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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

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Christine O. Whalen, and Suraj Zutshi, )

Plaintiffs, )

v. )

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

Defendants. )

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

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

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

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REQUESTED**

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## I. INTRODUCTION

1  
2 It is well-known that leave to amend is granted with “extreme liberality” and that a  
3 presumption exists in favor of granting leave to amend. Defendants’ arguments fall far from  
4 overcoming the presumption in Plaintiffs’ favor. Plaintiffs’ Motion to Amend their complaint  
5 is not “gamesmanship” but instead a proper request to amend following the closing of  
6 Defendants’ merger and the ensuing damages. Furthermore, as Plaintiffs could not have  
7 requested damages until after the closing of the merger but only injunctive relief to prevent  
8 future injury, the jury trial demand is timely.  
9

## II. ARGUMENT

### A. Defendants’ Have Failed to Overcome the Strong Presumption in Favor of Granting Leave to Amend.

10  
11  
12  
13 Leave to amend is to be granted with “extreme liberality.” *DCD Programs, Ltd v.*  
14 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted); *see, e.g., Foman v. Davis*, 371  
15 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (leave to amend should be freely given); *Eminence*  
16 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“Absent prejudice, or a  
17 strong showing of any of the remaining Foman factors, there exists a presumption under Rule  
18 15(a) in favor of granting leave to amend.”  
19

20 Of the factors considered by the Ninth Circuit in granting or denying leave to amend,  
21 “bad faith, undue delay, prejudice to the opposing party, and futility of amendment,”  
22 Defendants’ have failed to make a sufficient showing to overcome the strong presumption in  
23 favor and “extreme liberality” permitted in granting leave to amend in the present case. *DCD*  
24 *Programs*, 833 F.2d at 186.  
25

#### 1. Relevant Market is a Question of Fact for the Jury.

26 Plaintiffs have alleged in their Complaint that the relevant product and geographic  
27

1 markets are the transportation of airline passengers for charge in the United States and many  
2 submarkets, including various overlapping routes and airports. (Proposed First Amended  
3 Complaint ¶¶ 2, 78, 79, 81, 83, 84, 85, 87, 89, 90, 91, 92, 94, 95.)

4 Defendants argue that it would be futile for Plaintiffs amend the Complaint because the  
5 Complaint would be subject to immediate dismissal. And yet, it is well-established that the  
6 issue of relevant market is a question of fact for the jury. Defining the "[r]elevant market is a  
7 factual issue which is decided by the jury." *Syufy Enterprises v. American Multicinema, Inc.*,  
8 793 F.2d 990, 994 (9th Cir. 1986) (citing *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*,  
9 726 F.2d 1381, 1392 (9th Cir. 1984)); see also *Morgan, Strand, Wheeler & Biggs v.*  
10 *Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir.1991) ("Ordinarily, the relevant market is a  
11 question of fact for the jury"); *Agron, Inc. v. Lin*, 2004 U.S. Dist. LEXIS 26605, 2004 WL  
12 555377, at \*8 (C.D. Cal. 2004) (same); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 133  
13 *F.R.D. 41, 44 (D. Nev.1990)* ("The Ninth Circuit has established that both market definition  
14 and market power are essentially questions of fact appropriate for jury consideration");  
15 *Nobody in Particular Presents*, 311 F. Supp. 2d at 1083 ("The scope of the market is usually a  
16 question of fact for the jury.") (citing *Telecor Comm., Inc. v. Southwestern Bell Tel. Co.*, 305  
17 *F.3d 1124, 1131 (10th Cir. 2002)*).

20 **2. The Supreme Court has Consistently Analyzed Relevant Market By**  
21 **Looking at the Purpose of the Business and Not Individual Uses of**  
22 **Different Products or Services.**

23 "Substitutability" or "reasonably interchangeable products" are not the only criteria by  
24 which to determine a relevant product market, nor has the Supreme Court required just and  
25 only that analysis. The Supreme Court has consistently analyzed relevant market by looking  
26 at the purpose of the business and not the individual uses of the products.

1 “Congress neither adopted nor rejected specifically any particular tests for measuring  
2 the relevant markets, either as defined terms in terms of product or in terms of geographic  
3 locus of competition, within which the anticompetitive effects of a merger were to be judged.”  
4 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). In *Brown Shoe*, even though  
5 there could be no real question that girls’ shoes and boys’ shoes are not and could not be  
6 “reasonably interchangeable products” or “substitutes,” it made no difference.  
7 Notwithstanding all the indicia distinguishing those products, the Supreme Court accepted the  
8 District Court’s designation of “children’s shoes.” *Id.* at 327. Similarly, in the sensitive area  
9 of price differentials of products, and in the face of testimony of the President of Brown Shoe  
10 that the combine would bring Brown Shoe “into the field of prices which we were not  
11 covering,” *Id.* at 304 n8, the Supreme Court dismissed the effort because “in this case a further  
12 division of product lines based on ‘price/quality’ differences would be ‘unrealistic.’” *Id.* at  
13 326.  
14

15 In the progeny of *Brown Shoe*, all of which required the Supreme Court to reverse the  
16 District Courts, there was no problem with viewing the broad picture of the industries  
17 involved: *United States v. Philadelphia Bank*, 374 U.S. 321, 356 (1963) held that “the cluster  
18 of products (various kinds of credit) and services (such as checking accounts and trust  
19 administration) denoted by the term ‘commercial banking,’ (cite omitted), composes a distinct  
20 line of commerce”; *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) held that  
21 copper and aluminum conductors could be combined into electrical conductors  
22 notwithstanding price differentials and only 1.3% of aluminum products produced by the  
23 acquired company; *United States v. Vons Grocery Company*, 384 U.S. 270, 279 (1966), after  
24 denial of the Government’s Motion for a Restraining Order, and the Court’s famous tour de  
25 force of the history and purpose of Section 7, simply noted the “Los Angeles retail grocery  
26  
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28

1 market” and ordered “divestiture without delay”; *United States v. Falstaff Brewing Co.*, 410  
2 U.S. 526 (1973) made it plain that a potential competitor who doesn’t even compete in the  
3 market and who testifies that it would never enter a market except by acquisition was  
4 nonetheless in violation of Section 7 because it was able to enter.

5 In the line of Supreme Court cases mentioned above, the product markets include  
6 within them products that have patently non-interchangeable end uses. None of the relevant  
7 product markets in those Supreme Court cases would have withstood scrutiny under the  
8 relevant market analyses espoused by Defendants’.

9  
10 A jury could easily find and probably would find that there is a national airline  
11 industry as a relevant market and that there is actual and potential competition between and  
12 among the individual airlines.

13 **3. Defendants Fail to Distinguish Between Injunctive Relief Against**  
14 **the Threat of Future Injury under Section 16 of the Clayton Act**  
15 **and Damages under Section 4 of the Clayton Act.**

16 Defendants entirely fail to distinguish between injunctive relief against the threat of  
17 a *future* injury as authorized by Section 16 of the Clayton Act and damages as provided by  
18 Section 4 of the Clayton Act—and instead call it “gamesmanship.”

19 Section 16 of the Clayton Act, 28 U.S.C. §26 provides for injunctive relief against the  
20 threat of a *future* injury:

21 Any person, firm, corporation, or association shall be entitled to sue for and  
22 have injunctive relief, in any court of the United States having jurisdiction over  
23 the parties, against *threatened* loss or damage by a violation of the antitrust  
24 laws. [emphasis added]

25 When Plaintiffs filed their original Complaint on June 29, 2010, the Defendants had  
26 not yet closed their merger. There were no damages to be claimed at that time but only a  
27 request for injunctive relief against the *future* injury and damages that would occur as a result



1 of the Defendants' merger. Accordingly, the original Complaint requested only injunctive  
2 relief. On October 1, 2010, United and Continental announced that they had closed their  
3 merger. (Proposed First Amended Complaint at 8.)

4 Section 4 of the Clayton Act, 15 U.S.C. § 15 provides for damages *after* injury is  
5 sustained:

6 Any person who shall be injured in his business or property by reason of anything  
7 forbidden in the antitrust laws may sue therefore in any district court of the United  
8 States ... and shall recover threefold the damages by him sustained.

9 Plaintiffs' Proposed First Amended Complaint includes a claim for damages pursuant  
10 to Section 4 of the Clayton Act, following Defendants' merger. As the Plaintiffs have alleged  
11 in Paragraphs 3, 103, 104, and 105, et seq., of the First Amended Complaint, that since the  
12 merger there have been higher airfares, a reduced number of flights, and elimination of air  
13 service to smaller communities.

14 Plaintiffs Motion for Leave to Amend is not "gamesmanship", but instead necessary  
15 since when the initial Complaint had been filed, the Defendants' merger had not yet closed  
16 and damages were only prospective in nature.

17  
18 **4. Defendants Completely Fail to Show Any Prejudice in the Granting  
19 of Leave to Amend.**

20 Defendants have not and cannot make any credible argument of prejudice as a result of  
21 granting leave to amend the Complaint. Defendants argue that they will be subject to "severe  
22 prejudice" if leave to amend is granted, but cite only past events that have already transpired  
23 during the course of these proceedings to support that contention. Further, at the same time  
24 Defendants claim that they will be "severely prejudiced" by further proceedings, they claim  
25 that amendment is futile and that the Amended Complaint will be subject to immediate  
26 dismissal.

1 Moreover, Plaintiffs' First Amended Complaint does not change the underlying  
2 contention that the merger is illegal, and Defendants are not precluded from seeking  
3 discovery. Defendants arguments that "severe prejudice" will ensue are not only illogical but  
4 wholly unfounded.

5 In sum, Defendants' have failed to overcome the strong presumption in favor of  
6 granting leave to amend. Thus, Plaintiffs' Motion for Leave to Amend should be granted.

7 **B. Plaintiffs' Request for a Jury Trial is Timely.**

8 Federal Rule of Civil Procedure 38(b) provides that, "on any issue triable of right by a  
9 jury, a party may demand a jury trial." Plaintiffs sought injunctive relief against the *threat* of  
10 future injury under Section 16 of the Clayton Act in their original Complaint, and Plaintiffs  
11 could not have requested a jury trial at that time.

12 Defendants fail to recognize that when Plaintiffs original Complaint was filed,  
13 injunctive relief pursuant to Section 16 of the Clayton Act was the *only* remedy available to  
14 Plaintiffs, as Defendants' merger had not yet closed. At that time, there was only the threat of  
15 future injury.  
16

17  
18 Now that Defendants' merger has closed, Plaintiffs seek to amend the Complaint under  
19 Section 4 of the Clayton Act to add damages that have been sustained so far following the  
20 close of Defendants' merger. As alleged in the First Amended Complaint, the very  
21 anticompetitive effects that the Plaintiffs originally alleged "may" take place, are in fact taking  
22 place. As alleged, prices have increased; availability of flights have been curtailed; capacity  
23 has been lessened; routes have been changed; and services for otherwise gratuitous amenities  
24 have been eliminated and subject to service charges. Accordingly, requesting a jury trial is  
25 also proper at this time.  
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1 Plaintiffs have not delayed in requesting leave to amend or in requesting a jury trial.  
2 Proceedings in the Ninth Circuit Court of Appeal only concluded recently, as the mandate was  
3 issued on July 18, 2011. Plaintiffs' Motion to Amend was filed on August 22, 2011.

4 It is illogical to argue that a request for a jury trial is untimely, when a request for a  
5 jury trial was not available to Plaintiffs in their request for injunctive relief against the threat  
6 of *future* injury. Damages could not have been requested when the original Complaint was  
7 filed before the Defendants' merger was completed.

8  
9 Moreover, Defendants falsely state in their Opposition that *American Home Products*  
10 *Corporation v. Johnson & Johnson*, 111 F.R.D. 448 "Addressed exactly Plaintiffs' situation  
11 here...a defendant served counterclaims that sought only injunctive relief and did not assert a  
12 jury trial demand." (Opposition at 12.) This case does not address Plaintiffs position  
13 "exactly." In *American Home Products*, while defendants sought only injunctive relief on  
14 their counterclaims, they could have also sought damages. In the case currently before the  
15 Court, when the Complaint was initially filed, there were no damages to claim because the  
16 future injury to be caused by Defendants' merger had not yet occurred.

17  
18 Not one of the cases cited by Defendants addresses the exact same issue here.  
19 The difference is clear, fundamental, and elementary--in those cases the plaintiffs could have  
20 claimed damages and accordingly requested a jury trial. In this case and because Defendants'  
21 had not yet closed their merger-- damages were not available to Plaintiffs nor was a demand  
22 for a jury trial. Thus, Plaintiffs' request for a jury trial in conjunction with this Motion to  
23 Amend the Complaint is timely.

24 //

25 //

26 //

**III. CONCLUSION**

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

Dated: October 4, 2011

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