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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' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: December 22, 2011
Time: 1:30 p.m.
Courtroom: 3
Judge: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on December 22, 2011, at 1:30 p.m. or as soon thereafter as this matter may be heard before the Honorable Richard Seeborg, United States District Judge, in the United States District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco, CA, 94102, Defendants UAL Corporation, United Air Lines, Inc., and Continental Airlines, Inc. ("Defendants") will and hereby do move this Court for an order dismissing Plaintiffs' First Amended Complaint for Damages and Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act ("FAC"), with prejudice and without leave to amend, for failure to state a claim upon which relief can be granted. This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6). The FAC fails to state a claim upon which relief may be granted because Plaintiffs have not pled facts supporting their allegations and/or necessary elements of their claims.

This motion is based on this notice; the accompanying memorandum of points and authorities; the declaration of Mikael A. Abye ("Abye Decl."); the pleadings and papers on file in this action; and such other arguments as may be presented at the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants ask that the Court dismiss Plaintiffs' First Amended Complaint ("FAC") with prejudice for failing to state a viable antitrust relevant market. This Court, the Ninth Circuit, and the parties have been down this road before. As the Court stated just a few weeks ago, Plaintiffs have enjoyed ample opportunity to identify a viable relevant market for their Section 7 claims, yet "the market theories they have chosen to adopt lack both evidentiary and legal support."[1] Despite this failure, Plaintiffs have chosen to stick with the same market allegations in the FAC that this Court and the Ninth Circuit definitively found to be legally inadequate to maintain a Section 7 claim. As the Court noted in granting leave to amend and file the FAC, "Plaintiffs do not dispute that their relevant market theories remain unchanged."[2] Plaintiffs' insistence on clinging to their defective market theories mandates dismissal of the FAC.

Plaintiffs have dug an even deeper hole for themselves by staking their case on a specific market allegation -- the alleged national airline market -- that this Court and the Ninth Circuit have expressly found to be improper. Plaintiffs recently re-affirmed their reliance on "the national airline market which, plaintiffs have contended -- and continue to contend -- is the relevant market in this case."[3] Plaintiffs have chosen to base their antitrust case on the same national airline market that this Court and the Ninth Circuit previously rejected because it failed to meet the standards of reasonable interchangeability of use or cross-elasticity of demand that define a proper antitrust market.

Consequently, this Court should dismiss the FAC because the relevant market definition is facially unsustainable. As the Court advised Plaintiffs in ruling on the motion for leave to amend, "[a]bsent a change in plaintiffs' theory of the case, it is difficult to see how they can ultimately prevail."[4] Plaintiffs have made no change in their market allegations and in fact have

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[1] Abye Decl., Ex. A at 3 (Order dated 10/24/11 granting Plaintiffs' Motion for Leave to Amend).

[2] *Id.*

[3] *Id.*, Ex. B at 4 (Plaintiffs' Motion for Leave to File Supplemental Pleading dated 11/04/11).

[4] *Id.*, Ex. A at 3.

doubled-down on the disapproved national airline market as the alleged relevant market for their Section 7 case.

The Court should dismiss the FAC with prejudice because, as previously held, Plaintiffs have had ample opportunity to identify a viable relevant market but have failed to do so. Plaintiffs have had substantial fact and expert discovery, two full days of evidentiary hearings, extensive briefing and argument on a well-developed record, an appeal to the Ninth Circuit and the right to amend the complaint. Despite these many opportunities, they have elected to re-allege and stand on the same market allegations that have been rejected as inadequate at every stage of this case. Plaintiffs have absolutely no permissible basis to keep this patently defective Section 7 case alive.

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 (Dkt. #1, the "Complaint"). 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* Complaint ¶ 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." *Id*. ¶ 29.

Plaintiffs moved for a preliminary injunction on August 9, 2010 (Dkt. #38). 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 . . . 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.

Abye Decl., Ex. C at 653:3-15. 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 (Dkt. #135, the "September 27 Order"). Abye Decl., Ex. D. 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. 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. The Court specifically considered the alleged national airline market and expressly held that it failed to satisfy the standard market definition requirements of reasonable interchangeability of use or cross-elasticity of demand. *Id.* at 20-21. The Court noted that the only potentially cognizable market might be a city-pairs market (*id.* at 20), which Plaintiffs repeatedly rejected and declined to use as the basis of their Section 7 claim (*see, e.g., id.* at 10; Ex. C at 648:22-24).

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* Dkt. #138. In the appeal, Plaintiffs focused on the alleged "national market" for airline travel as the purported relevant market in which to evaluate the effects of the merger. *See* Abye Decl., Ex. E. After briefing and argument, on May 23, 2011, the Ninth Circuit affirmed the September 27 Order. *See id.*, Ex. F ("May 23 Decision"). 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. *Id.*, Ex. F at 4. The Ninth Circuit agreed with this Court that a properly defined antitrust market requires "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 3 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). As the circuit court held, "Plaintiffs have failed to demonstrate that the national market in air travel satisfies this standard." *Id.* at 4. 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[.]" *Id*. On July 18, 2011, the Ninth Circuit issued a formal mandate giving effect to its May 23 Decision.

On August 22, 2011, Plaintiffs filed a motion to amend with the FAC. The FAC repeats verbatim the allegation in the original complaint that "[t]he relevant product and geographic markets for purpose 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." FAC ¶ 29. After reviewing Defendants' opposition to Plaintiffs' motion, in which Defendants contended that allowing Plaintiffs to amend their complaint without changing their purported relevant market allegations would be futile because the FAC would be subject to dismissal (*see* Dkt. # 182), the Court 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." *See* Abye Decl., Ex. A at 3 (Dkt. #188, order dated October 13, 2011). The Court granted Plaintiffs leave to file the FAC because, "[a]lthough this motion presents a close call, the proper vehicle for [Defendants'] arguments on the merits is a motion to dismiss." *Id.*

On October 21, 2011, Plaintiffs petitioned the Supreme Court of the United States for a writ of certiorari concerning the May 23 Order. Abye Decl., Ex. G. Among other things, Plaintiffs contend that this Court and the Ninth Circuit disregarded Supreme Court precedent, abused their discretion "by requiring overly-detailed specificity within the airline market," and came to a conclusion that "is as unsupportable under the law as it is belied by common sense." *Id*. at 15-16.

On November 2, 2011, Plaintiffs filed the FAC. *See* Dkt. # 189. On November 4, 2011, Plaintiffs filed a motion for leave to file a supplemental pleading. *See* Abye Decl., Ex. B. In that motion, Plaintiffs expressly underscored that they are relying on "the national airline market which, plaintiffs have contended - and continue to contend - is the relevant market in this case." *Id*. at 4; *see also id.* at 5 ("[T]he relevant product and geographic markets which are alleged to be 'the transportation of airline passengers in the United States.' (First Amended Complaint at ¶ 29).").

ARGUMENT

I. THE FAC SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO IDENTIFY A VIABLE ANTITRUST RELEVANT MARKET

A. Plaintiffs Are Required to Plead a Cognizable Relevant Market

"To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1944 (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 claim, a plaintiff is required to plead a viable relevant market in which the defendant has market power. *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."); *California 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[.]"). "The failure to allege a product market consisting of reasonably interchangeable goods renders the [complaint] 'facially unsustainable' and appropriate for dismissal." *Pfizer*, 2011 WL 1898150 at *1 (quoting *Newcal Indus. Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)); *see also Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997) (same).

B. The Alleged National Airline Market Is Facially Unsustainable

At this stage of the case, there is absolutely no question that Plaintiffs' proffered market definition of a national airline market fails to support a Section 7 claim. As noted above, Plaintiffs have re-alleged that the national airline market is the relevant market for purposes of

the FAC. FAC ¶ 29; Abye Decl., Ex. B at 4-5 (Motion for Supplemental Pleading). As this Court and the Ninth Circuit have already determined, Plaintiffs cannot make out a Section 7 case on that market definition. It fails to meet the required standard of interchangeability of use or cross-elasticity of demand. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *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)).

Specifically, as the Court held in its September 27 Order, flights to and from various destinations around the country are not substitutable for one another. *See* Abye Decl., Ex. D at 21 (September 27 Order); *see also id.*, Ex. F at 4 (May 23 Order, noting lack of interchangeability of flights); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (to determine whether products have "reasonable interchangeability" the "test of market definition turns on reasonable substitutability.") (internal citations omitted). To say the least, it is inherently implausible to contend that a flight from San Francisco to Newark is a reasonable substitute for a flight from Seattle to Miami.

It is equally implausible to contend that there can be cross-elasticity of demand -- the extent to which purchasers will accept substitute products in the event of price fluctuations and other changes (*see United States v. Syufy Enters.*, 712 F. Supp. 1386, 1398-99 (N.D. Cal. 1989)) -- between a San Francisco/Newark flight and Seattle/Miami flight. As the Ninth Circuit found, "[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." Abye Decl., Ex. F at 4.

Plaintiffs' national airline market proposal fails because it completely ignores the standards governing market definition and tries to build an antitrust market out of products without interchangeable use and no cross-elasticity of demand. They have failed to state a viable antitrust market. Consequently, Plaintiffs' Section 7 claim is facially unsustainable and should be dismissed. *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*, 124 F.3d at 436 (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."); *UGG Holdings, Inc. v. Severn*, No. CV-04-1137-JFW, 2004 WL 5458426, at *3 (C.D. Cal. Oct. 1, 2004) ("Where a plaintiff fails to define his proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . even when all factual inferences are granted in his favor, the relevant market is legally insufficient and a motion to dismiss may be granted."); *E. & G. Gabriel v. Gabriel Bros., Inc.*, No. 93 CIV. 0894, 1994 WL 369147, at *3-4 (S.D.N.Y. July 13, 1994) ("Plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal. . . . Plaintiff's failure to allege a plausible product market is fatal to its claim. Without an appropriate product market, it is impossible for a court to assess the anticompetitive effect of challenged practices.") (quotations omitted).

CONCLUSION

As this Court has recognized, Plaintiffs have had ample opportunity to identify a viable relevant market. Despite the tremendous amount of public and private resources invested to date in this litigation, and this Court's express invitation that Plaintiffs change their theory to keep their case alive, Plaintiffs have insisted on clinging to a proposed national airline market that fails to state an antitrust claim. Dismissal with prejudice and without leave to amend is the appropriate step at this point in the case. *See e.g., UGG Holdings*, 2004 WL 5458426 at *4 ("[Plaintiff] has already had one opportunity to amend the Antitrust Claim to allege a legally sufficient relevant product market and has failed. Because amendment of the Antitrust Claim would be futile, [Plaintiff's] request for leave to amend is DENIED."). Defendants respectfully

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request that the Court put Plaintiffs' claims to rest and end the unnecessary additional expense, burden and prejudice that would be incurred in continuing to litigate this action.

Dated: November 16, 2011

Respectfully Submitted,

SHEARMAN & STERLING LLP

By: /s/ *James Donato*
James Donato

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