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)

APPELLANTS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

This case is about whether Plaintiffs have alleged a plausible relevant market: the national market for air transportation. Plaintiffs brought this action against merging Defendants United and Continental pursuant to § 7 of the Clayton Act. This is not the first time that this Court has been presented with this issue or this case. In this appeal, Plaintiffs raise arguments not previously considered by this Court.

First, the plausibility of Plaintiffs' claims does not turn on the application of the doctrine of the law of the case (as Defendants contend). Rather, the plausibility of a national market for air transportation has been sufficiently alleged in the FAC and amply demonstrated by the Defendants themselves (as well as other airlines) in *CRS* and *Continental v. American Airlines*—in which Defendants advocated a national market for air transportation as a relevant market for antitrust purposes. Defendants' positions in those cases are not ambiguous.

Second, Plaintiffs allegations of a national market for air transportation are supported by the Amended and Supplemental Complaints, which allege facts demonstrating a system of national pricing of fares by airlines.

Third, cross-elasticity of supply should and must be considered in defining a relevant market. This argument is not new. It was raised by

Plaintiffs in the briefing on the motion for a preliminary injunction. The admitted ability of Defendants to compete anywhere it would be profitable for them to do so renders city-pair market definitions overly narrow.

Fourth, relevant market is a question of fact for the jury, and Plaintiffs' were denied their 7th Amendment right to a jury trial.

Defendants' responsive papers attempt to elevate the issue of the doctrine of the law of the case to cloud the main issue on appeal: the plausibility of Plaintiffs' proposed relevant market as alleged in the Amended and Supplemental Complaints. Defendants utterly fail to rebut the argument, which they previously advocated, that the national market for air transportation is a viable relevant market for antitrust purposes.

It has been widely reported that American Airlines and US Airways are discussing a merger, which would reduce the number of major network carriers from four to three (Plaintiffs' October 26, 2012 Request for Judicial Notice, Exhibit A.) There have been six major airline mergers in the past seven years—all of which have gone unchallenged by federal antitrust authorities. US Airways, American Airlines and other airlines were participants in the *In re Air Passenger Computer Reservations Systems* (CD Cal. 1988) 694 F.Supp. 1443 ("*CRS")* and *Continental v. American Airlines* (S.D. Tex. 1993) 824 F.Supp. 689, cases. In those cases, American Airlines and USAir adopted the position

that the national market for air transportation was a relevant market for antitrust purposes.

ARGUMENT

I. DEFENDANTS' ARGUMENTS AVOID THE MAIN ISSUE ON APPEAL: THE PLAUSIBILTY OF PLAINTIFFS' PROPOSED MARKET DEFINITION

This case comes to this Court from the dismissal of Plaintiffs' complaint under Rule 12(b)(6). This case is about whether Plaintiffs have alleged a plausible relevant market in their FAC and Supplemental Complaint—the national market for air transportation. Plaintiffs have done so.

A. Plaintiffs' Argument that Cross-Elasticity of Supply Must be Considered in Defining a Relevant Market is Mandated by the Authority of this Circuit and Has Not Been Waived

In *United Air Lines, Inc. v. Civil Aeronautics Board* (7th Cir. 1985) 766 F.2d 1107, 1115, Judge Posner directly contradicts the opinion of this Court and the district court:

> When the elasticity of supply is high…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.]

Judge Posner held that different city-pairs were in the same market for air transportation. This Court, however, held just the opposite: "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." *Malaney v. UAL Corp*. (9th Cir. May 23, 2011) No. 10-17208, 2011 WL 1979870, at *4 ("*Malaney I*").

The difference is cross-elasticity of supply.

Defendants argue that cross-elasticity of supply is irrelevant but offer no authority to support that conclusion. The authority of this Circuit and the Supreme Court mandates its consideration in relevant market analysis. See *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 325; *United States v. Falstaff Brewing Corporation* (1973) 410 U.S. 526; *Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc.* (9th Cir. 1975) 512 F.2d 1264.

Continental's own expert acknowledged the importance of cross-elasticity of supply in market definition *In re Air Passenger CRS,* 694 F.Supp at 1468:

> In fact, Continental's own expert (Franklin Fischer) *has testified that a city pair cannot be 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. [Emphasis added.]

What Judge Posner, the Supreme Court in *Brown Shoe,* this Court in *Twin City,* and Franklin Fischer in *CRS* all recognize is that pricing is constrained by potential competition from other airlines. Cross-elasticity of supply, which in this case is demonstrated by the ease of airlines to move into

slots where it would be profitable to do so, must be included in a relevant market analysis. Without analysis of cross-elasticity of supply—a market definition is erroneous.

Plaintiffs have called attention to the need to define relevant market broadly since the inception of this case. (Defendants' SER 66-73; 154-159.) Plaintiffs raised this issue in the briefing on the motion for preliminary injunction:

> Because United and Continental are both able to enter any route in the United States where the other flies, they are potential, if not actual, competitors *everywhere*. Continental CEO Smisek put the matter well and succinctly:
>
> > Q: You said earlier that there was an ease of entry into the market?
> > A: Yes.
> > Q: Would you state briefly and give us an example as to what one would have to do in order to get into servicing passengers with airplanes?
> > A: You mean de novo?
> > Q: Yes. Well, that's what you were talking about, wasn't it?
> > A: Well, no, no, not at all. I mean, there are—competitors can enter your market at 540 miles an hour, so it's very easy to enter a market when you are already an airline. (Smisek Depo., 278:13-279:1.)
> >
> > ***
> >
> > …If I decide I want to fly to Charlotte tomorrow, all I have to do—I would want to sell the seats of aircraft, but I could take a 737 and point it to Charlotte and there I'd be. So it's actually fairly easy to enter markets. (Smisek Depo., 280:10-15.)
>
> Obviously, each of the defendants is an important potential entrant against the other, particularly given the breadth of their networks and the similarity of the package they offer to

business travelers. (Plaintiffs' SER 39:11-16; SER 40:1-11; Plaintiffs Post-Hearing Memorandum 31:11-16; 32:1-14.)

Any suggestion that the cross-elasticity of supply argument has been waived is patently false.

Even if Plaintiffs had failed to raise this argument in the lower court (even though they clearly did), the court may consider issues not presented to the district court. See *Broad v. Sealaska Corp.* (9th Cir. 1996) 85 F.3d 422, 430. If necessary, it would be appropriate for the Court to exercise this discretion to reconsider *Malaney I* in light of the *CRS* and *Continental v. American* cases and to take into account cross-elasticity of supply.

B. Defendants Have Failed to Rebut Any Argument About the Plausibility of Plaintiffs' Proposed Market Definition

In the Opening Brief, Plaintiffs argued that *Malaney I,* should be reconsidered based upon (1) the positions of Defendants in *CRS* and *Continental v. American Airlines* wherein they took the position that the national market for air transportation was a relevant market for antitrust purposes; and (2) the need to account for cross-elasticity of supply in defining a relevant market. In response to these arguments, Defendants say very little. Defendants merely repeat the same flawed syllogism of the district court that a "flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami." (Answering Brief at 18, 39.)

The Supreme Court has emphasized that analyzing the sufficiency of a complaint's allegations is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 679.

Plaintiffs' FAC and the Supplemental Complaint allege:

> The relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States… (II ER 057; FAC ¶ 29.)
>
> United and Continental are substantial rivals and competitors in the relevant market. (II ER 57; FAC ¶ 30.)
>
> United and Continental are substantial potential rivals and potential competitors in the relevant market. (II ER 57; FAC ¶ 31.)
>
> Not only do United and Continental provide competing passenger service against each other on a number of passenger routes, but also they are potentially able to provide competing passenger service against each other on any route anywhere in the United States if they believe it would be profitable to do so. (II ER 57; FAC ¶ 32.)
>
> United has the capability to serve every major market in the United States above 5,000 population. (II ER 57; FAC ¶ 33.)
>
> Continental has the capability to serve every major market in the United States above 5,000 population. (II ER 57; FAC ¶34.)
>
> 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 merger has resulted in countrywide fare increases. (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.)

Plaintiffs have alleged that United and Continental are actual and potential competitors throughout the United States and that their pricing is constrained by actual and potential competition from one another. The FAC and Supplemental Complaint further allege a system of national pricing by the airlines.

Plaintiffs have not only pointed out that cross-elasticity of supply should and must be considered in relevant market definition but also that courts and Defendants have previously recognized a national relevant market definition in the airline industry in the *CRS* and *Continental v. American Airlines* cases.

In this case, common sense suggests that allegations of national pricing by the airlines, the admitted ability of Defendants to compete anywhere in the United States (Plaintiffs' SER 39:11-16; SER 40:1-11; quoting Smisek

deposition), and the positions in *CRS* and *Continental*, all support the inference that the relevant market in this case is the national market for air transportation.

C. The *CRS* and *Continental v. American* Cases Are Relevant

Defendants argue that the *CRS* and *Continental v. American* cases are irrelevant. *Brown Shoe*, of course, recognizes 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. Defendants' argument that these cases are not relevant because they do not demonstrate perfect interchangeability confuses the point. These cases demonstrate that Defendants and the airlines not only recognize a national relevant market but also that they are constrained by both actual and potential competition from other airlines (in that airlines can easily enter other markets).

In the *Continental* case in particular, the court instructed the jury that it, "may conclude that a relevant market [for air transportation] exists only for the entire United States." This is relevant because it clearly proves that it is not inconceivable that Plaintiffs could prove a set of facts supporting the national relevant market alleged in the FAC. *Continental v. American Airlines* (S.D. Tex. 1993), Civ. Nos. G-92-259, G-92-266, 1993 WL 379396 at *3.

D. Under Either De Novo Review or an Abuse of Discretion Standard of Review, the Decision of the Lower Court Should be Reversed

The standard of review of the dismissal of a complaint under Rule 12(b)(6) is well-established—*de novo*. *Kendall v. Visa U.S.A., Inc.* (9th Cir. 2008) 518 F.3d 1042, 1046. Even Defendants concede this standard of review. (Answering Brief at 12.)

Defendants argue that under the doctrine of the law of the case, the district court's decision should be reviewed for abuse of discretion. Plaintiffs have argued that *Malaney v. UAL Corp*. No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011) was erroneously decided, particularly in light of the fact that Plaintiffs have now brought to the court's attention the *CRS* and *Continental* cases, which had not been previously considered by this Court and which the lower court refused to consider in determining the plausibility of Plaintiffs claims; and that as a result, Plaintiffs were prejudiced. These arguments are equally applicable grounds for finding an abuse of discretion.

A district court abuses its discretion in applying the law of the case doctrine if (1) the first decision was clearly erroneous; (2) if 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. *Ingle v. Circuit City* (9th Cir. 2005) 408 F.3d 592, 594.

The lower court abused its discretion in applying the doctrine of the law of the case for all the reasons raised in Plaintiffs' Opening Brief:

1. The lower court did not consider the Defendants' contrary positions in *CRS* and *Continental v. American Airlines* in determining the "plausibility" of Plaintiffs' claims (Opening Brief at 13-22);

2. The lower court and this Court in *Malaney I* did not consider cross-elasticity of supply in defining a relevant market, contrary to the authority of this Circuit and the Supreme Court (Opening Brief at 22-31); and

3. The *CRS* and *Continental* cases were never brought to this Court's attention in *Malaney I* (Opening Brief at 21).

Under either standard of review, the decision of the lower court should and must be reversed.

II. DEFENDANTS' REMAINING ARGUMENT IS UNSOUND

Defendants remaining arguments regarding the lower court's application of judicial estoppel are based on an erroneous interpretation of the *CRS* case. Defendants argue that their position is not clearly inconsistent with the *CRS* case and that they did not prevail on that issue. *Continental v. American Airlines* (S.D.Tex. 1993) 824 F.Supp. 689, which reviewed defendants' and plaintiffs' positions on relevant market in *CRS,* is instructive. In *Continental,*

the court considered whether plaintiffs Continental and Northwest were collaterally estopped from relitigating the relevant market issue by the district court's decision in *CRS*. The court in *Continental* summarized the positions in the *CRS* case:

> Defendants assert that Plaintiffs are collaterally estopped from claiming that the relevant market in air transportation is anything other than the national market by the district court's decision in *In re Air Passenger Computerized Reservations Sys. Antitrust Litig.,* 694 F.Supp. 1443 (C.D.Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Airlines, Inc.,* 948 F.2d 536 (9th Cir. 1991), *cert. denied,* 503 U.S. 977, 112 S.Ct. 1603, 118 L.Ed.2d 316 (1992) ("*Computerized Reservations").* In *Computerized Reservations,* several plaintiffs, including Continental and Northwest, sued American and United, asserting claims for various allegedly anticompetitive acts arising out of the defendants' ownership of computerized reservations systems. The defendants moved for summary judgment as to two of the plaintiffs' claims, and the court granted the motion in part and denied it in part. In particular the court found that Continental, the only plaintiff to argue that relevant markets other than national markets existed, had failed "to present evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry." *Id.* at 1468. Therefore, the court held that, as a matter of law, the only relevant air transportation market was the national market. Thereafter, Continental settled its claims. *Id.* at 706.

The *Continenta*l court makes note that Continental alleged that relevant markets other than the national market existed. The *CRS* opinion also informs that United contended that the only relevant market for air transportation is the national market. *In re Air Passenger CRS*, *Id*. at 1472. United's position in

CRS is clearly inconsistent with its position herein that the national market for air transportation is not facially sustainable.

It is also important to note that United did prevail on their position that the "only" relevant market for air transportation was the national market. In *CRS,* United had moved for summary judgment as to two of Continental's claims, and Continental had argued that there were relevant markets other than the national market. As the court noted in *Continental v. American Airlines,* "…the [CRS] court held that, as a matter of law, the only relevant air transportation market was the national market. Thereafter, Continental settled its claims." *Continental,* 824 F.Supp. at 706. In other words, United prevailed on its position that the only relevant market was the national relevant market.

Further, Plaintiffs were prejudiced by Defendants' failure to call attention to the adverse authority from *CRS* and *Continental.* As addressed in the Opening Brief at 46-48, the *CRS* and *Continental* cases would have been used to impeach Defendants' expert, whose opinion was substantially relied upon by the lower court to deny Plaintiffs' motion for preliminary injunction (Defendants' SER 38-44).

Defendants contend that Plaintiffs' judicial estoppel argument is in some way an attempt to avoid alleging a viable relevant market. This, of course, is also a mischaracterization of Plaintiffs' position. Plaintiffs' arguments

regarding the *CRS* and *Continental* cases, cross-elasticity of supply, and judicial estoppel simply point out what Defendants have previously recognized—that the national market for air transportation *is* a viable market for antitrust purposes. In the words of Continental CEO Smisek:

> A: Well, no, no, not at all. I mean, there are—competitors can enter your market at 540 miles an hour, so it's very easy to enter a market when you are already an airline. (Smisek Depo., 278:13-279:1.)
>
> ***
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> …If I decide I want to fly to Charlotte tomorrow, all I have to do—I would want to sell the seats of aircraft, but I could take a 737 and point it to Charlotte and there I'd be. *So it's actually fairly easy to enter markets.* (Smisek Depo., 280:10-15.) [Emphasis added.]

In *Brown Shoe,* 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.'" *Brown Shoe*, 370 U.S. at 326. Plaintiffs' arguments demonstrate the larger point that competition exists outside of perfectly interchangeable city-pair markets. Accordingly, the national relevant market is a viable market for antitrust purposes.

III. RELEVANT MARKET IS A QUESTION OF FACT FOR THE JURY

Defining the "[r]elevant market is a factual issue which is decided by the jury." *Syufy Enterprises v. American Multicinema*, Inc. (9th Cir. 1986) 793 F.2d 990, 994 (citing *Los Angeles Memorial Coliseum Comm'n v. N.F.L.* (9th Cir. 1984) 726 F.2d 1381, 1392); see also *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*. (9th Cir. 1991) 924 F.2d 1484, 1489 ("Ordinarily, the relevant market is a question of fact for the jury"); *Agron, Inc. v. Lin*, 2004 U.S. Dist. LEXIS 26605, 2004 WL 555377, at *8 (C.D. Cal. 2004) (same); *Rebel Oil Co., Inc. v. Atlantic Richfield Co*., (D. Nev.1990) 133 F.R.D. 41, 44 ("The Ninth Circuit has established that both market definition and market power are essentially questions of fact appropriate for jury consideration"); *Nobody in Particular Presents v. Clear Channel Communications* (D. Colo. 2004) 311 F. Supp. 2d at 1083 ("The scope of the market is usually a question of fact for the jury.") (citing *Telecor Comm., Inc. v. Southwestern Bell Tel. Co.* (10th Cir. 2002) 305 F.3d 1124, 1131.)

As this the district court pointed out in its October 24, 2011, Order Granting Leave to Amend (Defendants SER 6:6-9), *Syufy* and other authorities require that the jury's verdict on this issue be supported by "substantial evidence." In Plaintiffs' opinion, Defendants' success on a motion for

summary judgment in *CRS* and the positions articulated in *Continental* provide overwhelming support for Plaintiffs' contentions on this issue.

A. 7th Amendment Right to Trial by Jury

The 7th Amendment to the United States Constitution guarantees the right to trial by jury in civil cases:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The United States Supreme Court has underscored the importance of the right to trial by jury in antitrust cases. In *Beacon Theatres, Inc. v. Westover* (1959) 359 U.S. 500, 504, the Supreme Court declared that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade."

CONCLUSION

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

October 26, 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 3,671 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

October 26, 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 October 26, 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.

October 26, 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 October 26, 2012.

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