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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael Malaney, et al.,

Plaintiffs,

vs.

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

Defendants.

CASE NO. 3:10-CV-02858-RS

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT TO ADD DAMAGES CLAIM

Hearing Date: October 27, 2011
Time: 1:30 p.m.
Courtroom: 3
Judge: Hon. Richard Seeborg

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INTRODUCTION

Almost exactly one year ago, this Court denied Plaintiffs' request to block Defendants' merger under Section 7 of the Clayton Act because they had failed to establish the most basic element of their antitrust claim -- a relevant product and geographic market. After substantial fact and expert discovery, two full days of evidentiary hearings, and extensive briefing and argument, the Court found that all of Plaintiffs' proffered relevant markets failed as a matter of law and fact. Just a few months ago, the Ninth Circuit affirmed this Court's decision rejecting Plaintiffs' market definitions, and expressly held that "Plaintiffs failed to establish a relevant market for antitrust analysis, a necessary predicate for making a claim under §7 of the Clayton Act." *Malaney v. UAL Corp. et al*., No. 10-17208, 2011 WL 1979870, at *1 (9th Cir. May 23, 2011).

Plaintiffs' motion to amend the complaint should be denied because it does absolutely nothing to fix their failure to establish the essential element of a relevant market. Plaintiffs' main proposed amendment is simply to tack on a prayer for damages. Plaintiffs have stuck with exactly the same market allegations that this Court and the Ninth Circuit found patently inadequate, on a well-developed factual record, to maintain a Section 7 claim. They have done nothing to correct or address the fundamental defect of failing to establish a relevant market. Plaintiffs' Section 7 claim remains fatally flawed and the motion to amend should be denied as futile.

Plaintiffs' motion should also be denied for the unfairness and prejudice it threatens to impose on Defendants. Plaintiffs have already forced Defendants to expend substantial amounts of time and legal fees responding to their defective Section 7 claim, disrupted Defendants' operations up through the highest executive level, and created unwarranted uncertainty about the merger. Plaintiffs have had an extraordinary opportunity to establish a cognizable relevant market through substantial fact and expert discovery, evidentiary proceedings, an appeal and a motion to amend, but have failed to satisfy that most basic element of an antitrust case. Plaintiffs have no good faith basis for seeking to prolong their deficient Section 7 claim, and allowing this

flawed case to go forward as they request would inflict a grave injustice and extreme prejudice on Defendants.

As if these factors were not enough, Plaintiffs' motion also should be denied for the gamesmanship it evidences. Plaintiffs made the tactical choice to forego a damages prayer to bolster their demand for injunctive relief. Throughout the evidentiary proceedings before this Court, Plaintiffs insisted that they had absolutely no adequate remedy at law and that damages were unobtainable. Now, after failing to obtain equitable relief, they seek to pursue a damages remedy that they renounced when it fit their litigation interests. This gamesmanship should not be permitted in this case.

For these reasons, Defendants UAL Corporation, United Air Lines, Inc., and Continental Airlines, Inc. oppose Plaintiffs' Motion for Leave to File Amended Complaint to Add Damages Claim (Doc. #178). Defendants also oppose Plaintiffs' untimely request for a jury trial of their purported damages prayer.

BACKGROUND

This action began on June 29, 2010, when Plaintiffs filed a Complaint for Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act (Doc. #1, the "Complaint" or "Compl."). Plaintiffs' stated aim was "to enjoin and prohibit the merger of the defendants United [Airlines] and Continental [Airlines]," which had been announced on May 3, 2010. *See* Declaration of Jiyoun Chung ("Chung Decl."), Ex. A at 2. 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." *Id.* ¶ 29. Plaintiffs chose not to include a prayer for damages, and instead sought only injunctive relief pursuant to Section 16 of the Clayton Act. *Id.* ¶ 113. Plaintiffs did not request a jury trial.

After Defendants filed answers (Docs. #28 and #29), Plaintiffs filed a motion for a preliminary injunction on August 9, 2010 (Doc. #38). In advance of the hearing on the preliminary injunction motion, the parties conducted substantial fact and expert discovery. *See* Chung Decl. ¶ 11. This discovery included the taking of twelve depositions (including those

of both Defendants' respective CEOs and Plaintiffs' and Defendants' respective experts). *Id.* Defendants also made available to Plaintiffs all documents Defendants had previously produced to the Department of Justice in connection with the regulatory review of the merger. *Id.*

This Court held two full days of evidentiary hearings on Plaintiffs' preliminary injunction motion on August 31 and September 1, 2010, and heard post-hearing closing arguments on September 17, 2010. One key issue at the hearing was establishing the relevant market for Plaintiffs' Section 7 claim. As this colloquy shows, Plaintiffs proffered several alleged relevant markets:

> THE COURT: . . . So I just wanted to understand what you're -- as of today, what you are telling me I should look at as the relevant market. As I understand it, it's network carrier -- a network carrier market for business travelers; the 13 overlapping airport pairs, which we have just discussed; and a third possible market, which was the U.S. airport -- airline industry or U.S. airport industry as a whole.
>
> MR. ALIOTO: Correct.

Chung Decl., Ex. B at 653:8-15. Defendants contended that Plaintiffs had failed to meet their burden of defining a relevant market and that none of these purported markets were legally cognizable for Section 7 purposes.

After the evidentiary hearing and post-hearing briefing and argument by the parties, this Court denied Plaintiffs' motion for a preliminary injunction in an Order dated September 27, 2010 (Doc. #135, the "September 27 Order"). Chung Decl., Ex. E. The primary ground for the Court's denial of the motion was that Plaintiffs had "fail[ed] to establish a viable relevant market." *Id.* at 13:7. The Court analyzed each of Plaintiffs' proffered markets in detail and found that none of them constituted a legally adequate market under Section 7. *See id*. at 14:3-22:2. The Court noted that the only potentially cognizable market might be a city-pairs market (*id*. at 20:17-20), which Plaintiffs repeatedly rejected and declined to use as the basis of their Section 7 claim (*see, e.g*., Chung Decl., Ex. C at 10:3-11; Ex. B at 648:22-24). Moreover, the Court found that virtually none of the 49 individual plaintiffs would be affected in any way by the merger and that "nothing in the record presented . . . suggests that these forty-nine individual

plaintiffs will be irreparably harmed by the merger[.]" *Id*., Ex. E at 13:9-11, *see also id.* at 23:9-24:13.

On October 1, 2010, the Defendants' merger was consummated. That same day, Plaintiffs filed an appeal of the September 27 Order with the Ninth Circuit. *See* Doc. #138. After briefing and argument, on May 23, 2011, the Ninth Circuit affirmed the September 27 Order. The Ninth Circuit found that "[t]he city-pair market endorsed by the district court does satisfy the reasonable interchangeability standard," and that Plaintiffs' proposed "national market" does not. The circuit 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 . . . ." Chung Decl., Ex. G at 4.[1] On July 18, 2011, the Ninth Circuit issued a formal mandate giving effect to its May 23, 2011 ruling.

Plaintiffs filed the motion to amend on August 22, 2011. The motion attaches a proposed First Amended Complaint for Damages and Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act ("FAC"). The proposed amendment contains no new allegations whatsoever that address the relevant product or geographic market in this case. In fact, the relevant market allegations are identical to and unchanged from the allegations in the original complaint. *See* Chung Decl., Ex. H. Instead, the main proposed amendment is simply a new request for damages in the prayer for relief. The proposed amended complaint also includes a demand for a jury trial, and a handful of non-substantive allegations purporting to relate to the legally irrelevant topics of the shareholder vote and closing of the merger (FAC ¶¶ 1, 40-41), the merger between Southwest Airlines and AirTran (*id*. ¶¶ 72-75), speculation about a possible merger by American Airlines (*id*. ¶¶ 110-11), and layoffs at various airlines (*id*. ¶¶ 104-09).[2]

[1] Plaintiffs focused their appeal mainly on an alleged "national market" for airline travel as the purported relevant market in which to evaluate the effects of the merger. *See* Chung Decl., Ex. F.

[2] These changes are not all highlighted in the redline attached by Plaintiffs to their motion to amend. Counsel for Defendants notified Plaintiffs' counsel of this fact on August 25, 2011. *See* Chung Decl. ¶ 11. To date, Plaintiffs have not corrected this document. For the Court's convenience, Defendants have filed with this brief a redline prepared by Defendants that shows all of the differences between the FAC and the original complaint. *See id.*, Ex. H.

ARGUMENT

I. PLAINTIFFS HAVE NO GROUNDS FOR LEAVE TO AMEND

When, as here, a responsive pleading has already been filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Although leave may be freely given when justice requires, "leave to amend is not to be granted automatically. A trial court may deny such a motion if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (factors often considered in the Ninth Circuit are: "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings."). Plaintiffs' motion fails for these reasons.

A. Amendment Is Futile Because The Proposed Complaint Fails To Identify A Legally Sufficient Relevant Market

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin*, 59 F.3d at 845. An amendment is "futile" when the proposed amended complaint would be "subject to a meritorious motion to dismiss" or "when it is factually impossible for the plaintiff to amend the complaint so as to satisfy all elements of a claim." *Hintze v. Pershing Direct Brokerage Servs.*, No. 89-15491, 1991 WL 136190, at *2 (9th Cir. July 25, 1991); *In re Edwards Theatres Circuit, Inc.*, 281 B.R. 675, 682 (Bankr. C.D. Cal. 2002).[3] "Futility includes the inevitability of a claim's defeat on summary judgment." *Johnson v. Am. Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987) (citation omitted).

In light of Plaintiffs' utter failure to establish a relevant market, the futility of the proposed amendment is indisputable. In the original complaint, Plaintiffs alleged that "[t]he

[3] *See also Sencion v. Saxon Mortg. Servs., Inc.*, No. 10-03108 PSG, 2011 WL 672643, at *1 (N.D. Cal. Feb. 17, 2011) ("A proposed amendment is futile if it would not survive a motion to dismiss for failure to state a claim."); *Duffy v. Allstate Ins. Co.*, No. SACV 97-231-GLT (ANX), 1997 WL 809639, at *1 (C.D. Cal. Nov. 3, 1997) ("An amendment is futile if it fails to state a valid theory of liability.").

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." Chung Decl., Ex. A ¶ 29. As described by this Court, at the preliminary injunction hearing as well as in their pre- and post-hearing briefs, Plaintiffs in fact put forward several proposed relevant markets: "a market limited to network carriers competing for business travelers," "thirteen airport-pairs where [Plaintiffs] maintain[ed] the merger is likely to lessen competition," and "the United States airline industry as a whole." *See id.*, Ex. E at 13:15-17. Then, in their appeal to the Ninth Circuit, Plaintiffs argued that this Court erred by rejecting the "United States Commercial Airline Market" (*i.e.*, the national market) as the relevant market in this case. *See, e.g.*, *id.*., Ex. F at 10.

Fatally for Plaintiffs' overall case and the immediate motion to amend, all of the relevant markets Plaintiffs have identified and pursued have been unequivocally rejected by this Court, the Ninth Circuit, or both.[4] In denying Plaintiffs' preliminary injunction motion, this Court expressly held that all of the relevant markets identified by Plaintiffs were deficient, and that Plaintiffs had therefore "fail[ed] to establish a viable relevant market," which was "fatal to the relief they seek." *Id.*, Ex. E at 13:6-9, 22:1-2. The Ninth Circuit affirmed the finding that Plaintiffs had failed to establish any relevant market and did not even "reach Plaintiffs' other arguments on appeal." *Id.*, Ex. G at 4.

The proposed amended complaint does nothing whatsoever to fix this dispositive defect. The proposed FAC leaves untouched the prior relevant market allegations contained in the Complaint -- allegations that two courts determined failed to support a Section 7 case. Indeed, none of Plaintiffs' new allegations in the FAC relate to the identification of a relevant product or geographic market. While Plaintiffs added a few non-substantive comments about the shareholder vote and merger closing, the merger between Southwest Airlines and AirTran, and some other legally irrelevant topics, they chose not to say a single new word about the relevant

[4] With respect to the international market mentioned in the Complaint, Plaintiffs appear to have abandoned that market as a relevant market given their failure to pursue it in their prior briefs. In any event, this Court's rationale for rejecting the other three markets proposed by Plaintiffs would apply equally to a market defined as international flights to or from the U.S.

market. They have not answered or responded in any way to the finding of two courts that they have failed to establish a cognizable market.

This failure bars Plaintiffs' request to file the proposed FAC and keep this case alive. When, as here, Plaintiffs have done nothing at all to "repair the defects which doomed the original complaint," and the proposed amendment still does not "define properly the product market," Plaintiffs' "request for leave to amend the complaint [must be] denied as futile." *Beyer Farms, Inc. v. Elmhurst Dairy, Inc.*, 142 F. Supp. 2d 296, 305 (E.D.N.Y. 2001). Indeed, were Plaintiffs allowed for some reason to proceed, the FAC would be subject to immediate dismissal because of its failure to allege a proper relevant market. *See Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 10-15978, 2011 WL 1898150, at *1 (9th Cir. May 19, 2011) ("The failure to allege a product market consisting of reasonably interchangeable goods renders the SAC 'facially unsustainable' and appropriate for dismissal.") (citations omitted); *see also UGG Holdings, Inc. v. Severn*, No. CV-04-1137-JFW, 2004 WL 5458426, at *3 (C.D. Cal. Oct. 1, 2004) (analyzing and rejecting counterclaimant's relevant market allegations as clarified in that party's briefing, and holding that "[w]here a plaintiff fails to define his proposed relevant market" properly, "the relevant market is legally insufficient and a motion to dismiss may be granted").[5] Because "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act," *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957), and two courts have already found that Plaintiffs have failed to meet this requirement, any need to further consider the motion to amend -- or this case as a whole -- is at an end. The proposed amendment is futile, and the motion should be denied.[6]

[5] *UGG Holdings* cites many cases for this well-established proposition, including *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001), and *Big Bear Lodging Association v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999).

[6] The proposed prayer for damages should also be denied because Plaintiffs have no basis for claiming injuries. This Court found on a well-developed fact record that plaintiffs "fail[ed] to demonstrate any injury personal to them" and that at best they have established only "speculative" and *de minimis* injury (assuming there would be injury). Chung Decl., Ex. E at 24-25. The proposed FAC does not add any new allegations of purported injury or harm personal to plaintiffs.

B. Amendment Would Severely Prejudice Defendants

Permitting this case to move forward with a FAC and antitrust claim that are unsupported by any cognizable relevant market definition would inflict fundamental unfairness and severe prejudice on Defendants. As an initial matter, Plaintiffs have already taken up a significant amount of public and private resources on an antitrust claim that is missing a necessary element. Plaintiffs have enjoyed substantial expedited fact and expert witness discovery, a complete evidentiary hearing, detailed written and oral arguments, an order from this Court, appellate review, and a motion to amend. They have had a full opportunity to pursue any relevant market definition they determined appropriate for their antitrust claim, and they used that opportunity to present multiple relevant market definitions to this Court and the Ninth Circuit. Responding to Plaintiffs' defective claim has imposed substantial burdens on Defendants in the form of legal fees and litigation costs, diversion of employee time and resources up to the highest senior executive level, and unwarranted uncertainty about the legal status of the merger. Defendants are now incurring additional costs in addressing a motion to amend that does nothing to fix the fundamental defect in Plaintiffs' case.

Plaintiffs should not be permitted to consume even more private and public resources by proceeding with a FAC and claim that are utterly bereft of the essential element of a proper relevant market. There is nothing left in this case to justify any further proceedings. Consequently, requiring Defendants to continue to incur legal fees and costs and expend employee time on this litigation would be extremely prejudicial. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) ("Expense, delay, and wear and tear on individuals and companies count toward prejudice.").

Any last-minute effort by Plaintiffs in their reply brief to revive their moribund case by resorting to city-pairs or another relevant market should be rejected. Even if Plaintiffs were to concede at this late time that the city-pair market is a relevant market, Plaintiffs should not be allowed to re-start their case under this theory, which they had the opportunity to litigate a year ago but chose to reject. As this Court noted, and the Ninth Circuit concurred, substantial evidence about city-pairs was presented during the evidentiary proceedings and available for use

by Plaintiffs. *See* Chung Decl., Ex. E at 20:17-20 (September 27 Order) ("although defendants need not establish what they believe to be the relevant market on plaintiffs' motion for a preliminary injunction, given the substantial evidence suggesting city-pairs, plaintiffs' effort to establish anything else never leaves the gate."); *id.*, Ex. G at 4 (Ninth Circuit decision) ("The city-pair market endorsed by the district court does satisfy the reasonable interchangeability standard"). Rather than including city-pairs on the list of purported relevant markets and attempting to show antitrust injury within it, Plaintiffs repeatedly rejected city-pairs as the wrong relevant market and even denounced it as a construct that would stack the deck in Defendants' favor. *See, e.g., id.*, Ex. C at 10:3-11 ("Taking the broader market of city pairs, rather than airport pairs, results, not surprisingly, in less competitive foreclosure from defendants' merger than does using airport pairs."). Counsel for Plaintiffs told this Court during the post-hearing argument that "the city-pair stuff is gone. I mean, it's basically old hat." *Id.*, Ex. B at 648:22-24.

Allowing Plaintiffs to reverse course now on their strategic decision to reject city-pairs, or to introduce a wholly new relevant market, one year later, would be a waste of judicial and party resources, unfair and highly prejudicial. A district court recently faced with a very similar situation -- a plaintiff requesting amendment to adopt a proposition it previously opposed -- rejected that tactic:

> [Plaintiff] should not be permitted a "do-over" to assert new legal theories and permutations of its prior claims that it could have asserted much earlier. . . . If [plaintiff] had viable, alternative theories of recovery in this case . . . it should not have withheld them while we invested considerable time and judicial resources evaluating what it now says was an incomplete set of theories, which emphasized the wrong facts, set forth the wrong sources of legal duties and, overall, charted the wrong course to the requested relief.

Goldfish Shipping, S.A. v. HSH Nordbank AG, 623 F. Supp. 2d 635, 641 (E.D. Pa. 2009). This Court too should not allow Plaintiffs a "re-do" after extensive trial and appellate court proceedings because Plaintiffs chose not to litigate an issue that was before the Court.

C. Plaintiffs' Motion Evidences Impermissible Gamesmanship

In an express effort to bolster their claim for equitable relief, Plaintiffs expressly stated to this Court on many occasions that damages were not available to them. These representations included Plaintiffs' insistence that the "*only* remedy available to plaintiffs under federal antitrust law is the injunctive relief afforded by Section 16 of the Clayton Act" and that "[d]amages cannot compensate plaintiffs for their future injuries -- indeed, [Plaintiffs] have not even asked for damages, which are not available under Section 16." Chung Decl., Ex. D at 37:6-9 (emphasis added). Plaintiffs lost their bid for equitable relief because they failed to establish a relevant market and because this Court found that none of the Plaintiffs faced injury or irreparable harm. *See id.*, Ex. E at 24-25.

Plaintiffs' abrupt request for a damages prayer at this late point in the case evidences a sporting approach to litigation that should not be countenanced. There is nothing new whatsoever in Plaintiffs' proposed FAC to warrant their demand for damages. All of the facts on which Plaintiffs' request for damages is based were known to Plaintiffs at the time they filed the original complaint in June 2010. It appears evident that Plaintiffs' motivation for omitting a request for damages was tactical -- they used the decision not to pursue damages to bolster their claim for injunctive relief. After that tactical choice proved unsuccessful, Plaintiffs now ask to replay the same hand for a different remedy.

Plaintiffs request to pursue different remedies in a serial fashion for the same alleged facts and legal claims evidences a type of gamesmanship that ought not to be countenanced. Leave to amend should be denied in this circumstance. *See, e.g.*, *Bonin*, 59 F.3d at 845 ("Additionally, we have held that a district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally."); *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 141 (5th Cir. 1993) ("[A]wareness of facts and failure to include them in the complaint might give rise to the inference that the [party] was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial

of leave to amend on the grounds of bad faith may be appropriate."); *Jackson*, 902 F.2d at 1388 ("Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.").

II. THE REQUEST FOR A JURY TRIAL IS UNTIMELY

Because Plaintiffs' motion to amend should be denied it its entirety on the basis of futility, prejudice, and the other factors discussed above, Plaintiffs' additional new request for a jury trial is moot. The jury request should be denied for the separate and independent reason that it is untimely and any right Plaintiffs had to a jury trial has been waived.

Under Federal Rules of Civil Procedure Rule 38, which governs the demand for trial by jury, Plaintiffs were required to make a jury trial demand no later than 14 days after Defendants answered the original complaint. Fed. R. Civ. P. 38(b). Here, Plaintiffs filed the Complaint on June 29, 2010, and Defendants answered on August 5, 2010. Plaintiffs made their first and only request for a jury trial in the motion to amend filed on August 22, 2011. Consequently, the jury request is untimely and has been waived.

Plaintiffs' attempt to add a prayer for damages in the FAC does not re-start the Rule 38 clock or allow them to demand a jury trial now. Simply adding a new type of relief under a pre-existing claim is insufficient to revive a plaintiff's waiver of a jury trial. *See, e.g., Lutz v. Glendale Union High Sch., Dist. No. 205*, 403 F.3d 1061, 1066 (9th Cir. 2005) ("Our case law is clear that the presentation of a new theory does not constitute the presentation of a new issue on which a jury trial should be granted as of right under Rule 38(b).").

The Ninth Circuit addressed this issue in an antitrust context in affirming dismissal of the Las Vegas Sun's Clayton Act (and other) claims against various Howard Hughes Casinos. *See Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614 (9th Cir. 1979). The court declined to find that the plaintiff's amended complaint gave rise to a jury right -- despite the fact that the plaintiff "added new legal theories of recovery in its amended complaint" -- because, just like here, "the issues in the original complaint and the amended complaint turn on the same matrix of facts." *Id.* at 620 (citing *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974)).

The court in *American Home Products Corporation v. Johnson & Johnson*, 111 F.R.D. 448, 452-53 (S.D.N.Y. 1986), also addressed exactly Plaintiffs' situation here and concluded that the jury trial right had been waived. In *American Home Products*, a defendant served counterclaims that sought only injunctive relief and did not assert a jury trial demand. *Id*. at 449. Several months later, the defendant sought to amend the counterclaims to add a prayer for damages and a jury trial demand. The district court held that the jury demand had been waived:

> McNeil asserts that it was not entitled to demand a jury at the time AHP served its reply because McNeil had demanded only declaratory and injunctive relief and not damages on its counterclaims . . . McNeil could have requested damages as well as injunctive relief on its counterclaims and demanded a jury trial at the outset, but it chose not to do so . . . Under these circumstances, I conclude that McNeil waived its right to demand a jury with respect to its counterclaims when it initially chose not to request damages. That right was not revived when some ten months later McNeil altered its counterclaims to add a request for damages.

Id. at 452-53. The same reasoning applies here in full. Even if Plaintiffs' request for a jury trial is considered independently, it should be denied as untimely and waived.

CONCLUSION

After substantial proceedings in this Court and before the Ninth Circuit, Plaintiffs face the inescapable truth that they do not have a cognizable Section 7 antitrust case. A fatal flaw in their conception of the purported relevant market doomed the original complaint, and the proposed amendment replicates exactly the same error. Plaintiffs have had extraordinary opportunities to establish a relevant market and have failed to meet that most basic element of an antitrust claim. Plaintiffs' complete silence on the market element in their motion can only be interpreted as an admission that they have nothing new to say or allege on this dispositive issue.

Consequently, Defendants respectfully request that, in this instance, the Court not only deny Plaintiffs' motion for leave to file an amended complaint in its entirety, but also dismiss the

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case with prejudice.[7] Plaintiffs have no good faith basis for prolonging this action, and allowing any additional proceedings on their meritless claim would pose a grave injustice to Defendants.

Dated: September 20, 2011

Respectfully Submitted,

SHEARMAN & STERLING LLP

By: /s/ *James Donato*
James Donato

FRESHFIELDS BRUCKHAUS DERINGER US LLP

Attorneys for Defendants

[7] This Court "may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim . . . ." *Pyle v. Hatley*, 239 F. Supp. 2d 970, 982 (C.D. Cal. 2002) (citations omitted). *See also Hernandez v. McClanahan*, 996 F. Supp. 975, 979 (N.D. Cal. 1998) ("The court may dismiss a complaint on its own initiative for failure to state a claim under Rule 12(b)(6) if the inadequacy of the complaint is apparent as a matter of law. It is not mandatory to provide a plaintiff notice and an opportunity to be heard.") (citations omitted); *Ricotta v. California*, 4 F. Supp. 2d 961, 968 (S.D. Cal. 1998) (same).