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

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

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

Attorneys for Defendant Continental Airlines, Inc.

[Names and Addresses of Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael C. Malaney, et al., Plaintiffs, vs. UAL CORPORATION, UNITED AIR LINES, INC., and CONTINENTAL AIRLINES, INC., Defendants.	CASE NO. 3:10-CV-02858-RS DEFENDANTS' PROPOSED FINDINGS OF FACT

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I. PLAINTIFFS ARE NOT IMPACTED BY THE MERGER.

1. Only one of the forty-nine Plaintiffs regularly flies Continental or United. (*See* Rubinfeld Report Ex. 33;[1] *see also* Exs. 1050, 1051, 1052, 1053, 1075; Brown Dep. Tr. 16:19-17:2; Robinson Dep. Tr. 9:8-16.)

2. All but one of the plaintiffs have not flown on any of the thirteen overlap routes identified by their expert. (Tr. 372:5-373:9 (Brown), 617:3-9 (Malaney), 392:19-394:1 (Stensrud), 606:17-607:25 (Robinson); *see also* Exs. 1050, 1051, 1052, 1053, 1054, 1070, 1075; Brown Dep. Tr. 56:22-59:10; Malaney Dep. Tr. 131:22-24, 132:6-133:10; Stensrud Dep. Tr. 57:3-58:24; Robinson Dep. Tr. 133:2-134:24.) (*See infra* ¶¶ 275-286)

3. They do not regularly travel for business, and even when they do, they often choose to travel on LCCs. (Tr. 375:16-376:10, 377:2-5 (Brown); Tr. 596:18-20 (Robinson); D'Augusta Dep. Tr. 62:3-13, 65:5-21, 69:14-23, 74:1-12, 86:4-10.) They often do not pay for their own tickets. (Tr. 606:5-10 (Robinson); D'Augusta Dep. Tr. 57:2-11, 57:24-58:1, 3; (Tr. 614:3-5, 19-23 (Malaney).) (*See infra* ¶¶ 287-293)

4. Plaintiffs' alleged injury—increased fares—is compensable by monetary damages. Tr. 379:25-280:2 (Stensrud); Tr. 616:10-11, 616:13 (Malaney); D'Augusta Dep. Tr. 118:1-7; Stensrud Dep. Tr. 38:6-7; Brown Dep. Tr. 24:5-13.) (*See infra* ¶¶ 262-274)

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

A. Plaintiffs Fail to Offer Credible Expert Testimony.

1. Dr. Rubinfeld.

5. 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 on economic issues and has testified and been accepted by numerous courts as an expert economist. (Rubinfeld Report ¶ 2 (Ex. 1025), Appx. A (Rubinfeld's *curriculum vitae*) (summarizing qualifications); Tr. 430:22-24.)

6. In 1997 and 1998, Dr. Rubinfeld served as the Deputy Assistant Attorney General and 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.)

7. 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

[1] The reports and affidavits referenced herein correspond to Defendants' trial exhibits as follows: Expert Report of Daniel Rubinfeld (Ex. 1025); Rebuttal Expert Report of Daniel Rubinfeld (Ex. 1071); Affidavit of Jeffery A. Smisek (Ex. 1057); Affidavit of Glenn F. Tilton (Ex. 1058); Affidavit of Kevin N. Knight (Ex. 1059).

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.").)

2. Professor Bush.

8. Professor Bush 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; Bush Dep. Tr. 40:12-14.)

9. Professor Bush worked at the DOJ in the capacity of a junior staff lawyer, not as an economist. (Tr. 555:11-18; 579:18-590:2.)

10. Professor Bush has not published a single article relating to airlines in any peer-reviewed economics journal. (Tr. 557:10-12.)

11. Professor Bush has done no economic modeling of any kind in at least the past five years. (Tr. 557:13-15.)

3. Analysis Performed by Dr. Rubinfeld.

12. Dr. Rubinfeld testified that an economics-based Clayton Act Section 7 analysis, like those he supervised as chief economist of the DOJ, begins "by looking at a market definition, because we're trying to talk about a market or markets where we think there might be a potential problem". (Tr. 431:24-432:1)

13. Once the relevant market has been defined, the next step is to determine "whether the merger is likely to have any effect on . . . that market or markets". (Tr. 432:2-5.)

14. To determine whether the merger is likely to have a competitive effect, the economic analysis determines whether there is "enough potential economic power on the part of the merging parties to make a difference". (Tr. 432:5-8.)

15. Market share is only one indication for analyzing the probable competitive impact of a merger. Dr. Rubinfeld testified that "[w]e typically use a Herfindahl index, an index of sort of the concentration of the firms in the market. Now, that's just an indicator; that's something that the guidelines suggest we ought to look at to give us a sense of whether we ought to pursue the analysis or whether we think it's sufficiently unlikely to be a problem that we could stop right there." (Tr. 432:10-16; *but see* Tr. 432:16-22 (discussing limitations of Herfindahl index).) Dr. Rubinfeld testified that "we never draw a conclusion about likely competitive effects simply by looking at that indicator". (Tr. 432:21-22.)

16. Dr. Rubinfeld also considers whether there are any barriers to entry in the relevant market "[b]ecause, if there are no significant barriers to entry, then any attempt to try

to raise prices or fares would likely lead to a response that would defeat that price increase". (Tr. 433:4-6.)

17. In the airline merger context, Dr. Rubinfeld then analyzes particular city-pair routes on which the merging carriers overlap to determine whether the combination of the two airlines would cause a meaningful change in the state of competition on those routes. (Tr. 433: 7-12; 440:24-441:11.)

18. Dr. Rubinfeld testified that a proper economic analysis also considers efficiencies and consumer benefits arising from the merger. (Tr. 433:17-434:7.)

19. Dr. Rubinfeld testified that a proper economic analysis determines whether the merger is likely to cause either unilateral or coordinated anticompetitive effects. (Tr. 434:10-16.)

20. The unilateral effects inquiry focuses on whether the merged entity would be able to, "after the merger, change their behavior in terms of the pricing or the quality of service that they offered". (Tr. 434:17-435:1.)

21. "For coordinated effects, we're really asking whether there's a substantial likelihood that the merger would increase the possibility that there would be some kind of collusive behavior." (Tr. 435:2-5.)

22. After performing this analysis, Dr. Rubinfeld concluded that the merger of United and Continental is unlikely to have either unilateral or coordinated anticompetitive effects whatsoever. (Tr. 436:2-437:5 (no unilateral effects); 468:3-469:21 (no coordinated effects).)

23. Professor Bush testified that Dr. Rubinfeld "does great econometric work" and stated that he had no reason to doubt the accuracy of any of the exhibits to Dr. Rubinfeld's report. (Tr. 579:12-17.)

4. Analysis Performed by Professor Bush.

24. Professor Bush did not conduct any economic analysis relating to this merger. (*See generally* Bush Dep. Tr.)

25. Professor Bush did no work to quantify the degree to which competition is likely to be substantially lessened as a result of the transaction. (Tr. 569:23-570:2.)

26. Professor Bush did no work to quantify the percentage of competition that will be or could be impacted by the transaction. (Tr. 569:13-22.)

27. Professor Bush did no work to calculate the degree to which fares would have to rise for there to be a substantial lessening of competition. (Tr. 569:8-12.)

28. Professor Bush did no modeling to determine whether any fares would actually increase as a result of the merger. (Tr. 559:22-24.)

29. Professor Bush has not engaged in any economic forecasting or modeling of fares. (Tr. 572:13-21.)

30. Professor Bush did no analysis of whether the merged carrier could maintain price increases on any route served by another carrier. (Tr. 571:3-22.)

31. Professor Bush did no analysis to determine whether capacity would be reduced as a result of the merger. (Tr. 572:8-17.)

32. Professor Bush did no work to quantify the number of passengers who prefer one airport over another in any of the regions that are the subject of his report. (Tr. 557:16-559:6.)

33. Professor Bush has no economic basis for suggesting that the three New York area airports do not compete with one another. (Tr. 561:12-562:3.)

34. Professor Bush has not done any work to determine the cross-elasticities of demand between airports in any region. (Tr. 562:4-9.)

35. Professor Bush 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.)

36. A substantial portion of Professor Bush's expert report in this case was copied word-for-word from his written Congressional testimony opposing the United/Continental merger. (Tr. 559:7-12.)

37. Professor Bush's Congressional testimony did not consist of economic analysis but rather reflected his opinions on "merger policy and antitrust policy". (Tr. 559:13-18.) Professor Bush testified that at the time he wrote that Congressional testimony, he was not wearing his "economist's hat". (*Id.*)

38. Professor Bush has not sought to determine the number of passengers who pay fares of one type versus another. (Tr. 562:10-13.)

39. Professor Bush testified that the DOJ has never adopted an airport pair definition of the relevant market in any litigation. (Tr. 562:14-24.)

40. Appendix A to Professor Bush's rebuttal report considers only a two-day snapshot of fares, which can fluctuate over time. (Tr. 537:18-25.)

41. Professor Bush testified that fare restrictions can impact fare prices. (Tr. 564:9-11.)

42. Professor Bush has no idea what the fare bases for the fares listed in Appendix A to his rebuttal report actually are. (Tr. 568:21-569:7.)

43. Professor Bush believes that a rigorous economic analysis of fares on specific airport pairs might include an analysis of the effects of fare restrictions, but did not conduct

such an analysis in developing Appendix A to his rebuttal report. (Tr. 563:22-565:13.)

44. In Appendix A to his rebuttal report, Professor Bush did not attempt to determine whether fares with the same fare restrictions from two different airports on the same route would be comparable. (Tr. 565:5-13.)

45. Professor Bush did no economic modeling to support a conclusion that the geographic market for network airline competition should be the United States. (Tr. 580:24-581:11.)

46. Professor Bush has not offered any opinions on international competitive effects. (Tr. 572:22-25.)

47. Professor Bush has not attempted to replicate or analyze the work of Morrison regarding the impact of LCCs on air fares—which found that the presence of Southwest had a large impact on fares on routes, even if Southwest served the route from an adjacent airport—although he testified that he was aware of Morrison's economic work. (Bush Dep. Tr. 54:8-55:10)

48. Professor Bush has done no economic work to seek to disprove the results of the Goolsbee and Syverson study, which found that the presence of Southwest Airlines at an endpoint had a large impact on fares on routes serving that endpoint, even if Southwest did not fly the routes in question. (Bush Dep. Tr. 55:24-56:18.)

49. Professor Bush has no reason to doubt the findings of economists Brueckner, Ito and Lee, who found that the elimination of double marginalization created downward pricing pressure on air fares, although he was aware of their work. (Bush Dep. Tr. 58:9-59:22.)

50. Professor Bush did no economic work to determine whether historical airline mergers have or have not produced significant benefits. (Bush Dep. Tr. 136:18-137:2.)

51. Professor Bush has no reason to believe that the merger would not result in new online destinations and new online service. (Bush Dep. Tr. 154:8-17, 156:15-21.)

52. Bush agrees that the combined company will be able to eliminate redundancies that it could not eliminate in the absence of a merger. (Bush Dep. Tr. 163:8-13.)

53. Bush agrees that, without a merger, the companies could not have a single labor agreement or frequent flyer plan. (Bush Dep. Tr. 162:11-18.)

54. Bush has done no analysis to determine whether the merger will result in any reduction in quality of service. (Bush Dep. Tr. 173:7-10.)

55. Professor Bush did not study the extent to which LCCs compete at United and Continental hubs. (Tr. 576:1-5.)

56. Professor Bush did no work to determine whether there are any differences between business travelers who fly on LCCs such as Southwest and Airtran as opposed to those who travel on network carriers. (Tr. 574:22-575:21.)

57. Professor Bush has not offered an opinion that any LCC will exit any route as a result of the merger. (Tr. 578:20-25.)

58. Professor Bush has not offered an opinion that any LCC will exit any United or Continental hub as a result of the merger. (Tr. 579:1-6.)

59. Professor Bush determined that many travelers to United and Continental's hub destinations have LCC alternatives. (Bush Dep. Tr. 87:17-25.)

60. Professor Bush has no information to support his conclusion that LCCs face major barriers to entry, including substantial sunk costs. (Bush Dep. Tr. 139:15-140:2.)

61. Professor Bush has no reason to doubt the accuracy of Dr. Rubinfeld's findings regarding entry. (Bush Dep. Tr. 141:1-9.)

B. Plaintiffs Fail To Define a Relevant Market.

1. Network Carrier Market for Business Travelers.

62. According to Professor Bush, there is a "market of competition between network carriers" for business travelers. (Tr. 547:7-8.)

63. Professor Bush testified that the routes, frequent flyer programs and choice of seating provided by network carriers "drives certain classes of customers" to network carriers rather than LCCs. (Tr. 549:3-550:1.)

64. In support of that market definition, Professor Bush did not use any "so-called economic or quantitative analysis" to establish a network carrier market. He relied only on what he termed "common sense". (Tr. 550:25-551:11; Bush Rebuttal Report at 2.)

65. Dr. Rubinfeld testified that there is substantial economic work to support the fact that LCCs "compete very heavily" with network carriers for business travelers: "[T]he low-cost carriers vary in the way in which they seek to attract business travelers. But they definitely do, [] from [] offering actually a separate seating category, to others, like Southwest, providing just a special kind of service offered to business passengers". (Tr. 453:20-24.)

66. Dr. Rubinfeld testified that he is not aware of any economic work that has defined a separate market for business or time-sensitive travelers because "no one has been able to find enough evidence, at least in the markets that I have looked at, to think that there would be a separate group of time-sensitive passengers who might be harmed". (Tr. 446:12-447:12.)

67. Professor Bush acknowledged that LCCs compete for business passengers (Tr. 573:21-23) by offering, among other benefits, frequent flyer programs (Tr. 573:14-16). Indeed, he stated unequivocally that "there are certain . . . categories of business passengers that would fly LCCs." (Tr. 573:24-25.)

68. Professor Bush acknowledged that Southwest Airlines' frequent flyer program, like those of the network carriers, partners with many businesses such as banks, flower delivery services, restaurants and hotels. (Tr. 573:17-20; Bush Dep. Tr. 79:21-80:16.)

69. Frontier and AirTran both offer a frequent flyer program. (Tr. 626:22-627:1 (Malaney); *see also* Ex. 1017 (noting that JetBlue, Virgin America, Spirit and other LCCs offer frequent flyer programs as well).)

70. Professor Bush testified that he has not done any economic work that sought to determine the percentage of passengers on LCCs like Southwest that were flying for business versus leisure travel. (Bush Dep. Tr. 66:18-22.)

71. Professor Bush did no work to determine whether there are any differences between business travelers who fly on LCCs such as Southwest and Airtran as opposed to those who travel on network carriers. (Tr. 574:22-575:21 (Bush).)

72. Professor Bush has done no work to study what routes business travelers fly on LCCs like Southwest. (Bush Dep. Tr. 73:19-74:4.)

73. 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).)

74. Mr. Tilton also testified that "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" and that Midwest and Frontier both offer premium cabins on their aircraft. (Tilton Dep. Tr. 109:7-24.)

75. Mr. Smisek testified that LCCs are "a very disciplining factor on price" and have caused "continued downward pressure on fares". (Tr. 159:24-160:5, 161:11-14 (Smisek); *see also* Tr. 204:1-7.)

76. For example, Mr. Smisek testified that an LCC offering service between JFK and Oakland—a route with high numbers of business travelers—would "absolutely" affect Continental's pricing decisions between Newark and San Francisco. (Tr. 196:3-24.)

77. Mr. Smisek further testified that "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. Yes." (Tr. 114:11-15; *see also* Ex. 1013.)

78. Mr. Smisek himself has flown Southwest for business travel. (Tr. 204:8-13 (Smisek).)

79. Kevin Knight testified, "[L]ow-cost carriers . . . absolutely do compete for business traffic, and they are aggressively doing so every day in the marketplace." (Tr. 338:11 17; *see also* Ex. 1014, 1015, 1042, 1043.)

80. Mr. Tilton and Mr. Knight testified that there has undeniably been convergence in business models between LCCs and network carriers, with some LCCs adopting hub-and-spoke business models that are similar to those of the network carriers. "[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." (Tilton Dep. Tr. 110:17-111:14.) For example, "AirTran has a significant network, out of Atlanta. Frontier has a significant network out of . . . Denver." (Tr. 331:5-19 (Knight).)

81. Professor Bush acknowledged that LCCs fly into each and every one of United's and Continental's hubs. (Tr. 575:22-25.)

82. Plaintiffs themselves testified about the competition between network carriers and LCCs for business travelers. Their testimony demonstrates that they consider LCCs to be a viable alternative to network carriers, even for business travelers or time-sensitive travelers. (*See infra* ¶¶ 83-108.)

83. As a travel agent in Denver, Ms. Robinson booked business clients on Frontier from time to time. (Tr. 597:12-598:4.)

84. When Ms. Robinson was a travel agent in Denver, one of her main criteria—indeed, her "first responsibility"—was to look for the lowest fare for both her leisure and business clients. (Tr. 598:5-601:2.)

85. In November 2009, Ms. Robinson flew Spirit to Chicago and back. She flew Spirit because it went at a time that she preferred. She chose Spirit for this flight over a nonstop American Airlines flight. (Tr. 603:15-604:1.)

86. In late August 2010, Ms. Robinson flew JetBlue from New York to Florida. She chose JetBlue over Delta because JetBlue departed at the time that she preferred. (Tr. 604:4-15.)

87. According to Ms. Robinson, there are so many options to fly from the Palm Beach area to San Francisco that it is very confusing to pick one. Some of those options are on network carriers, and some are on LCCs, like JetBlue, AirTran or Virgin America. (Tr. 604:21-605:7.)

88. To attend the hearing in this matter, Ms. Robinson took a flight from Fort Lauderdale to San Francisco on Virgin America because it offered the most convenient schedule.

Ms. Robinson thought that the Virgin America flight was "fabulous". She "[a]dored it". (Tr. 605:10-17.) She testified that she liked the flight because:

> "It was like a nightclub. It was so beautiful and so new. And the service, the service was astronomical from the time you could walk into the airport until [the] time you got your luggage. It was absolutely superb." (Tr. 608:21-24.)

89. Mr. Malaney testified that the number of LCC options in Grand Rapids (his home airport) has increased in the last several months. Allegiant has entered, AirTran has entered and Frontier has entered as well. (Tr. 618:21-619:2.)

90. The LCCs entered Grand Rapids because they were given incentives to do so in order to put downward pressure on airfares. (Tr. 619:3-5 (Malaney).)

91. And, in fact, the LCCs' entry into Grand Rapids has put downward pressure on air fares for business travelers and leisure travelers alike. (Tr. 619:12-17 (Malaney).)

92. For example, Mr. Malaney testified that before the LCCs came in, Delta was charging somewhere in the range of $600 for a flight from Grand Rapids to Baltimore. After AirTran came in and offered a flight to Baltimore for $198, Delta matched that fare. Mr. Malaney acknowledged that this was an extremely significant reduction in airfare and that AirTran's entry into Grand Rapids caused Delta to reduce its fare to Baltimore. (Tr. 619:18-620:4.)

93. Mr. Malaney testified that business travelers have benefited from AirTran's entry into Grand Rapids whether they use Delta or AirTran to fly to Baltimore. Specifically, a business traveler who now wants to travel between those two cities can choose the Delta $198 fare or the AirTran $198 fare. (Tr. 620:2-16 (Malaney).)

94. Another example of significant downward pressure on fares is the Grand Rapids to Orlando, Florida route. According to Mr. Malaney's testimony, Delta was offering a fare to Orlando of about $350. After Allegiant entered the market and offered a fare of $198, Delta matched that fare. (Tr. 620:17-25.)

95. Mr. Malaney testified that he would offer the Allegiant flight to Orlando as an option to his business traveler clients and that he himself would consider using Allegiant to fly on business from Grand Rapids to Orlando because he is trying to find the lowest fare for his business travel. (Tr. 621:14-18, 624:21-625:4 (Malaney).) Mr. Malaney believes that business travelers between Grand Rapids and Orlando have benefited significantly from Allegiant's entry, regardless of whether they fly Allegiant or Delta on that route, since they were paying $350 and are now paying $198. (Tr. 622:24-623:11.)

96. Mr. Malaney also acknowledged that, for a business traveler who wanted flexibility on the return flight, Mr. Malaney could put together an itinerary from Grand Rapids to Orlando that included an Allegiant flight to Sanford, FL and a return flight on an airline like American or Delta back from Orlando to Grand Rapids, and that the fare

for such an itinerary could compare favorably to flying Allegiant both ways. (Tr. 621:22-622:12.)

97. Mr. Malaney also testified that that sort of itinerary—*i.e.*, an LCC one way and a network carrier another—could be used for other destinations as well, and that he has, in fact, put together such itineraries for business travelers. (Tr. 622:13-23.)

98. Mr. Malaney believes that the low fares occasioned by the LCCs' entry into various markets will remain available because LCC entry has increased competition in those markets. (Tr. 623:22-25.)

99. Mr. Malaney also anticipates that, in the future, there will be additional examples besides Baltimore and Orlando where LCCs will offer lower fares than network carriers and will exert downward pricing pressure on those routes. (Tr. 624:1-10.)

100. Mr. Malaney acknowledged that LCCs currently offer additional alternatives for business travelers flying from Grand Rapids to a number of other destinations around the country. For example, today, business travelers from Grand Rapids to Las Vegas have the option of a nonstop Allegiant flight. (Tr. 624:11-13.)

101. Allegiant is now an option that Mr. Malaney has offered and would offer to business travelers flying from Grand Rapids to Phoenix. (Tr. 625:12-626:8.)

102. Mr. Malaney would offer his business travelers the option of a flight from Grand Rapids to San Francisco, Grand Rapids to Denver, Grand Rapids to Seattle and Grand Rapids to Los Angeles on Frontier. (Tr. 625:5-627:5.)

103. Mr. Malaney also has used Midwest as a travel option from Grand Rapids to Milwaukee. (Tr. 627:14-16.)

104. Similarly, Ms. Brown testified that business travelers flying from Reno to Atlanta could take Southwest as an alternative to several flights operated by network carriers. (Tr. 365:15-18.)

105. Ms. Brown herself flew America West to Puerto Vallarta in June 2006 because it offered the best combination of price and itinerary. (Tr. 368:24-369:19.)

106. Ms. Brown also chose to travel numerous times on Southwest over network carriers, sometimes based on price and sometimes based on its offering the most convenient departure times. (Tr. 370:9-11.)

107. The website for Mr. Stensrud's travel agency specifically states that the agency books flights for business travelers on LCCs like JetBlue, Southwest and Sun Country. (Ex. 1065.)

108. Ms. D'Augusta's travel records also show that she flies legacy and LCC carriers interchangeably. (Ex. 1051.)

2. National Market.

109. Professor Bush testified that he has not done any economic modeling to support a national market. (Tr. 581:9-11.)

110. Dr. Rubinfeld testified that a national market "is not supportable". (Tr. 445:6.) Dr. Rubinfeld explained:

> "[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.)

111. Dr. Rubinfeld testified that a "national" market "wouldn't make sense" as it would "suggest that a flight from Seattle to L.A. is somehow competitive with a flight from Boston to New York". (Tr. 445:17-21.)

112. Dr. Rubinfeld explained that "there is not a single market" and one would need to look at "city pairs to see which airlines are competing in those city pairs". (Tr. 479:11-12.) He testified that "you have to look at . . . individual city pairs" and "for particular city pairs each of those airlines can be a very effective competitor". (Tr. 478:6-10.)

3. Airport Pairs.

113. Professor Bush stated that he has not done any economic analysis of the appropriateness of using airport pairs as a relevant market. Professor Bush has, for instance:

a. not determined the number of passengers who pay fares of one fare type versus another (Tr. 562:10-13);

b. not done a "full-on study of airfares for these airport pairs" that takes into account restrictions airlines have in their fares (Tr. 564:12-18);

c. not done any economic modeling in the past five years to test whether airport pairs are a relevant market (Tr. 557:13-15);

d. not done "any study to determine the relative numbers of individuals who prefer one airport versus another in any of the metropolitan regions" discussed during the hearing (Tr. 559:4-6); and

e. not done any work to determine the cross-elasticities of demand between airports in any region (Tr. 562:4-9).

114. Professor Bush stated that he is not aware of any instance in which the Department of Justice has adopted an airport pair market definition in any litigation. (Tr. 562:14-18.)

115. Professor Bush testified that "for some classes of customers, it is very much the case" that adjacent airports "are substitutable". (Tr. 561:12-24.)

116. A GAO analysis of airport pairs upon which plaintiffs rely itself notes 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.)

117. Professor Bush acknowledged that he is aware of another GAO report on the airline industry from July 2008 that used city pairs as the appropriate competitive analysis. (Tr. 563:3-8.)

118. Dr. Rubinfeld explained that an "airport pairs" market is an incorrect barometer of competition:

> "I don't think, as I've said before, it's appropriate to look at airport markets. And when you do that, you -- you miss out on some of the important sources of competition that come from -- from the fact that many customers fly from alternative airports. In particular, origins and destinations". (Tr. 449:5-10.)

119. Dr. Rubinfeld testified, "[T]he conclusion that city pairs are generally the right way to look at relevant markets is not simply based on an initial conclusion by me. It's based on analysis by a lot of top economists who really study airlines". (Tr. 442:11-14.)

120. Dr. Rubinfeld explained, "What matters from a competition point of view is whether the merger will change the ability of the merged entity to . . . raise fares or lower service". (Tr. 460:18-20.) An "airport-pairs" market does not answer that question. Even if there are some customers that would prefer not to use an alternative airport, "they would be protected [from a price increase] by other people who would be willing to switch [to a substitutable airport]". (Tr. 461:3-4.)

121. Dr. Rubinfeld explained that an analysis of competition in the "city pair" market takes into account the competitive impact of LCCs:

> "Q: Are there any relevant markets here where you believe it would be appropriate to separate out low-cost carriers from network carriers?
>
> A: No. I should say, Counsel, that when I look at markets, I tend to focus on markets involving origins and destinations. That's the standard methodology of the Department of Justice. And I tend to -- I tend to look on pairs of cities.
>
> And so, if I'm looking at competition, it's the standard way in which we do analysis of competition. And when I'm looking at particular city pairs, I

would look at both. I would look at all the firms that are providing service between those city pairs. That would include the so-called low-cost carriers, as well as the hub-and-spoke legacy carriers." (Tr. 440:24-441:11.)

122. Professor Bush testified that LCCs fly into each of the three Washington, D.C. area airports (Tr. 573:4-8 (Bush)) and into each of the three New York airports (Tr. 573:9-11).

123. LCCs compete at hubs and adjacent to hubs. (Tr. 184:15-185:2 (Smisek); Smisek Aff. ¶ 19; Tilton Aff. ¶ 21; Rubinfeld Report ¶ 18; Exs. 1022, 1024; *see also* Bush Dep. Tr. 75:22-78:16.)

124. Dr. Rubinfeld's finding that there is competition at airports within a city pair is based upon economic analysis of consumers' actual behavior. For example, with respect to the San Francisco International Airport ("SFO") to Houston Intercontinental Airport ("IAH") route that Professor Bush 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 in fact did, choose to fly out of and/or into the alternative airports located in the Bay Area and Houston (Oakland International Airport and Houston Hobby Airport). (Rubinfeld Rebuttal ¶ 5 (Ex. 1071).)

125. On the Newark-Dulles route, which plaintiffs claim would be a monopoly, "only a very small percentage fly from Newark to Dulles". (Tr. 460:5-6 (Rubinfeld).) The Newark to Washington Dulles route captures only two percent of the air traffic between the New York City and Washington, D.C. metropolitan areas. (Rubinfeld Rebuttal Ex. 1.)

126. Twelve of the thirteen airport pairs cited by Bush are subject to competition at adjacent airports, with 23 to 98 percent of passengers choosing different airport pairs within the city pair (and on the thirteenth airport pair—LAX-HNL—there are multiple other competitors, including three that each have more than 20% of the market). (*Id.*; *see also* Rubinfeld Report Ex. 34; Exs. 1018, 1019.)

127. Mr. Smisek testified that Continental does not set its airfares on an airport pair basis. (Tr. 195:9-11 (Smisek).) Indeed, he testified that an LCC offering service between JFK and Oakland would "absolutely" affect Continental's pricing decisions between Newark and San Francisco because those routes involve substitutable airports. (Tr. 196:3-24.) Similarly, Mr. Tilton testified that "I can't price in Dulles or in Re[a]gan without [paying] close attention to prices in BWI. It's simply impossible." (Tr. 279:14-25.)

128. Plaintiffs have used multiple airports as substitutes at particular origins and destinations, including for business and time-sensitive travel. (*See infra* ¶¶ 129-140.)

129. For example, Ms. Robinson testified that she has used the Fort Lauderdale airport over the West Palm Beach airport in order to get a nonstop flight at the right time, even though the West Palm Beach airport is about 15 minutes from her house and the

Fort Lauderdale airport is about an hour and ten minutes from her house. (Tr. 601:5-22.)

130. In July 2008, Ms. Robinson flew Frontier from Fort Lauderdale to Denver because she needed to get to Denver quickly and the Frontier flight was the most convenient for her. (Tr. 602:7-9.)

131. In September 2008, Ms. Robinson flew Frontier from Fort Lauderdale to Denver for the same reason. (Tr. 601:23-602:4.)

132. In each case, Ms. Robinson chose Frontier from Fort Lauderdale even though it was an hour further than West Palm because it was a nonstop flight and got her to Denver quicker. (Tr. 602:10-15.)

133. It is likely that Ms. Robinson will take the Frontier flight to Denver out of Fort Lauderdale again. (Tr. 602:25-603:3.)

134. To attend the hearing in this matter, Ms. Robinson chose a Virgin America flight to San Francisco from Fort Lauderdale, rather than West Palm Beach, because it was a nonstop flight. (Tr. 605:8-15.)

135. Similarly, Mr. Malaney testified that he would offer—and has offered—his business traveler clients the option of flying on Allegiant from Grand Rapids to Phoenix, even though Allegiant flies into Chandler, Arizona, which is about 25 miles away from the Phoenix airport. (Tr. 625:12-626:8.)

136. Ms. Brown testified that she has booked her business traveler clients into all three of the New York area airports, LaGuardia, JFK and Newark. (Tr. 366:8-21.)

137. Ms. Brown also testified that in May 2010, she flew into an alternative airport (Tulsa) that was further from her final destination in order to obtain a lower fare. (Tr. 368:9-23.)

138. Ms. Brown also acknowledged that LAX, Burbank and Orange County could serve as viable alternatives to the airport in Ontario, California to which she has traveled. (Tr. 370:20-371:17.)

139. In October 2005, Ms. D'Augusta flew from SFO to Newark. On the return flight, she chose to travel out of LaGuardia airport to SFO. (Ex. 1051; D'Augusta Dep. Tr. 61:16-21.)

140. In April 2007, Ms. D'Augusta flew JetBlue from JFK to Oakland, rather than San Francisco, even though the San Francisco airport is closer to her home and she had flown out of the San Francisco airport on prior occasions. (Ex. 1051; D'Augusta Dep. Tr. 71-72.)

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

1. Trends Since Deregulation.

141. Professor Bush testified that "Airfares have trended on the decline since—since deregulation, for a multitude of reasons". (Tr. 560:2-3; *see also* Exs. 1006, 1016, 1023.)

142. Dr. Rubinfeld testified that "[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". (Tr. 437:14-24; *see also* Rubinfeld Report ¶ 12 & Rubinfeld Ex. 6.)

143. Over the past thirty years, capacity and output have expanded significantly. After deregulation, the number of ASMs grew from approximately 259 billion to over 756 billion in 2007, declining to 681 billion in the last two years due to poor economic conditions. Revenue passenger miles ("RPMs") flown by all U.S. carriers have grown from 161 billion in 1978 to 602 billion in 2007, falling to 551 billion in 2009. In short, since deregulation more passengers have flown to more places more cheaply. (Rubinfeld Report ¶ 13, Rubinfeld Exs. 1-2.).)

144. Since deregulation, regional jets have significantly expanded connecting and non-stop options for passengers originating at smaller airports. (Rubinfeld Report ¶ 15.)

145. As output and the number of non-stop and connecting routes have increased, airline fares have fallen. Over the last 20 years, yields for both legacy carriers and LCCs have fallen, but legacy carriers' yields have fallen much more rapidly than yields of LCC carriers. This is due to the competitive response of legacy carriers to the entry and expansion of LCCs. The downward trend in inflation-adjusted fares is also the result of the growing efficiency of the airlines, which has been shared with the traveling public. (Rubinfeld Report ¶ 16, 67 & Rubinfeld Exs. 1, 3; *see also* Ex. 1023.)

146. Fares have continued to decline even since the Delta/Northwest merger in 2008. Dr. Rubinfeld testified that "I think the Delta/Northwest merger was completed around October of 2008. And, from that period to the present, to the last time I looked, fares have actually declined." (Tr. 438:18-21; *see also* Ex. 1006.)

147. The price transparency afforded by Internet booking services has enabled consumers to compare carriers' prices easily and directly, exerting additional pressure on carriers to match the low prices of their competitors. (Tr. 183:2-15 (Smisek).)

148. As a result of these and other structural factors, Mr. Smisek has characterized the current level of competition in the airline industry as "brutal". (Tr. 182:14-23.)

149. Moreover, recent exogenous shocks and volatility have weakened the legacy carriers significantly, reducing the potential impact of the proposed merger. As Mr. Tilton

testified, 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; *see also* Rubinfeld Report Ex. 8 (depicting the large number of bankruptcy filings in the airline industry since deregulation).)

150. "In 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.)

151. Mr. Tilton explained, "we need not really start with 9/11. You can start with the collapse of the dot-com bubble, and the intermediation of prices and the transparency of prices with now all of the online sites that Mr. Smisek cited, such as Expedia, Travelocity, Priceline, Cheapfares.com, the growth of all of the low-cost carriers who are clearly growing . . . ." (Tr. 248:8-14.)

152. "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 . . . [and] its global revenue ranking [has fallen] from second to sixth during the same time period", during which United entered and exited bankruptcy (Tilton Aff. ¶ 27; Exs. 1012, 1031)

153. 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 (Ex. 1057).)

154. Although both United and Continental have recorded profitable quarters in 2010, there is no indication that they will be profitable as stand-alone entities. Dr. Rubinfeld testified that he believes that "we're entering a period of very slow growth and I'm discouraged about that" (Tr. 501:16-17), and cautions that "[w]e would have to wait until the end of 2010 to know for sure what the profitability would be of each of the airlines" (Tr. 506:1-3).

2. Entry, Stability and Growth of LCCs.

155. The growth of LCCs has been one of the major drivers of increased competition in the airline industry. LCCs have increased their shares of domestic passengers over the last decade, partly at the expense of legacy carriers. (Rubinfeld Report ¶ 17 & Rubinfeld Exs. 4-6.)

156. As Mr. Tilton testified, "[T]he LCCs' share of domestic passengers has nearly doubled in the past 12 years, from 19.9% in 1998 to 37.7% in 2009." (Tilton Aff. ¶ 19; Ex. 1020.) Professor Bush testified that he has no reason to doubt the accuracy of the passenger share data depicted in Exhibit 1020. (Bush Dep. Tr. 86:4-17.)

157. LCCs have benefited from relatively low barriers to entry in the airline industry. The normal costs of operating an airline, such as obtaining gates and ground services, are not barriers to entry that tend to keep new entrants out to the benefit of incumbents, but instead are costs that both new entrants and incumbents must bear to provide service. Such costs have not prevented LCCs from expanding their networks and increasing their output. In fact, LCCs have grown faster than legacy carriers over the last decade. Between 2000 and 2009, LCCs experienced annual growth of 5.5 percent in revenue passenger miles. During the same period, legacy carriers experienced a decline of 0.5 percent in revenue passenger miles. (Rubinfeld Rebuttal ¶¶ 18-19 & Rubinfeld Rebuttal Ex. 4.)

158. Professor Bush testified that he reviewed the work done by Dr. Rubinfeld regarding entry and had no reason to doubt its accuracy. (Bush Dep. Tr. 141:1-9.)

159. Airline routes are characterized by frequent entry. Over 83 percent experienced at least one entry event between 2000 and 2009, nearly 65 percent experienced two or more entry events, and over 40 percent experienced three or more entry events. (Rubinfeld Report ¶¶ 19, 78-79; Rubinfeld Exs. 7, 8.)

160. The top six legacy carriers have between 165 and 308 entry events into one of the top 1,000 city pairs over the past decade. The top three LCCs also have a large number of entries, with 264 for AirTran, 251 for Southwest, and 130 for jetBlue. (Rubinfeld Report ¶ 80; Rubinfeld Ex. 26.)

161. Professor Bush testified that there have been numerous LCC entrants in recent years. (Tr. 578:10-13 (Bush).)

162. The major LCCs have grown substantially between 2000 and 2009. For example, jetBlue has grown from serving six cities with five routes in 2000 to serving 39 cities with 95 routes in 2009. AirTran and Frontier have also shown substantial growth over the last decade. Even Southwest, which was already a large carrier in 2000, has continued to grow. It has expanded from serving 55 cities with 284 routes to serving 64 cities with 416 routes. (Rubinfeld Rebuttal ¶ 19; Rubinfeld Rebuttal Ex. 4.)

163. Indeed, Southwest currently is the largest domestic carrier by passenger share, and will continue to be so after the merger is consummated—and its success is reflected in the success of Southwest's stock. (Smisek Aff. ¶ 17-18; Tr. 185:9-19 (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"); *see also* Ex. 1012.) Professor Bush agreed that Southwest is and, after the merger, will continue to be the largest carrier by domestic O&D passenger share. (Bush Tr. 64:6-65:6.)

164. Among other things, LCCs have benefited from a generally lower cost structure than legacy carriers, which allows LCCs to compete vigorously on price. (Rubinfeld Report Ex. 22 (comparing top ten carrier operating expenses).)

165. LCCs target travelers with a wide range of offerings, from traditional hub-and-spoke networks and multiple-cabin aircraft to unique onboard entertainment and communications services. (Smisek Aff. ¶ 18 ("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."); *see also* Tr. 573:21-574:11 (Bush) (noting that some LCCs offer some of the same amenities as network carriers, including first class cabins and frequent flyer programs).)

166. Dr. Rubinfeld testified that LCCs such as AirTran and Southwest "find it profitable to develop their own hubs of sorts". (Tr. 439:19-420:9.)

167. LCCs now compete for 80 percent of all domestic travelers, and over 85 percent of passengers traveling nonstop on United or Continental currently have an LCC alternative. (Tilton Aff. ¶ 20; Exs. 1021, 1030.)

168. LCCs are now present at every hub airport operated by United and Continental, as well as adjacent airports that compete directly with those hubs. (Tr. 184:15-185:2 (Smisek); Smisek Aff. ¶ 19; Tilton Aff. ¶ 21; Rubinfeld Report ¶ 18; Ex. 1022, 1024; *see also* Bush Dep. Tr. 75:22-78:16.)

169. Professor Bush testified that he has done no work to determine the extent to which LCCs compete for United and Continental passengers at their hubs. (Tr. 576:1-5 (Bush).)

3. LCCs Will Continue to Compete and Constrain Pricing After the Merger.

170. After the merger, United and Continental will continue to face competition from Southwest Airlines at all eight of their hubs. (Rubinfeld Report ¶ 66.)

171. Southwest is now, and, post-merger, will continue to be the largest domestic airline in terms of passenger share. United and Continental will also face competition at their hubs from Frontier Airlines (which has nearly 20 percent of O&D passengers at Denver), Virgin America (with 8 percent of passengers at San Francisco), and jetBlue (with nearly 20 percent of passengers at New York). This LCC competition will be unaffected by the merger and will continue to provide a competitive constraint on the post-merger behavior of the combined carrier. (Rubinfeld Report ¶ 66 & Rubinfeld Ex. 5; Exs. 1012, 1022.) Professor Bush testified that he had no reason to doubt that Southwest would remain the largest domestic airline by passenger share post-merger. (Bush Dep. Tr. 64:6-18.) He also testified that he has no reason to doubt the accuracy of the information in Exhibit 1022, which describes LCC presence at each of United and Continental's hubs (Bush Dep. Tr. 89:6-94:20; *see also* Tr. 575:22-25 (Bush).)

172. 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. (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.)

173. As a result of LCC presence at network carrier hubs, which Professor Bush acknowledges (Tr. 573:1-13, 575:22-25 (Bush)), fares to and from hubs have declined relative to other fares. (Rubinfeld Report ¶ 65.)

174. Dr. Rubinfeld testified that, as a result of continued competitive pressure from LCCs, the merger is unlikely to result in any unilateral anticompetitive effects. (Tr. 439:6-11 ("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.")

175. Mr. Smisek testified, "the LCC's are—are a very—a very disciplining factor on price and that the majority of the decrease in fares is [the] result of low-cost competitor competition." (Tr. 161:11-14.)

176. Professor Bush offered no opinion that any LCC is likely to exit any route as a result of the merger. (Tr. 578:14-579:6 (Bush).)

177. Dr. Rubinfeld testified that the merger will not hinder LCC competition in any way. "When there's a route or set of routes that are offering a profit opportunity smaller networks can definitely compete." (Tr. 457:19-25.)

178. Mr. Tilton agreed, testifying that "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." (Tr. 268:24-269:1.)

179. Mr. Tilton testified that, "Given the industry landscape and the relative ease with which LCCs can enter routes served by network carriers and other LCCs, this merger will not result in a reduction in competition." (Tilton Aff. ¶ 29.)

180. Plaintiff Michael Malaney testified that, in the last several months, three LCCs—AirTran, Frontier and Allegiant—have begun serving the Grand Rapids airport (Tr. 610:22-611:6; 618:21-619:2), and fares out of Grand Rapids have declined precipitously:

> "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. 619:18-620:25.)

181. The threat of potential entry by LCCs constrains prices even on routes that are not currently served by an LCC. Mr. Knight testified, "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". (Knight Aff. ¶ 18 (Ex. 1059).).

4. The Merger Will Not Have Any Anticompetitive Effects.

182. Under the "national market" definition advanced by plaintiffs, the Herfindahl index for carriers nationwide (including LCCs) would show that concentration following the merger would remain under 1,500—which the recently revised Horizontal Merger Guidelines define as an "unconcentrated market". (Rubinfeld Ex. 29.)

183. Dr. Rubinfeld testified that his "expectation is that this merger will . . . if anything, help to further that—the continued decline in fares." (Tr. 439:2-4 (Rubinfeld).)

184. Competition from adjacent airports will continue to constrain pricing. Specifically, Dr. Rubinfeld has 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.)

185. Professor Bush did no modeling to determine whether any fares would increase as a result of the merger (Tr. 559:22-24 (Bush)), nor did he engage in any economic forecasting or modeling of fares (Tr. 572:13-21).

186. Professor Bush did no analysis of whether the merged carrier could maintain price increases on any route served by another carrier. (Tr. 571:3-22 (Bush).)

187. Professor Bush did no work to quantify the degree to which competition is likely to be substantially lessened as a result of the transaction. (Tr. 569:23-570:2 (Bush).)

188. Professor Bush did no work to quantify the percentage of competition that will be or could be impacted by the transaction. (Tr. 569:13-22 (Bush).)

189. Professor Bush did no work to calculate the degree to which fares would have to rise for there to be a substantial lessening of competition. (Tr. 569:8-12 (Bush).)

190. Professor Bush did no analysis to determine whether capacity would be reduced as a result of the merger. (Tr. 572:8-17 (Bush).)

191. Because of the airline industry's strong price competition and price transparency, United and Continental do not—and will not—have the power to raise prices unilaterally. Mr. Smisek explained: "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.)

192. Mr. Smisek also explained that, when a carrier attempts to raise a fare unilaterally, "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." (Tr. 210:15-211:8.)

193. 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. 267:17-20.)

a. Competition on Nonstop Routes.

194. Out of more than eight hundred nonstop routes that would be served by the combined carrier, there are only fifteen nonstop city-pair overlaps. On each of the fifteen overlap routes, the combined carrier will continue to have nonstop competitors after the merger. (Knight Aff. ¶ 17; Rubinfeld Report ¶ 103 & Rubinfeld Ex. 34; *see also* Ex. 1018.)

195. Using an airport-pair analysis, Professor Bush has identified thirteen airport-pair overlaps that he deems potentially problematic. (Bush Report at 3.)

196. Many of the airports in Professor Bush's list of nonstop overlaps have nearby airports that offer competing service. For example, for many San Francisco routes, including both of the "problematic" San Francisco routes on Professor Bush's list, passengers originating in the San Francisco area can choose to depart from either San Francisco International Airport (SFO) or Oakland International Airport (OAK). Passengers traveling to Houston may choose between Houston Intercontinental Airport (IAH) and Houston Hobby Airport (HOU). Thus passengers traveling from the Bay Area to Houston have four combinations of airports they can use (SFO-IAH, OAK-IAH, SFO-HOU, OAK-HOU). Nearly 40 percent of San Francisco-Houston passengers use an airport pair other than the one cited by Professor Bush (SFO-IAH). (Rubinfeld Rebuttal ¶ 5; *see also* Ex. 1019 (depicting competitors that will continue to offer nonstop and connecting service on the 13 airport-pairs post merger).) Professor Bush testified that he had no reason to doubt the accuracy of the information on Exhibit 1019. (Bush Dep. Tr. 84:24-85:1.)

197. The availability of nearby airports as alternatives is not restricted to San Francisco-Houston passengers. The airport pairs Professor Bush identifies are not the preferred airport pairs for many passengers traveling between the identified city pairs. For example, Newark-Dulles (EWR-IAD) is not the preferred airport pair for travel between New York and Washington, DC, for most passengers, since it carries only 2 percent of passengers. Similarly, Cleveland-Dulles (CLE-IAD) carries only 8 percent of passengers traveling between Cleveland and Washington, DC, and Newark-O'Hare (EWR-ORD) carries only 30 percent of passengers traveling between New York and Chicago. (Rubinfeld Rebuttal ¶ 6; Rubinfeld Rebuttal Ex. 1.)

198. In some instances, passengers on the airport pairs listed by Professor Bush will retain service from at least three carriers, including, in some instances, service from a low-cost carrier ("LCC"). (*See* Ex. 1036.) In other instances, there is little evidence that United and Continental compete strongly on the airport pair today. For example on SFO-IAH, United is scheduled to operate approximately one-sixth as many frequencies as Continental in October 2010, and United carried less than ten percent of passengers in 2009. On LAX-IAH, United only recently entered and is scheduled

to operate approximately one-tenth the frequencies of Continental in October 2010. (Rubinfeld Rebuttal ¶ 7.)

b. Competition on Connecting Routes.

199. The connecting route overlaps between the two carriers are minimal as well, with only three routes (Steamboat Springs/Hayden, CO - Houston, Montrose/Delta, CO - New York/Newark and Houston to Montrose/Delta, CO) going from 2 competitors to 1 following the merger, far fewer than the 66 such routes in the Delta/Northwest merger the DOJ approved in 2008. These three routes account for only approximately 55 passengers per day each way, a 0.068% share of the approximately 80,500 passengers that fly domestic routes on United and Continental every day. (Knight Aff. ¶ 19 (Ex. 1059).)

200. "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." (Tr. 467:4-16 (Rubinfeld) (concluding that "when you put all that together, I just do not see even any real possibility of a problem. And I see substantial benefits that will, as I said, make the new entity actually a more competitive entity").)

201. Professor Bush did no analysis as to how many connecting passengers would be affected by the merger. (Bush Dep. Tr. 127:2-4.) He testified that a number of LCCs fly from the Midwest to the East Coast, and that he has no reason to believe that any LCCs will exit any such routes after the merger. (Tr. 127:20-131:1.)

202. According to Dr. Rubinfeld, Professor Bush's analysis of connecting competition is flawed. Professor Bush postulates that passengers connecting between the Midwest and the East Coast would have fewer connecting options (and would have to rely mainly on United/Continental and Delta hubs) and that post-merger, United/Continental "may have the incentive" to reduce frequencies on connecting routes. However, Professor Bush does not point out that the pattern of hub presence suitable for serving Midwest-East Coast connecting routes is quite rich. An examination of the locations of the competing United/Continental hubs and the Delta hubs relative to the hubs of other competing airlines shows that other competitors operate large hubs in the region and are capable of providing competing connecting service. (Rubinfeld Rebuttal ¶ 9.)

203. There are a number of hubs capable of providing service in competition with United/Continental and Delta following the merger. For example, American operates a large hub at Chicago-O'Hare—in addition to the United hub at the same airport. 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; Rubinfeld Rebuttal Ex. 2 (map of U.S. hubs and focus cities operated by major carriers).)

204. Passengers have many connecting options, in part because some LCCs have begun to develop networks around hubs and focus cities. LCCs such as Frontier and AirTran clearly have networks built around hubs. Over 85 percent of AirTran's and all of Frontier's nonstop routes originate at a hub or focus city. Southwest's network has traditionally been considered a point-to-point network. However, 74 percent of Southwest's nonstop routes now originate in hubs or focus cities. (Rubinfeld Rebuttal Report ¶ 11; Rubinfeld Rebuttal Ex. 3.)

205. Dr. Rubinfeld concludes that the merger does not raise competitive concerns regarding connecting overlaps. The limited number of overlaps results from the fact that United's and Continental's networks are complementary and are focused on different areas of the country. In fact, United and Continental each have over a ten percent share of origin and destination ("O&D") passengers at only four domestic airports. (Rubinfeld Rebuttal ¶ 12.) Plaintiffs and Professor Bush made no attempt at the preliminary injunction hearing to rebut Dr. Rubinfeld's showing that competition on connecting routes will not be harmed as a result of the merger.

c. Competition at Individual Airports and Metropolitan Areas.

206. Dr. Rubinfeld concludes that the four metropolitan areas in which plaintiffs allege the merger will cause an anticompetitive increase in competition—Washington, D.C., New Orleans, San Diego and Seattle—do not pose any competitive concerns. In each city, the merged carrier would carry less than twenty percent of passengers—and in each city, Southwest would have a larger share of passengers than the merged carrier. (Rubinfeld Report ¶ 93 & Ex. 30.)

207. Of the seventeen airports that plaintiffs allege will suffer excessive concentration, all seventeen are served by multiple other carriers, and Continental and United each have a current passenger share over ten percent in only the two smallest airports. (Rubinfeld Report ¶ 94-95 & Ex. 31).

d. Competition on International Routes.

208. Professor Bush stated that he offers no opinions regarding potential international competitive effects (Tr. 572:22-25 (Bush).)

209. Continental and United were granted antitrust immunity by the U.S. government on international routes in 2009. (*See* Ex. 1039.) With the exception of specific carve-out routes on which immunity was not granted, United and Continental are already free to coordinate operations on international routes, and therefore the merger could not possibly injure competition on those routes. (Rubinfeld Report ¶¶ 83-84.)

210. Among the routes that are excluded from STAR antitrust immunity, United and Continental currently provide overlapping service on only U.S. to Beijing routes, and even on those routes, they provide service from different U.S. cities, and they combine to provide less than half of existing service. (Rubinfeld Report Ex. 27; *see also* Rubinfeld Report ¶ 84 and n.85, ¶ 88 (U.S.-Beijing exclusion from immunity may be lifted following nine months of service by Delta and American, which both recently instituted service).)

211. Even if United and Continental had not been granted antitrust immunity on international routes, Dr. Rubinfeld has stated that there still would be no competitive impact on international routes. (Rubinfeld Report ¶¶ 85-88.) Foreign competitors account for more than half of all transatlantic and transpacific capacity to and from the United States. (Rubinfeld Report Ex. 28; *see also* Tr. 180:18-24 (Smisek) (demonstrative used by plaintiffs "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").)

212. Moreover, United and Continental do not directly compete on any international non-stop city-pair routes. (Bush Dep. Tr. 64:1-5 (agreeing that there are no metal-to-metal international overlaps between United and Continental).) Although United and Continental do serve a number of common international destinations, there is not a single international city pair on which United and Continental both offer non-stop service. The two airlines have complementary rather than competing strengths in their international offerings. United's core international strength is the Pacific, while Continental's core international strength is in Latin America. (Rubinfeld Report ¶ 88.)

e. "Potential Competition" on Domestic Routes.

213. United and Continental each have a ten percent share of passengers at only four domestic airports. Accordingly, United is unlikely to be the most viable potential connecting competitor to Continental on many routes. Similarly, Continental is unlikely to be the most viable potential connecting competitor to United on many routes. (Rubinfeld Rebuttal Report ¶ 24.)

214. Professor Bush testified that there are a number of other existing competitors on the routes on which he identified a threat to potential competition. He stated that at least the following additional carriers serve the route from Los Angeles to Cleveland: Southwest, US Airways, Delta, American, AirTran and Frontier. At least the following carriers serve the route between Los Angeles and New York: American, jetBlue, Delta, Virgin America, US Airways and Alaska Airlines. At least the following carriers serve the route between Cleveland and San Francisco: Southwest, Delta, US Airways, Frontier, American, AirTran. (Bush Dep. Tr. 123:5-126:18.)

f. There is No Likelihood of Coordinated Effects.

215. Dr. Rubinfeld analyzes the likelihood of coordinated effects as follows: Given the heterogeneity of airline route structures, flight offerings, costs and fares, the merger is not likely to facilitate unlawful collusion in the airline industry. Across carriers on a given route, there are clear differences in flight frequencies, average daily non-stop seats, the mixes of non-stop versus connecting service, and the types of equipment flown. Carriers further differentiate their product offerings on the basis of flight times, airport service and amenities, breadth of frequent flyer offerings from particular airports, minimum-stay and advance-purchase requirements and other characteristics of the various fare classes sold. U.S. airlines also have costs that are heterogeneous and volatile, as are the various airfares offered on a given route or a given flight. This heterogeneity makes coordination on the setting of fares difficult at best. (Rubinfeld Report ¶¶ 69-74 & Rubinfeld Exs. 21-25; Tr. 435:2-17, 468:3-469:24 (Rubinfeld).)

216. The fact that combinations of fares and the quantity of seats airlines offer at any time are not transparent further hinders coordination. In addition to changing their displayed fares for each fare class, airlines also frequently change the number of tickets they offer for sale in each class, through their system of yield management. Unlike the fares themselves, carriers do not publicly display the number of tickets they offer for sale in each fare class, which reduces price transparency. As a result, the ability to observe the fares that competitors offer provides only limited information given that the number of tickets offered at each fare is not public. (Rubinfeld Report ¶ 75.)

217. While airlines can see many of the fares that their competitors offer to the public, there are also many fares that are not publicly observable. These include special discounts offered to members of frequent flyer programs, members of other travel clubs, students and other selected individuals; discounted pricing deals provided to corporations; the airfare portion of packages that bundle air travel with hotels, rental cars, and other travel services (frequently offered by online travel services such as Expedia or Orbitz); and tickets sold through auction-based online sites such as Priceline.com or Hotwire.com. Tickets sold in these ways make up a sizable portion of all sales, and further hinder any price coordination. (Rubinfeld Report ¶¶ 76-77; *see also* Tr. 468:12-469:21 (Rubinfeld) ("the 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, whe[n] 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.").) Plaintiffs and Professor Bush made no attempt in his report or at the hearing to establish a likelihood of coordinated effects as a result of the merger.

5. The Merger's Procompetitive Effects.

a. Network Benefits.

218. The merger will create more than 1,000 new online domestic city pairs served by the combined carrier, providing additional convenience to customers; approximately half of which currently are not served by any single carrier. (Knight Aff. ¶¶ 10-13; *see also* Smisek Aff. ¶¶ 8, 10; Tilton ¶ 5; Rubinfeld Report ¶¶ 22, 39; Exs. 1026, 1027.) Professor Bush testified that he had no reason to disagree that the merger would indeed create these new online itineraries. (Bush Dep. Tr. 154:8-156:21.)

219. At least twenty-five new nonstop routes will be made possible by the merger. (Knight Aff. ¶ 16; Ex. 1035; Rubinfeld Report ¶ 45 & Rubinfeld Ex. 13.)

220. Mr. Smisek explained that the merger will give customers "access to 116 new domestic destinations; 40 will be new to United customers, and 76 will be new to Continental customers". (Smisek Aff. ¶¶ 8, 10; *see also* Tilton ¶ 5, 32; Knight Aff. ¶ 10.) Professor Bush testified that he had no reason to doubt the accuracy of these statistics. (Bush Dep. Tr. 154:22-155:7.)

b. Preservation and Enhancement of Service to Small Communities.

221. Of the "116 new domestic destinations", "93 of them are small communities or small metropolitan areas". (Knight Aff. ¶ 10; *see also* Tilton Aff. ¶ 47; Ex. 1028.) Professor Bush testified that he had no reason to doubt the accuracy of these statistics. (Bush Dep. Tr. 157:25-158:17.)

222. Mr. Tilton confirmed that "[t]he new United will be a more efficient carrier, better able to sustain service to small communities nationwide". (Tilton Aff. ¶ 6; *see also* Smisek Aff. ¶ 9; Rubinfeld Report ¶ 22.)

223. Mr. Smisek noted, "[n]etwork reach, particularly to small communities, has been reduced in the last decade due to various factors, including Low Cost Carriers ('LCCs') siphoning off traffic from high density routes". (Smisek Aff. ¶ 9; *see also* Tilton ¶¶ 6, 50; Knight Aff. ¶¶ 26-29.)

224. Mr. Knight explained that "[t]he network carriers' service to small communities is made possible by the network carriers' hub-and-spoke structure, as well as their varied fleet types (including small regional aircraft) that can efficiently be deployed to both large and small routes". (Knight Aff. ¶ 29; *see also* Tr. 337:10-13 (Knight).)

225. Mr. Knight stated that "the stability and growth of network carriers like United and Continental is critical to the preservation of service to small communities. The merger will ensure that the combined carrier is equipped to preserve and enhance service to small communities nationwide". (Knight Aff. ¶ 33.)

c. Enhanced Flight Frequencies and Scheduling Convenience.

226. The merger will provide customers with enhanced flight frequencies and scheduling convenience. Mr. Knight explained that this is done "[b]y combining the schedules of United and Continental", which would "enhance[] passenger flexibility and reduce[] connection wait time by increasing the number of frequencies on a single carrier, making it more likely that passengers will be able to find flights that are convenient to their schedules". (Knight Aff. ¶ 14; *see also* Ex. 1034 (demonstrating how a customer who currently has 25 round-trip combination options on United will see that number quadruple to 100 post-merger based on the frequencies expected to be flown by the combined carrier); Rubinfeld Report ¶¶ 34-35.)

227. "Typically, frequency options on the same carrier are more valuable to consumers than frequencies on separate carriers. More frequencies on a single carrier provide greater flexibility to change flights after a ticket is booked and more convenient travel options on the passenger's carrier of choice." (Knight Aff. ¶ 15; Ex. 1034.)

228. These enhanced flight frequencies and scheduling conveniences would not be achievable if the carriers remained standalone companies. Mr. Knight explained, "[b]ecause fleet optimization requires the flexibility to reassign aircraft from United's fleet to Continental's and vice versa, it is not possible optimally to achieve this efficiency in the absence of a merger, even considering the parties' existing alliance relationship". (Knight Aff. ¶ 23; *see also* Ex. 1029.)

229. Professor Bush stated in his report and confirmed at his deposition that increased frequencies on a carrier are of benefit to the flying public. (Bush Report at 9; Bush Dep. Tr. 159:9-19.)

d. Combined Frequent Flyer Program.

230. Mr. Smisek confirmed that customers will benefit from a combined frequent flyer program: "Once the merger is complete, customers also will participate in the industry's leading frequent flyer program, which will give millions of members more opportunities to earn and redeem miles than ever before. Through our membership in Star Alliance, the leading global alliance network, our customers also will continue to benefit from service to more than 1,000 destinations worldwide". (Smisek Aff. ¶ 12; *see also* Tilton Aff. ¶ 17.)

231. Ms. Robinson testified that the joint frequent flyer program would facilitate the use of her United Mileage Plus points on routes currently flown by Continental. (Tr. 596:9-14.)

232. Professor Bush confirmed that United and Continental would not be able fully to combine their frequent flyer programs in the absence of a merger. (Bush Dep. Tr. 162:11-14.)

e. Elimination of Double Marginalization.

233. Dr. Rubinfeld explained that, because “the Continental and United networks are highly complementary”, “the elimination of double marginalization can result in substantial efficiencies”. (Rubinfeld Report ¶ 27; *see also* Tr. 462:13-16.)

234. Dr. Rubinfeld explained that economic literature shows that a portion of the cost reductions associated with an elimination of double marginalization “is passed on to consumers”. (Tr. 461:17-21; *see also* Tr. 466:4-20; Rubinfeld Report ¶ 24 (Ex. 1025).)

235. Professor Bush testified that he is familiar with the concept of double marginalization and the academic literature that analyzes it. Professor Bush stated that he has not sought to replicate the work underlying that academic literature and that he has no reason to doubt the conclusion in those studies that the elimination of double marginalization leads to downward pressure on airfares. (Bush Dep. Tr. 57:17-59:22.)

f. Between $442 and $840 Million in Annual Benefits to Consumers.

236. In its review of the Delta-Northwest merger, the DOJ recognized that the benefit to consumers of improved service quality is reflected in increases in the forecasted post-merger traffic of the merging carriers and can be quantified by valuing the fare reduction necessary to drive an equivalent increase in traffic. (Rubinfeld Report ¶¶ 51, 116-17 (Appx. D); Ken Heyer, Carl Shapiro, and Jeffrey Wilder (2009), “The Year in Review: Economics at the Antitrust Division, 2008-2009,” *Review of Industrial Organization*, 35:4, pp. 349-67 (2009).)

237. Applying that methodology to the Profitability Forecasting Model that United uses in the ordinary course of business, Dr. Rubinfeld found that consumer benefits arising from the transaction will likely exceed $442 million annually on domestic routes with additional benefits on international routes”. (Rubinfeld Report ¶¶ 32, 51-53 & Rubinfeld Ex. 16-17, Appx. D.)

238. Dr. Rubinfeld testified that this methodology is conservative in many ways. To address the limitations of the methodology, Dr. Rubinfeld used a consumer demand model that builds on extensive academic literature to estimate the consumer benefits of the merger. Based on that model, Dr. Rubinfeld estimated that annual consumer welfare will increase by $579 to $840 million annually on domestic routes as a result of the merger. (Rubinfeld Report ¶¶ 54-64 & Rubinfeld Exs. 18-20, Appx. D.)

239. Professor Bush testified that he has read the Heyer, Shapiro and Wilder piece (*see supra* ¶ 236), which endorses the use of the QSI methodology in analyzing airline mergers and that he has no reason to disagree with its conclusions. (Bush Dep. Tr. 98:2-98:19.) Professor Bush also testified that he has no reason to doubt the accuracy of Dr. Rubinfeld’s opinions with regard to the $442 million reduction in quality-adjusted fares likely to result from the merger. (Bush Dep. Tr. 148:19-149:9.)

g. Synergies and Cost Savings.

240. United expects that the merger will generate upwards of $1.47 billion in merger-specific annual cost and revenue synergies by 2014, less an expected labor dis-synergy of $277 million, giving the combined carrier a more competitive cost structure, the flexibility to price more competitively and the ability to invest in its product, all of which will benefit the company, its customers and shareholders. (Knight Aff. ¶ 34; *see also* Tilton Aff. ¶ 7; Smisek Aff. ¶¶ 13-14; Rubinfeld Report ¶¶ 29-31.)

241. The cost savings will arise from many areas of the combined carrier's operations including, but not limited to, station overlap, procurement, information technology and fleet optimization. (*See* Knight Aff. ¶¶ 38-56.) Revenue synergies will include passenger revenue, frequent flyer program, cargo and merchandising synergies. (*See* Knight Aff. ¶¶ 57-74; *see also* Tr. 344:15-19 (Knight).)

242. These synergies would not be possible if the airlines remained standalone companies, even with their existing alliance relationship. (Knight Aff. ¶ 35; *see also* Tilton Aff. ¶ 16; Ex. 1029; Tr. 164:1-20 (Smisek).)

243. Mr. Tilton explained that, while the existing alliances between the companies "have generated some synergies and significant consumer benefits, they do not provide the cost savings and employee and customer benefits of a merger". For instance, Mr. Tilton explained that "following a merger, [a combined United] can fully optimize [its] schedules and integrate [its] fleets. (Tilton Aff. ¶ 16; Tilton Ex. 2.)

244. The tables below summarize United's most recently calculated estimates of cost and revenue synergies associated with the merger.

United Estimate of Annual Steady-State Cost Synergies	
Synergy	**Inflation-Adjusted ($M)**
Salaried and Management Employees	190
Station Overlap	148
Procurement	151
Information Technology	108
Non-Airport Facilities Reduction	18
Cost Savings From Fleet Optimization	174
Total Cost Synergy	789
Labor Dis-Synergy	(277)
Net Cost Synergy	512

United Estimate of Annual Steady-State Revenue Synergies	
Synergy	**PRASM-Adjusted ($M)**
Passenger Revenue	652
Frequent Flyer Program	59
Merchandising	39
Cargo	20
Revenue-Related Costs	(89)
Total Revenue Synergy	681

(Knight Aff. ¶ 36; *see also* Smisek Aff. ¶ 13 ("Continental's analysis has identified between $1.0-$1.2 billion in annual revenue synergies and cost savings resulting from the merger, including $800-$900 million in annual revenue synergies and $200-$300 million in annual cost savings."); Smisek Aff. ¶ 16.)

245. Professor Bush testified that he is aware of recent statements by Delta Airlines that the synergies actually achieved as a result of Delta's 2008 merger with Northwest Airlines have exceeded estimates. (Bush Dep. Tr. 28:16-29:2; *see also* Ex. 1007, 1008.) Professor Bush also testified that he has done no analysis to show that the synergies estimated to be achieved as a result of the United/Continental merger are not obtainable. (Bush Dep. Tr. 180:19-181:15.)

h. Increased Capacity.

246. Dr. Rubinfeld stated that the merger would allow the combined carrier to increase both effective and actual capacity. (Rubinfeld Report ¶¶ 41-46.)

247. According to Mr. Knight, the merger would "enable the most efficient utilization of seat capacity" through the process of "fleet optimization". (Knight Aff. ¶ 20; *see also* Smisek Aff. ¶¶ 11, 15 ("For example, upgauging certain routes—especially hub-to-hub routes—will save fuel costs while retaining seating capacity and frequencies.")

248. Mr. Knight explains how "fleet optimization" would lead to higher effective capacity: "[A]ssume 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. Passengers on Route B would also benefit by virtue of the increased capacity, which means that more of the potential passengers on that route would be able to purchase tickets on the flight that they prefer". (Knight Aff. ¶¶ 21-22.)

249. Mr. Smisek testified that "fleet optimization" would enhance capacity capabilities here: "[W]hat this combination gives us [is] the opportunity to take airplanes that are probably in the right markets at United, and in the right markets for Continental, given our networks. But where they're flying, for example, too big an aircraft and we're flying too small an aircraft, we can swap those across and satisfy the demand better than we do". (Tr. 212:6-12; *see also* Tilton Aff. ¶ 16.)

250. Professor Bush testified that United and Continental cannot fully optimize their fleets in the absence of a merger and noted that fleet optimization "could very well be" a benefit arising from the merger. (Bush Dep. Tr. 161:21-162:10.)

251. Actual capacity on the combined carrier would also increase due, in part, to the addition of seven new frequencies on hub-to-hub routes and the introduction of

twenty-five new nonstop routes. (Rubinfeld Report ¶¶ 41-46 & Rubinfeld Exs. 12, 13.) Even without the twenty-five new nonstop routes, annual ASMs offered by the combined carrier post-merger are expected to increase by 0.6 percent, from 258.1 billion to 259.7 billion, relative to the stand-alone schedules of the two carriers across the entire domestic and international network. Domestically, ASMs are expected to increase by 1.0 percent from 144.0 billion to 145.6 billion. Internationally, ASMs will increase by 0.04 percent from the current level of 114.1 billion. Post-merger schedules developed by the companies' planning departments also indicate that, on the fifteen domestic routes on which both United and Continental provide non-stop service, ASMs will increase by 11.1 percent. (Rubinfeld Report ¶ 41 & Rubinfeld Ex. 11; *see also* Tr. 512:24-513:2 (Rubinfeld).)

252. The analysis presented to Continental's Board of Directors prior to its approval of the merger also predicted that capacity on the combined carrier would increase. (Ex. 26 at -0017.)

i. A More Competitive Carrier.

253. Mr. Tilton and Mr. Smisek explained that these procompetitive benefits are important to creating a healthy airline that can contend with any unforeseen shocks that have in the past severely harmed the airline industry. (Tilton Aff. ¶¶ 11, 12; Smisek Aff. ¶ 5; *see also* Tr. 455:16-20 (Rubinfeld).)

254. Mr. Knight explained that "[t]he combined carrier will be more financially sound and better equipped to withstand and absorb the external shocks and fluctuating costs (*e.g.*, jet fuel) that have plagued the industry". (Knight Aff. ¶ 74.); *see also* Tr. 455:16-20 (Rubinfeld).)

255. 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; *see also* Smisek Aff. ¶ 5; Tr. 260:21-261:3 (Tilton); Tr. 340:10-14; 340:19-24 (Knight).)

256. Mr. Tilton described the state of the airline industry: "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; Smisek Aff. ¶¶ 4, 17; *see also* Tr. 79:6-8; 79:12-13, 170:18-19, 208:2-4 (Smisek); *see also* Rubinfeld Ex. 8.)

257. Mr. Tilton explained that this, in addition to other factors, has resulted in "United's share of domestic passengers declin[ing] to fifth place nationwide behind Southwest, Delta, American and US Airways . . . [, its] global revenue ranking [falling] from second to sixth during the same time period" and its having to enter and exit bankruptcy. (Tilton Aff. ¶¶ 27-28.)

258. According to Mr. Smisek, Continental faces the same obstacles: "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.)

259. As standalone companies, Mr. Smisek testified that there is not much more these companies can do in the way of cost savings: "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 point". (Tr. 164:1-20.)

260. Mr. Tilton explained that "the cost savings resulting from the merger will allow United the flexibility to absorb, to a greater degree, any increases in its operating costs (*e.g.*, jet fuel) that might otherwise flow through to consumers. Most importantly, the merger will put the company on a path to sustained profitability and away from the failed strategy of serial bankruptcies that has plagued the industry." (Tilton Aff. ¶ 7; *see also* Smisek Aff. ¶ 5.)

261. Dr. Rubinfeld explained that the merger efficiencies will enable the new United to compete more effectively and offer a better product to its customers: "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 (Rubinfeld); *see also* Knight Aff. ¶¶ 37, 74; Smisek Aff. ¶ 16; Tilton Aff. ¶ 34; *see generally* Ex. 1048.)

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM.

262. The individual plaintiffs seek to enjoin the merger 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"); Tr. 616:10-11, 616:13 (Malaney) ("The costs will go up"); 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");[2] *see also* Stensrud Dep. Tr. 38:6-7 ("less competition will increase fares"); Brown Dep. Tr. 24:12-13 ("less competition normally means higher prices").)

263. Plaintiffs' counsel stated that "if . . . ten cents is raised on a particular ticket, that's compensable damage". (Tr. 23:5-8 (Alioto Opening).)

[2] 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.

264. Plaintiff Jan Marie Brown is additionally concerned that she will lose commissions or service fees from her clients. (Tr. 374:24-375:14.)

265. Plaintiff Rosemary D'Augusta described how she could use records available to her to calculate allegedly lost commissions. (D'Augusta Dep. Tr. 49:12-51:6.)

266. The complaint alleges that "[i]f the merger is consummated, it will result in lower capacity; that is, fewer seats in the sky, which, in turn, will result in *higher ticket fares* for consumers". (Compl. ¶ 63 (emphasis added).)

267. Prior to the nearly identical lawsuit challenging the Delta/Northwest merger (*see* Ex. 1046), plaintiffs entered into an agreement (*i.e.*, the Passengers Against Mergers ("PAM") Agreement (*see* Ex. 1049)) to bring suit to enjoin the merger in anticipation that they would recover a monetary award.

268. Plaintiffs ultimately settled the Delta/Northwest suit for a monetary payment. (*See* Exs. 1044A, 1044B; *see also* Tr. 629:4-6 (Malaney); 397:25-398:8 (Stensrud); D'Augusta Dep. Tr. 35:21-23.)

269. 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, 628:22-25; Ex. 1049 at 100-101; Malaney Dep. Tr. 40:9-13.)

270. Pursuant to the PAM Agreement, Mr. Malaney received a proportionate share of the $5 million monetary payment in the lawsuit challenging the Delta/Northwest merger. (Tr. 629:1-8; Malaney Dep. Tr. 52:10-54:7)

271. Mr. Stensrud likewise entered into the PAM Agreement, purchasing one share (at $2,000 per share) with the "anticipat[ion] that as a result of that lawsuit [*i.e.*, the one challenging the Delta/Northwest merger]", he "might share in a monetary award" "[i]f there was one". (Tr. 397:1-5, 397:16-24 (Stensrud); Ex. 1049 at 54-55; Stensrud Dep. Tr. 6:16-17, 19.)

272. Mr. Stensrud shared in the monetary award received in the Delta/Northwest suit. (Tr. 398:3-5; Stensrud Dep. Tr. 46:16-22, 49:1-4.)

273. Ms. D'Augusta was a participant in the PAM agreement and has also "received money [] as a result of [her] activities in PAM" including settlement of the Delta/Northwest suit. (D'Augusta Dep. Tr. 21:3-5; 26:21-23, 44:19-24, 46:9-13; Ex. 1049 at 96-97.)

274. Ms. D'Augusta found the settlement of the Delta/Northwest suit for a monetary payment "acceptable". (D'Augusta Dep. Tr. 45:6-12.)

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

A. Plaintiffs Do Not Fly the Allegedly Relevant Airport-Pair Routes.

275. Plaintiffs' counsel agreed that when a claim is brought "under Section 16 [of the Clayton Act]," the Court "focus[es] on the harm" to "the Plaintiffs who are actually named", not "harm generally in the marketplace". (Tr. 8:22-9:7 (Alioto Opening).)

276. Only one of the forty-nine plaintiffs regularly flies on either United or Continental. (*See* Rubinfeld Report. Ex. 33.)

277. With a single exception (*i.e.*, Rosemary D'Augusta, who once flew from SFO-EWR), in the last five years none of the five designated plaintiffs has flown the thirteen "problematic" routes identified by Professor Bush—*i.e.*, (a) Los Angeles to Houston; (b) Los Angeles to Honolulu; (c) San Francisco to Houston; (d) Washington Dulles to Cleveland; (e) Washington Dulles to Newark; (f) Washington Dulles to Houston; (g) O'Hare in Chicago to Cleveland; (h) O'Hare to Newark; (i) O'Hare to Houston; (j) Denver to Cleveland; (k) Denver to Newark; (l) Denver to Houston; (m) San Francisco to Newark. (Tr. 372:5-373:9 (Brown), 617:3-9 (Malaney), 392:10-394:1 (Stensrud), 606:17-607:25 (Robinson); *see also* Exs. 1050, 1051, 1052, 1053, 1054, 1070, 1075.)

278. Ms. Brown does not have "anything booked" and no "set plan" to fly any of the thirteen routes. (Tr. 373:10-14.)

279. Mr. Stensrud does not have any "current plan" to travel any of the thirteen routes. (Tr. 394:2-3, 394:12-14.)

280. Nor does Mr. Stensrud have any "specific" plans to fly in the "next 12 months". (Tr. 385:22-25.)

281. When asked whether he has any current "plan to fly any of [the thirteen challenged] routes in the future", Mr. Malaney responded, "I don't think so". (Malaney Dep. Tr. 133:11-14.)

282. Ms. Robinson has no plans "to fly any of [the thirteen] routes in the foreseeable future". (Tr. 608:1-8.)

283. Ms. D'Augusta has flown one of the thirteen routes once, about five years ago, "[s]o you went on October 7, 2005 from San Francisco to Newark, New Jersey. Is that correct? That is correct." (D'Augusta Dep. Tr. 55:25-56:6; Ex. 1051.) On the return trip, she flew from LaGuardia to San Francisco. (Ex. 1051.)

284. Ms. D'Augusta did not pay any airfare for her flight from San Francisco to Newark in 2005. (*See* D'Augusta Dep. Tr. 57:2-11; Ex. 1051.)

285. Ms. D'Augusta chose an alternate airport-pair route rather than the alleged overlapping route (*i.e*. SFO-EWR) on each of her multiple other trips between the San Francisco and New York areas. (Ex. 1051.)

286. Defendants' transfer of slots at Newark Liberty to Southwest Airlines as part of the DOJ clearance process resolved any potential competitive concerns on routes into and out of Newark airport. (*See* Exs. 1073, 1074).

B. Plaintiffs Do Not Generally Travel for Business and Often Do Not Pay For Flights.

287. Ms. Brown "hope[s]" to travel, but business that would require her to travel is "pretty slow right now" and she has not done so in the last five years. (Tr. 375:16-376:10, 377:2-5) (Brown).)

288. Mr. Stensrud has only flown for business once in the last five years, and it was to attend a spa/salon conference unrelated to his current employment, so it is far from certain to recur in the future. (Tr. 386:23-387:14 (Stensrud); Exs. 1050, 1075.)

289. Ms. Robinson has not flown for business in the last five years. (Tr. 596:18-20 (Robinson).)

290. In the last five years, Ms. D'Augusta has never traveled for business, including on her trip from SFO-EWR, which was to visit family. (D'Augusta Dep. Tr. 62:3-13, 65:2-21, 69:14-13, 74:1-12, 86:4-10; *see also* Ex. 1051.)

291. Ms. D'Augusta often was "able to get tickets where [she] only had to pay a service fee and not the fare for the ticket". (D'Augusta Dep. Tr. 57:24-58:3.)

292. Mr. Malaney also does not pay for his flights personally but rather "run[s] it through [his] business" or previously used a "barter account" with Northwest Airlines that entitled him to free travel. (Tr. 614:3-23.)

293. On the two occasions that Mr. Malaney traveled for business in the past five years, he used the barter account. (Malaney Dep. Tr. 81:18-21, 82:16-19, 86:4-87:7.)

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

A. Enjoining the Merger will Cause Harm to Defendants.

1. Lost Synergies.

294. United and Continental "anticipate[] that by 2014 the merger will result in at least $681 million in revenue synergies, adjusted for anticipated industry PRASM growth net of revenue-related costs . . . [and] at least $789 million in annual cost synergies, adjusted for inflation. Thus, the merger is anticipated to generate at least $1.47 billion in annual synergies, net of revenue-related costs." (Knight Aff. ¶ 34; *see also* Tilton Aff. ¶ 7; Smisek Aff. ¶ 13.)

295. If the merger is delayed "[the merged airlines] would not begin to achieve the merger synergies which begin from day one". (Tr. 206:18-19 (Smisek).) "And every day that goes by, we're not able to begin to implement those synergies, none of which we can implement until we get the merger done". (Tr. 208:6-8 (Smisek); *see also* Smisek Aff. ¶ 25 (same); Tilton Aff. ¶ 54 ("If the merger is not consummated, United and Continental will also fail to achieve the substantial efficiencies and other consumer benefits that motivated their agreement to merge").)

2. Inability to Withstand External Shocks.

296. External "shocks come at this industry [*i.e.*, the airline industry] with more rapidity than they do any other industry". (Tr. 260:21-261:3 (Tilton); *see also* Tr. 340:10-14; 340:19-24 (Knight) ("This is an industry that has been subject to all kinds of variations and fluctuations and shocks"—"[t]hat has been our history" as a "very, very volatile industry").)

297. For example, "U.S. network carriers have had to contend with . . . wildly fluctuating fuel prices, terrorist attacks, economic recessions and public health scares like H1N1." (Tilton Aff. ¶ 26; *see also* Smisek Aff. ¶ 5; Tr. 260:22-261:3 (Tilton) ("a combination of two companies such as ours reduces financial risk, and reduces the vulnerability of either company to external shocks such as terrorism, SARS, bird flu, volcanic ash and the like").)

298. United and Continental have faced financial instability in the past decade. (Tilton Aff. ¶ 11; Smisek Aff. ¶¶ 4, 17 (Continental has lost $1 billion since September 11); Tr. 170:18-19; 208:2-4 (Smisek) (same); 79:6-8 (Smisek) (Continental "lost about three-quarters of a billion dollars" in 2008); 79:12-13 (Smisek) (Continental lost "about a half a billion dollars in 2009, and [] over $100 million in the first quarter of [2010]").)

299. "Financial instability [] leaves United vulnerable to external shocks, including changes in oil prices. Moreover, airline industry volatility has increased in the last few years, driven by highly variable input costs, demand shocks from global health concerns, terrorism and most recently a global recession." (Tilton Aff. ¶ 53; *see also* Tr. 241:9-11 (Tilton).)

3. Inability to Withstand Inroads by International Carriers.

300. Continental and United face significant competition from international carriers. (Smisek Aff. ¶ 20; *see also* Tilton Aff. ¶ 23; Ex. 1031.)

301. "Increasing competition from LCCs and large foreign carriers, along with other competitive factors, have made it more difficult for full service network carriers like United—carriers who connect large and small cities, both domestically and internationally—to sustain their networks. This trend will likely continue if network carriers like United and Continental cannot strengthen the depth and breadth of their networks, a necessary step in preserving service to small communities domestically and competing with large foreign carriers on a global scale." (Tilton Aff. ¶ 50.)

4. Inability to Provide Job Security.

302. "As a result of United's declining profitability and shrinking market share, employees continue to experience uncertainty about their job stability and long-term career prospects. This uncertainty is likely to prevail if the status quo is maintained and the merger is not consummated. In line with industry trends, the company has lost many thousands of jobs over the past decade and there is a strong chance that continuing financial instability will result in further job loss, including attrition resulting from employees' perception of instability." (Tilton Aff. ¶ 52; *see also* Tilton Aff. ¶ 38.)

303. For example, "[i]n 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) while Continental has reduced its workforce from approximately 54,300 to 41,300" since 2001 (Smisek Aff. ¶ 4).

304. Mr. Smisek testified, "I would like to have a profit, a sustainable profit, 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.)

305. Mr. Smisek further testified "that the merged Continental will be able to provide more growth, more capacity, a better future for my co-workers, and certainly for the communities we serve, than we could on a standalone basis. It would—it will also provide us with the profitability we need to continue to invest in our product". (Tr. 205:10-15.)

306. "The merger will provide . . . greater career stability and retirement security for our employees." (Smisek Aff. ¶ 5.)

307. "If the merger is not consummated, the Parties will fail to achieve the substantial efficiencies and other consumer benefits that motivated their agreement to merge. As a result, each of the Parties, as well as their employees . . . would be deprived of the significant benefits of the merger." (Smisek Aff. ¶ 25; *see also* Smisek Aff. ¶ 4; Tilton Aff. ¶ 48.)

5. Significant Merger-Specific Costs.

308. "[W]hen you go into a merger transaction, in some ways it begins to paralyze your ongoing business. You defer decisions, you begin to lose people, people begin to trade out". (Tr. 206:20-23 (Smisek).) "[Y]ou forego things that are really important to you, and [] it would put us in a very difficult spot [if the merger were enjoined]". (Tr. 209:4-6 (Smisek).)

309. Mr. Smisek testified, "[y]ou defer investments and technology . . . [like a project] we thought could save us about $30 million . . . [w]e have deferred that decision pending the merger". (Tr. 207:7-15.) "And every day that goes by . . . is costing you money". (Tr. 207:20-21.)

310. "United management is currently devoting substantial resources to merger integration planning. While United continues to develop its standalone strategy, the resources available to define and implement that strategy have necessarily been depleted. If the transaction does not proceed, United may have foregone opportunities that would have been attractive only as a standalone company in anticipation of more attractive opportunities available only to the merged company." (Tilton Aff. ¶ 55; *see also* Smisek Aff. ¶ 25 (same regarding Continental).)

6. Defendants' Ability to Compete As Stand-Alone Carriers.

311. "If United remains a standalone entity, the company's profitability and market share, which have tended downward over the past decade, will in all likelihood continue to suffer from strategic gaps in the company's network position, which its lack of profitability prevents the company from addressing with its own financial resources." (Tilton Aff. ¶ 48.)

312. "If the proposed transaction is not consummated, and United remains a standalone entity, the company expects ongoing trends in its financial performance to continue. United's domestic passenger share decreased from approximately 15% in 1998 to approximately 11% at the end of Q3 2009. United's global revenue ranking fell from second to sixth over the same period. If United remains a standalone entity, the company expects its ability to sustain sufficient profitability to return a reasonable return on its capital base across the economic cycle to continue to be at risk." (Tilton Aff. ¶ 49; *see also* Tr. 241:9-11) (Tilton) (merger is "the only way for the company [*i.e.*, United] to be sustainably profitable and avoid the prospect of bankruptcy, given all the exogenous shocks that this industry is subject to").)

313. Mr. Smisek "felt [Continental] would not be able to compete as effectively if [it] did not merge with United" and that "[Continental's] 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. 94:23-24, 95:23-25 (Smisek).)

314. Mr. Rubinfeld has "doubts whether [standalone Continental or United] will be profitable on a year-to-year basis". (Tr. 499:18-19.)

B. The Merger Will Not Cause Harm to Plaintiffs.

315. Plaintiffs claim that they will suffer "higher fares" on routes that, with a single exception addressed above, no plaintiff flies or intends to fly in the future. (*See supra* ¶¶ 275-293.)

316. Professor Bush testified that he knows of no harm that plaintiffs will suffer as a result of the merger. (Bush Dep. Tr. 15:5-9.)

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

317. Dr. Rubinfeld testified, "[T]he 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.)

318. Dr. Rubinfeld quantified the consumer benefits "arising from the transaction" and found that, based on DOJ's QSI-based methodology, consumer benefits will amount to over "$400 million annually on domestic routes" (Rubinfeld Report ¶ 32; *see also* Tr. 457:3-16 (Rubinfeld)) and, based on a "basic demand model" that takes into account "the fact that some passengers may wish to switch to the improved products offered by the combined carrier post-merger", total consumer welfare "will increase by $579 to $840 million annually on domestic routes as a result of the merger". (Rubinfeld Report ¶¶ 51-64; *see also* Tr. 457:3-16 (Rubinfeld).)

A. Lower Fares.

319. The "benefits of the merger" "include reduced costs because we eliminate the double markup problem". (Tr. 456:17-18 (Rubinfeld).)

320. The economic literature shows that, as a result of the elimination of double marginalization, "there are cost reductions, and that a portion of that actually is passed on to consumers". (Tr. 461:17-21 (Rubinfeld); *see also* Rubinfeld Report ¶¶ 24-25.)

321. Professor Bush testified that he has no reason to doubt the conclusions in the academic literature regarding double marginalization. (Bush Dep. Tr. 58:20-24, 59:9-22.)

B. New Travel Options.

322. 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 (Rubinfeld); *see also* Rubinfeld Report ¶¶ 34-35.)

323. Mr. Smisek testified 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. 135:25-136:2.)

324. "Customers will have access to 116 new domestic destinations; 40 will be new to United customers, and 76 will be new to Continental customers. The merger will create more than 1,000 new online domestic city pairs served by the combined carrier, providing additional convenience to customers; 280 of these currently are not served by any single carrier. Continental lacks the resources independently to expand

its network to match the merged carrier's network." (Smisek Aff. ¶ 8; *see also* Tilton Aff. ¶¶ 32, 47; Knight Aff. ¶ 12.)

325. Professor Bush testified that he has no reason to doubt that the merger will create these new destinations. (Bush Dep. Tr. 154:8-158:17.)

326. Those new connections 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).)

327. "The merger will also enhance [the airlines'] frequent flyer programs. Currently, it is sometimes difficult for United and Continental frequent flyers to obtain reciprocal benefits, elite recognition and awards through the other carrier. A combined program would offer more benefit to customers as they accrue and redeem awards across our broad combined network on a seamless frequent flyer program." (Tilton Aff. ¶ 17; *see also* Tilton Aff. ¶ 36; Smisek Aff. ¶ 12.) Ms. Robinson acknowledged that the joint frequent flyer program would facilitate the use of her United Mileage Plus points on routes currently flown by Continental. (Tr. 596:9-14.)

328. Professor Bush testified that, in the absence of a merger, United and Continental would not be able fully to combine their frequent flyer programs. (Bush Dep. Tr. 162:11-14.)

C. Expanded Global Network.

329. "The merger will combine United and Continental's highly complementary existing networks to provide consumers unparalleled access to 347 destinations in 59 countries around the world." (Tilton Aff. ¶ 5; *see also* Smisek Aff. ¶ 24.)

330. "The merger will enhance and ensure continuing service to 148 small communities and small metro areas across the United States. Network reach, particularly to small communities, has been reduced in the last decade . . . . Network carriers' business model provides critical network reach and breadth, including service to numerous small communities nationwide." (Smisek Aff. ¶ 9; *see also* Tilton Aff. ¶ 46; Knight Aff. ¶ 10 (of the 347 destinations, "148 are small communities or small metropolitan areas").)

331. Both United and Continental have a long history of serving small- and medium-sized communities. (Smisek Aff. ¶ 21; Tilton Aff. ¶ 43.)

332. "The turmoil in [the airline] industry has been devastating to many small- and medium-sized communities. Since 2000, more than 100 small communities have lost all network carrier service. Approximately 50 more have seen their service levels cut, losing at least half of their seats." (Tilton Aff. ¶ 44; *see also* Knight Aff. ¶¶ 26-27; Smisek Aff. ¶ 22.)

333. An additional 43 small communities have lost 50% or more of their network carrier service (by seats) since 2000 and are at risk of having no network carrier service. (Knight Aff. ¶ 28; *see also* Smisek Aff. ¶ 22.)

334. "[T]he stability and growth of network carriers like United and Continental is critical to the preservation of service to small communities. The merger will ensure that the combined carrier is equipped to preserve and enhance service to small communities nationwide." (Knight Aff. ¶ 33.)

D. Fleet Optimization.

335. "Fleet optimization refers to the assignment of particular aircraft types to particular routes in order optimally to match capacity to demand. Combining United and Continental's mainline fleet of more than 700 aircraft in several sizes would enable the most efficient utilization of seat capacity." (Knight Aff. ¶ 20.)

336. Professor Bush testified that he agrees that fleet optimization would be a benefit of the merger and that, in the absence of a merger, the airlines would "not [be] able to optimize fully their fleets". (Bush Dep. Tr. 161:21-162:10.)

337. "[T]he merger allows the new carrier to more efficiently allocate its fleet across the combined network in order to better match capacity to demand. The combined carrier can increase effective capacity, since it can utilize smaller equipment on routes with excess capacity and utilize larger equipment on routes that are capacity constrained." (Rubinfeld Report ¶ 43.)

338. Passengers on routes where equipment is upgauged would also benefit by virtue of the increased capacity, which means that more of the potential passengers on that route would be able to purchase tickets on the flight that they prefer. (Knight Aff. ¶ 22.)

339. Increased capacity will lead to greater choice for the general public. (Tr. 193:20-194:2 (Smisek); Knight Aff. ¶ 22.)

E. New Technology and Equipment.

340. The cost synergies achieved from the merger will also allow the merged entity to invest in new technology and equipment. (Tr. 350:1-4 (Knight); *see also* Tilton Aff. ¶ 34.)

341. "Importantly, 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." (Smisek Aff. ¶ 16.)

342. The growth that Mr. Smisek expects in the combined carrier has led him to have discussions with Boeing about accelerating the delivery of some "787s which are new highly fuel-efficient and customer-pleasing aircraft". (Tr. 208:17-24 (Smisek).)

F. Environmental Benefits.

343. "[The merged carrier] will have one of the youngest and most fuel-efficient fleets among the major U.S. network carriers, as well as the flexibility to manage our fleet more effectively. With one of the best new aircraft order books in the industry, we will also be able to retire older, less efficient aircraft. This will result not only in greater efficiency but less environmental impact from our fleet." (Tilton Aff. ¶ 35; *see also* Knight Aff. ¶ 25 (same).)

G. Job Security.

344. In the past decade, 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.)

345. 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.)

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By: /s/
Katherine B. Forrest

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

Admitted *Pro Hac Vice*

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

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

Admitted *Pro Hac Vice*

Attorneys for Defendant Continental Airlines, Inc.

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

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