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9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

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

Date: August 31, 2010
Time: 9:00 a.m.
Judge: Hon. Richard Seeborg

PLAINTIFFS' REPLY MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

22 Plaintiffs,

23 v.

24 UAL CORPORATION, UNITED AIRLINES,
INC., and CONTINENTAL AIRLINES, INC.)

25 Defendants.
26

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1 Plaintiff s above named submit this reply memorandum in support of their motion for
 2 a preliminary injunction against the proposed merger of defendants United Airlines, Inc.
 3 (“United”) and Continental Airlines, Inc. (“Continental”). In their Joint Memorandum of Law
 4 in Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“joint memorandum”),
 5 defendants make a number of assertions of law and fact that are unfounded, misleading, and
 6 inconsistent, to which plaintiffs will respond in this reply.
 7

8 **I. DEFENDANTS ARE NOT FAILING COMPANIES**

9 The defendants’ joint memorandum is replete with assertions of how much money
 10 United and Continental have lost, purportedly as a justification or rationale for their need to
 11 merge. Defendants are not failing companies either legally or factually, and their pleas of
 12 poverty are wholly irrelevant and entitled to no consideration in these proceedings.
 13

14 The failing company defense under Section 7 was first recognized by the Supreme
 15 Court in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930), and was fully explicated in
 16 *Citizen Publishing Co. v. United States*, 394 US 131, 136-37 (1969), in which the Court held
 17 that the defense was available only when (1) “the resources of...[the acquired] company were
 18 so depleted and the prospect of rehabilitation so remote that ‘it faced the grave probability of
 19 a business failure,’” and (2) “it is established that the company that acquires the failing
 20 company or brings it under dominion is the only available purchaser.” United and
 21 Continental have made no such showing here.
 22

23 Nor can they. Kathryn Mikells, the Chief Financial Officer of United, expressly
 24 testified in her deposition on August 24, 2010, that [REDACTED] (Mikells
 25 Depo., [39:20]-[40:1]. In his deposition three days later, on August 27, Glenn Tilton, CEO of
 26 United, [REDACTED] Tilton Depo., [25:14-19]. Indeed, they are not. [REDACTED]
 27 [REDACTED]
 28

1 [REDACTED] *Id.*, [42:3-7].

2 [REDACTED] Jeffrey Smisek Depo.,

3 [156:1-2].

4 **II. THE DEPARTMENT OF JUSTICE IS NOT ENTITLED TO DEFERENCE**

5 Defendants argue that this Court should and must defer to the alleged expertise of the
6 Department of Justice in reviewing and closing its investigation of their merger.¹ The law is
7 clear, however, that what the Department of Justice does or does not do in no way binds or
8 governs this Court in a private antitrust challenge. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1,
9 13 (1979) (“Of course, a consent judgment, even one entered at the behest of the Antitrust
10 Division, does not immunize the defendant from liability for actions, including those
11 contemplated by the decree, that violate the rights of nonparties”).

12 Moreover, the respect, approaching awe, shown by defendants for the Antitrust
13 Division is not universally shared. This is, after all, the same Department of Justice that in
14 2008 approved the Delta-Northwest merger, which Continental CEO Smisek testified [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] Smisek Depo., [74:8-18];

19 Exhibit 88. During the Congressional review of that merger, Representative John Conyers had
20 these prescient comments about the Division’s merger review process:

21 And since airline deregulation first took effect some 30 years ago,
22 we've gone from a highly competitive structure to an oligopoly.
23 Most of this has occurred under the Department of Transportation's
24 watch, but the Department of Justice also has to come in for its
25 share of responsibility, as literally scores of airline mergers have
26 been approved.

27 Consumers have been prejudiced, as delays are on the increase,
28 services in decline, and prices are rising. And we've fallen into a
culture where business executives have opted frequently to the

¹ A DOJ press release on Friday, August 27, disclosed that it was closing its investigation of the merger because defendants agreed to lease 18 slots at Newark airport to Southwest, although numerous state attorneys general continue to investigate the merger.

1 resort of bankruptcy as a means of avoiding their labor obligations
while enhancing their own personal incomes.

2 All too often executives of Chapter 11 debtors receive extravagant
3 bonus and stock option compensation packages while workers are
forced to accept pay cuts or even job losses and retirees lose hard-
won pensions and health benefits.

4 Example: Glenn Tilton, CEO of United Airlines, former Chapter
5 11 debtor, last year received \$39.7 million compensation package.
6 During the course of the bankruptcy case, however, pension plans
for 120,000 workers were terminated, and many others had to make
significant wage concessions.

7 * * *

8 This is the context in which we come together this morning, ladies
and gentlemen. We have an antitrust division that approves
9 mergers left and right, frequently overturning judgments of the
career staff at the Department of Justice.

10 The department has not attempted to block or modify any major
merger over the last seven years, including some of the largest,
11 most controversial mergers among direct competitors. Remember
Whirlpool- Maytag, AT&T-BellSouth, XM-Sirius. The
12 department's hands-off approach has even encouraged companies
with questionable merger justifications to give it a try.

13 And some analysts have stated that the government has nearly
stepped out of the antitrust enforcement business, leaving
14 companies to mate with whom they wish.

15 There has been a 59 percent decline in merger investigations over
the past four years of this administration compared to the last four
16 years of the Clinton administration. And with respect to merger
challenges, the last four years reveal a 75 percent decline to the last
17 four years of the Clinton administration.

18 So all I'm suggesting is that we need to consider where this merger
will take us. I'm concerned that if this merger is approved it will
19 simply result in a cascade of other mergers, such as Continental-
United, American and US Airways. We might end up a situation
20 where we have three mega-carriers operating through hubs
21 competing with a handful of low-cost carriers.

22 Original Source: Political Transcript Wire
23 HOUSE COMMITTEE ON THE JUDICIARY ANTITRUST TASK FORCE AND
COMPETITION POLICY HOLDS A HEARING ON AIRLINE COMPETITION
24 APRIL 24, 2008

25 In *Reilly v. The Hearst Corp.*, 107 F. Supp. 2d 1192, 1211 (ND Cal., 2000), Chief Judge
26 Walker of this District found it regrettably necessary to observe, with respect to the DOJ's
27 review of the merger before the Court, that he was "astonished and disappointed that DOJ
28 would allow itself to be put in a position where the inference can be so easily drawn that its

1 action or inaction in this case was political favoritism masquerading as law enforcement.”²

2 Finally, the Merger Guidelines under which the Department of Justice operates are in
3 no sense law or binding on the Courts, even though the defendants’ expert, Dr. Rubinfeld,

4 [REDACTED]”
5 Rubinfeld Depo., [84:1-2]. They are not even unanimously endorsed by the enforcement
6 authorities. Federal Trade Commissioner J. Thomas Rosch has observed about the latest
7 version of the Guidelines, issued August 19, 2010, that “these Guidelines are still flawed both
8 as a description of how the staff (at the Commission at least) conducts ex ante merger review
9 and *what the Agencies should tell courts about merger analysis.*” STATEMENT OF
10 COMMISSIONER J. THOMAS ROSCH ON THE RELEASE OF THE 2010 HORIZONTAL
11 MERGER GUIDELINES (emphasis added), available at
12 <http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf> .
13

14 The law of mergers is the law of the Supreme Court and the lower courts applying what
15 the Supreme Court has said, not what employees of federal agencies may think, no matter how
16 qualified and well-intentioned they may be.³
17

18 **III. THE DEFENDANTS’ ALLEGED CONCERNS ABOUT CLOSING THEIR MERGER**
19 **QUICKLY ARE INCONSISTENT WITH THEIR ACTIONS AND INTENTIONS**

20 The defendants stress the alleged urgency of being able to consummate their merger
21 because of the uncertainty and risk created by these proceedings and the deleterious
22 consequences of delay. If this is so, they should have agreed to plaintiffs’ offer to consolidate
23 the hearing on the preliminary injunction motion with trial on the merits, which they refused.
24 That offer still stands, as does plaintiffs’ readiness to proceed quickly to trial on the merits
25 following this hearing.
26

27 ² The timing of the DOJ’s action on Friday, August 27, in this case, given the imminence of
the preliminary injunction hearing, invites similar conjecture.

28 ³ One is of course also tempted to wonder just how fulsome defendants’ praise of the Antitrust
Division would be if the DOJ had not closed its investigation of their merger.

1 Among defendants' professed concerns is, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] Testimony of Jeffrey A. Smisek, p. 8. Defendants ignore, however,
5 that following the consummation of their merger, their intended firings and layoffs will dwarf
6 any claimed pre-merger loss of employees.

7
8 The Testimony of Kevin N. Knight, United Senior Vice President – Planning, lays out
9 in detail what defendants intend. Defendants' projected "cost synergies" or cost savings
10 include [REDACTED]

11 [REDACTED]

12 [REDACTED] Page 9. [REDACTED]

13 [REDACTED] (Tilton Testimony, p. 3); [REDACTED] (Smisek
14 Testimony, p. 3)). A [REDACTED] on a work force of 87,600
15 yields 13,095 lost jobs. Defendants thus seem to be telling this Court that it needs to approve
16 their merger as quickly as possible so that the delay doesn't cause their employees to leave
17 before defendants have a chance to fire over 13,000 of them.⁴

18
19 Certainly, in the current economy, the public interest favors preserving the status quo
20 until the Court can try and decide this case on the merits, when 13,095 jobs hang in the
21 balance.⁵

22
23 ⁴ Paragraphs 41-51 of Mr. Knight's Testimony provide further detail on where defendants
24 intend to achieve their "labor" synergies.

⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962):

25 A company's history of expansion through mergers presents a different economic
26 picture than a history of expansion through unilateral growth. Internal expansion
27 is more likely to be the result of increased demand for the company's products and
28 is more likely to provide increased investment in plants, more jobs and greater
output. Conversely, expansion through merger is more likely to reduce available
consumer choice while providing no increase in industry capacity, jobs or output.
It was for these reasons, among others, Congress expressed its disapproval of

1 **IV. THE DEFENDANTS' SUBMISSIONS FULLY SUPPORT THE NETWORK**
2 **CARRIER MARKET FOR BUSINESS TRAVELERS DEFINED BY THE**
3 **PLAINTIFFS**

4 Although defendants argue that plaintiffs have failed to define a cognizable relevant
5 market under Section 7, their own submissions fully support the existence of the network
6 carrier market for business travelers claimed by plaintiffs. At the outset, of course, it is black
7 letter law that plaintiffs need not prove that defendants' merger may substantially lessen
8 competition or tend to create a monopoly in *every* market or *all* markets in which the merged
9 entity will operate. Plaintiffs need show only that the merger is likely to have the proscribed
10 effect in *some* market, *any* market. *United States v. Pabst Brewing Company*, 384 U.S. 546,
11 559-60 (1966) ("The language of ... section [7] requires merely that the Government prove the
12 merger may have a substantial anticompetitive effect somewhere in the United States--'in any
13 section' of the United States.").

14 Plaintiffs' expert, Professor Darren Bush, opined in his Congressional testimony and
15 his reports in this case that defendants' merger was likely to lessen network competition for
16 time-sensitive travelers or business travelers. In his deposition testimony, Continental CEO

17 Smisek [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED] Smisek Depo., [29:16]-[29:20],
22 [36:10]-[36:11], [33:2]-[33:9], [43:25]-[44:16], [45:4]-[46:5], [60:13]-[60:24], [96:18]-[97:8].

23 He also testified [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 _____
27 successive acquisitions.
28 Particularly curious, in view of the planned elimination of 13,095 jobs post-merger, is the
statement at page 26 of defendants' joint memorandum that "Enjoining the merger would
threaten the job security for tens of thousands of United and Continental employees."

1 [REDACTED] *Id.*

2 In their pre-hearing submissions, defendants provide further evidence confirming the
3 existence of this relevant market. Among the statements made by Mr. Smisek in his written
4 Testimony are that LCCs use [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] (P. 6.) United CEO Glenn Tilton says

9 in his Testimony, [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15
16
17 Defendants make these statements in the context of an argument that appears to portray
18 their flying to so-called small communities as some type of public service or eleemosynary
19 undertaking, which will be jeopardized if defendants' merger is not approved. To the contrary,
20 service to these smaller communities lies at the core of their network strategy, their
21 competition for business travelers, and their ability to offer a product with which LCCs cannot
22 and do not compete. Mr. Smisek described the strategy fully in his deposition: [REDACTED]

23 [REDACTED]

24
25
26 ⁶ Further, no matter how often or vociferously defendants' proclaim their allegedly vigorous
27 competition with Southwest, such protestations are difficult to square with their recent
28 agreement to lease Southwest 18 slots at their Newark hub. Defendants can hardly fear
Southwest as much as they claim, and certainly not in defendants' key market of network
carrier competition for business travelers. Indeed, the decision to lease the slots to Southwest
is further, telling evidence that Southwest is not even in this market.

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[REDACTED]

([29:16]-[29:20].)

[REDACTED]

(*Id.*, [33:2]-[33:9].)

[REDACTED]

(*Id.*, [45:4]-[46:5]; emphasis added.)

Moreover, the reason defendants serve small markets has nothing to do with a sense of civic obligation, and everything to do with the profitability of business travelers, who provide the airlines with a higher yield (*i.e.*, revenue per available seat mile) than do non-business travelers.

[REDACTED]



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5 (Id., [60:13]-[60-24].)

6 Hence, when defendants emphasize their service to so-called small communities in
7 their pre-hearing submissions, they are only reinforcing the definition of the relevant market
8 involving network carrier competition for business travelers, although this is undoubtedly not
9 their intention. Defendants confirm that there is a particular class of customers, business
10 travelers, requiring a specific type of product, a large-scale network with differentiated classes
11 of service and a frequent flyer program permitting upgrades, which only the network carriers,
12 and not LCCs, can provide.

13
14 As *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), makes clear,

15 The boundaries of such a submarket may be determined by
16 examining such practical indicia as industry or public recognition
17 of the submarket as a separate economic entity, the product's
18 peculiar characteristics and uses, unique production facilities,
19 distinct customers, distinct prices, sensitivity to price changes, and
20 specialized vendors.

21 The record in this case, as evidenced by the defendants' own testimony, provides just
22 such "peculiar characteristics and uses" of the product (an extensive network, multiple classes
23 of service, frequent flyer programs allowing upgrades); "distinct customers" (business
24 travelers); and "specialized vendors" (network carriers), as *Brown Shoe* identifies as hallmarks
25 of a distinct relevant market. Defendants have thus admitted this market.

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27
28
**V. THE DEFENDANTS' SUBMISSIONS DO NOT REFUTE OTHER MARKETS
CLAIMED BY THE PLAINTIFFS**

The plaintiffs also will show that the effects of defendants' merger may be substantially
to lessen competition or to tend to create a monopoly not only in the 14 overlap airport pairs

1 resulting from the merger, but also in any and every airport pair where one defendant now
2 operates without actual competition from the other.

3 As to the overlap routes created by the merger, defendants argue that the relevant
4 markets should be city pairs, rather than airport pairs. This means, for example, that rather
5 than considering a relevant market to be flights from San Francisco International Airport to
6 JFK, the Court should consider the relevant market to be flights from the greater San Francisco
7 area, which includes the San Francisco, Oakland, and San Jose airports, to the greater New
8 York area, with JFK, LaGuardia, and Newark airports. Taking the broader market of city
9 pairs, rather than airport pairs, results, not surprisingly, in less competitive foreclosure from
10 defendants' merger than does using airport pairs.
11

12 On this issue, there is no legally mandated answer, as the rebuttal report of Professor
13 Bush makes clear in pointing out the split of authority on whether airport-to-airport routes are
14 preferable to city-to-city routes as relevant markets. Rebuttal Report, p. 4, n.5, citing DOJ
15 official Bruce McDonald, *Antitrust For Airlines*, available at
16 <http://www.justice.gov/atr/public/speeches/217987.htm>.;
17 www.gao.gov/new.items/d02293r.pdf; *U.S. v. Airline Tariff Publishing Co.*, 1994-2 Trade
18 Cases ¶ 70,687 (D.D.C., 1994); and *U.S. v. AMR Corp*, 140 F. Supp. 2d 1141, 1145-1146 (D.
19 Kan., 2001), (discussing allegations of monopolizing airport pair markets), *aff'd* 335 F. 3d
20 1109 (10th Cir., 2003). The answer depends on the facts of each case. Here, where business
21 travelers are the desired customers, Professor Bush notes that "it is clear that airlines charge
22 higher fares for airports that are likely business destinations than they do secondary airports
23 more likely accessed by leisure passengers." *Id.*, pp. 4-5. He finds this to be true for San
24 Francisco versus Oakland, Houston Intercontinental versus Houston Hobby, and for other
25 cities with multiple airports. *Id.*, pp. 5-7. This leads him to conclude not only that airport pairs
26 are appropriate markets in this case, but also that "to prove for purposes of a preliminary
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1 injunction hearing that airport pairs are relevant markets does not require sophisticated and
2 expensive econometric techniques.” *Id.*, p. 7.⁷

3 The other relevant market issue involves potential competition, as found by the
4 Supreme Court in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 528-29 (1973), to be
5 a basis for enjoining Falstaff from acquiring Narragansett, a local New England brewer, even
6 though Falstaff contended that it would not enter the market *de novo*. As the Court observed,
7 “Entry through merger by such a company, although its competitive conduct in the market may
8 be the mirror image of that of the acquired company, may nevertheless violate § 7 because
9 entry eliminates a potential competitor exercising present influence on the market.” 410 U.S.
10 at 532.

11 Here, Mr. Tilton states in his Testimony that [REDACTED]
12 [REDACTED] P. 7.⁸ Mr. Smisek testified in his
13 deposition that [REDACTED]
14 [REDACTED] Depo., [278:24]-[279:1]. He elaborated:
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] *Id.*, [208:8-14].

20 It is hard to imagine a clearer admission that defendants are now potential competitors
21 in every market in which one operates without the other, no matter how the markets are
22
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25 _____
26 ⁷ The DOJ’s decision to close its investigation on the basis of the divestiture of the Newark
27 gates also suggests, first, that defendants’ merger does present likely anticompetitive effects,
28 and, second, that airport pairs, rather than city pairs, are important, in that all of the
divestitures took place at only a single one of the three New York airports.

⁸ Tilton also states that [REDACTED]

[REDACTED] *Id.*

1 defined. Their merger will obviously eliminate that potential competition and is therefore in
 2 violation of Section 7, as *Falstaff* makes clear.⁹

3 **VI. THE BALANCE OF HARDSHIPS TIPS DECISIVELY IN PLAINTIFFS FAVOR**
 4 **BECAUSE THEY HAVE NO ADEQUATE REMEDY AT LAW**

5 Defendants argue that the balance of hardships tips in their favor because plaintiffs
 6 have an adequate remedy at law in damages, and because divestiture can cure any problems
 7 with their merger. Neither argument has merit.

8 First, defendants premise their damages argument on the settlement of prior litigation
 9 challenging the Delta-Northwest merger, in which the plaintiffs in that case accepted a cash
 10 payment in exchange for a dismissal with no equitable relief. Even if settlement of prior
 11 unrelated litigation were relevant to any issue in this case—and it is not—one cannot make the
 12 leap of logic to assume that the settlement in any way constitutes a measure of the plaintiffs’
 13 damages in that case. The defendants cannot point to a single item of evidence in the record in
 14 the Delta-Northwest case, and have not done so, indicating either a claim for damages by the
 15 plaintiffs or the amount of the claimed damages. Indeed, the suit was solely for equitable relief
 16 under Section 16 of the Clayton Act. The amount of the settlement could represent plaintiffs’
 17 attorney fees, their cost of suit, the defendants’ cost of litigation, a nuisance settlement for the
 18 defendants, a payment to eliminate the risk or uncertainty of litigation for either side, or
 19 consideration for some other unknown factor. The point is that it is impossible to know and
 20 unwise to speculate what the settlement represents.
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25 ⁹ As the Supreme Court said in *Brown Shoe*, 370 U.S. at 346, “We cannot avoid the
 26 mandate of Congress that tendencies toward concentration in industry are to be curbed in their
 27 incipency, *particularly when those tendencies are being accelerated through giant steps*
 28 *striding across a hundred cities at a time*. In the light of the trends in this industry we agree
 with the Government and the court below that this is an appropriate place at which to call a
 halt.” (Emphasis added.)

1 To turn a settlement of one case into a reason for denying relief in another unrelated
2 action is further destructive of the strong federal policy to encourage the settlement and
3 extrajudicial resolution of lawsuits, *Marek v. Chesny*, 473 US 1, 10 (1985) (Fed.R.Civ.P. 68
4 “expresses a clear policy of favoring settlement of all lawsuits”); *Class Plaintiffs v. City of*
5 *Seattle*, 955 F.2d 1268, 1276 (9th Cir., 1991) (noting “strong judicial policy that favors
6 settlements”); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir., 1976) (“Public
7 policy strongly favors settlement of disputes without litigation.”) The plaintiffs in this suit and
8 the Delta-Northwest case overlap, but are not totally identical. There is no authority cited by
9 the defendants that would permit this Court to speculate on the basis for the settlement in
10 Delta-Northwest as a ground for denying relief in this wholly equitable action. Nor is there
11 logic, fairness, or justice in doing so.

12
13 Equally unsupported is the defendants’ argument that, post-merger, damages are
14 readily susceptible of calculation. Once the merger occurs, the harms anticipated include not
15 merely an increase in airfares, but a reduction in output, including elimination of routes, fewer
16 available seats, reduced frequency of flights, and diminished quality of service. Putting a
17 dollar value on the present value of possible future fare increases is difficult enough; indeed
18 defendants will no doubt contend that whatever number plaintiffs come up with is
19 impermissibly speculative. Attaching a number to the remaining items involving reduced
20 output is even more so, so much so that defendants’ contention that plaintiffs have an adequate
21 remedy at law in damages is absurd.

22
23
24 As to divestiture, although the remedy may be available to private antitrust plaintiffs,
25 *California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990), the nationwide nature of the violations
26 in this case makes post-merger divestiture particularly inadvisable. Defendants no doubt
27 consider that the only negative outcome of this litigation might be a finding that the effect of
28 their merger is likely to be a substantial lessening of competition on one or more specific

1 routes, which the Court can then order divested. To the contrary, the evidence supports not
2 only foreclosure on specific routes, but much broader violations on a nationwide scale, which
3 can be cured only by a complete unraveling of defendants' merger, an undertaking this Court
4 might well be loath to assume post-merger, particularly when it can be avoided by enjoining
5 the merger before its consummation.

6 These violations include both the likely foreclosure of competition for business
7 travelers by the network carriers, and the likely foreclosure of potential competition between
8 the defendants on every route one defendant flies without the other being present. Competition
9 in both markets takes place on a nationwide, if not worldwide, basis. Hence, the likelihood of
10 a substantial lessening of competition in either market or both markets can be cured only by a
11 complete divestiture once the merger has closed, not by a piecemeal divestiture of specific
12 routes.
13

14 Defendants also contend that plaintiffs have not suffered "antitrust injury," and therefore
15 are barred from equitable relief. In doing so, defendants ignore the prospective aspects of both
16 Sections 7 and 16 of the Clayton Act. Neither requires harm or injury actually to have occurred
17 for equitable relief to be available. "Section 7 was enacted to prevent anticompetitive mergers in
18 their incipiency. Therefore, all that is necessary [under Section 7] is that the merger create an
19 appreciable danger of [anticompetitive] consequences in the future." *California v. Sutter Home*
20 *System*, 130 F.Supp.2d 1109, 1117-18 (N.D. Cal. 2001) (emphasis added) quoting *U.S. v.*
21 *Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (quotations and other citation omitted).
22 "Competition is so important that mergers or acquisitions that 'may' lessen competition are
23 prohibited. The Supreme Court has specifically recognized that by using the phrase 'may,'
24 Congress was concerned with probabilities, not certainties." *Bon-Ton Stores, Inc. v. May*
25 *Department Stores Co.*, 881 F.Supp. 860, 867 (W.D.N.Y. 1994), citing *Brown Shoe Co. v. U.S.*,
26 370 U.S. 294, 323 (1962).
27
28

1 The Supreme Court has articulated the specific basis for obtaining injunctive relief under
2 Section 16 of the Clayton Act in language demonstrating plaintiffs' entitlement here:

3 . . . Section 16 of the Clayton Act, 15 U.S.C. § 26, which was
4 enacted by the Congress to make available equitable remedies
5 previously denied private parties, invokes traditional principles of
6 equity and authorizes injunctive relief upon the demonstration of
7 "threatened" injury. That remedy is characteristically available
8 even though the plaintiff has not yet suffered actual injury . . . , he
9 need only demonstrate a significant threat of injury from an
10 impending violation of the antitrust laws or from a contemporary
11 violation likely to continue or recur.

12 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). The standing
13 requirements under Section 16 of the Clayton Act to obtain injunctive relief are also different
14 from and less stringent than those under Section 4 applicable to damage claims. *Hawaii v.*
15 *Standard Oil Co.*, 495 U.S. 251, 261 (1972); *Lucas Automotive Eng'g v. Bridgestone/Firestone,*
16 *Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998). Finally, Chief Judge Walker of this District has
17 expressly held that consumers, such as plaintiffs, have standing to challenge anticompetitive
18 mergers. *Reilly v. The Hearst Corp.*, 107 F. Supp. 2d at 1194-95.

19 The last matter plaintiffs will address is defendants' contention that plaintiffs must post a
20 substantial bond in order to obtain an injunction. Defendants are wrong. This Court has
21 discretion to order a nominal bond, or no bond at all, where the requirement of a bond would
22 effectively deny plaintiffs access to judicial review of their claims. *People ex rel. Van De Kamp*
23 *v. Tahoe Regional Plan*, 766 F. 2d 1319, 1325-26 (9th Cir., 1985) ("The court has discretion to
24 dispense with the security requirement, or to request mere nominal security, where requiring
25 security would effectively deny access to judicial review."); *Continental Oil Company v. Frontier*
26 *Refining Company*, 338 F. 2d 780, 782-83 (10th Cir., 1964); *Wayne Chemical, Inc. v. Columbus*
27 *Agcy. Serv. Corp.*, 567 F. 2d 692, 701 (7th Cir., 1977). Here, the exercise of such discretion is
28 more than appropriate given that the defendants have declined plaintiffs' offer to consolidate this
hearing with trial on the merits, and the disparity in resources between the parties.

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Dated: August 29, 2010

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