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

Preliminary Statement

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

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

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[1] Proper names and defined terms are the same as in our pre-hearing memoranda. Citations to the transcript of the hearing are in the form "Tr. __". Citations to exhibits in evidence are in the 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.

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

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

Plaintiffs do no better on the other essential preliminary injunction elements. They have confirmed in their depositions and their hearing testimony that their claimed injury (if any) is "higher prices". That is economic harm, compensable by money damages, and hence is not irreparable. Perhaps dispositive on this point is the fact that when these very same plaintiffs, represented by the very same lawyers, brought the very same Section 7 challenge to the Delta/Northwest merger under the very same legal theory, they entered into a written agreement to buy shares in the lawsuit, in anticipation that there would be a monetary recovery and that they would participate in that recovery in proportion to the number of shares that they bought. Indeed, one plaintiff bought *three* shares—hoping thereby to triple his monetary return—which he obviously would not have done had he been interested in funding only an injunction suit.

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

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

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

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

Argument

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

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

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

A. Plaintiffs Fail to Offer Credible Expert Testimony.

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

1. Dr. Rubinfeld.

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

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

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

2. Prof. Bush.

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

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

- He did no work to quantify the degree to which competition is likely to be substantially lessened as a result of the merger. (Tr. 569:23-570:2.)
- He did no work to quantify the percentage of competition that would or could be impacted by the merger. (Tr. 569:13-22.)
- He did no work to calculate the degree to which fares would have to rise to constitute a substantial lessening of competition. (Tr. 569:8-12.)
- He did no modeling to determine whether any fares would actually increase as a result of the merger. (Tr. 572:13-21 ("I have not [engaged in] any economic modeling of fares, no"); 559:22-24.)
- He did no analysis of whether the merged carrier could sustain a price 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.)

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

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

> "Q. You don't have any idea what the fare bases are on the right hand of Appendix A, do you?
>
> "A. I've answered that. I do not. . . .
>
> "Q. Do you know whether you're comparing apples-to-apples fare bases on the right-hand side of Appendix A? Do you know?
>
> "A. As I stated before, *I do not know what those fare bases are*."

(Tr. 563:11-569:7 (emphasis added); *see also id.* (acknowledging that a "full-on study" of fares—which he concedes he did not attempt—would likely include an analysis of the effect of fare restrictions).) In contrast, Exhibits 23, 24A-J and 25 to Dr. Rubinfeld's report demonstrate that there 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.

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

B. Plaintiffs Fail To Define a Relevant Market.

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

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

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

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

In addition to defining a relevant product market, plaintiffs also "bear[] the burden of proving the proper geographic market in which to analyze the competitive effects of the proposed merger". *Sutter Health Sys.*, 130 F. Supp. 2d at 1120. "The proper geographic market is that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition". *Id.* (quotation marks omitted). "A determination of the proper geographic market must be based on the '*commercial realities of the industry*,' and therefore, must involve a dynamic as opposed to static analysis of 'where consumers could practicably go, not on where they actually go'". *Id.* (citation omitted; emphasis added).

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

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

[2] Although their complaint also mentions a so-called "international" market (*see* Compl. ¶ 29), plaintiffs have presented no evidence—and Prof. Bush has done no work—to support such a market. (Tr. 572:22-25.) Nor could plaintiffs show anticompetitive effect in an "international" market—since, as discussed in our pre-hearing memoranda, the U.S. government granted defendants antitrust immunity in 2009 with respect to coordination on international fares, schedules and capacity. (*See* Ex. 1039.) Furthermore, plaintiffs' attempt to demonstrate a market share impact in the "international" market is fundamentally flawed because it fails to include any international carriers 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.)

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

1. Network Carriers Serving Business Travelers.

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

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

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

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

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

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

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

Mr. Malaney's testimony about the impact of LCCs on business traveler fares is perhaps the most compelling demonstration of why LCCs must be included in the relevant product market. He testified that the recent entry into Grand Rapids of three LCCs—*i.e.*, AirTran, Frontier and Allegiant—has caused a major decline in fares offered to business travelers by both LCCs and network carriers and that he expects this LCC impact to continue in the future. (Tr. 610:22-611:6; 618:21-619:2.)

> "Q. As an example, before the LCCs came in, Delta was charging somewhere in the range of $600 for a flight to Baltimore, correct?
>
> "A. That is correct.
>
> "Q. And AirTran then came in and offered a flight to Baltimore for $198, correct?
>
> "A. Yes, sir, that is correct.
>
> "Q. And Delta then matched that fare?
>
> "A. Yes, sir, they did.
>
> . . .
>
> "Q. Another example is Grand Rapids to Orlando, correct?
>
> "A. Yes, sir.
>
> "Q. Delta was offering a fare of about $350?
>
> "A. Yes, sir.
>
> "Q. And Allegiant entered the market and offered a fare of $198?
>
> "A. That is correct.
>
> "Q. And Delta then matched that fare, correct?
>
> "A. They did, sir."

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

In sum, the empirical evidence—both from the airline CEOs and from plaintiffs themselves—and the economic data overwhelmingly establish that Prof. Bush's unsupported "common sense" guesswork is just plain wrong. Plaintiffs' attempt to define a relevant product market that excludes LCCs fails.

2. National Market.

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

> "[W]hen you're thinking about possible competitive effects, you want to talk about markets in which consumers might potentially be injured. And that would be looking at where they're flying from, and where they want to fly to. 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.)

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

3. Airport Pairs.

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

Prof. Bush conceded that he is not aware of any instance in which the DOJ has relied upon an "airport pair" market in any litigation. (Tr. 562:14-18.) The principal support that he offers for such a market is the GAO Report (Ex. 71), which actually supports the proposition that "airport pairs" is *not* an economically viable market for purposes of a Section 7 analysis. The GAO report expressly cautions that "[i]t is generally preferable, time permitting, *to assess city pair rather than* *airport pair* changes in competition". (Ex. 71 at 16 n.22 (emphasis added).)[3] Consistent with the approach favored by both the DOJ and the GAO, Dr. Rubinfeld testified that airport pairs "[do] not give an accurate picture of the competition issues" (Tr. 486:12-13) because they "miss out on some of the important sources of competition that come from [] the fact that many customers fly from alternative airports" (Tr. 449:7-9). Dr. Rubinfeld explained that "[t]he conclusion that city pairs are generally the right way to look at relevant markets is not simply based on" his own analysis; but it is also "based on analysis by a lot of top economists who really study airlines". (Tr. 442:11-14.)

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

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

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

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

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

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

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

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

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

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

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

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

In particular—and contrary to plaintiffs' approach—the Supreme Court has made it clear that "[s]tatistics concerning market share and concentration" are "not conclusive indicators of anticompetitive effects". *U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). Rather, "'only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effects of [a] merger'". *Id.* (quoting *Brown Shoe v. United States*, 370 U.S. 294, 322 n.38 (1962)); *see also U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) ("The court's consideration of these factors [*e.g.*, the *General Dynamics* factors] was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects"); *U.S. v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) ("under *General Dynamics*, a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect").

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

[5] Moreover, Section 7 jurisprudence has evolved significantly since the early Supreme Court cases upon which plaintiffs rely. "Although the Supreme Court has not overruled these Section 7 precedents, it has cut them back sharply." *Baker Hughes, Inc.*, 908 F.2d at 990. "[T]he fundamental ideology of mergers has shifted dramatically over the last three decades and now embodies values 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

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

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

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

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

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

182:14-23 (Smisek).)

2. Competition From LCCs.

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

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

[6] Mr. Stensrud's airport, SEA, is served by at least AirTran, Southwest, Frontier, jetBlue and Virgin America. (Rubinfeld Ex. 33.) Ms. Robinson's airports, PBI and FLL, are served by Southwest, jetBlue, Virgin America, Spirit, AirTran and Frontier. (Rubinfeld Ex. 33; Tr. 605:5-15 (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.

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

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

(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.)

3. The Lack of Power Over Price.

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

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

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

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

[7] Indeed, the Herfindahl index (including LCCs) for plaintiffs' proposed "national" market 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.)

the merging firms or the hubs of Northwest/Delta." (Bush Report at 8.) But this ignores the vigorous competition and hub presence of both LCCs and other network carriers on all those routes. As described by Dr. Rubinfeld:

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

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

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

The bottom line is that, because of the lack of significant overlapping routes and the 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:

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[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.

> "Q. If the merger proceeds, will the combined entity have the power to raise prices?
>
> . . .
>
> "A. . . . [T]his is a very competitive business. . . . [W]e're effectively price-takers. We can't unilaterally increase a price. If we were to do that, you very quickly would 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."

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

Dr. Rubinfeld summarized the situation as follows:

> "[T]here's relatively little overlap, which is where you would normally be concerned 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.
>
> "And when you put all that together, I just do not see even a real possibility of a problem."

(Tr. 467:8-14.)[10]

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

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[9] *See also* Tr. 210:18-211:8 (Smisek) (when Continental has attempted to increase fares, "unless competitors as well match that fare, we very rapidly have bookings go away from us, and we have to withdraw that price increase. THE COURT: Do the larger carriers . . . [such as] Delta/Northwest . . . 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 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 [of Continental's customers] . . . . [W]hatever benefit we get from the bookings at $5 more, we forfeit significantly more than that in book-away.").

[10] Plaintiffs proffer an unsolicited e-mail from Vaughn Cordle that offers his (contrary) opinion that the merger might lead to higher prices. (Ex. 49.) Mr. Cordle is an independent industry blogger 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").)

4. The Merger's Procompetitive Effects.

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

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

[11] In an effort to counter that showing, plaintiffs cross examined Mr. Smisek on an internal Continental preliminary study from April 2010 indicating potential capacity reductions at various 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

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

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

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

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

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

> "As I've spelled out in my report, the merged entity does, consistent with each of the companies' separate internal analysis presented to their boards of directors, have plans to actually grow, to expand the number of frequencies in some of its . . . hub 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."

(Tr. 455:10-20.)

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

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

II. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM.

Harm compensable by money damages is not irreparable. *See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("It is well established, however, that such monetary injury is not normally considered irreparable"); *Reilly v. MediaNews Group, Inc.*, No. 06-04332, 2006 WL 2419100, at *5 (N.D. Cal. July 28, 2006) ("It is well established . . . that an injury that is solely financial and that is compensable by monetary damages cannot constitute irreparable injury"; denying a preliminary injunction on a Section 7 claim where, *inter alia*, the plaintiff failed to establish irreparable harm). The evidence here shows that if plaintiffs are faced with any harm at all as a result of the merger (and they are not), it would be economic harm that is fully compensable by a monetary award.

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

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

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

[13] Plaintiff Brown suggested that she might also lose commissions or service fees as a result of the merger. (Tr. 374:24-375:14 (Brown).) But lost commissions and fees—like higher prices—are fully compensable with a monetary award. *See, e.g.*, *Am. Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1411 (9th Cir. 1995) ("financial losses" of a "week's worth of revenue' "fall[] far short of qualifying as irreparable injury" because "[i]njury of a strictly monetary nature generally is not cognizable as a 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.)

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

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

Plaintiffs try to avoid that result by arguing that they are suing for injunctive relief under Section 16, not for damages under Section 4. But the issue is not governed by the choice that plaintiffs might make for their own particular tactical reasons; rather it is governed by the options that are available to them. And Section 4 is clearly one such option.[14]

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

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

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

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[14] Moreover, even if money damages were not an adequate remedy (and it is), the preferable approach would still be to remedy any anticompetitive effect after the merger closes through targeted divestiture of routes served by the combined entity. *See Cal. v. Am. Stores Co.*, 495 U.S. 271, 281 (1990) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation 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.

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

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

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

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

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

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

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

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

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

[16] Plaintiffs Stensrud, Malaney and Brown suggested that the merger might adversely affect their travel agencies' clients or businesses. (*See* Tr. 380:9-17 (Stensrud); 617:3-19 (Malaney); 374:24-375:14 (Brown).) As a threshold matter, this is wholly speculative; plaintiffs offer not an 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*.

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

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

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

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

[17] An injunction would also jeopardize the substantial time and money that defendants have invested in the merger. Mr. Smisek testified that merger negotiations "paralyze your ongoing 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.)

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

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

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

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

Dr. Rubinfeld testified that "the merger will lead to significant benefits in the form of . . . reductions in cost, and a more effective merged entity" which, "by making the merged entity a more competitive entity, will likely benefit consumers". (Tr. 436:7-11.) Dr. Rubinfeld quantified those consumer benefits at more than "$400 million annually on domestic routes" "and possibly as much as $840 million". (Rubinfeld Report ¶¶ 32, 64; *see also* Tr. 457:3-16.) The benefits fall into a number of categories.

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

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

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

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

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

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

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

Seventh, the merger will offer employees "improved long-term career opportunities and enhanced job stability by being part of a larger, financially stronger and more geographically diverse carrier that is better able to compete successfully in the global marketplace and withstand the volatility of our industry". (Tilton Aff. ¶ 38.) This holds the promise of reversing the trend of the past decade in which employees in the U.S. airline industry "have faced ongoing uncertainty as the industry has been forced to shed tens of thousands of jobs. In fact, in January 2009, the full-time equivalent employees for the U.S. airline industry numbered 390,700—that figure is 151,000—or more than 25 percent—less than the all time high airline employment figure of 542,300. Employees have been forced to weather the volatility of oil prices and the challenges of terrorist attacks, increased security, a massive recession and unforeseen events such as SARS, H1N1 and volcanic ash." (Tilton Aff. ¶ 37.)[19]

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

[19] Some job losses, primarily redundant management positions, are anticipated as a result of the merger. (Tr. 305:5-8 (Knight) (approximately 1,200 salaried management jobs are expected to be cut), 312:2-18 (approximately 1,000 ground handling employees are expected to be lost through 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.

Conclusion

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

Dated: September 13, 2010

By: /s/
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