court's application of the law of the case doctrine to this Court's May 23 Order should be reviewed under the abuse of discretion standard. *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) ("Because application

of the doctrine is discretionary, we review a district court's decision to apply the law of the case for an abuse of discretion."). "A district court abuses its discretion in applying the law of the case doctrine only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Id.*

Similarly, the District Court's decision not to apply judicial estoppel should be reviewed under the abuse of discretion standard. *See Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir. 2007) ("We review the district court's application of judicial estoppel for abuse of discretion."). "Reversal for abuse of discretion is not appropriate unless this court has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996).

The Court's review of the District Court's conclusion that the FAC fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) should be reviewed *de novo*. *See Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 10-15978, 2011 WL 1898150, at *1 (9th Cir. May 19, 2011) ("This Court reviews *de novo* a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).").

SUMMARY

Plaintiffs simply refuse to accept this Court's and the District Court's rulings on the appropriate legal standard and relevant market for their Section 7 claim. When the parties were previously before this Court, the Court clearly stated the standard for defining a relevant market and held that Plaintiffs' proposed national air transportation market failed to meet that standard. Despite that holding, and the District's Court's identical prior holding, Plaintiffs filed a FAC that repeated verbatim the national market allegation that is not viable under governing law. In response to United's motion to dismiss, Plaintiffs clung to the national market definition and argued that judicial estoppel allowed the FAC to go forward even though it lacked the essential element of a viable market definition. Plaintiffs also repeated the same arguments and citations to Supreme Court cases that they made unsuccessfully on several prior occasions to the District Court and this Court. This current appeal is nothing more than another improper effort to sidestep prior dispositive holdings and re-argue the viability of the alleged national air transportation market.

The District Court properly exercised its discretion in applying the law of the case to stop Plaintiffs from re-litigating the standard for defining a relevant market. It properly exercised its discretion to stop Plaintiffs from making an end run around that standard on the basis of judicial estoppel. It correctly dismissed

the FAC with prejudice because of Plaintiffs' explicit refusal to amend their relevant market allegations. Plaintiffs have not come close to stating any basis on which to reverse these decisions.

As an initial and dispositive matter, the District Court correctly exercised its discretion in applying this Court's May 23 Order to the FAC under the law of the case doctrine. On May 23, 2011, after extensive briefing and oral arguments, this Court articulated the standard for defining a relevant market: "In defining the outer bounds of a relevant antitrust market, we consider the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. [citation] To meet this standard, products do not have to be perfectly fungible [citations], but must be sufficiently interchangeable that a potential price increase in one product would be defeated by the threat of a sufficient number of customers switching to the alternate product." SER 101. This Court held that Plaintiffs' proposed market definition failed this test. SER 102. When Plaintiffs improperly tried to re-litigate the relevant market issue in response to United's motion to dismiss, the District Court correctly determined that the May 23 Order was the "binding law of this case." ER 7-8. As the District Court stated, Plaintiffs' "arguments on this issue have already been considered, discussed at length, and rejected." ER 8.

Plaintiffs' contention that this Court should now "re-consider" the issue of the relevant market is equally improper and lacking in merit. Plaintiffs argue, once more, that the Court should ignore the governing standard in favor of vague considerations about national pricing (Op. Br. 31-33), and a previously unmentioned emphasis on an irrelevant point of cross-elasticity of supply (Op. Br. 22-28). Plaintiffs also repeat the same points and citations to Supreme Court opinions they made in their first appeal, to argue yet again for a different relevant market standard than the one mandated in this case. Op. Br. 33-42.

None of these arguments demonstrate that the District Court abused its discretion in applying the law of the case doctrine, or otherwise improperly dismissed the FAC. Plaintiffs' national pricing claims and Supreme Court citations were considered and rejected by this Court leading up to the May 23 Order. The argument about cross-elasticity of supply has been waived because it was never presented to the District Court, and is also irrelevant because Plaintiffs make no effort to show how it in any way applies to this case.

The District Court also properly exercised its discretion when it refused to allow Plaintiffs to sidestep the requirement of defining a viable relevant market on the basis of judicial estoppel. Judicial estoppel is an extraordinary remedy designed to protect the courts from litigants playing fast and loose with facts and legal arguments. It requires that a party's later position is "clearly inconsistent"

with its earlier position; (2) that the party succeeded in persuading a court to accept its earlier position; and (3) that the party would derive an unfair advantage or impose unfair detriment on the opposing party if allowed to pursue the inconsistent position.

As the District Court correctly concluded, none of these required elements exist in this matter. In the prior case, the record does not indicate that United took a clearly inconsistent position but instead "appears equally likely from the face of the opinion that the airline merely accepted the national market for argument's sake given the lack of any competent evidence." ER 6. Similarly, even if United had taken a clearly inconsistent position in the prior case, it did not prevail on that position because "nothing turned on its position." ER 7. In addition, Plaintiffs failed to show that they would suffer any unfairness warranting estoppel. And "[e]ven assuming, however, for argument's sake, that estoppel did bar [United] from attacking the sufficiency of plaintiffs' pleadings, plaintiffs simply could not proceed on a legally deficient complaint." ER 5. Consequently, the District Court did not abuse its discretion by refusing to estop United.

As a final dispositive point against Plaintiffs, the District Court correctly dismissed the FAC because Plaintiffs failed to identify a relevant market meeting the standards articulated by this Court. Alleging a viable relevant market is a necessary predicate for an antitrust case, and case law requires that an antitrust

plaintiff plead a viable relevant market in the complaint. Here, Plaintiffs' purported national market for air transportation fails to meet the required standard of interchangeability of use or cross-elasticity of demand. As this Court has already concluded, "a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami." SER 102. And "[n]o 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." SER 102. Consequently, Plaintiffs' Section 7 claim is facially unsustainable and was correctly dismissed by the District Court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT APPLIED THIS COURT'S MAY 23 ORDER FOR DEFINING A RELEVANT MARKET

A. The District Court Correctly Excluded Already-Litigated Arguments Under the Law of the Case Doctrine

On May 23, 2011, after extensive briefing and oral arguments, this Court identified the legal standard to be used in defining a relevant market. The Court also rejected Plaintiffs' proposed national air transportation market under that standard:

> In defining the outer bounds of a relevant antitrust market, we consider "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. To meet this standard, products do not have to be perfectly

> fungible, *see United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956); *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964), but must be sufficiently interchangeable that a potential price increase in one product would be defeated by the threat of a sufficient number of customers switching to the alternate product. *See Cont'l Can*, 373 U.S. at 453-54 (holding that, although not entirely fungible, metal and glass containers are in the same market because "[i]n differing degrees for different end uses manufacturers in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing policy").
>
> Plaintiffs have failed to demonstrate that the national market in air travel satisfies this standard. As the district court noted, 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.

SER at 101-02.

The District Court correctly applied the law of the case doctrine to deny Plaintiffs' subsequent request to re-litigate the relevant market standard in response to United's motion to dismiss. As the District Court held, the May 23 Order was the "binding law of this case" and declined to consider Plaintiffs' arguments for a different relevant market standard on the grounds that Plaintiffs' "arguments on this issue have already been considered, discussed at length, and rejected." ER 7-8. *See also United States v. Jingles*, 682 F.3d 811, 816 (9th Cir. 2012) ("Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue

previously decided by the same court, or a higher court, in the same case.") (quotations omitted); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007) (the law of the case doctrine applies to appeals to motions for preliminary injunction with regard to legal issues); *Herrington v. Cnty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) ("The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.").

Plaintiffs do not offer any arguments to show that the District Court somehow abused its discretion in following this Court's May 23 Order as law of the case on the issue of the relevant market. *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) ("A district court abuses its discretion in applying the law of the case doctrine only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result.") (citations omitted). In fact, Plaintiffs do not even mention or discuss these factors by which to evaluate the District Court's application of the law of case, let alone demonstrate how they require reversal here.

Instead, they simply ignore this issue and the standard of review, and contend yet again that this Court and the District Court erred in defining the correct

standard for determining the relevant market. *See* Op. Br. 22-23 ("It is erroneous to define a market by looking at demand considerations alone. . . . [In the May 23 Order,] this Court did just that."). And they argue again that the Court should disregard well-established precedent on the relevant market standard in favor of an approach based on Plaintiffs' idiosyncratic views of national pricing (Op. Br. 31-33), Supreme Court cases (Op. Br. 33-42), and cross-elasticity of supply (Op. Br. 22-28). None of Plaintiffs' arguments for revisiting this already-decided issue amount to anything because they fail to show that the District Court abused its discretion in applying the law of the case doctrine.

Plaintiffs' first two arguments -- that the Court should look at national pricing events (Op. Br. 31-33) and that Supreme Court cases support a different standard (Op. Br. 33-42) -- have already been considered and rejected by this Court. *See* SER 51-96 (Plaintiffs' prior Ninth Circuit briefing). Asking this Court to rule on these rehashed arguments for the second time undermines the purpose of the law of the case doctrine, which is to maintain consistency and help the courts efficiently adjudicate cases. *See Ingle*, 408 F.3d at 594 ("This doctrine has developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.") (quotations omitted); *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) ("The law of the case doctrine is a judicial invention designed to aid in

the efficient operation of court affairs.").[4] Plaintiffs offer no basis whatsoever for re-visiting the prior ruling on the proper relevant market standard.

B. Plaintiffs' Cross-Elasticity of Supply Argument Was Never Raised with the District Court and Is Irrelevant

Plaintiffs' new references to cross-elasticity of supply also do nothing to demonstrate that the District Court abused its discretion in invoking the law of the case doctrine. *See* Op. Br. 22-28.

As an initial and dispositive matter, the District Court could not have abused its discretion because Plaintiffs never raised the supply argument at any time with the District Court. Plaintiffs purport to fault the District Court and this Court for not considering cross-elasticity of supply. Op. Br. 24. But the alleged fault is entirely of Plaintiffs' own making. They never raised supply elasticity with the District Court in their allegations about the relevant market in the complaint or FAC, in testimony or argument during the preliminary injunction hearing, or in response to United's motion to dismiss the FAC. Plaintiffs also never raised it in their prior briefs and arguments to this Court, or in the petition for certiorari to the Supreme Court. The case law Plaintiffs cite for the point is not new -- they cite *Brown Shoe*, for example, which was decided in 1962, and *Twin City Sportservice*

[4] If the Court wishes to be refreshed on United's substantive arguments rebutting Appellants' contentions about national pricing and the Supreme Court cases, we refer the Court to United's Answering Brief submitted in case 10-17208. *See* SER 197-215.

Inc., which was decided in 1975[5] -- and the basic facts about airline transportation have not changed during these proceedings. Plaintiffs were the masters of their complaint and had every imaginable opportunity to define and defend the national market allegation in light of supply substitution considerations. They chose not to mention or rely on allegations of cross-elasticity of supply, and cannot fault this Court or the District Court for their own decision.

Under well-developed law in this Circuit, Plaintiffs have waived this argument by failing to present it to the District Court. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so. . . . [W]e will not reframe an appeal to review what would be in effect a different case than the one decided by the district court."). They had ample prior opportunity to raise this point with the District Court, this Court, and the Supreme Court, but failed to do so. For this reason alone, Plaintiffs' cross-elasticity of supply argument should not be considered.

[5] In addition, none of the cases Plaintiffs cite on supply substitution involve a motion to dismiss. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) (direct appeal after trial); *Brown Shoe*, 370 U.S. at 294 (same); *Equifax, Inc. v. F.T.C.*, 618 F.2d 63, 65 (9th Cir. 1980) (appeal of administrative agency decision after "lengthy hearing on the merits"); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674 (9th Cir. 1976) (appeal of summary judgment); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264 (9th Cir. 1975) (appeal after trial).

Plaintiffs' argument is also a wholly improper request for reconsideration of this Court's May 23 Order. Plaintiffs argued their prior appeal and filed requests for rehearing and rehearing *en banc* of the May 23 Order, without any mention whatsoever of the supply elasticity argument. They have no basis to seek reconsideration of the May 23 Order now. *See* Cir. L. R. 27-10(a) ("party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this Court must comply with the time limits and other requirements of FRAP 40"); FRAP 40(a)(1) ("a petition for panel rehearing may be filed within 14 days after entry of judgment"); *id.* 40(a)(2) ("The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended"); *United States v. James*, 146 F.3d 1183 (9th Cir. 1998) (untimely petition for rehearing is subject to be stricken).

Even if the cross-elasticity of supply argument were properly before this Court -- which it is not -- Plaintiffs make no showing whatsoever that it applies in this case or validates the alleged national market. The economic principle of cross-elasticity of supply (also known as supply substitution) has to do with the "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." *Twin City*, 512 F.2d at 1271. The majority of

antitrust cases do not consider supply substitution because interchangeability of use or cross-elasticity of demand are appropriate to define the relevant market. *See id.* at 1271 ("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."). As Plaintiffs' own citations make clear, some courts have considered supply substitution in the specific circumstance where a competitor competes in an adjacent market, but can easily enter the alleged product market. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("sellers of full-serve gasoline can easily convert their full-serve pumps, at virtually no cost, into self-serve, cash-only pumps . . . [t]he ease by which marketers can convert their full-serve facilities to increase their output of self-serve gasoline requires that full-serve sales be part of the relevant market"); *Twin City*, 512 F.2d at 1273 (where concessionaires utilized same employees, stands, equipment, purchasing agents, and supervisorial personnel for non-baseball sales, "relevant franchise market cannot be limited to those offered for sale by [baseball] teams").

Plaintiffs utterly fail to demonstrate how or why supply substitution is a meaningful factor in defining the relevant market for their claims. Specifically, Plaintiffs fail to show how their argument would matter in the face of the practical

reality that a flight from San Francisco to Newark does not and cannot compete with a flight from Seattle to Miami. Plaintiffs fail to show how the ability of a gas station to convert from full-service to self-service, or a concessionaire to sell hot dogs at a baseball game or another event in the same stadium, is even remotely relevant to defining the relevant market for their claims in this case. Plaintiffs' supply substitution arguments offer no basis for re-visiting the law of the case on the relevant market standard or for finding that the District Court abused its discretion by following this Court's May 23 Order. *See Ingle*, 408 F.3d at 594 (stating elements of abuse of discretion in context of law of the case review).[6]

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REJECTING PLAINTIFFS' JUDICIAL ESTOPPEL ARGUMENT

Plaintiffs' main argument before the District Court to avoid dismissal was based on a misapplication of a judicial estoppel theory. Plaintiffs effectively asked the District Court to allow the FAC to go forward despite a total absence of a

[6] Plaintiffs also argue that the May 23 Order should be "revisited by this Court in light of the Defendants' admissions in *In re Air Passenger CRS* and *Continental v. American Airlines*." Op. Br. 22. But this argument fails because they have no basis for "revisiting" this Court's decision at this time and because there is nothing in these district court decisions that contradicts this Court's articulation of the test for determining relevant market. In fact, *Continental Airlines v. American Airlines* does not describe any test for determining relevant market, and the *CRS* case describes one in harmony with this Court's test. *See CRS*, 694 F. Supp. at 1457 ("products and services which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes").

viable relevant market on the grounds that United should be judicially estopped from challenging the adequacy of a national market allegation. The District Court properly rejected this argument and Plaintiffs have failed to show that the District Court abused its discretion in making the ruling.

Judicial estoppel is designed "to protect against a litigant playing fast and loose with the courts." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996). It is "an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity." *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1123 (C.D. Cal. 2007) (internal citations and quotations omitted). Indeed, courts have emphasized that judicial estoppel "is an extreme remedy, to be used only when the inconsistent positions are tantamount to a knowing misrepresentation to or even fraud on the court." *Behrend v. Comcast Corp.*, 626 F. Supp. 2d 495, 507 (E.D. Pa. 2009) (internal citation omitted); *see also Siegel*, 496 F. Supp. 2d at 1122 (judicial estoppel is intended to prevent "perversion of the

judicial process" and applies where "intentional self-contradiction is being used" to obtain unfair advantage).

Judicial estoppel requires proof of three key elements: (1) that the party's later position is "clearly inconsistent" with its earlier position; (2) that the party succeeded in persuading a court to accept its earlier position, such that "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) that the party would "derive an unfair advantage or impose unfair detriment on the opposing party" if allowed to pursue the inconsistent position. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

Plaintiffs' judicial estoppel argument to the District Court was based on the 1988 *CRS* case -- *In re Air Passenger Computer Reservations Systems Antitrust Litigation*, 694 F. Supp. 1443 (C.D. Cal. 1988).[7] According to Plaintiffs, "both United and Continental relied upon a national market for air transportation as a relevant market." Op. Br. 44. Specifically, Plaintiffs allege that "United contended in its motion for summary judgment [in *CRS*] that the national air

[7] Plaintiffs also cite in their Opening Brief, for the first time in this case, an excerpt of jury instructions from a 1993 Southern District of Texas case involving Continental. *Continental Airlines v. American Airlines*, Civ. Nos. G-92-259, G-92-266 (S.D. Tex. 1993). Op. Br. 19. However, they do not -- and cannot -- argue that the District Court should have estopped United on the basis of that case because they never presented it to the District Court and Continental did not prevail in that matter. *See* Op. Br. 42-46.

transportation market was the only relevant market and United's motion for summary judgment was granted." *Id.* Plaintiffs content that the District Court abused its discretion in not estopping United from challenging the legal viability of Plaintiffs' proposed national air transportation market in this case. *Id.*

But as the District Court found, Plaintiffs' argument is based on a description of *CRS* that "does not accurately reflect the position of the parties in *CRS*, or the court's ultimate holding." ER 6. The parties, facts, and issues in *CRS* were substantially different from those in this Section 7 merger case. In that case, Continental Airlines, as plaintiff, among others, brought a Sherman Act Section 2 monopolization claim against defendants American Airlines and United Airlines. *CRS*, 694 F. Supp. at 1449. As that court stated, the "case arises out of defendants' ownership of Computerized Reservation Systems ('CRS')." *Id.* "A CRS is composed of computer terminals and printers in travel agents' offices" to send and receive air transportation booking information. *Id.* The gravamen of the case was whether CRSs were "essential facilities" or relevant markets that defendants had monopolized and from which competitors like Continental were improperly excluded. *Id.* at 1450-51. To resolve the summary judgment motions before it, the court spent the bulk of the opinion analyzing whether CRSs were essential facilities (*id.* at 1450-56), whether CRSs were a relevant market in which defendants had monopoly power (*id.* 1457-63), whether defendants had engaged in

willful acquisition or maintenance of monopoly power in the CRS market (*id*. at 1463-65), and whether plaintiffs sustained antitrust injury (*id*.) -- all issues completely unconnected and irrelevant to Plaintiffs' proposed market definition in this matter.

The part of the opinion that Plaintiffs argue is relevant involved the court addressing ancillary allegations that "United and American leveraged the reservation system to monopolize, or attempt to monopolize the downstream 'national air transportation market' as well as 'various local air transportation markets.'" ER 6 (quoting *CRS*, 694 F. Supp. at 1466, 1471). The *CRS* court rejected claims based on these markets on the grounds that Plaintiffs had failed to carry their evidentiary burdens with respect to establishing required elements of monopolization or attempted monopolization. *CRS*, 694 F. Supp. at 1466-67. In stark contrast to the opinion's rigorous analysis of the CRS market question (*id*. at 1457-63), the court did not engage in any substantive analysis of market definition in relation to these air transportation claims. There was simply no need to do so given the court's conclusion that (i) the plaintiffs had failed to provide evidence supporting the existence of local air transportation markets and (ii) any monopolization claims based on a national market were plainly barred due to reasons unrelated to market definition, including the fact that "defendant's market share has never reached 12%" if the market were so-defined. *Id*. at 1467, 1472.

The District Court correctly held that *CRS* does not support estoppel. As the District Court found, the *CRS* decision does not show that United adopted a position that is "clearly inconsistent" with any position in this case:

> [T]he [*CRS*] opinion states only that "[t]he evidence submitted supports defendant's contention that the only relevant air transportation market is the national market." It appears that United took this position because there was no evidence to establish local air transportation markets as a viable alternative to the national market, and as for the national market, "[p]laintiffs have provided no competent evidence supporting a claim that United monopolized the national air transportation market." *CRS* contains no other substantive discussion about the viability of the local or the national market, and it is not even clear from the opinion that United affirmatively argued that a national air transportation market provides a viable basis for antitrust analysis. Rather, **it appears equally likely from the face of the opinion that the airline merely accepted the national market for argument's sake given the lack of any competent evidence**. As a result, plaintiffs here have failed to establish that United took a clearly inconsistent position.

ER 6 (emphasis added and citations omitted). Accordingly, Plaintiffs have failed to show that the District Court abused its discretion in finding that there was no "clearly inconsistent" prior position on which a theory of judicial estoppel could be based. *See, e.g.*, *New Hampshire*, 532 U.S. at 750; *Cozart v. Target Corp.*, No. 07-5772, 2008 WL 4330257, at *2 (C.D. Cal. Sept. 19, 2008) ("While the doctrine of judicial estoppel serves the important purpose of preventing manipulative parties from prevailing twice on opposite theories in certain circumstances, it may not be used to hamstring a litigant from advancing a particular position when this position is not clearly inconsistent with a prior position.") (internal quotation marks and

citation omitted); *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000) ("There must be a true inconsistency between the statements in the two proceedings. If the statements can be reconciled there is no occasion to apply an estoppel.").

Likewise, the District Court also properly rejected Plaintiffs' judicial estoppel theory because, even if Plaintiffs had established that United took a "clearly inconsistent" position in *CRS*, United cannot be said to have succeeded in advancing that position. Contrary to Plaintiffs' contention, United did not obtain summary judgment on the basis of any position it took with respect to the definition of the air transportation market. As the District Court recognized, an alleged national air transportation market was simply not a disputed issue in *CRS* that the court decided in Defendants' favor as an essential part of its summary judgment ruling:

> Of course, even if United did accept the national market as the relevant market for antitrust purposes, because of the absence of any competent evidence directed to either the local or the national market, nothing turned on its position. Plaintiffs in this case have therefore also failed to show that United maintained its purported prior position with success.

ER 6. As a result, even if United had taken a different position in *CRS* with respect to a national air transportation market, there is no reason to believe that the outcome of the case would have been any different. That fact is also fatal to Plaintiffs' argument. *See, e.g., Siegel*, 496 F. Supp. 2d at 1123 ("It is not

inequitable to allow defendants to now take a position inconsistent with one taken in a prior litigation if the conclusion reached in that prior litigation would have been the same regardless of the defendants' advocated position."); *Pennycuff v. Fentress Cnty Bd. of Educ.*, 404 F.3d 447, 453 (6th Cir. 2005) (finding defendants' position "clearly inconsistent" but declining to apply judicial estoppel because the prior inconsistent position was not the basis for the ruling in the prior action).[8]

In addition, Plaintiffs have failed to establish that the District Court's rejection of Plaintiffs' flawed market definition resulted in any unfairness, or "perversion of the judicial process" (*Siegel*, 496 F. Supp. 2d at 1122), that would warrant the application of judicial estoppel here. Indeed, Plaintiffs' judicial estoppel argument is nothing more than an evasive maneuver to avoid having to satisfy the mandatory legal requirements for stating a relevant market, *i.e.*, reasonable interchangeability of use or cross-elasticity of demand. Plaintiffs propose that they be allowed to bring a Section 7 case on the basis of a purported market that this Court has already expressly held is legally deficient. *See* ER 2.

[8] Nor could Appellants claim judicial estoppel based on the positions Continental had taken against United in *CRS*, in light of the recent Continental-United merger. To the extent Continental had asserted claims against United based on a national air transportation market theory, the *CRS* court rejected those claims. Accordingly, Continental's prior position cannot be the basis for judicial estoppel. *See, e.g.*, *New Hampshire*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, . . . and thus poses little threat to judicial integrity.") (citations and quotations omitted).

Plaintiffs offer no authority that suggests that an antitrust case can proceed in the absence of a viable market on the basis of judicial estoppel. Nor could they as a properly determined relevant market is a "necessary predicate" for a Section 7 case. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). Requiring Plaintiffs to state a relevant market that satisfies applicable legal standards cannot possibly be deemed unfair or a perversion of the judicial process and Plaintiffs' judicial estoppel argument should be rejected on this ground alone. *See, e.g.*, *Williams v. Boeing Co.*, 517 F.3d 1120, 1135 (9th Cir. 2008) (finding judicial estoppel inapplicable where party "will not derive an unfair advantage if not judicially estopped").

As the District Court noted, even if Plaintiffs had been able to meet all of the elements of their judicial estoppel claim (which is not the case), allowing them to move forward with a legally deficient complaint would result in the expenditure of potentially substantial judicial and private resource on an antirust case missing the essential element of a viable relevant market. ER 6 ("Even assuming, however, for argument's sake, that estoppel did bar defendants from attacking the sufficiency of plaintiffs' pleadings, plaintiffs simply could not proceed on a legally deficient complaint."). Such a result would undermine the integrity of judicial process. *See New Hampshire*, 532 U.S. at 749-50 ("courts have uniformly recognized that [judicial estoppel's] purpose is to protect the integrity of the judicial process")

(quotations omitted). It would also result in the completely untenable and unprecedented result of an antitrust case proceeding in the absence of a viable relevant market.

The District Court correctly concluded that "*CRS* does not provide any basis for the application of estoppel against defendants in this case." (ER 6.) Plaintiffs have not come close to satisfying their heavy burden of establishing that this ruling was an abuse of discretion.[9]

[9] Appellants' suggestion that United "had a duty to bring CRS to the attention of this Court and the lower court" (Op. Br. 48) is just wrong. Under Rule 5-200 of the Rules of Professional Conduct of the State Bar of California, United may not "mislead the judge." R. Prof. Conduct State Bar Cal. Rule 5-200(b). And under American Bar Association Model Rule 3.3, United is required to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model Rules 3.3(a)(2); *see also In re Girardi*, 611 F.3d 1027, 1035-36 (9th Cir. 2010) (in determining whether an attorney's conduct falls below the standards of the profession, the Ninth Circuit may consider state bar ethical rules and the American Bar Association model rules). United's actions were at all times consistent with these rules. First, as detailed above, *CRS* is irrelevant to both the Court's May 23 Order and whether Appellants are able to state a claim in their complaint (*see* Section III(B), *supra*) and cannot be the basis for judicial estoppel (*see* Section II, *supra*). *CRS*, therefore, is not directly adverse to United's positions. Second, *CRS* is a district court case from the Central District of California, which is not controlling nor binding for either this Court, or the Northern District of California. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citations omitted). Last, Appellants *did* bring *CRS* to the District Court's attention, and the District Court correctly concluded that it did not save Appellant's non-viable market definition.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE FAC BECAUSE IT IS FACIALLY UNSUSTAINABLE

A. The FAC Is Facially Unsustainable

As a final dispositive point, Plaintiffs simply cannot escape the fact that the District Court properly dismissed the FAC. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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.* A "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545 (citations and internal punctuation omitted).

To maintain a Section 7 antitrust claim, Plaintiffs are required to plead a viable relevant market in which United has market power. *See Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 10-15978, 2011 WL 1898150, at *1 (9th Cir. May 19, 2011) ("In order to state an antitrust claim, a plaintiff must identify a relevant market within which the defendant has market power."); *Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) ("To establish a prima

facie case under Section 7 of the Clayton Act, a plaintiff must first define the relevant market."). Failure to plead a viable relevant market renders Plaintiffs' complaint subject to dismissal. *See Pfizer*, 2011 WL 1898150 at *1 (dismissing antitrust claim where plaintiffs alleged "pharmaceutical industry" as the relevant market but failed to allege facts establishing that "all pharmaceutical products are interchangeable for the same purpose"); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable").

As demonstrated above, this Court and the District Court have already determined that Plaintiffs cannot make out a Section 7 case based on a national market for air transportation. Such a market fails to meet the required standard of interchangeability of use or cross-elasticity of demand. *See* SER 101 (May 23 Order) ("In defining the outer bounds of a relevant antitrust market, we consider 'the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'") (quoting *Brown Shoe*, 370 U.S. at 325); *Pfizer*, 2011 WL 1898150 at *1 ("The products alleged in a relevant market must be 'reasonably interchangeable by consumers for the same purposes.'") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Consequently, Plaintiffs' Section 7 claim is facially unsustainable and was

correctly dismissed by the District Court. *See Pfizer*, 2011 WL 1898150 at *1 ("The failure to allege a product market consisting of reasonably interchangeable goods renders the SAC 'facially unsustainable' and appropriate for dismissal."); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997) (noting that a motion to dismiss may be granted "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand"). Accordingly, the District Court correctly dismissed the FAC for failure to plead a viable relevant market.

B. The *CRS* and *Continental v. American* Cases Are Irrelevant To The Pleadings In This Matter

To avoid dismissal under these pleading requirements, Plaintiffs argue that the District Court should have considered the *CRS* and *Continental Airlines* cases not just for judicial estoppel but also because they somehow made the national air market allegation more "plausible." Op. Br. 14. This argument, which is largely a rephrasing of the misdirected judicial estoppel argument discussed above, falls flat on procedural and substantive grounds.

First, none of Plaintiffs' purported facts from these two cases could be considered on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In deciding if Plaintiffs' complaint failed to state a claim for which relief may be granted in this matter, the District Court properly considered the pleadings, documents incorporated by reference in the FAC, and documents that were

judicially noticeable. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). But the "facts" that Plaintiffs allude to in *CRS* and *Continental Airlines* as making the national market more plausible are not pled in the FAC, or included in documents referenced in it. And, even if the filings for the 1988 and 1993 cases were judicially noticeable -- which they are not (*see* United's Opposition to Request for Judicial Notice, filed simultaneously with United's Answering Brief) -- the truth and substance of the matters asserted in those documents are not subject to judicial notice. *See Peel v. BrooksAmerica Mortg. Corp.*, 788 F. Supp. 2d 1149, 1158 (C.D. Cal. 2011) ("a court may take judicial notice of the existence of another court's opinion or of the filing of pleadings in related proceedings; the Court may not, however, accept as true the facts found or alleged in such documents"); *accord M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support

a contention in a cause then before it."). Accordingly, Plaintiffs' "facts" could not insulate the FAC from dismissal.[10]

But even if the alleged facts could have been considered for the motion to dismiss, they would have no bearing on the outcome of this matter because they are substantively irrelevant. A proposed relevant market either describes a market consisting of products that are reasonable interchangeable and have cross-elasticity of demand with substitutes, or it does not. Regardless of what United's legal positions were in past litigation, a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami, and 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. As such, Plaintiffs' arguments about plausibility are nothing more than logical non-sequiturs designed to confuse the issues. They in no way save the defective FAC.

[10] In addition, Appellants have waived any argument as to whether the purported facts of *Continental v. American* make their allegations in this matter more plausible because they never presented this argument to the District Court. *See Baccei*, 632 F.3d at 1149 ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal[.]").

CONCLUSION

For the foregoing reasons, United respectfully requests that the Court affirm the District Court's dismissal of the FAC.

Dated: September 14, 2012

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 9,509 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 14, 2012

By: *s/ James Donato*
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STATEMENT OF RELATED CASES

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **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 September 14, 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.

I further certify that on September 14, 2012, the **Supplemental Excerpts of Record** were served by overnight delivery to:

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