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Katherine B. Forrest (NY Bar No. 2381457)
Max R. Shulman (NY Bar No. 1473982)
Stuart W. Gold (NY Bar No. 1639434)
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700
Email: kforrest@cravath.com
mshulman@cravath.com
sgold@cravath.com
Admitted *Pro Hac Vice*

Attorneys for Defendants UAL Corporation and United Air Lines, Inc.

Paul L. Yde (D.C. Bar No. 449751)
FRESHFIELDS BRUCKHAUS DERINGER US LLP
701 Pennsylvania Ave., NW. Suite 600
Washington, DC 20004
Telephone: (202) 777-4500
Facsimile: (202) 777-4555
Email: paul.yde@freshfields.com
Admitted *Pro Hac Vice*

Attorneys for Defendant Continental Airlines, Inc.

[Names and Addresses of Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Michael C. Malaney, et al.,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS' POST-HEARING
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

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1 Defendants United and Continental submit this post-hearing memorandum in further
2 opposition to plaintiffs' motion for a preliminary injunction.¹

3 **Preliminary Statement**

4 Every regulatory authority that has scrutinized the United/Continental merger
5 (including the DOJ, the DOT, the European Commission and other foreign competition bodies) has
6 approved it. Plaintiffs have not come anywhere close to establishing that all those regulators—
7 uniformly—got it wrong. Plaintiffs have failed to demonstrate that the merger is likely to have any
8 anticompetitive effect whatsoever—much less the *strong* showing that the merger might
9 *substantially* lessen competition that is required to justify the extraordinary remedy of preliminary
10 injunction. Indeed, plaintiffs have failed to satisfy any of the four essential prongs of the preliminary
11 injunction standard—*i.e.*, that they are likely to succeed on the merits, that they will suffer
12 irreparable harm if the merger is not enjoined, that the balance of equities tips in their favor and that
13 an injunction would serve the public interest.

14 On the merits, plaintiffs trip on the threshold element of defining a relevant product
15 and geographic market. Their putative geographic markets are either too broad (*i.e.*, the so-called
16 “national” market) or too narrow (*i.e.*, the so-called “airport pairs” market). The former fails to take
17 account of the fact that there is absolutely no substitutability between (for example) a route from San
18 Francisco to Cleveland and a route from Houston to New York City. The latter fails to take account
19 of the obvious substitutability among different airports in the same locality (like the San Francisco
20 and Oakland airports in the Bay Area or JFK, LaGuardia and Newark in the New York metropolitan
21 area). Likewise, plaintiffs' putative product market (*i.e.*, network carriers serving business travelers)
22 fails to take account of the overwhelming factual and economic record—including plaintiffs' own
23 testimony—showing that LCCs compete vigorously and effectively against network carriers for all
24 travelers, business and leisure, and will continue to do so in the future.

25 _____
26 ¹ Proper names and defined terms are the same as in our pre-hearing memoranda. Citations to
27 the transcript of the hearing are in the form “Tr. ___”. Citations to exhibits in evidence are in the
28 form “Ex. ___”. We are also submitting an optional set of Defendants' Proposed Findings of Fact,
which contain record support in addition to the record citations contained herein.

1 Plaintiffs' expert purports to support his proffered markets by nothing more than what
2 he calls his own "common sense"—rather than through the kind of rigorous economic analysis and
3 modeling performed by defendants' expert—and even though (as plaintiffs' expert concedes) his
4 so-called markets have never been used by the DOJ in any Section 7 merger case and have never
5 been accepted by any court of which we are aware. In short, although it might be his "common
6 sense", it is at odds with the record, the empirical data, the economic literature and the position of
7 the DOJ.

8 The same disconnect defeats plaintiffs' attempt to show a substantial lessening of
9 competition. Plaintiffs' conjecture about the merger's effects is contradicted by the record, the
10 empirical evidence, the economic literature and the clearance that the merger has received from
11 every relevant regulatory authority. For example, contrary to plaintiffs' conclusory speculation, the
12 record shows that over the past twenty years—and despite a history of mergers among legacy
13 carriers—air fares have trended downward, that this trend has continued even after the
14 Delta/Northwest merger in 2008 and that during the same twenty year period capacity has increased.
15 The major success of LCCs in entering routes and their vibrant competition on price (conceded by
16 plaintiffs' expert) has disciplined fares and will continue to do so even after the merger. Plaintiffs
17 have offered not a shred of evidence to suggest that any LCC will exit any market or route as a result
18 of the merger.

19 Plaintiffs do no better on the other essential preliminary injunction elements. They
20 have confirmed in their depositions and their hearing testimony that their claimed injury (if any) is
21 "higher prices". That is economic harm, compensable by money damages, and hence is not
22 irreparable. Perhaps dispositive on this point is the fact that when these very same plaintiffs,
23 represented by the very same lawyers, brought the very same Section 7 challenge to the
24 Delta/Northwest merger under the very same legal theory, they entered into a written agreement to
25 buy shares in the lawsuit, in anticipation that there would be a monetary recovery and that they
26 would participate in that recovery in proportion to the number of shares that they bought. Indeed,
27
28

1 one plaintiff bought *three* shares—hoping thereby to triple his monetary return—which he obviously
2 would not have done had he been interested in funding only an injunction suit.

3 Moreover, the record is clear that plaintiffs themselves will suffer none of the
4 economic harm that they speculate will flow from the merger. With one exception, in the past five
5 years no plaintiff has been a regular business traveler and, also with one exception, none has flown
6 any of the thirteen “airport pair” routes identified by plaintiffs’ expert. And one of those exceptions
7 has chosen, on all but one of her trips, an alternate airport within the same city pair, indicating that
8 she could easily avoid any alleged adverse impact on the so-called “airport pair” route that plaintiffs’
9 expert relies upon. In addition, every plaintiff testified that he or she freely chooses between
10 network carriers and LCCs—which further establishes an ability to avoid any alleged adverse impact
11 in plaintiffs’ putative network carrier market.

12 On the balance of equities element, plaintiffs again come up short. Indeed, the
13 balance tips decidedly in defendants’ favor. The bottom line is that these forty-nine individuals—
14 who almost uniformly do not fly the routes in question and whose flying patterns (*e.g.*, use of LCCs
15 and substitutable airports) are inconsistent with their own legal theories—are trying, based upon a
16 claim of injury that is ephemeral, miniscule and fully compensable by money damages, to stop a
17 merger that would yield billions of dollars of synergies to defendants, would allow defendants to
18 compete more effectively in the future and would provide increased job security to tens of thousands
19 of their employees.

20 But the damage from the injunction that these few individuals seek would go well
21 beyond that. It would be not just to defendants themselves. It would be to the traveling public as
22 well—to the tens of millions of people who would be deprived of all that the merger will enable:
23 *i.e.*, the higher quality product that defendants will offer, the lower air fares (resulting in part from
24 elimination of double markups), the more effective route structures and increased flight choices, the
25 added frequencies and improved capacity and the ability of defendants to make their networks and
26 equipment more efficient (including more environmentally efficient). As a result, an injunction
27 would seriously harm—not serve—the public interest.

1 For all these reasons, as discussed further below, plaintiffs’ motion for a preliminary
2 injunction should be denied.

3 **Argument**

4 “A preliminary injunction is an extraordinary remedy never awarded as of right.”
5 *Alliance for the Wild Rockies v. Cottrell*, --- F.3d ---, 2010 WL 2926463, at *3 (9th Cir. July 28,
6 2010) (quoting *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008)). “A plaintiff
7 seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is
8 likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips
9 in his favor, and that an injunction is in the public interest.” *Id.* (quoting *Winter*, 129 S. Ct. at 374).
10 As discussed below, plaintiffs fail to demonstrate even one of those essential preliminary injunction
11 elements—let alone all four.

12 Plaintiffs argue that under the Ninth Circuit’s “sliding scale”, they need show only a
13 “serious question” going to the merits of their claims, which (they assert) can be reached even before
14 the Court considers whether they have demonstrated a sharp tipping of the hardships in their favor.
15 (*See* Tr. 21:9-22:8 (Alioto).) Plaintiffs are wrong. Indeed, they have the rule precisely reversed.
16 Under the “sliding scale” approach, their “success on the merits” burden is reduced *only after* they
17 demonstrate that “the balance of equities” “tips sharply in [their] favor”. *See Alliance for the Wild*
18 *Rockies*, 2010 WL 2926463, at *3-4 (quotation marks omitted). That is something they do not—and
19 cannot—do. Accordingly, although plaintiffs would fail even under the “sliding scale” standard, in
20 fact their burden is to make a “stronger showing” of likelihood of success on the merits to offset
21 their weakness on the balance of equities. *Id.*, at *4. Moreover, under either standard, they would
22 still have to—but cannot—establish the other two preliminary injunction elements (*i.e.*, irreparable
23 harm and benefit to the public interest). *Id.* at *7 (even if the equities tip sharply in plaintiffs’ favor,
24 “plaintiffs must also satisfy the other *Winter* factors, including the likelihood of irreparable harm”).

1 **I. PLAINTIFFS FAIL TO MAKE A STRONG SHOWING OF LIKELIHOOD OF**
 2 **SUCCESS ON THE MERITS.**

3 **A. Plaintiffs Fail to Offer Credible Expert Testimony.**

4 Under Fed. R. Evid. 702, the Court may consider expert opinion testimony to the
 5 extent that it “is the product of reliable principles and methods, and [] the witness has applied the
 6 principles and methods reliably to the facts of the case”. Fed. R. Evid. 702. Both parties have
 7 offered witnesses whom they propose as economic experts to provide testimony about the relevant
 8 market(s) and the state of competition within those market(s). The Court should credit the testimony
 9 of defendants’ expert Dr. Daniel Rubinfeld and should give little (if any) weight to the testimony of
 10 plaintiffs’ expert Prof. Darren Bush. The former based his testimony upon rigorous and well
 11 recognized economic analyses and modeling; the latter (although proffered as an economics expert)
 12 performed no economic analysis or modeling at all, but relied instead primarily upon what he
 13 described as his own “common sense”.

14 **1. Dr. Rubinfeld.**

15 Dr. Rubinfeld is a highly qualified economist with significant experience in the
 16 airline industry. Since receiving his Ph.D. in economics from M.I.T. in 1972, Dr. Rubinfeld has
 17 authored two textbooks on economics, has written or edited five other books and more than one
 18 hundred articles and has been accepted by a number of courts as an expert economist. (Rubinfeld
 19 Report ¶ 2, Appx. A (Ex. 1025); Tr. 430:22-24.) In 1997 and 1998, he served as the chief economist
 20 for the Antitrust Division of the DOJ and in that capacity worked on several airline matters. (Tr.
 21 429:11-430:21; *see also* Rubinfeld Report Appx. A.) At the DOJ, Dr. Rubinfeld and his team
 22 regularly applied the principles underlying Section 7 of the Clayton Act. (Tr. 431:9-18 (“[T]he folks
 23 at the antitrust division when I was there, would look into . . . Clayton Section 7 issues by following
 24 a pretty standard method of analysis that relied heavily on the horizontal merger guidelines. And,
 25 that’s a method of analysis that I’ve also used in doing some of my work in this matter here.”).)

26 The economic analysis and modeling that form the bases of Dr. Rubinfeld’s reports
 27 are well recognized within his field. (*See generally* Rubinfeld Report and Exhibits; Rubinfeld
 28

1 Rebuttal and Exhibits (Ex. 1071).) Prof. Bush himself acknowledged that “Dr. Rubinfeld does great
 2 econometric work” and testified that he has no reason to doubt the accuracy of any of the thirty-five
 3 exhibits to Dr. Rubinfeld’s report. (Tr. 579:12-17.) The Court should credit Dr. Rubinfeld’s
 4 conclusion that the merger “is not only not problematic, [but is] actually likely to be beneficial to the
 5 flying public”. (Tr. 436:2-437:5.)

6 **2. Prof. Bush.**

7 In contrast, Prof. Bush is not an expert economist. Although he has a doctorate in
 8 economics from the University of Utah, he has never previously been qualified as an expert witness
 9 in any court, he has never worked as an economist, he has never been a professor of economics and
 10 he has never been on the staff of an economic consulting firm. (Tr. 555:19-22; 556:6-11; 556:16-
 11 18.) His role in airline investigations when he was at the DOJ was limited to that of a junior staff
 12 lawyer, not an economist. (Tr. 555:11-18; 579:18-580:2.) He has not published a single article
 13 relating to airlines in any peer-reviewed economics journal and, in at least the last five years, he has
 14 done no economic modeling of any kind—whether in connection with this case or any other
 15 engagement. (Tr. 557:10-15.)

16 A complete lack of economic underpinning pervades Prof. Bush’s analysis here. For
 17 example:

- 18 • He did no work to quantify the degree to which competition is likely to be
 19 substantially lessened as a result of the merger. (Tr. 569:23-570:2.)
- 20 • He did no work to quantify the percentage of competition that would or could
 21 be impacted by the merger. (Tr. 569:13-22.)
- 22 • He did no work to calculate the degree to which fares would have to rise to
 23 constitute a substantial lessening of competition. (Tr. 569:8-12.)
- 24 • He did no modeling to determine whether any fares would actually increase as
 25 a result of the merger. (Tr. 572:13-21 (“I have not [engaged in] any economic
 26 modeling of fares, no”); 559:22-24.)
- 27 • He did no analysis of whether the merged carrier could sustain a price
 28 increase on any route served by another carrier. (Tr. 571:3-22.)
- He did no analysis to determine whether capacity would be reduced as a result
 of the merger. (Tr. 572:8-17.)
- He did not study the extent to which LCCs compete at hubs. (Tr. 576:1-5.)

- 1 • He did no work to determine whether there are differences between business
2 travelers who fly on LCCs such as Southwest and AirTran and business
3 travelers who fly on network carriers. (Tr. 574:22-575:21.)
- 4 • He did no work to quantify the number of passengers who prefer one airport
5 over another in any of the regions served by the “airport pairs” that are the
6 subject of his report. (Tr. 557:16-559:6.)
- 7 • He has no basis other than anecdotal information to support his contention
8 that, in the San Francisco area, SFO is “the preferred airport for either
9 business or time sensitive travel”. (Tr. 552:9-555:6.)

10 Furthermore, he could offer no economic analysis to support the purported fare
11 differences on routes between adjacent airports that are set forth in Appendix A to his rebuttal report.
12 He admitted that Appendix A is only a snapshot in time—but that fares are not static, particularly
13 when fare classes and restrictions are taken into account. (Tr. 537:18-25 (“THE COURT: So two
14 days you looked at. But do prices stay static? THE WITNESS: Prices stay — well, it depends on if
15 you start bumping into those different fare classes.”).) And he admitted that his analysis completely
16 fails to take account of those fare restrictions—indeed, he admitted that he has no idea which fares in
17 his sample were subject to restrictions or what effect such restrictions might have on his conclusions
18 regarding price differences.

19 “Q. You don’t have any idea what the fare bases are on the right hand of
20 Appendix A, do you?”

21 “A. I’ve answered that. I do not. . . .

22 “Q. Do you know whether you’re comparing apples-to-apples fare bases
23 on the right-hand side of Appendix A? Do you know?”

24 “A. As I stated before, *I do not know what those fare bases are.*”

25 (Tr. 563:11-569:7 (emphasis added); *see also id.* (acknowledging that a “full-on study” of fares—
26 which he concedes he did not attempt—would likely include an analysis of the effect of fare
27 restrictions).) In contrast, Exhibits 23, 24A-J and 25 to Dr. Rubinfeld’s report demonstrate that there
28 is substantial fare dispersion even among comparable flights on the same carrier. (Rubinfeld Exs.
23, 24A-J, 25.) Prof. Bush’s failure to control for that dispersion (or even to bother to learn what it
is) fatally undermines his analysis.

1 At bottom, Prof. Bush does not even pretend to be an economics expert. Far from
2 using “economic or quantitative analysis” to support his opinions, he instead relies upon his own
3 “common sense”. (Tr. 550:25-551:11; 447:19-24 (quoting Bush Rebuttal at 2).) He disdains the
4 need to use regression analysis, referring to a “kind of . . . joke” about “advancement through
5 regression”. (*Id.*) But so-called “common sense” cannot substitute for economics expertise. *See*
6 *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 334 (S.D.N.Y. 1995) (plaintiffs did not meet
7 their burden where, *inter alia*, “[their expert] failed to provide a consistent and persuasive
8 methodological basis for deciding which [] products to include in his [] market”). Prof. Bush’s
9 opinions are based upon neither “reliable principles and methods” (because he admittedly did not use
10 any) nor a “reliabl[e]” “appli[cation of such] principles and methods [] to the facts of the case”. Fed.
11 R. Evid. 702. Accordingly, his opinions should be given no weight.

12 **B. Plaintiffs Fail To Define a Relevant Market.**

13 To establish a likelihood of success on the merits, plaintiffs must first define a
14 relevant market—*i.e.*, a product market and a geographic market within which to measure the
15 merger’s supposed competitive effects. *See, e.g., Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1109,
16 1118 (N.D. Cal. 2001) (on a motion for a preliminary injunction, “[t]o establish a prima facie case
17 under Section 7 of the Clayton Act, a plaintiff must first define the relevant market”).

18 In defining a relevant product market, “the outer boundaries” “are determined by the
19 reasonable interchangeability of use or the cross-elasticity of demand between the product itself and
20 substitutes for it”. *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1119 (N.D. Cal. 2004) (quotation
21 marks omitted). “[R]easonable interchangeability of use” refers to “products [that] have reasonable
22 interchangeability based upon price, use and qualities”, *id.* at 1131 (quotation marks omitted),
23 whereas the “cross-elasticity of demand” is “the extent to which purchasers will accept substitute
24 products in the event of price fluctuations and other changes”, 62B Am. Jur. 2d Private Franchise
25 Contracts § 72 (2010); *see also U.S. v. Syufy Enters.*, 712 F. Supp. 1386, 1398-99 (N.D. Cal. 1989)
26 (“In analyzing cross elasticity of demand in this case, the Court must decide if consumers would
27 choose to view motion pictures on home video, cable television, pay-per-view television, or as sub-

1 run motion pictures rather than as first-run motion pictures if Syufy were to increase the prices it
2 charged consumers for first run pictures”).

3 To be part of the same relevant market, products need be only “viable” substitutes.
4 *See e.g., Syufy Enters.*, 712 F. Supp. at 1399 (“In other words, consumers consider home video,
5 cable television, sub-run exhibition, and, to a lesser degree, pay-per-view television *viable*
6 *substitutes* to first-run theatrical exhibition. Thus, the Court finds that there is a very high cross
7 elasticity of demand”) (emphasis added); *Sutter Health Sys.*, 130 F. Supp. 2d at 1119 (finding a
8 group of hospitals to be within a product market because “they do provide *viable substitutes* for
9 services offered at other hospitals”) (emphasis added). The mere fact that a “[c]ustomer [has]
10 preferences towards one product over another do[es] not negate interchangeability”; put another
11 way, a product should be included in the relevant market if it is a reasonable substitute, even if it is
12 not the consumer’s “first choice”. *Oracle Corp.*, 331 F. Supp. 2d. at 1131.

13 Courts are wary about proposed relevant product markets that (as plaintiffs attempt
14 here) are carefully tailored to achieve a desired result. *See, e.g., id.* at 1118, 1120 (“Judicial
15 experience cautions against the use of qualitative factors to define narrow markets”; “defining
16 markets in terms of ‘localized competition’ may result in markets defined so narrowly that one
17 begins to question whether the market constitutes a ‘line of commerce’ as required by section 7”);
18 *see also U.S. v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1103 (C.D. Cal. 1979) (“The Court finds []
19 these attempts to narrow the product market inappropriate when measured against the *Brown Shoe*
20 criteria”); *U.S. v. Gillette Co.*, 828 F. Supp. 78, 83-4 (D.D.C. 1993) (“The court therefore holds that
21 the product market proposed by plaintiff is far too narrow. . . . Plaintiff has not made its prima facie
22 case, therefore, and the court finds that plaintiff is not likely to succeed on the merits of the case”).

23 In addition to defining a relevant product market, plaintiffs also “bear[] the burden of
24 proving the proper geographic market in which to analyze the competitive effects of the proposed
25 merger”. *Sutter Health Sys.*, 130 F. Supp. 2d at 1120. “The proper geographic market is that
26 geographic area to which consumers can practically turn for alternative sources of the product and in
27 which the antitrust defendants face competition”. *Id.* (quotation marks omitted). “A determination
28

1 of the proper geographic market must be based on the ‘*commercial realities of the industry*,’ and
 2 therefore, must involve a dynamic as opposed to static analysis of ‘where consumers could
 3 practicably go, not on where they actually go’”. *Id.* (citation omitted; emphasis added).

4 A “snap-shot view” of consumer choices at a particular point in time (as, for example,
 5 the one reflected in Prof. Bush’s Exhibit A) is not helpful in defining a relevant geographic market.
 6 *Advocacy Org. for Patients and Providers v. Mercy Health Servs.*, 987 F. Supp. 967, 973 (E.D.
 7 Mich. 1997); *see also E.I. Du Pont De Nemours and Co. v. Kolon Indus., Inc.*, 683 F. Supp. 2d. 401,
 8 411 (E.D. Va. 2009) (“When framing the geographic market, the examination does not look merely
 9 at a snapshot in time of the present market”). Instead, the geographic market must include the entire
 10 area within which customers could turn if a “hypothetical monopolist” were to raise prices—*i.e.*, all
 11 other locations that would operate to constrain a significant price increase at the initial location.
 12 Horizontal Merger Guidelines § 4.2.1 (Aug. 19, 2010) (“Merger Guidelines”); *see also Sutter Health*
 13 *Sys.*, 130 F. Supp. 2d at 1120, 1128-32 (adopting the Merger Guidelines “hypothetical monopolist”
 14 test for defining a geographic market).

15 Plaintiffs have failed to meet their burden to define either a relevant product market
 16 or a relevant geographic market. They propose a product market consisting of network carriers
 17 serving “business passengers” (or “time sensitive travelers”) (*see* Tr. 33:16-35:17 (Alioto))—which
 18 ignores the vigorous and highly effective competition that network carriers receive from LCCs.
 19 They propose two geographic markets that they label the “national” market and the “airport pairs”
 20 market (*id.*)—the former of which, as mentioned above, is too broad and the latter too narrow.²

21 ² Although their complaint also mentions a so-called “international” market (*see* Compl. ¶ 29),
 22 plaintiffs have presented no evidence—and Prof. Bush has done no work—to support such a market.
 23 (Tr. 572:22-25.) Nor could plaintiffs show anticompetitive effect in an “international” market—
 24 since, as discussed in our pre-hearing memoranda, the U.S. government granted defendants antitrust
 25 immunity in 2009 with respect to coordination on international fares, schedules and capacity. (*See*
 26 Ex. 1039.) Furthermore, plaintiffs’ attempt to demonstrate a market share impact in the
 27 “international” market is fundamentally flawed because it fails to include any international carriers
 28 and many LCCs—even though foreign competitors account for more than half of all transatlantic
 and transpacific capacity to and from the United States. (Tr. 180:18-24 (Smisek) (“it leaves out a
 number of very potent competitors that we have today, such as Jet Blue, Virgin America, Spirit,
 others in the United States, and completely leaves out competitors that comprise, for example, two-
 thirds of the capacity across the Pacific and about half the capacity cross the Atlantic as our foreign
 competitors”); *see also* Rubinfeld Ex. 28.)

1 None of those proposed markets is based upon rigorous economic analysis and none reflects the
2 “commercial realities” of the airline industry.

3 **1. Network Carriers Serving Business Travelers.**

4 Prof. Bush claims that the network carriers’ routes, frequent flyer programs and
5 choice of seating “drives certain classes of customers” to them rather than to LCCs. (Tr. 549:3-
6 550:1.) However, as mentioned above, his opinion is based not upon economic analysis, but merely
7 upon his own “common sense”. (Tr. 550:25-551:11.) That is insufficient to support a relevant
8 product market. *See, e.g., Delco LLC v. Giant of Md., LLC*, Civil No. 07-3522, 2007 WL 3307018,
9 at *16 (D.N.J. Nov. 8, 2007) (“inferences” and “assumptions” about “cross-shopping” are
10 “insufficient to sustain [plaintiff’s] burden” when they result in “competitive businesses” being
11 excluded from the product market); *see also Oracle Corp.*, 331 F. Supp. 2d at 1158 (“the testimony
12 of all three industry witnesses offered by plaintiffs affords no reliable or articulable basis to
13 distinguish a high function product market”). Especially is that so where, as here, all the evidence—
14 including the conduct of the individual plaintiffs themselves—demonstrates that LCCs do in fact
15 compete with network carriers for business travelers.

16 *First*, both parties’ experts provided support for including LCCs in the relevant
17 product market. Dr. Rubinfeld discussed the substantial economic evidence demonstrating that
18 LCCs “compete very heavily” with network carriers for business travelers. (Tr. 454:3-454:12.) For
19 example, LCCs are present at all of defendants’ hubs and sixty-six percent of United’s domestic
20 passengers and seventy-one percent of Continental’s domestic passengers travel on routes with at
21 least one LCC. (Rubinfeld Report ¶ 66; *see also* Tr. 453:20-24 (“the low-cost carriers vary in the
22 way in which they seek to attract business travelers. But they definitely do, . . . from [] them
23 offering actually a separate seating category, to others, like Southwest, providing just a special kind
24 of service offered to business passengers”).) And even Prof. Bush conceded that there was
25 competition for business travelers between LCCs and network carriers. (Tr. 573:24-25 (“there are
26 certain class—categories of business passengers that would fly LCCs”), 573:14-16 (all LCCs have
27 frequent flyer programs that are used to attract business passengers).) He also acknowledged that
28

1 Southwest's frequent flyer program, like those of network carriers, partners with many commercial
2 enterprises such as banks, flower delivery services, restaurants and hotels. (Tr. 573:17-20.)

3 *Second*, the CEOs of both defendants testified that their airlines experience brutal
4 competition from LCCs for business travelers. Mr. Tilton testified that "LCCs are increasingly
5 being used by business travelers and are targeting those travelers by providing amenities such as
6 preferred seating and boarding access". (Tilton Aff. ¶ 22 (Ex. 1058).) Mr. Smisek testified that
7 LCCs are "a very disciplining factor on price" and have caused "continued downward pressure on
8 fares". (Tr. 159:24-160:4, 161:11-14; *see also* Tr. 114:11-15 ("Southwest has a product, I believe
9 it's called Business Select, and a website, I think it's swabusiness.com or something like that, at
10 which they attempt to and do actually, unfortunately for us, do a very good job of attracting business
11 passengers."); *see also* Tr. 338:11-17 (Knight) ("[D]o low-cost carriers compete for business traffic?
12 They absolutely do compete for business traffic, and they are aggressively doing so every day in the
13 marketplace.".) Many LCCs offer business or first class seats comparable to those on network
14 carriers. (Tilton Dep. Tr. 109:7-24 ("AirTran has a specific business first class that I think has, on
15 their Boeing aircraft, that I think has eight first-class seats or business first-class seats. Q. Are there
16 any other of these LCCs that will have a first class? A. Mid West and Frontier.".) Indeed, some
17 LCCs are adopting hub and spoke business models that are similar to those of network carriers.
18 (Tilton Dep. Tr. 110:17-111:14 ("[A]cross the United States the historical . . . delineation of different
19 business models is now being blurred by the emergence of new strategies by these companies . . .
20 that are converging with what had historically been described as network carriers and point-to-point
21 carriers or LCCs and legacy carriers"); Tr. 331:5-19 (Knight) ("AirTran has a significant network,
22 out of Atlanta. Frontier has a significant network out of . . . Denver. AirTran has all classes of
23 service. They are . . . targeting the business customer as well as the leisure customer"); *see also* Exs.
24 1042, 1043.)

25 *Third*, the testimony of the individual plaintiffs themselves demonstrates the
26 substantial competition between LCCs and network carriers. For example, as a travel agent in
27 Denver, plaintiff Dana Robinson booked business travelers on Frontier (*i.e.*, an LCC). (Tr. 597:12-
28

1 598:4.) Because her “first responsibility” as a travel agent was to offer her clients the lowest fare
2 (Tr. 598:5-601:2), she considered price a principal criterion in choosing among Delta, American,
3 Continental and Frontier (Tr. 598:5-599:9). Ms. Robinson herself has chosen LCCs—like Frontier,
4 jetBlue, Spirit and Virgin America—over network carriers for her own travel in order to take
5 advantage of their convenient schedules. (Tr. 601:23-602:24 (she used Frontier because it “got [her]
6 there quicker” than the network carriers could); 603:15-604:20 (she used Spirit and jetBlue because
7 of their convenient schedules); 605:8-606:4 (she “adored” Virgin America’s quality of service on her
8 flight from Florida to San Francisco).) Plaintiff Jan Marie Brown testified that business travelers
9 choose between multiple carriers, including LCCs. (Tr. 365:15-18.) Plaintiff Clyde Stensrud owns a
10 travel agency whose website actively solicits business travelers to fly on LCCs. (Ex. 1065; Tr.
11 390:13-391:1.) Plaintiff Rosemary D’Augusta’s travel records show that she flies network and LCC
12 carriers interchangeably on the same routes. (Ex. 1051 (showing flights on Continental, Delta,
13 Southwest, jetBlue and Virgin America).)

14 Plaintiff Michael Malaney testified that, as a travel agent in Grand Rapids, Michigan,
15 he has offered business travelers the option of flying Frontier from Grand Rapids to Denver and
16 Allegiant from Grand Rapids to Phoenix (even though the Allegiant flight goes to Chandler,
17 Arizona, which is about twenty-five miles from Phoenix). (Tr. 625:5-626:1.) Mr. Malaney also
18 testified that he would offer business travelers low-cost fares on Frontier from Grand Rapids to San
19 Francisco, Seattle or Los Angeles (Tr. 626:9-627:5) and on Allegiant from Grand Rapids to Las
20 Vegas (Tr. 624:11-15). He testified that he has himself flown Midwest Airlines (*i.e.*, an LCC) from
21 Grand Rapids to Milwaukee. (Tr. 627:14-16.)

22 Mr. Malaney’s testimony about the impact of LCCs on business traveler fares is
23 perhaps the most compelling demonstration of why LCCs must be included in the relevant product
24 market. He testified that the recent entry into Grand Rapids of three LCCs—*i.e.*, AirTran, Frontier
25 and Allegiant—has caused a major decline in fares offered to business travelers by both LCCs and
26

1 network carriers and that he expects this LCC impact to continue in the future. (Tr. 610:22-611:6;
2 618:21-619:2.)

3 “Q. As an example, before the LCCs came in, Delta was charging somewhere in the
4 range of \$600 for a flight to Baltimore, correct?

5 “A. That is correct.

6 “Q. And AirTran then came in and offered a flight to Baltimore for \$198, correct?

7 “A. Yes, sir, that is correct.

8 “Q. And Delta then matched that fare?

9 “A. Yes, sir, they did.

10 . . .

11 “Q. Another example is Grand Rapids to Orlando, correct?

12 “A. Yes, sir.

13 “Q. Delta was offering a fare of about \$350?

14 “A. Yes, sir.

15 “Q. And Allegiant entered the market and offered a fare of \$198?

16 “A. That is correct.

17 “Q. And Delta then matched that fare, correct?

18 “A. They did, sir.”

19 (Tr. 619:12-623:7.) Mr. Malaney testified that the reduction in fares resulting from LCC entry into
20 Grand Rapids has significantly benefited business travelers. (Tr. 621:14-18, 623:8-11, 627:6-13.)
21 He testified that, because of this benefit, he would consider using Allegiant for his own business
22 travel from Grand Rapids to Orlando. (Tr. 624:21-625:4.)

23 In sum, the empirical evidence—both from the airline CEOs and from plaintiffs
24 themselves—and the economic data overwhelmingly establish that Prof. Bush’s unsupported
25 “common sense” guesswork is just plain wrong. Plaintiffs’ attempt to define a relevant product
26 market that excludes LCCs fails.
27
28

1 **2. National Market.**

2 Prof. Bush conceded that he has done no economic modeling to support the existence
3 of a so-called “national” market. (Tr. 581:9-11.) He has not done the work because such a market
4 makes no sense. It does not bear the slightest resemblance to the “commercial realities of the
5 industry”. Dr. Rubinfeld explained why a “national” market “is not supportable”:

6 “[W]hen you’re thinking about possible competitive effects, you want to talk
7 about markets in which consumers might potentially be injured. And that
8 would be looking at where they’re flying from, and where they want to fly to.
9 And so, you wouldn’t get at this [] by simply talking at an aggregate level
about a single market. You would want to talk about individual markets,
involving origins and destinations.” (Tr. 445:8-16.)

10 Plaintiffs’ putative “national” market fails to define the geographic boundaries
11 within which the competitive effects of the merger could be judged. *See Sutter Health Sys.*,
12 130 F. Supp. 2d at 1120 (“the plaintiff bears the burden of proving the proper geographic
13 market in which to analyze the competitive effects of the proposed merger”). As such, it is
14 legally deficient.

15 **3. Airport Pairs.**

16 Prof. Bush has identified thirteen “airport pairs” that, he claims, would be
17 “problematic” if the merger were consummated. (*See Bush Report at 7.*) However, by excluding
18 competition from nearby airports that serve the same metropolitan area, an “airport pair” market is
19 both contrary to well-established economic principles and inconsistent with the individual plaintiffs’
20 own behavior.

21 Prof. Bush conceded that he is not aware of any instance in which the DOJ has relied
22 upon an “airport pair” market in any litigation. (Tr. 562:14-18.) The principal support that he offers
23 for such a market is the GAO Report (Ex. 71), which actually supports the proposition that “airport
24 pairs” is *not* an economically viable market for purposes of a Section 7 analysis. The GAO report
25 expressly cautions that “[i]t is generally preferable, time permitting, *to assess city pair rather than*

1 *airport pair* changes in competition”. (Ex. 71 at 16 n.22 (emphasis added).)³ Consistent with the
 2 approach favored by both the DOJ and the GAO, Dr. Rubinfeld testified that airport pairs “[do] not
 3 give an accurate picture of the competition issues” (Tr. 486:12-13) because they “miss out on some
 4 of the important sources of competition that come from [] the fact that many customers fly from
 5 alternative airports” (Tr. 449:7-9). Dr. Rubinfeld explained that “[t]he conclusion that city pairs are
 6 generally the right way to look at relevant markets is not simply based on” his own analysis; but it is
 7 also “based on analysis by a lot of top economists who really study airlines”. (Tr. 442:11-14.)

8 A properly defined relevant geographic market must include locations where
 9 consumers “could practicably go, not [] where they actually go” for substitute products. *See Sutter*
 10 *Health Sys.*, 130 F. Supp. 2d at 1120. Prof. Bush has made no attempt to show that consumers could
 11 not practicably go to adjacent airports within a city pair. Indeed, he concedes that “for some classes
 12 of customers, it is very much the case” that adjacent airports “are substitutable”. (Tr. 561:22-24.) In
 13 contrast, Dr. Rubinfeld supports his conclusion of airport substitutability with solid economic
 14 analysis of consumers’ actual behavior. For example, with respect to the SFO to Houston
 15 Intercontinental Airport (“IAH”) route that Prof. Bush has labeled “problematic”, Dr. Rubinfeld
 16 found that “[n]early 40 percent of San Francisco-Houston passengers use an airport pair other than
 17 the one cited by Professor Bush”—*i.e.*, passengers were able to, and did in fact, fly out of and/or into
 18 alternative airports in the Bay Area and Houston (Oakland International Airport and Houston Hobby
 19 Airport). (Rubinfeld Rebuttal ¶ 5.) Similarly, the Newark to Washington Dulles route challenged by
 20 Prof. Bush carries a mere two percent of the air traffic between the New York City and Washington
 21 D.C. metropolitan areas. (Rubinfeld Rebuttal Ex. 1.) Indeed, twelve of the thirteen “airport pairs”
 22
 23
 24

25 ³ This is highlighted by the fact that the report that the GAO did in 2008 on the Delta/Northwest
 26 merger actually “used city pairs as the appropriate competitive analysis”. (Tr. 563:3-10 (Bush).)
 27 Moreover, the GAO Report relied upon by Prof. Bush makes the point that the DOJ (which also uses
 28 city pairs) “has the primary responsibility to evaluate most mergers in order to carry out its antitrust
 responsibilities”. (Ex. 71 at 3.)

1 cited by Prof. Bush are subject to competition at adjacent airports—with twenty-three to ninety-eight
2 percent of passengers choosing different airport pairs within the city pair.⁴ (*Id.*)

3 Although Prof. Bush expressed the belief that “there are certain classes of
4 customers”—*i.e.*, “time-sensitive passengers”—“who are willing to pay more to fly to [their]
5 preferred airport” (Tr. 532:19-21; 544:4-15), he has done no economic analysis to support that view.
6 (Tr. 557:13-15.) He has not attempted to determine who is and is not a so-called “time-sensitive”
7 passenger (Tr. 562:4-9); he has not attempted to determine the number of passengers who pay fares
8 of one type versus another (Tr. 562:10-13); he has not done a “full-on study of airfares for these
9 airport pairs” that takes into account the wide variety of fare restrictions that airlines impose (Tr.
10 564:12-18); he has “not done any study to determine the relative numbers of individuals who prefer
11 one airport versus another in any of the metropolitan regions” with an airport that he has identified
12 as supposedly “problematic” (Tr. 559:4-6). His unsupported conjecture about consumer preference
13 is insufficient to define a relevant market. *See, e.g., HTI Health Servs., Inc. v. Quorum Health*
14 *Group, Inc.*, 960 F. Supp. 1104, 1122 (S.D. Miss. 1997) (rejecting defendant’s geographic market
15 because its expert’s assertion that “[customers] are just as likely to drive certain distance in one
16 direction as in any other direction” “is not supported by record evidence”).

17 Especially is that so where (as here) the factual record of what consumers actually
18 do—*i.e.*, the testimony of the individual plaintiffs themselves—flatly undermines Prof. Bush’s
19 conjecture. Ms. Robinson, for instance, has consistently used airports that are alternatives to the
20 airport closest to her. She has flown out of the Fort Lauderdale-Hollywood International Airport
21 rather than the Palm Beach International Airport in order to get flights that she prefers despite the
22 fact that the Palm Beach airport is almost an hour closer to her than the Fort Lauderdale airport. (Tr.
23 601:5-18; 601:23-602:6; 602:7-9; 602:25-603:14.) In fact, she traveled to the hearing in San
24 Francisco on Virgin America (*i.e.*, an LCC) from Fort Lauderdale rather than Palm Beach because it
25

26 ⁴ On the thirteenth airport pair—*i.e.*, LAX-HNL—there are many other competitors besides
27 United and Continental, including three that have more than twenty percent of the market each.
(Rubinfeld Report Ex. 34.)

1 was a nonstop flight. (Tr. 605:8-15.) Similarly, Ms. Brown testified that she has regularly booked
2 business travelers to alternative airports—*e.g.*, to all three New York area airports (*i.e.*, JFK, Newark
3 and LaGuardia). (Tr. 366:8-21.) She herself has found it to be a “reasonable alternative” to fly into
4 airports that are farther from her destination rather than closer in order to take advantage of less
5 expensive fares. (Tr. 368:9-23.) Mr. Malaney testified that he has offered business travelers low
6 cost Allegiant flights to Phoenix (even though the flights go to Chandler, Arizona, which is about
7 twenty-five miles away from Phoenix) and to Orlando (even though the flights go to Sanford,
8 Florida, which is about half an hour from the Orlando airport). (Tr. 621:11-21; 625:12-626:1.)

9 This actual consumer behavior is confirmed by the CEOs of both defendants—who
10 testified that competition from adjacent airports forces them to consider those airports when making
11 pricing decisions. Mr. Smisek testified that a merged United would not have the ability to sustain a
12 price increase on a nonstop route, even if it were the only carrier at that airport pair, because of price
13 competition from LCCs at nearby airports. (Tr. 196:3-197:3.) Mr. Tilton testified that, for example,
14 “I can’t price in Dulles or in Re[a]gan without close attention to prices in BWI. It’s simply
15 impossible.” (Tr. 279:14-25.)

16 If (as is obvious from the above) consumers are willing to switch to an alternative
17 airport to defeat a price increase, then the alternative airport must be included in the geographic
18 market—even if there are some consumers who would not switch. *See Sutter Health Sys.*, 130 F.
19 Supp. 2d at 1120; Merger Guidelines § 4.2.1. As Dr. Rubinfeld explained, those passengers who do
20 prefer one airport over another “would be protected [from a price increase] by other people who
21 would be willing to switch [to a substitutable airport]”. (Tr. 461:3-461:4.) He found that “10 or 20
22 percent [] of the relevant population being willing to switch is usually enough to defeat any attempt
23 to raise a price increase”. (Tr. 461:7-9.) Consequently, even accepting Prof. Bush’s speculation
24 that certain “time-sensitive passengers” are not willing to switch airports, the travelers who *are*
25 willing to do so would defeat a price increase at the other passengers’ preferred airport. (Tr. 447:9-
26 12 (Rubinfeld).)

1 Plaintiffs simply fail to consider these “commercial realities of the industry”. As a
2 result, they do not satisfy their burden of defining a relevant market.

3 **C. Plaintiffs Fail To Demonstrate a Substantial Lessening of Competition.**

4 “The standard for showing the lessening of the competition under Section 7 of the
5 Clayton Act is based on *probabilities*, not possibilities”. *Go-Video III v. Matsushita Elec.*, No. CIV
6 90-1864-PHX-RCB, 1990 WL 259684, at *1 (D. Ariz. Dec. 20, 1990) (emphasis added); *see also*
7 *Oracle Corp.*, 331 F. Supp. 2d at 1109 (“Congress used the words ‘*may* be substantially to lessen
8 competition’ (emphasis supplied) to indicate that its concern was with probabilities . . .” (quotation
9 marks omitted)). In assessing whether there is a probability that a merger will have the proscribed
10 anticompetitive effect, courts “adopt a flexible approach”. *Oracle Corp.*, 331 F. Supp. 2d at 1111
11 (scrutinizing efficiencies to determine whether a merger threatened competition and noting the
12 “trend . . . away from the very strict merger decisions of the 1960s”); *see also U.S. v. Syufy Enters.*,
13 903 F.2d 659, 664 (9th Cir. 1990) (“low entry barriers” and “other evidence of a defendant’s
14 inability to control prices or exclude competitors” were important factors in concluding that the
15 purchase of movie theaters did not substantially lessen competition, citing the Merger Guidelines);
16 *Lambtek Yogurt Machs. v. Dreyer’s Grand Ice Cream, Inc.*, No. CIV. 96-20959 SW, 1997 WL
17 108718, at *4 (N.D. Cal. Mar. 3, 1997) (“Every merger of two existing entities into one, whether
18 lawful or unlawful, has the potential for producing economic readjustments that adversely affect
19 some persons. But Congress has not condemned mergers on that account; it has condemned them
20 only when they may produce anticompetitive effects” (quoting *Brunswick Corp. v. Pueblo Bowl-O-*
21 *Mat, Inc.*, 429 U.S. 477, 487 (1977))).

22 In particular—and contrary to plaintiffs’ approach—the Supreme Court has made it
23 clear that “[s]tatistics concerning market share and concentration” are “not conclusive indicators of
24 anticompetitive effects”. *U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). Rather, ““only a
25 further examination of the particular market—its structure, history and probable future—can provide
26 the appropriate setting for judging the probable anticompetitive effects of [a] merger””. *Id.* (quoting
27 *Brown Shoe v. United States*, 370 U.S. 294, 322 n.38 (1962)); *see also U.S. v. Baker Hughes Inc.*,

1 908 F.2d 981, 986 (D.C. Cir. 1990) (“The court’s consideration of these factors [*e.g.*, the *General*
2 *Dynamics* factors] was not only appropriate, but imperative, because in this case these factors
3 significantly affected the probability that the acquisition would have anticompetitive effects”); *U.S.*
4 *v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) (“under *General Dynamics*, a substantial
5 existing market share is insufficient to void a merger where that share is misleading as to actual
6 future competitive effect”).

7 As discussed in our response to plaintiffs’ pre-hearing memorandum, plaintiffs
8 improperly attempt to minimize their burden of proof in this area by misconstruing a series of early
9 Supreme Court cases—*i.e.*, *Brown Shoe*; *U.S. v. Phila. Nat’l Bank*, 374 U.S. 321 (1963); *U.S. v.*
10 *Cont’l Can Co.*, 378 U.S. 441 (1964); *U.S. v. Pabst Brewing Co.*, 384 U.S. 546 (1966); and *U.S. v.*
11 *Von’s Grocery Co.*, 384 U.S. 270 (1966). (Defs. Pre-Hearing Resp. at 4 & n. 4.) None of those
12 cases, however, supports the proposition (offered by plaintiffs) that courts assess mergers under
13 Section 7 solely by looking at market share impact. Rather, in all of them, the Supreme Court
14 analyzed competitive effects by considering a broad range of economic evidence—including the
15 historic trend toward concentration in the industry (*see Brown Shoe Co.*, 370 U.S. at 344-45; *Von’s*
16 *Grocery Co.*, 384 U.S. at 277-78), the vigor of competition after the merger (*see Phila. Nat’l Bank*,
17 374 U.S. at 366-67), the existence of “small but significant competitors” (*U.S. v. Aluminum Co. of*
18 *Am.*, 377 U.S. 271, 279-281 (1964)) and “documents, statistics, official records, depositions and
19 affidavits” regarding, *inter alia*, competitive trends in the market (*Pabst Brewing Co.*, 384 U.S. at
20 550-53). As explained during opening argument at the hearing, “the courts [in those cases] were
21 clear that the concentration in the market was not the end point which the Court needed to consider
22 to determine whether or not a merger should be enjoined”. (Tr. 44:4-7 (Forrest).)⁵

23
24 ⁵ Moreover, Section 7 jurisprudence has evolved significantly since the early Supreme Court
25 cases upon which plaintiffs rely. “Although the Supreme Court has not overruled these Section 7
26 precedents, it has cut them back sharply.” *Baker Hughes, Inc.*, 908 F.2d at 990. “[T]he fundamental
27 ideology of mergers has shifted dramatically over the last three decades and now embodies values
28 that are inconsistent at the most fundamental level with those that the Supreme Court last
articulated.” Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* at 208 (2005).
Perhaps the most insightful comment about plaintiffs’ reliance upon these cases was made by
plaintiffs’ counsel himself: “One would be hard pressed to find a lower court decision following any

1 A full and proper assessment of the economic and factual record here establishes that
 2 plaintiffs have not come close to showing a probability that the merger will substantially lessen
 3 competition. Indeed, just the opposite: the merger will be pro-competitive.

4 **1. The Long History of Price Declines in the Airline Industry.**

5 Since deregulation in 1978 (and since the 2008 Delta/Northwest merger), competition
 6 in the airline industry has intensified and fares have steadily declined. (Tr. 560:2-3 (Bush)
 7 (“Airfares have trended on the decline since—since deregulation, for a multitude of reasons”);
 8 437:14-20 (Rubinfeld) (“[I]t is a highly-competitive industry, and it’s one which has gotten more
 9 and more competitive over the last decade or two, ever since deregulation in 1978. And, the
 10 increased competition is due to a number of factors, but probably most important has been the
 11 growth of the low-cost carriers”); 438:12-21 (Rubinfeld) (fares have declined since the 2008
 12 Delta/Northwest merger).)

13 During that time, capacity has increased and airline yields have decreased (*see*
 14 Rubinfeld Report Exs. 1-3), and the industry has been characterized by rapid LCC entry into new
 15 routes. (*See* Rubinfeld Report Exs. 7, 8, 26; Rubinfeld Rebuttal ¶¶ 18-21 & Ex. 4; *see also* Knight
 16 Aff. ¶ 18 (Ex. 1059) (“In addition to the existing competitors on these routes, there are a number of
 17 potential entrants for many of these routes, which further constrains pricing. For example, both
 18 jetBlue and Virgin America currently serve several destinations from Los Angeles and San
 19 Francisco and could enter the routes from those cities to Houston as they expand their networks.
 20 Similarly, Alaska Airlines currently serves several routes from the West Coast to Hawaii and is a
 21 potential competitor on the route from Los Angeles to Honolulu”).) The price transparency afforded
 22 by the internet has enabled consumers to compare carriers’ prices easily and directly, which exerts
 23 additional pressure on carriers to match the lower prices of their competitors. (Tr. 183:2-15
 24 (Smisek).) Plaintiffs have offered no evidence that these trends will not continue even after the
 25 merger. They have caused the current level of competition in the airline industry to be “brutal”. (Tr.

26 of these cases to enjoin or unwind a merger.” Daniel R. Shulman, *A New U.S. Administration and*
 27 *U.S. Antitrust Enforcement*, 10 Sedona Conf. J. 1, 7 (Fall 2009).

1 182:14-23 (Smisek).)

2 **2. Competition From LCCs.**

3 LCCs have grown substantially over the past decade while network carriers have
4 shrunk. (*See* Tilton Aff. ¶ 19; Ex. 1020 (“The increased competition from LCCs has been dramatic
5 as they have experienced tremendous growth over the past decade. Indeed, as depicted in Exhibit 3,
6 the LCCs’ share of domestic passengers has nearly doubled in the past 12 years, from 19.9% in 1998
7 to 37.7% in 2009.”); Tr. 578:10-13 (Bush) (there have been numerous LCC entrants in recent years);
8 Rubinfeld Report Exs. 4-6.) LCCs have benefited from a generally lower cost structure than
9 network carriers, which has allowed LCCs to compete vigorously on price. (Rubinfeld Report Ex.
10 22 (comparing operating expenses for the top ten carriers).)

11 LCCs have effectively targeted business travelers by, *inter alia*, developing
12 traditional hub-and-spoke networks, offering multiple-cabin aircraft, implementing frequent flyer
13 programs and providing onboard entertainment and communications services. (Smisek Aff. ¶ 18
14 (Ex. 1057) (“These carriers also have been a source of innovation in the industry, providing
15 DIRECTV on JetBlue, Virgin America and Frontier; XM Satellite Radio on JetBlue and AirTran;
16 and WiFi on AirTran and Virgin America”); Tr. 439:19-440:9 (Rubinfeld) (LCCs such as AirTran
17 and Southwest “find it profitable to develop their own hubs of sorts”); Tr. 573:14-16 (Bush); Ex.
18 1017.) LCCs now compete for eighty percent of all domestic travelers; and more than eighty-five
19 percent of passengers traveling nonstop on United or Continental currently have an LCC option.
20 (Tilton Aff. ¶ 20; Exs. 1021, 1030.) LCCs are present at every United and Continental hub and at
21 adjacent airports that compete directly with those hubs. (Smisek Aff. ¶ 19; Tilton Aff. ¶ 21; Ex.
22 1024; Tr. 573:1-13; 575:22-25 (Bush) (LCCs fly to defendants’ hub cities).) There are no fewer than
23 two and as many as six LCCs at each individual plaintiff’s local airports.⁶ Indeed, Southwest

24 _____
25 ⁶ Mr. Stensrud’s airport, SEA, is served by at least AirTran, Southwest, Frontier, jetBlue and
26 Virgin America. (Rubinfeld Ex. 33.) Ms. Robinson’s airports, PBI and FLL, are served by
27 Southwest, jetBlue, Virgin America, Spirit, AirTran and Frontier. (Rubinfeld Ex. 33; Tr. 605:5-15
28 (Robinson).) Ms. Brown’s airport, RNO, is served by Southwest and Allegiant. (Rubinfeld Ex. 33;
Tr. 371:24-372:3 (Brown).) Mr. Malaney’s airport, GRR, is served by AirTran, Allegiant, Frontier
and Midwest. (Rubinfeld Ex. 33; Tr. 611:1-6; 627:14-16 (Malaney).) Ms. D’Augusta’s airports,
SFO and OAK, are served by Southwest, jetBlue, Virgin America, Spirit, Frontier and Midwest.

1 currently is the largest domestic carrier by passenger share and will continue to be so after the
 2 merger. (Smisek Aff. ¶¶ 17-18; Tr. 185:15-19 (Smisek) (“[Southwest’s] market capitalization at one
 3 point was greater than all of the network carriers combined. I believe their market capitalization
 4 today is more than twice what ours and United’s is combined, which is the market rewarding them,
 5 as it should, for success.”).)

6 Prof. Bush could not identify a single LCC that is likely to exit any route as a result of
 7 the merger. (Tr. 578:14-579:6.) In fact, the merger will not hinder LCC competition in the slightest.
 8 (Tr. 457:23-25 (Rubinfeld) (“when there’s a route or set of routes that are offering a profit
 9 opportunity, I think smaller networks can definitely compete”); 268:24-269:1 (Tilton) (“I agree with
 10 Gary Kelly, the CEO of Southwest, when he said nobody should worry about Southwest in the event
 11 of a United-Continental merger”).) This continuing competitive pressure from LCCs makes it
 12 unlikely that the merger will have any unilateral anticompetitive effects. (Tr. 439:6-11 (Rubinfeld)
 13 (“my expectation is we will continue to see competitive pressure, particularly from low-cost carriers.
 14 Q: Does that suggest to you that it’s unlikely that there would be a unilateral effect as a result of this
 15 merger? A: It does.”); Tr. 161:11-14 (Smisek) (“My own belief is that the LCC’s are . . . a very
 16 disciplining factor on price and that the majority of the decrease in fares is [the] result of low-cost
 17 competitor competition”).) Nor is there likely to be an increase in “coordinated effects” as a result
 18 of the merger. (Tr. 469:14-21 (Rubinfeld) (“[T]he industry is so volatile, and so varied in terms of
 19 the ways firms compete, that I don’t see coordination as a problem at all. If it was ever a problem, it
 20 would have been a problem ten or 20 years ago, where the industry was a much simpler industry.
 21 Now it’s a very complex industry, with so much and so variety of competition, I just don’t see any
 22 possibility of collusion occurring as a result of this merger.”).)

23
 24
 25
 26
 27 (Rubinfeld Ex. 33.) In addition, after the merger no fewer than four competing domestic legacy
 carriers will also be present at each individual plaintiff’s local airports. (*See* Rubinfeld Ex. 33.)

1 **3. The Lack of Power Over Price.**

2 Because the networks of United and Continental are almost entirely complementary,
3 combining them will not significantly increase concentration.⁷ More than eight hundred nonstop city
4 pair routes would be served by the merged carrier; only fifteen are currently overlapping routes—
5 and in all of them there are other competitors besides defendants. (Knight Aff. ¶ 17.) Of the current
6 connecting city pair routes that are overlapping, only three (*i.e.*, Steamboat Springs/Hayden, CO -
7 Houston; Montrose/Delta, CO - New York/Newark; and Houston - Montrose/Delta, CO) will go
8 from two competitors to one following the merger—which is far fewer than the sixty-six connecting
9 routes that went from two competitors to one after the Delta/Northwest merger. (Knight Aff. ¶ 19.)
10 And even on those routes, if the merger did result in a substantial increase in fares, other airlines,
11 such as the LCCs, would be poised to enter and put downward pressure on price. As Mr. Smisek
12 testified, entry into any market is as easy as pointing an airplane in that direction. (Tr. 155:2-6; *see*
13 *also* Rubinfeld Report ¶¶ 19, 78-79, 111 & Rubinfeld Exs. 7-8.) Thus, no such fare increase would
14 be sustainable.

15 Plaintiffs allege that four metropolitan areas will experience anticompetitive effects as
16 a result of the merger (*i.e.*, Washington, D.C., New Orleans, San Diego and Seattle). (*See* Compl.
17 ¶ 72.) But in each city, the merged airline will carry fewer than twenty percent of the passengers—
18 and in each city, Southwest will still have the largest market share. (Rubinfeld Report Ex. 30.)

19 Plaintiffs allege that there will be excessive concentration at seventeen airports as a
20 result of the merger. (*See* Compl. ¶ 73.) But all seventeen are served by multiple other carriers, and
21 defendants' combined passenger share exceeds ten percent at only the two smallest of the airports.
22 (Rubinfeld Report Ex. 31.)

23 Plaintiffs contend that “connections from origins or destinations east of Colorado in
24 the Midwest to East Coast destinations may only have as reasonable connections options the hubs of
25

26 ⁷ Indeed, the Herfindahl index (including LCCs) for plaintiffs' proposed “national” market
27 would remain under 1,500 after the merger—which the Horizontal Merger Guidelines define as an
“unconcentrated market”. (Rubinfeld Report Ex. 29; Merger Guidelines § 5.3.)

1 the merging firms or the hubs of Northwest/Delta.” (Bush Report at 8.) But this ignores the
2 vigorous competition and hub presence of both LCCs and other network carriers on all those routes.

3 As described by Dr. Rubinfeld:

4 “For example, American operates a large hub at Chicago-O’Hare—in addition to the
5 United hub at the same airport. Based on the Official Airline Guide for October 2010,
6 Southwest has a large operation in Chicago with 50 destinations served from Midway
7 Airport. Southwest also serves 43 destinations from its hub at Baltimore-Washington
8 Airport, and 30 destinations from St. Louis. Frontier operates a hub at Milwaukee
9 serving 30 destinations, and AirTran serves 21 destinations from Milwaukee. In
10 addition, for many Midwest-East Coast city pairs, a connecting hub on the East Coast
11 would be just as feasible as a connecting hub in the Midwest. For example, there is
12 significant LCC service at Baltimore-Washington International Airport that could
13 provide competition to Continental’s hub at Cleveland. US Airways’ hub at Charlotte
14 is capable of providing many connections with comparable circuitry to Memphis.
15 Finally, jetBlue has a large operation in New York at JFK with service to 36
16 destinations.”

(Rubinfeld Rebuttal ¶ 10; *see also* Rubinfeld Rebuttal Ex. 2.)

17 Finally, plaintiffs contend that the merger might have an adverse competitive effect
18 on defendants’ non-overlapping routes because it will eliminate United or Continental as “potential”
19 competitors. (Bush Report at 9 (citing LAX-CLE, LAX-EWR and SFO-CLE).) However, plaintiffs
20 present no economic support for this proposition—and in fact the record indicates that neither carrier
21 currently plans to begin overlapping service on any of these routes. (Rubinfeld Rebuttal ¶ 23.) As
22 Dr. Rubinfeld explained, “United and Continental each have a ten percent share of passengers at
23 only four domestic airports. This means that United is unlikely to be the most viable potential
24 connecting competitor to Continental on many routes.” (Rubinfeld Rebuttal ¶ 24.) As a result, Dr.
25 Rubinfeld testified, “I don’t see any loss of any potential competition that would be a real threat as a
26 result of this merger.” (Tr. 455:5-7; *see also* Rubinfeld Rebuttal ¶¶ 22-24.)⁸

27 The bottom line is that, because of the lack of significant overlapping routes and the
28 presence of intense LCC competition (both actual and potential) on all routes, there is virtually no
chance that the merger will give the combined airline power to raise prices or to sustain a fare
increase in any market. As Mr. Smisek explained:

⁸ And, of course, plaintiffs’ position ignores the fact that LCCs will continue to be significant potential entrants into each of the routes in question.

1 “Q. If the merger proceeds, will the combined entity have the power to raise prices?

2 . . .

3 “A. . . . [T]his is a very competitive business. . . . [W]e’re effectively price-takers.
4 We can’t unilaterally increase a price. If we were to do that, you very quickly would
5 see customer book-away, because of the transparency of the market and the fact that
consumers are, in fact, quite sensitive. As a result, we don’t have that ability today,
and we won’t have that ability after the merger.”

6 (Tr. 204:14-25.)⁹ Mr. Tilton agrees. He testified that “the low-cost carriers set the price” and that
7 “after the merger” the merged company would not “have the power to increase the price in any
8 market”. (Tr. 268:17, 278:6-9; *see also* Tr. 280:12-24.) He testified that it is not the case “that
9 market concentration in this industry actually results in pricing power” or that “pricing power comes
10 from network consolidation”. (Tr. 267:18-20.) And Mr. Malaney’s testimony (set forth at page __
11 *supra*) clearly demonstrates the lack of network carrier pricing power.

12 Dr. Rubinfeld summarized the situation as follows:

13 “[T]here’s relatively little overlap, which is where you would normally be concerned
14 about a competitive problem. And where there is overlap in those city pairs, there is
very substantial competition, both from existing carriers that we call legacy carriers,
or low-cost airlines, or other carriers.

15 “And when you put all that together, I just do not see even a real possibility of a
16 problem.”

(Tr. 467:8-14.)¹⁰

17 For all these reasons, plaintiffs have failed to establish that the merger will increase
18 the power of any airline to raise prices.

19 ⁹ *See also* Tr. 210:18-211:8 (Smisek) (when Continental has attempted to increase fares, “unless
20 competitors as well match that fare, we very rapidly have bookings go away from us, and we have to
21 withdraw that price increase. THE COURT: Do the larger carriers . . . [such as] Delta/Northwest
22 . . . have more ability to test the marketability of a price than the smaller carriers? THE WITNESS:
I don’t think so, certainly as a result of the merger, because you have such potent disciplining on the
23 market by the low-cost competitors. If . . . Continental[] would want to raise a fare by \$5 [i]n a
Southwest-competitive market, if Southwest doesn’t match it, they’ll take . . . a significant amount
24 [of Continental’s customers] . . . [W]hatever benefit we get from the bookings at \$5 more, we
forfeit significantly more than that in book-away.”).

25 ¹⁰ Plaintiffs proffer an unsolicited e-mail from Vaughn Cordle that offers his (contrary) opinion
26 that the merger might lead to higher prices. (Ex. 49.) Mr. Cordle is an independent industry blogger
27 who is not privy to internal company information (Tr. 263:9-11; 274:22-275:3 (Tilton)); plaintiffs
have not even attempted to qualify him as an expert; and his opinion is entitled to no weight. (*See*
Tr. 507:5-7 (Rubinfeld) (“[I]f I understand the phrase ‘pricing power,’ I would disagree [with Mr.
Cordle] that this merger would increase pricing power”).)

1 **4. The Merger’s Procompetitive Effects.**

2 The merger will create enormous benefits for defendants, their employees, consumers
3 and shareholders. (Tilton Aff. ¶¶ 4-12; Smisek Aff. ¶¶ 6-16; Knight Aff. ¶¶ 10-74; Tr. 466:6-20
4 (Rubinfeld).) Those benefits include, among others: more than one thousand new online
5 connections; 116 new destinations system wide (of which ninety-three will serve small
6 communities); twenty-five entirely new routes made possible by the merger; enhanced flight
7 frequencies and scheduling convenience; a combined frequent flyer program; elimination of double
8 marginalization (which will lead to lower prices); a reduction of \$400 million in quality adjusted
9 fares; and more than \$1 billion in annual steady state revenue synergies and cost savings. (Rubinfeld
10 Report ¶¶ 25, 32, 46; Tilton Aff. ¶ 5, 7, 32, 36, 47; Smisek Aff. ¶¶ 13-14; Knight Aff. ¶¶ 14, 16,
11 34-37; Ex. 1034 (demonstrating how a customer who currently has twenty-five round-trip
12 combination options on United will see that number quadruple to one hundred after the merger).)

13 In addition, the merger will allow defendants to increase capacity. This will be made
14 possible, in part, by the addition of seven new frequencies on hub-to-hub routes and twenty-five new
15 nonstop routes. (Knight Aff. ¶ 16; Rubinfeld Report ¶¶ 44-45 & Rubinfeld Exs. 12, 13; Ex. 1035.)
16 It will also be made possible by the ability to optimize fleet usage, which will permit defendants to
17 assign larger aircraft to routes with higher demand. (*See* Knight Aff. ¶ 21 (“For example, assume
18 that United is flying an aircraft with a 100-seat capacity on Route A, which has demand from only
19 50 passengers. On Route B, assume that Continental is flying a 60-seat aircraft that is routinely fully
20 booked. Once the parties merge, it may make sense to reassign the 100-seat aircraft from Route A to
21 Route B to support the greater demand on Route B, while reassigning the 60-seat aircraft to Route A.
22 By doing so, the load factor of each flight will increase, and per-passenger costs will be reduced.”).)
23 As Dr. Rubinfeld succinctly put it, “[t]he combined airline will increase capacity”. (Tr. 512:24-
24 513:2.)¹¹

25 _____
26 ¹¹ In an effort to counter that showing, plaintiffs cross examined Mr. Smisek on an internal
27 Continental preliminary study from April 2010 indicating potential capacity reductions at various
28 locations, including Cleveland. (*See* Ex. 15.) Mr. Smisek testified that he was not aware of the
document at the time it was prepared and that the forecasts that were actually presented to the
Continental board in connection with its consideration of the merger projected year-over-year

1 The benefits that will arise from the merger are simply not achievable by defendants
2 on a stand alone basis. Perhaps most importantly, the recent exogenous shocks to and extreme
3 volatility of the airline industry have weakened both companies. As Mr. Tilton explained, “[i]n
4 addition to the increased competition from LCCs and foreign carriers, U.S. network carriers have
5 had to contend with external shocks—including wildly fluctuating fuel prices, terrorist attacks,
6 economic recessions and public health scares like H1N1—that have increased United’s costs and
7 decreased demand for its services”. (Tilton Aff. ¶ 26.) Mr. Tilton described this as part of a wider
8 phenomenon affecting all network carriers. He testified that, over the last decade, “our industry has
9 lost over 150,000 jobs, and there have been nearly 40 bankruptcies since 2001. U.S. airlines have
10 lost a total of \$60 billion since 2001. In 2000, United employed over 100,000 people around the
11 world. Today, United’s employees total less than half that number, approximately 46,000.” (Tilton
12 Aff. ¶ 11.)

13 “As a result of these and other factors . . . United’s share of domestic passengers [has]
14 declined to fifth place nationwide behind Southwest, Delta, American and US Airways . . . [, its]
15 global revenue ranking [has fallen] from second to sixth during the same time period” and it has
16 entered and exited bankruptcy. (Tilton Aff. ¶ 27.) Similarly, “Continental has lost over \$1 billion
17 since September 11th. It has survived on a hand to mouth basis for the last decade in an airline
18 industry that has become increasingly competitive with the increased presence of LCCs.” (Smisek
19 Aff. ¶ 17.)

20 There is very little (if any) additional cost that these companies, standing alone, could
21 squeeze out of their operations. As Mr. Smisek testified, “We have done our very best to cut our
22 costs. We are always looking for new ways, but we have been cutting costs since 9/11 and we are
23 pretty much at the very end of the tree, picking the very last berry off of the very last branch at this
24

25 *increases* in overall capacity. (Ex. 26; Tr. 192:3-194:6.) Moreover, other internal preliminary
26 studies—which Mr. Smisek first learned about in response to a newspaper reporter’s inquiry after
27 the hearing—projected post merger capacity increases in Cleveland. Finally, any issue concerning
28 possible capacity reductions in Cleveland has now been put to rest by the Ohio Attorney General’s
closing his investigation of the merger.

1 point.” (Tr. 164:16-20.) Dr. Rubinfeld’s conclusion, which is fully supported by the factual record,
 2 is that the merger is the best (and perhaps only) way for defendants to realize the kinds of
 3 efficiencies that will enable them to compete effectively and offer a better product to consumers:

4 “As I’ve spelled out in my report, the merged entity does, consistent with each of the
 5 companies’ separate internal analysis presented to their boards of directors, have
 6 plans to actually grow, to expand the number of frequencies in some of its . . . hub
 7 routes, and to also add service to additional . . . points. So with that growth and the
 cost savings that the companies expect to achieve, and . . . the so-called revenue
 synergies, I expect that the merged entity actually will be a more effective competitor
 than each entity is separately, without the merger.”

8 (Tr. 455:10-20.)

9 There are “extensive studies by many scholars of the airline industry” that show that
 10 the sorts of cost savings and operating efficiencies that defendants will realize through the merger
 11 will be passed on to consumers in “a meaningful degree” and therefore “really do benefit the flying
 12 public”. (Tr. 466:6-20 (Rubinfeld).) Plaintiffs have offered no evidence tending to show either that
 13 defendants will not achieve these savings and efficiencies or that the savings and efficiencies will
 14 not be passed on.

15 The substantial benefits created by the merger should be considered against the
 16 (unsupported and nonexistent) anticompetitive effects alleged by plaintiffs. *See FTC v. Tenet Health*
 17 *Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999); *Oracle Corp.*, 331 F. Supp. 2d at 1110
 18 (“Arguments related to efficiencies resulting from the merger may also be relevant in opposing
 19 plaintiffs’ case”); *see also* Merger Guidelines § 10 (“a primary benefit of mergers to the economy is
 20 their potential to generate significant efficiencies and thus enhance the merged firm’s ability and
 21 incentive to compete, which may result in lower prices, improved quality, enhanced service, or new
 22 products”). Such a balancing thoroughly undermines plaintiffs’ request for a preliminary injunction.

23 **II. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM.**

24 Harm compensable by money damages is not irreparable. *See Los Angeles Mem’l*
 25 *Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (“It is well
 26 established, however, that such monetary injury is not normally considered irreparable”); *Reilly v.*
 27 *MediaNews Group, Inc.*, No. 06-04332, 2006 WL 2419100, at *5 (N.D. Cal. July 28, 2006) (“It is
 28

1 well established . . . that an injury that is solely financial and that is compensable by monetary
 2 damages cannot constitute irreparable injury”; denying a preliminary injunction on a Section 7 claim
 3 where, *inter alia*, the plaintiff failed to establish irreparable harm). The evidence here shows that if
 4 plaintiffs are faced with any harm at all as a result of the merger (and they are not), it would be
 5 economic harm that is fully compensable by a monetary award.

6 The individual plaintiffs testified that they seek to enjoin the merger in order to avoid
 7 increased prices. (Tr. 379:25-380:2 (Stensrud) (“Q: When you say ‘adverse effects,’ what do you
 8 mean by that? A: I think that there could be price instances that would affect me.”); 616:10-11,
 9 616:13 (Malaney) (“The costs will go up”); 357:22-25 (Brown); D’Augusta Dep. Tr. 118:1-7 (“Q:
 10 You believe that you are going to be injured because airfares on the merged airline are going to go
 11 up after the merger. Is that correct? A: Yes. Q: And that’s the fare increase that you’re concerned
 12 about. A: Yes.”)¹².) “Higher prices” are classically remedied through money damages. *See, e.g.,*
 13 *Reilly*, 2006 WL 2419100, at *5 (claims that “newspaper subscription rates will increase” and that
 14 “newspaper advertising rates will increase” did not constitute “irreparable harm” because “[b]oth
 15 allegations assert ways in which plaintiff will be financially injured” and “an injury that is solely
 16 financial and that is compensable by monetary damages cannot constitute irreparable injury”).¹³

17 That plaintiffs themselves recognize the adequacy of money damages is demonstrated
 18 by their attempt to enjoin the Delta/Northwest merger. (*See* Ex. 1046.) Before bringing that lawsuit,
 19 they executed an agreement that expressly anticipated that there would be a monetary recovery and

20 ¹² Because plaintiffs listed Ms. D’Augusta as a live witness, defendants did not designate her
 21 entire deposition transcript. However, due to illness, Ms. D’Augusta ultimately did not testify at the
 22 hearing. (*See* Tr. 353:14-19.) Defendants therefore now designate the entire D’Augusta transcript.

23 ¹³ Plaintiff Brown suggested that she might also lose commissions or service fees as a result of
 24 the merger. (Tr. 374:24-375:14 (Brown).) But lost commissions and fees—like higher prices—are
 25 fully compensable with a monetary award. *See, e.g., Am. Tunaboat Ass’n v. Brown*, 67 F.3d 1404,
 26 1411 (9th Cir. 1995) (“financial losses” of a “week’s worth of revenue” “fall[] far short of qualifying
 27 as irreparable injury” because “[i]njury of a strictly monetary nature generally is not cognizable as a
 28 basis for issuing an injunction”); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Baxter*, No. 1:09CV45DAK, 2009 WL 960773, at *5 (D. Utah Apr. 8, 2009) (“The court agrees that Merrill Lynch’s alleged damages from lost commissions are calculable monetary damages. These types of damages do not provide a basis for injunctive relief”). Indeed, Ms. D’Augusta described how she could use records available to her to calculate allegedly lost commissions. (D’Augusta Dep. Tr. 49:12-51:6.)

1 that they would share in it. (*See* Ex. 1049 (the Passengers Against Mergers (“PAM”) Agreement).)
2 Each PAM participant bought shares in the lawsuit with the understanding that the more shares they
3 bought, the greater would be their relative economic reward. Thus, Mr. Malaney was a participant in
4 the PAM Agreement, purchasing three shares (at \$2,000 per share) “in the anticipation that three
5 shares would allow [him] to recover a larger percentage of any monetary award in the Delta and
6 Northwest merger lawsuit than one share”. (Tr. 627:21-25, 628:5-8, 628:18, 628:22-25.) And when
7 there was a payment of \$5 million in that lawsuit, Mr. Malaney received his proportionate share.
8 (Tr. 629:1-8.) Mr. Stensrud likewise executed the PAM Agreement, purchasing one share (for
9 \$2,000) with the “anticipat[ion] that as a result of that lawsuit”, he “might share in a monetary
10 award” “if there was one”. (Tr. 397:1-5; 397:16-24.) And he too received a portion of the money
11 recovered in that case. (Tr. 398:3-5.) The bottom line: if money was sufficient for these plaintiffs
12 in the analogous lawsuit there, it is obviously sufficient for them here.

13 Plaintiffs have argued that the “only remedy available to [them] under federal
14 antitrust law” is an injunction—*i.e.*, that “[t]hey cannot obtain damages and, as such, do not have an
15 adequate remedy at law”. (Pls. Pre-Hearing Mem. at 27.) Plaintiffs are wrong. Section 4 of the
16 Clayton Act allows private individuals to recover money damages for Section 7 violations. *See* 15
17 U.S.C. § 15. Alleged “higher prices” is just what Section 4 was meant to rectify. *See, e.g., Blue*
18 *Shield of Va. v. McCready*, 457 U.S. 465, 482-83 (1982) (an “increase in price resulting from a
19 dampening of competitive market forces is assuredly one type of injury for which § 4 potentially
20 offers redress”); *Am. Ad Mgmt, Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051 (9th Cir. 1999) (finding
21 that authorized sellers of Yellow Pages advertising could sue under Section 4 for damages caused by
22 higher advertising prices).

23 Plaintiffs try to avoid that result by arguing that they are suing for injunctive relief
24 under Section 16, not for damages under Section 4. But the issue is not governed by the choice that
25
26
27
28

1 plaintiffs might make for their own particular tactical reasons; rather it is governed by the options
2 that are available to them. And Section 4 is clearly one such option.¹⁴

3 **III. PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY WILL SUFFER ANY**
4 **INJURY AT ALL.**

5 A plaintiff suing under Section 16 of the Clayton Act has to prove “antitrust injury”—
6 *i.e.*, injury “of the type the antitrust laws were designed to prevent and that flows from that which
7 makes defendants’ acts unlawful”. *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 113 (1986). To
8 determine whether plaintiffs here have made such a showing, the Court examines only the harm (if
9 any) that plaintiffs themselves would suffer in the absence of an injunction—not the alleged harm to
10 the general public or to consumers as a whole. *See, e.g., Associated Gen. Contractors v. Calif. St.*
11 *Council of Carpenters*, 459 U.S. 519, 542 (1983) (“The existence of an identifiable class of persons
12 whose self-interest would normally motivate them to vindicate the public interest in antitrust
13 enforcement diminishes the justification for allowing a more remote party . . . to perform the office
14 of a private attorney general”). Plaintiffs concede the point. (Tr. 8:22-9:7 (Alioto) (“under Section
15 16 [of the Clayton Act]”, the “focus is on the harm” to “the Plaintiffs who are actually named”, not
16 “harm generally in the marketplace”).)

17 If plaintiffs cannot demonstrate that they themselves will be adversely affected by the
18 merger, they lack antitrust standing. Courts routinely deny standing to antitrust plaintiffs whose
19 alleged harm is too remote or attenuated. *See, e.g., Adams v. Pan Am. World Airways, Inc.*, 828 F.2d
20 24, 27, 29 (D.C. Cir. 1987) (plaintiffs lacked standing to pursue an antitrust claim because they
21 could not show that they would be harmed by reduced competition in the market for “transatlantic
22 air transportation”); *see also Serfecz v. Jewel Food Stores*, 67 F.3d 591, 598 (7th Cir. 1995) (a mall

23 ¹⁴ Moreover, even if money damages were not an adequate remedy (and it is), the preferable
24 approach would still be to remedy any anticompetitive effect after the merger closes through targeted
25 divestiture of routes served by the combined entity. *See Cal. v. Am. Stores Co.*, 495 U.S. 271, 281
26 (1990) (“Divestiture has been called the most important of antitrust remedies. It is simple, relatively
27 easy to administer, and sure. It should always be in the forefront of a court’s mind when a violation
28 of § 7 has been found” (quotation marks and footnotes omitted)). Indeed, the targeted transfer to
Southwest of certain Continental slots at Newark airport is precisely what was done as part of the
DOJ clearance process in this very case.

1 owner lacked standing to pursue an antitrust claim alleging anticompetitive effects in the “retail
2 grocery store market in Elk Grove, Illinois”); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly*
3 *Area Planning Ass’n*, 830 F.2d 1374, 1379, 1382 (7th Cir. 1987) (a trade association of real estate
4 brokers lacked standing to sue for alleged anticompetitive conduct in the “brokerage services market
5 in Beverly Hills and Morgan Park”, but an individual brokerage firm did have standing because the
6 conduct allegedly caused it to lose business).

7 Plaintiffs cannot satisfy the above standard. They have utterly failed to show that
8 they themselves would suffer any harm whatsoever as a result of the merger. With a single
9 exception (*i.e.*, Ms. D’Augusta), in the last five years none of them has even flown the thirteen
10 “airport pair” routes identified by Prof. Bush. (Tr. 372:6-373:9 (Brown); 617:3-9 (Malaney),
11 392:19-394:1 (Stensrud), 606:17-607:25 (Robinson); *see also* Exs. 1051, 1052, 1075.) Nor do any
12 of them plan to fly those routes in the future (except Ms. D’Augusta who anticipates flying from San
13 Francisco to Newark).¹⁵ (Tr. 373:10-14 (Brown); 394:2-3, 394:12-14 (Stensrud); 608:1-3
14 (Robinson).)

15 Moreover, plaintiffs are almost uniformly not business travelers and often do not pay
16 for flights themselves. (Tr. 375:16-376:10, 377:2-5) (Brown); 386:23-387:14 (Stensrud); 596:18-20,
17 606:5-10 (Robinson); D’Augusta Dep. Tr. 57:2-11, 57:24-58:1, 58:3, 62:11-62:13.) For example,
18 Mr. Malaney does not travel for business on any of the thirteen allegedly relevant routes and never
19 personally pays for any flight; rather, he now “run[s] it through [his] business” and previously used a
20 “barter account” with Northwest Airlines. (Tr. 614:3-5, 19-23 (Malaney).) Only one of the
21 forty-nine plaintiffs regularly flies on either United or Continental. (*See* Rubinfeld Report Ex. 33.)
22 In the last five years, only one plaintiff (Ms. D’Augusta) has flown United or Continental on any of
23 thirteen allegedly relevant airport pair routes. (*See* Rubinfeld Report ¶ 106 & Rubinfeld Ex. 33.)
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25

26 ¹⁵ Of course, any issue of concentration on the San Francisco to Newark route has been resolved
27 by Continental’s transfer of slots at Newark to Southwest as part of the DOJ clearance process. (*See*
28 Exs. 1073, 1074.)

1 In light of the above, plaintiffs do not—and cannot—demonstrate that they personally
2 would suffer injury as a result of the merger. They therefore lack antitrust standing.¹⁶

3 **IV. PLAINTIFFS FAIL TO DEMONSTRATE THAT THE BALANCE OF EQUITIES**
4 **FAVORS AN INJUNCTION.**

5 Plaintiffs likewise fail to demonstrate that the balance of equities tips in their favor.
6 *See Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1203-04; *see, e.g., Wright, Miller & Kane*,
7 11A Fed. Prac. & Proc. Civ. § 2948.2 (2d ed.) (the court balances “the severity of the impact on
8 defendant should the temporary injunction be granted and the hardship that would occur to plaintiff
9 if the injunction should be denied”). To the contrary, the balance tips strongly in favor of
10 defendants.

11 The merger’s substantial benefits to defendants have already been discussed. They
12 include, as an initial matter, \$1.47 billion in annual synergies. (*See Knight Aff.* ¶ 34; *Tilton Aff.* ¶ 7;
13 *Smisek Aff.* ¶ 13; *see also Tr.* 198:23-25 (*Smisek*)). As Mr. Smisek explained, “the merger
14 synergies . . . begin from day one” and every day that the merger is delayed is a day that “we’re not
15 able to begin to implement those synergies, none of which we can implement until we get the merger
16 done”. (*Tr.* 206:18-19; 208:2-8; *see also Smisek Aff.* ¶ 25; *Tilton Aff.* ¶ 54.)

17 But lost synergies are not the only harm that defendants would suffer from an
18 injunction. Both companies’ profitability and market share have trended downward and likely
19 would continue to do so if the merger were enjoined. (*Tilton Aff.* ¶¶ 11, 26-28, 48-50; *Smisek Aff.*
20 ¶¶ 4, 17-20.) In addition, without the merger, defendants would remain vulnerable to the types of
21 unforeseen exogenous shocks that have depressed passenger traffic in the past. (*See Tr.* 340:10-14,
22 340:19-24 (*Knight*) (the merger “will help us weather the type of volatility and shocks” that have
23 adversely affected United over the last several years).) It is also likely that defendants would

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25 ¹⁶ Plaintiffs Stensrud, Malaney and Brown suggested that the merger might adversely affect
26 their travel agencies’ clients or businesses. (*See Tr.* 380:9-17 (*Stensrud*); 617:3-19 (*Malaney*);
27 374:24-375:14 (*Brown*)). As a threshold matter, this is wholly speculative; plaintiffs offer not an
28 iota of factual evidence to support it. And, in any event, plaintiffs are suing only in their individual
capacity. Therefore, any alleged injury to their clients or businesses (even if supportable) could not
confer antitrust standing on *them*.

1 continue to lose ground to international carriers in the absence of a merger. (*See* Tilton Aff.
2 ¶¶ 23-24, 50; Smisek Aff. ¶ 20.)

3 Finally, enjoining the merger would threaten job security for tens of thousands of
4 defendants' employees—and the stability of the communities that will benefit from the strength of
5 defendants' combined balance sheet. (Tilton Aff. ¶¶ 37-38, 51-52; Smisek Aff. ¶¶ 5, 21, 22, 24, 25.)
6 The merger will counteract the work force reductions that both airlines have suffered in the past ten
7 years—*i.e.*, a reduction from more than 100,000 employees to 46,000 for United and from 54,300 to
8 41,300 for Continental. (*See* Tilton Aff. ¶¶ 11, 52; Smisek Aff. ¶¶ 4, 25.) As Mr. Smisek testified,
9 “I would like to have a . . . future where I can give reasonable assurance to my constituencies,
10 whether they are my co-workers or my customers or the communities I serve or my shareholders,
11 that I am able to have a business that will be profitable and will sustain its profitability throughout
12 the business cycle”. (Tr. 165:16-21; *see also* Tr. 205:10-15.)¹⁷

13 The combined impact of all these consequences could imperil defendants' very
14 existence. Thus, Mr. Smisek testified that “I had a concern that if we did not merge with United,
15 that our future competitiveness would be materially adversely affected, which could result in not
16 being able to remain in the business over a long enough time period”. (Tr. 95:22-25.) Mr. Tilton
17 testified that the merger was “the only way for [United] to be sustainably profitable and avoid the
18 prospect of bankruptcy”. (Tr. 241:9-11.) Dr. Rubinfeld confirmed that, in the absence of the
19 merger, the prospects for either airline to be “profitable on a year-to-year basis” would be
20 “doubt[ful]”. (Tr. 499:18-19.)

21 Against this devastating—indeed, irreparable—harm to defendants if an injunction is
22 granted, the Court should weigh the supposed consequences to plaintiffs if an injunction is denied.
23 Those consequences are (even being generous) speculative, ephemeral, *de minimis* and fully

24 _____
25 ¹⁷ An injunction would also jeopardize the substantial time and money that defendants have
26 invested in the merger. Mr. Smisek testified that merger negotiations “paralyze your ongoing
27 business”, that “[y]ou defer decisions, you begin to lose people” (Tr. 206:20-23) and that “you
forego things that are really important to you” (Tr. 209:4-6)—*e.g.*, a specific technology investment
that “could save [Continental] about \$30 million” (Tr. 207:7-18). (*See also* Smisek Aff. ¶ 25.)
United has felt the same effects. (*See* Tilton Aff. ¶ 55.)

1 compensable by money damages—*i.e.*, allegedly higher fares on routes that, with a single exception,
2 no plaintiff flies or intends to fly in the future.

3 In such circumstances, the balance of equities tips decidedly in defendants' favor and
4 injunctive relief should be denied. *See, e.g., Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480
5 U.S. 1301, 1309 (1987) (O'Connor, J., sitting as Circuit Justice) (“[t]he cost of enjoining this huge
6 undertaking only hours before its long awaited consummation is simply staggering in its magnitude,
7 in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no
8 more than preserve the ‘status quo,’ in the face of this upheaval, would be to blink at reality”); *U.S.*
9 *v. Siemens Corp.*, 621 F.2d 499, 510 (2d Cir. 1980) (the “uncertainty of [defendant’s] future after
10 two years of substantial losses” supports a finding that an injunction would cause defendants
11 “immediate and irreparable injury”); *U.S. v. FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963)
12 (the balance of equities tipped in defendant’s favor where defendant stood “to lose a great deal if a
13 preliminary injunction is granted” by “los[ing] the benefit to be derived by the acquisition” and
14 where the “[t]ime and money [that] have been expended by both corporations” to consummate the
15 transaction would be wasted).

16 **V. PLAINTIFFS FAIL TO DEMONSTRATE THAT AN INJUNCTION WOULD**
17 **SERVE THE PUBLIC INTEREST.**

18 “The public interest analysis for the issuance of a preliminary injunction requires [the
19 Court] to consider whether there exists some critical public interest that would be injured by the
20 grant of preliminary relief.” *Alliance for the Wild Rockies*, 2010 WL 2926463, at *11 (quotation
21 marks omitted). Although the analysis is frequently subsumed by the balancing of equities, “it is
22 better seen as an element that deserves separate attention in cases where the public interest may be
23 affected”. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1226 (E.D. Cal. 2009) (quoting
24 *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). Here, granting an
25 injunction would injure a critical public interest.

26 Dr. Rubinfeld testified that “the merger will lead to significant benefits in the form of
27 . . . reductions in cost, and a more effective merged entity” which, “by making the merged entity a
28

1 more competitive entity, will likely benefit consumers”. (Tr. 436:7-11.) Dr. Rubinfeld quantified
2 those consumer benefits at more than “\$400 million annually on domestic routes” “and possibly as
3 much as \$840 million”. (Rubinfeld Report ¶¶ 32, 64; *see also* Tr. 457:3-16.) The benefits fall into a
4 number of categories.

5 *First*, there will be lower fares resulting from “reduced costs because we eliminate the
6 double markup problem”. (Tr. 456:17-18 (Rubinfeld).) Dr. Rubinfeld explained that economic
7 literature shows that elimination of double marginalization leads to “cost reductions, and that a
8 portion of that actually is passed on to consumers”. (Tr. 461:17-21; *see also* Rubinfeld Report ¶ 24.)

9 *Second*, the merger will create new travel options on domestic nonstop routes and will
10 increase scheduling convenience on connecting routes by four percent. (Rubinfeld Report ¶¶ 34-35.)
11 As Dr. Rubinfeld testified, the merger “is likely to provide flights that will make for improved
12 convenience for customers. That means there will be more options that get you from Point A to
13 Point B more quickly. It will improve the quality of offerings at some airports, in terms of the
14 services and amenities you get at airports”. (Tr. 456:21-457:1.) Mr. Smisek echoed that testimony,
15 explaining that “there will be a number of new destinations that we [*i.e.*, the merged carrier] will
16 serve” and “[i]n fact, we have already announced a few that are dependent, in part, on the merger”.
17 (Tr. 135:22-136:2.) The merger will also enable defendants to add more than one thousand “online”
18 connections (Tilton Aff. ¶¶ 5, 32; Smisek Aff. ¶ 8; Knight Aff. ¶ 12), which will benefit consumers
19 by “provid[ing] just a better product. In terms of being able to get your baggage handled
20 appropriately, in terms of the recognition you receive for flying on the airline, in terms of handling at
21 the airport, an online service is just — just superior.” (Tr. 345:19-23 (Knight).) Consumers will
22 additionally benefit from the merged carrier’s frequent flyer program, which will “offer more benefit
23 to customers as they accrue and redeem awards across our broad combined network on a seamless
24 frequently flyer program”. (Tilton Aff. ¶ 17; *see also id.* ¶ 36; Smisek Aff. ¶ 12.)¹⁸

25
26 ¹⁸ Plaintiff Dana Robinson found that the combined frequent flyer program would be a
27 particular benefit to her because it will permit her to use her United frequent flyer miles on
28 Continental flights. (Tr. 589:13, 596:9-14.)

1 *Third*, the merged carrier’s network will provide access to 347 destinations in fifty-
2 nine countries around the world. (Tilton Aff. ¶ 5.) Of those destinations, “148 are small
3 communities or small metropolitan areas” (Knight Aff. ¶ 10), many of which have lost major airline
4 service over the past decade and face further service reductions in the future in the absence of the
5 merger (Smisek Aff. ¶¶ 8-9, 21-24; Tilton Aff. ¶¶ 6, 43-47; Knight Aff. ¶¶ 10, 26-33).

6 *Fourth*, the merger will allow for “fleet optimization” (*i.e.*, “the assignment of
7 particular aircraft types to particular routes in order optimally to match capacity to demand”), which
8 will make it possible to “increase[] capacity, which means that more of the potential passengers of
9 [any given] route would be able to purchase tickets on the flight that they prefer”. (Knight Aff.
10 ¶¶ 20, 22; *see also* Tr. 193:20-194:2 (Smisek).) Increased capacity will, in turn, lead to greater
11 choice for the general public.

12 *Fifth*, the cost synergies resulting from the merger will enable the merged carrier to
13 invest in new technology and equipment. (Tr. 350:1-4 (Knight); *see also* Tilton Aff. ¶ 34 (“The new
14 airline will be more cost effective; we expect to realize annual cost-saving synergies of at least \$789
15 million, mostly through reductions in overhead such as rationalizing our two information technology
16 platforms, combining facilities and corporate functions such as finance, marketing, sales and
17 advertising”); Smisek Aff. ¶ 16 (“the combined airline will be better able to enhance the travel
18 experience for our customers through investments in technology, the acquisition of new planes, and
19 the implementation of the best practices of both airlines”).)

20 *Sixth*, the merged carrier “will have one of the youngest and most fuel-efficient
21 fleets”. (Tilton Aff. ¶ 35.) That will give it the ability “to retire older, less efficient aircraft”, which
22 “will result not only in greater efficiency but less environment impact from [its] fleet”. (*Id.*; *see also*
23 Knight Aff. ¶ 25 (“After the merger, the combined company also would have one of the youngest
24 and most fuel-efficient fleets, which would result in a smaller combined carbon footprint”).)

25 *Seventh*, the merger will offer employees “improved long-term career opportunities
26 and enhanced job stability by being part of a larger, financially stronger and more geographically
27 diverse carrier that is better able to compete successfully in the global marketplace and withstand the
28

1 volatility of our industry”. (Tilton Aff. ¶ 38.) This holds the promise of reversing the trend of the
2 past decade in which employees in the U.S. airline industry “have faced ongoing uncertainty as the
3 industry has been forced to shed tens of thousands of jobs. In fact, in January 2009, the full-time
4 equivalent employees for the U.S. airline industry numbered 390,700—that figure is 151,000—or
5 more than 25 percent—less than the all time high airline employment figure of 542,300. Employees
6 have been forced to weather the volatility of oil prices and the challenges of terrorist attacks,
7 increased security, a massive recession and unforeseen events such as SARS, H1N1 and volcanic
8 ash.” (Tilton Aff. ¶ 37.)¹⁹

9 These forty-nine individual plaintiffs represent a mere 0.00008 percent of all airline
10 passengers. The twenty-five plaintiffs who have actually flown either United or Continental in the
11 past five years constitute just 0.00028 percent of all United/Continental passengers. Yet they are
12 threatening to deprive tens of millions of travelers and tens of thousands of employees of the above
13 benefits. The public interest demands that they not be allowed to do that. The DOJ, the DOT and
14 every relevant foreign regulatory authority have uniformly approved the merger. To them, it serves
15 the public interest and poses no competitive concerns. Plaintiffs have failed to show why this Court
16 should reach a different result.

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25 ¹⁹ Some job losses, primarily redundant management positions, are anticipated as a result of the
26 merger. (Tr. 305:5-8 (Knight) (approximately 1,200 salaried management jobs are expected to be
27 cut), 312:2-18 (approximately 1,000 ground handling employees are expected to be lost through
28 attrition and not replaced), 314:11-12 (some IT jobs might be eliminated).) Of course, if the merger
is enjoined there is the distinct possibility of further airline decline (or even failure) and job losses on
a much more profound scale.

1 **Conclusion**

2 For all the foregoing reasons, and all those discussed in our pre-hearing memoranda,
3 the Court should deny plaintiffs' motion for a preliminary injunction.

4
5 Dated: September 13, 2010

By: _____ /s/
Katherine B. Forrest

6 Katherine B. Forrest (NY Bar No. 2381457)
7 Max R. Shulman (NY Bar No. 1473982)
8 Stuart W. Gold (NY Bar No. 1639434)
9 CRAVATH, SWAINE & MOORE LLP
10 Worldwide Plaza
11 825 Eighth Avenue
12 New York, NY 10019
13 Telephone: (212) 474-1000
14 Facsimile: (212) 474-3700
15 Email: kforrest@cravath.com
16 mshulman@cravath.com
17 sgold@cravath.com
18 Admitted *Pro Hac Vice*

14 Attorneys for Defendants UAL Corporation and United
15 Air Lines, Inc.

16 Paul L. Yde (D.C. Bar No. 449751)
17 FRESHFIELDS BRUCKHAUS DERINGER US LLP
18 701 Pennsylvania Ave., NW. Suite 600
19 Washington, DC 20004
20 Telephone: (202) 777-4500
21 Facsimile: (202) 777-4555
22 Email: paul.yde@freshfields.com
23 Admitted *Pro Hac Vice*

21 Attorneys for Defendant Continental Airlines, Inc.

22 Patrick D. Robbins (CA Bar No. 152288)
23 SHEARMAN & STERLING LLP
24 525 Market Street, Suite 1500
25 San Francisco, CA 94105-2723
26 Telephone: (415) 616-1100
27 Facsimile: (415) 616-1199
28 Email: probbins@shearman.com

Attorneys for Defendants UAL Corporation, United Air
Lines, Inc. and Continental Airlines, Inc.