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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 Michael C. Malaney, Katherine R. Arcell,)
Kieth Dean Bradt, Jose' M. Brito, Jan Marie)
12 Brown, Robert D. Conway, Rosemary)
D'Augusta, Brenda K. Davis, Pamela Faust,)
13 Carolyn Fjord, Don Freeland, Ted Friedli,)
Donald V. Fry, Gabriel Garavanian, Harry)
14 Garavanian, Yvonne Jocelyn Gardner, Lee M.)
Gentry, Jay Glikman, Donna M. Johnson,)
15 Valarie Ann Jolly, Gail S. Kosach, Rozann)
Kunstle, Steve Kunstle, John Lovell, Len)
16 Marazzo, Lee McCarthy, Lisa McCarthy,)
Patricia Ann Meeuwesen, L. West Oehmig, Jr.,)
17 Cynthia Prosterman, Deborah M. Pulfer,)
Sharon Holmes Reed, Dana L. Robinson,)
18 Robert A. Rosenthal, Bill Rubensohn, Sondra)
K. Russell, Sylvia N. Sparks, June Stansbury,)
19 Clyde D. Stensrud, Sherry Lynne Stewart,)
Wayne Taleff, Gary Talewsky, Annette M.)
20 Tippetts, Diana Lynn Ultican, J. Michael)
Walker, Pamela S. Ward, David P. Wendell,)
21 Christine O. Whalen, and Suraj Zutshi,)

22 Plaintiffs,)

23 v.)

24 UAL CORPORATION, UNITED AIR LINES,)
INC., and CONTINENTAL AIRLINES, INC.)

25 Defendants.)
26 _____)
27)
28)

CASE NO.: CV-10-02858 (RS)

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT TO ADD
DAMAGES CLAIM**

Date: September 29, 2011
Time: 1:30 p.m.
Judge: Honorable Richard
Seeborg

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on September 29, 2011, at 1:30 p.m., or as soon
4 thereafter at the matter may be heard in the Courtroom of the Honorable Richard Seeborg,
5 United States District Judge for the Northern District of California, located at 450 Golden
6 Gate Avenue, San Francisco, California, Plaintiffs will move this Court, for an order granting
7 Plaintiffs leave to file their First Amended Complaint and ordering that the First Amended
8 Complaint submitted with this motion be deemed filed.

9 The motion will be based on this Notice of Motion and Motion, the Memorandum of
10 Points and Authorities, Plaintiffs' Amended Complaint, and the [Proposed] Order filed
11 herewith, on all of the files and records of this action, and on any additional material that may
12 be elicited at the hearing of this motion.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 Through this motion, Plaintiffs seek leave to file their First Amended Complaint pursuant
16 to Federal Rule of Civil Procedure 15(a) and this Court's June 23, 2011, Case Management
17 Order. Plaintiffs' First Amended Complaint, attached hereto as Exhibit A, adds a damages claim
18 and additional factual allegations relating to Plaintiffs' previously asserted claims. On September
19 27, 2010, this Court denied Plaintiffs' Motion for a Preliminary Injunction. Thereafter, there was
20 extensive briefing, as well as, extensions on the briefing, as well as argument in the Ninth Circuit
21 Court of Appeal. Thus, Plaintiffs' Amended Complaint is timely and does not cause any
22 prejudice to Defendants.

23 **II. STATEMENT OF FACTS**

24 Plaintiffs filed this lawsuit on June 29, 2010. Defendants answered on August 5, 2010.
25 On September 27, 2010, an Order was entered denying Plaintiffs' Motion for a Preliminary
26 Injunction. On or about October 1, 2010, Defendants closed their merger.

27 On October 1, 2010, a Notice of Appeal to the United States Court of Appeals for the
28 Ninth Circuit was filed, from this Court's Order denying Plaintiffs' Motion for a Preliminary

1 Injunction. Oral argument on Plaintiffs' appeal was heard on May 10, 2011. On May 23,
2 2011, the Ninth Circuit, issued its decision, affirming the District Court's September 27, 2010,
3 denial of the Motion for a Preliminary Injunction.

4 In the Case Management Statement Order filed on June 23, 2011, this Court ordered
5 Plaintiffs to file any request to amend the Complaint within 60 days. After the denial of the
6 Motion for a Preliminary Injunction, Plaintiffs' counsel sought consent from Defense counsel to
7 file a damages claim. However, Defendants do not consent to the filing of a First Amended
8 Complaint, as of the time of this filing. Accordingly, Plaintiffs seek an order permitting Plaintiffs
9 to file the proposed First Amended Complaint.
10

11 III. ARGUMENT

12 A. Leave Should be Granted to Amend the Complaint.

13 1. Leave is Freely Granted.

14 Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall
15 be freely given when justice so requires." The United States Supreme Court, the Ninth
16 Circuit, and this Court have repeatedly reaffirmed that leave to amend is to be granted with
17 "extreme liberality." *DCD Programs, Ltd v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)
18 (citation omitted); *see, e.g., Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)
19 (leave to amend should be freely given); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
20 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining
21 Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to
22 amend.") (emphasis in original); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)
23 (courts should be guided by policy favoring decisions on the merits "rather than on the
24 pleadings or technicalities"); *Cooper Development Co. v. Employers Insurance of Wausau*,
25 765 F.Supp. 1429, 1432 (N.D. Cal. 1991) (courts have been "quite liberal" in granting leave
26 to amend); *Building Service Employees Pension Trust v. Horsemen's Quarter Horse Racing*
27
28

1 *Association*, 98 F.R.D. 458, 459 (N.D. Cal. 1983) (same); *see also* Moore, 3-15 *Moore's*
2 *Federal Practice – Civil* § 15.14 (“A liberal, pro-amendment ethos dominates the intent and
3 judicial construction of Rule 15(a).”). The primary factors relied upon by the Supreme Court
4 and the Ninth Circuit in denying a motion for leave to amend are “bad faith, undue delay,
5 prejudice to the opposing party, and futility of amendment.” *DCD Programs*, 833 F.2d at 186.
6 None of these factors are present here.

7
8 **B. Amendment Should be Permitted.**

9 Plaintiffs’ First Amended Complaint is timely and should be allowed. In its Case
10 Management Order, this court permitted parties to seek leave to amend until August 22, 2011.
11 This motion is being filed within that deadline. Furthermore, Plaintiffs fall well within the
12 liberal standard for freely allowing the amendment of pleadings. *See Foman v. Davis*, 371
13 U.S. 1978, 182 (1962) (“In the absence of...undue delay, bad faith or dilatory motive on the
14 part of the movant...undue prejudice to the opposing party by virtue of allowance of the
15 amendment...the leave sought should, as the rules require, be ‘freely given.’”)
16

17 There is no prejudice to Defendants here. Plaintiffs’ First Amended Complaint does
18 not change the underlying contention that the merger is illegal, nor are Defendants precluded
19 from seeking discovery in relation to the Amended Complaint. There is presently no deadline
20 to complete discovery. Accordingly, Defendants will not be prejudiced by an order granting
21 leave to file Plaintiffs’ First Amended Complaint.

22 Moreover, Plaintiffs’ First Amended Complaint is offered in good faith and without
23 undue delay. As this Court is aware, an appeal of the order denying the motion for a
24 preliminary injunction was pending in the Ninth Circuit for some time. Since the filing of its
25 original complaint, Plaintiffs have discovered new information, there has been another
26 substantial merger in the airline industry between Southwest Airlines and AirTran Airways,
27 and there continue to be media reports of future additional mergers in the airline industry.
28

1 This information supports Plaintiffs damages claim as well as Plaintiffs assertion of additional
2 details in support of its previously asserted claims. *See Coilcraft, Inc., v. Inductor Warehouse,*
3 2000 U.S. Dist. LEXIS 6097, *8-9 (no bad faith where plaintiff made “reasonable inquiry”
4 into facts supporting new claim, introduced relevant evidence, and “has never
5 mischaracterized the nature of the lawsuit”). Additionally, consistent with the antitrust laws,
6 the Proposed First Amended Complaint further clarifies that Plaintiffs are seeking the remedy
7 of divestiture.

8
9 In sum, Plaintiffs’ First Amended Complaint was filed timely and in good faith,
10 contains a claim similar to those originally asserted and does not prejudice Defendants.
11 Consequently, none of the factors on which the courts base denial of motions for leave to
12 amend are present here. Thus, Plaintiffs’ motion for leave should be granted.

13 **IV. CONCLUSION**

14 For the reasons discussed above, Plaintiffs respectfully seek leave of this Court to file
15 the proposed First Amended Complaint.
16

17
18 Dated: August 22, 2011

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