STEVEN C. SUNSHINE, *admitted pro hac vice*
steven.sunshine@skadden.com
GARY A. MACDONALD, *admitted pro hac vice*
gary.macdonald@skadden.com
SARA L. BENSLEY, *admitted pro hac vice*
sara.bensley@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

ALLEN J. RUBY (SBN: 47109)
allen.ruby@skadden.com
THOMAS V. CHRISTOPHER (SBN: 185928)
thomas.christopher@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue
Palo Alto, California 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570

Attorneys for Defendants
SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP., and
AIRTRAN HOLDINGS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYNE TALEFF, et al.

Plaintiffs,

v.

SOUTHWEST AIRLINES CO., et al.

Defendants.

CASE NO.: CV-11-02179-JW

NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Filed Under Separate Cover:

(1) REQUEST FOR JUDICIAL NOTICE;

and

(2) DECLARATION OF THOMAS V. CHRISTOPHER IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

Date: October 31, 2011
Time: 9:00 a.m.
Courtroom: Courtroom 15, 18th Floor
Before: Hon. James Ware

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on October 31, 2011 at 9:00 a.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable James Ware, Courtroom 15, 18th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, Defendants Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings, Inc., will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiffs' First Amended Complaint for Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act (the "Amended Complaint") with prejudice. The motion to dismiss is based upon this Notice and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice, the Declaration of Thomas V. Christopher, the arguments of counsel, and all other matters properly considered by the Court. This motion to dismiss is brought on the grounds that the Amended Complaint fails to state a claim against Defendants upon which relief can be granted.

At the hearing, Defendants will request that the Court dismiss this matter with prejudice for failure to state a claim.[1]

DATED: August 8, 2011

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Steven C. Sunshine
STEVEN C. SUNSHINE
Attorneys for Defendants
SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP., and
AIRTRAN HOLDINGS, INC.

[1] Defendants' counsel contacted Plaintiffs' counsel to coordinate a mutually convenient hearing date but were not able to confirm that Plaintiffs' counsel would be available on October 31st.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES (CIVIL L. R. 7-4(A)(3))

1. Whether the Amended Complaint should be dismissed on the ground that it fails to state a claim against Defendants under Section 7 of the Clayton Antitrust Act because Plaintiffs have failed to allege a plausible relevant product market.

2. Whether the Amended Complaint should be dismissed because Plaintiffs have failed to allege facts sufficient to demonstrate that they are entitled to injunctive relief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have brought a meritless strike suit that never should have been filed, and it is now time for it to end. The Supreme Court and the Ninth Circuit have instructed that the courts must be vigilant to dismiss unmeritorious antitrust lawsuits at the pleading stage "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). This is such a lawsuit.

At the thirteenth hour, seven months *after* the $1.4 billion merger of Southwest Airlines and AirTran Airways had been announced, and a day *after* the merger had closed, Plaintiffs – a small group of individual alleged air travelers – filed their initial complaint seeking to block the consummated transaction.[2] Unfazed by their inexplicable delay, Plaintiffs then sought a futile *ex*

[2] In the meantime, the U.S. Department of Justice Antitrust Division ("DOJ Antitrust Division") investigated the competitive implications of the merger and, a month before Plaintiffs filed their complaint, announced its conclusion that the transaction was not only *unlikely* to substantially lessen competition but was, in fact, likely to benefit competition. *See* Press Release, Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of AirTran, at 1 (Apr. 26, 2011) ("DOJ Press Release"), http://www.justice.gov/atr/public/press_releases/2011/270293.pdf. A copy of the DOJ Press Release is attached to the Declaration of Thomas V. Christopher in Support of the Request for Judicial Notice (hereinafter "RJN"), which is being filed today under separate cover. (RJN Ex. 1 (DOJ Press Release).) In ruling on a motion to dismiss for failure to state a claim, a court may consider, in addition to the pleadings, a matter that is properly the subject of judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *see also Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (on a motion to dismiss, a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment).

parte temporary restraining order ("TRO") to block the already-closed transaction, which this Court correctly denied. Plaintiffs then filed a meritless appeal of the TRO denial with the Ninth Circuit, coupled with a wholly improper "emergency" motion for a hold-separate order pending resolution of their appeal challenging a *different* airline merger.[3] (RJN Ex. 8 (Emergency Motion for Injunction Seeking Temporary 'Hold Separate' Order Pending Disposition of Malaney, et al. v. UAL Corporation, et al." (the "Emergency Motion").) The Ninth Circuit summarily dismissed both their appeal of this Court's TRO denial (for lack of jurisdiction) and their "emergency" motion (as moot). *Taleff v. Southwest Airlines Co.*, No. 11-16173, slip op. at 1 (9th Cir. Jun. 2, 2011).

Now that Plaintiffs' appeal is over, this Court should put an end to Plaintiffs' suit by dismissing the Amended Complaint for its failure to state a claim for which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(6), for at least the following two independent reasons.

First, Plaintiffs fail to plead a plausible, cognizable relevant market, which dooms their substantive claim under Section 7 of the Clayton Act, 15 U.S.C. § 18. They have alleged a "national" market in air passenger travel, and, in their Amended Complaint filed during the pendency of their appeal, added a national "submarket" consisting of "low cost carriers" ("LCCs"). (Am. Compl. ¶19.) Plaintiffs' alleged market and "submarket," however, both fail in light of the Ninth Circuit's holding in *Malaney v. UAL Corp.*, No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011), which is controlling and dispositive on this legal point: an alleged national market in air travel, as Plaintiffs allege here, "fail[s] to establish a relevant market for antitrust analysis, . . . a 'necessary predicate' for making a claim under § 7 of the Clayton Act." *Id.* at *1. This point alone requires dismissal of Plaintiffs' complaint.

Second, even assuming, *arguendo*, that Plaintiffs have alleged a plausible relevant market, which they have not, they are not entitled to the belated, extreme remedy they seek of post-merger divestiture, which if this Court grants to a private party would be wholly unprecedented. Pursuant to principles of equity that can be determined now by this Court as a matter of law, Plaintiffs are

[3] The other appeal, involving a challenge to the merger of United Air Lines and Continental Airlines, was *Malaney v. UAL Corp.* No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011).

not entitled to the extraordinary remedy of unwinding this $1.4 billion merger. Plaintiffs are 43 individuals who claim to intend to take certain flights in the future. Even accepting all of their claims at face value (which of course Defendants do not), the maximum total harm to Plaintiffs is *de minimis* at best.[4] In contrast, a divestiture would impose enormous costs to the corporations, cause potential dire and immediate consequences to Defendants' shareholders, inflict substantial uncertainty and job losses to employees, and seriously disrupt air travel for passengers across the country. Simply put, the balance of harms is so heavily weighted against Plaintiffs that their case can and should be dismissed with prejudice now without further burdening the Courts and the parties. Furthermore, Plaintiffs' own delay in bringing this action defeats any right they might have to injunctive relief. Plaintiffs inexplicably waited until after the merger closed to even file this action and now three months later have continued to sit on their hands. Their time to be permitted to even attempt to block this merger is long past. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8th Cir. 2010) (affirming dismissal of private antitrust challenge to InBev's acquisition of Anheuser-Busch because plaintiffs' only remaining remedy, divestiture, was inappropriate as a matter of law where plaintiffs had delayed bringing suit until two months after deal was announced and failed in their bid for a preliminary injunction).

In sum, it is time for this Court to dismiss Plaintiffs' meritless suit. The Amended Complaint fails both to state a plausible substantive claim, as addressed directly by the Ninth Circuit in *Malaney, supra*, and, as a matter of equity, the relief sought by these 43 Plaintiffs is overwhelmed by the countervailing harms to the now-combined Defendants, their millions of additional customers, as well as their now-combined boards, management and shareholders. Because Plaintiffs have already amended their complaint, and any further amendment would be futile, the Amended Complaint should be dismissed with prejudice.

II. RELEVANT FACTS

On September 27, 2010, defendants Southwest Airlines Co. ("Southwest") and AirTran

---

[4] For illustrative purposes only, consider the following example: if all 43 passengers fly twice per year, the average cost of a flight is $250, and the merger raises price by 10%, then the *total* damage to the class in any year is *only* $2,150.

Holdings, Inc. ("AirTran") publicly announced their proposed merger, in a transaction valued at approximately $1.4 billion. (Am. Compl. ¶ 1.) Seven months later, on April 26, 2011, the U.S. Department of Justice Antitrust Division announced its clearance of the merger without conditions, and found that the merger would have pro-competitive benefits. (RJN Ex. 1 (DOJ Press Release).) Thereafter, on May 2, 2011, Southwest and AirTran consummated their merger. (Order Denying Plaintiffs' Ex Parte Motion for a Temporary Restraining Order ("Order"), at 1:17.) On May 3, 2011, one day *after* the Southwest/AirTran merger closed, Plaintiffs filed their complaint in this action, seeking declaratory and injunctive relief pursuant to Section 16 of the Clayton Act, alleging that Defendants' acquisition was likely to result in a substantial lessening of competition in violation of Section 7 of the Clayton Act. (Am. Compl. ¶ 92; Order at 1:16-17.) At the same time, Plaintiffs filed an *ex parte* motion for a TRO purportedly attempting to block the already-consummated merger. (Order at 1:15-17, 2:3-8.) The next day, this Court entered an order denying the TRO, (*id.* at 2:17), at which point Plaintiffs raced to the U.S. Court of Appeals for the Ninth Circuit, even though a TRO denial is generally not appealable and the denial Plaintiffs sought to challenge clearly did not meet the narrowly circumscribed exceptions. (Notice of Appeal.) The appeal was wholly unfounded, given that Plaintiffs plainly could have no real interest in pursuing a 14-day TRO blocking the consummation of the already-consummated merger.

That same day, May 9, 2011, Plaintiffs filed with the Ninth Circuit a motion styled as an "Emergency Motion for Injunction Seeking Temporary 'Hold Separate' Order Pending Disposition of Malaney, et al. v. UAL Corporation, et al." (the "Emergency Motion"). (RJN Ex. 8.) Among other things, the Emergency Motion purported to seek an injunction in the first instance from the Ninth Circuit, not pending the appeal of this Court's TRO denial, but pending a decision in a *different* appeal,[5] on the unsupported grounds that it would be impracticable to have sought a

[5] *Malaney v. UAL Corp.*, No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010), *aff'd*, No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011), is a lawsuit challenging the merger of United Air Lines and Continental Airlines. Defendants are not parties to that action. Although both *Malaney* and this suit involve airline mergers (and forty of the same plaintiffs and the same plaintiffs' counsel), *Malaney* was filed *before* the United/Continental merger closed and the plaintiffs there sought a preliminary injunction prior to closing, which was denied after an evidentiary hearing. *Id.* at *1.

preliminary injunction from this Court. (RJN Ex. 8, at 2, 4 (Emergency Motion).)

On May 12, 2011, Defendants moved to dismiss the Ninth Circuit appeal for lack of jurisdiction and also noted fatal pleading flaws in Plaintiffs' initial Complaint, including its failure to allege a plausible relevant market. (RJN Ex. 9, at 14-16 (Mot. to Dismiss Appeal).) In apparent response to these observations, Plaintiffs filed an Amended Complaint on May 20, 2011, that added an alleged submarket consisting of LCCs, but maintained the unsupported and implausible position that air travel markets are nationwide in geographic scope.[6] (Am. Compl. ¶ 19.)

In light of the proceedings in the Ninth Circuit, the parties stipulated on May 26, 2011, to a stay of the proceedings in this Court pending issuance of the Ninth Circuit's mandate, and to an extension of the deadline for Defendants to answer or otherwise plead until 30 days after the issuance of the mandate. On May 27, 2011, this Court entered an order consistent with these stipulations and further required a Joint Status Statement and scheduled a status conference for August 29, 2011.

As events turned out, Plaintiffs were especially rash in seeking to tie their appeal to *Malaney*. Not only was that an improper procedural tactic, but on May 23, 2011, the Ninth Circuit affirmed the district court's decision denying a preliminary injunction in *Malaney* on the ground that Plaintiffs failed to establish a relevant market for purposes of antitrust analysis. *Malaney v. UAL Corp.*, No. 10-17208, 2011 WL 197980 (9th Cir. May 23, 2011). For reasons discussed herein, the *Malaney* ruling requires dismissal of Plaintiffs' Amended Complaint in this case for failure to state a claim.

On June 2, 2011, before briefing was even complete on Defendants' motion to dismiss Plaintiffs' appeal of this Court's TRO denial, the Ninth Circuit summarily dismissed Plaintiffs' appeal for lack of jurisdiction and concomitantly dismissed the Plaintiffs' Emergency Motion as

---

[6] The initial Complaint had alleged: "The relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States, and the transportation of airline passengers to and from the United States on international flights to Mexico and the Caribbean." (Compl. ¶ 19.) Plaintiffs' Amended Complaint alleges: "The relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States. There are also submarkets, one of which is Low Cost Carriers ("LCCs") of airline passengers in the United States." (Am. Compl. ¶ 19.)

moot. The Ninth Circuit mandate issued on June 24, 2011.

III. ARGUMENT

A. Standard Of Review

In *Twombly*, the Supreme Court clarified the pleading standards under the Federal Rules of Civil Procedure and held that a complaint is subject to dismissal pursuant to Rule 12(b)(6) unless it pleads enough facts, as distinct from mere legal conclusions, to show that the claim is "plausible on its face." 550 U.S. at 558-59, 570; *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("Only a complaint that states a plausible claim for relief survives a motion to dismiss."). In other words, a complaint "must be dismissed" unless the plaintiff alleges sufficient facts to "nudge[] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, and "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*). Careful application of this standard is particularly important in antitrust cases, given the potential for extremely burdensome discovery. As the Ninth Circuit explained in *Kendall*, "discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." 518 F.3d at 1047 (citation omitted); *see also Twombly*, 550 U.S. at 558 (recognizing particularly substantial discovery costs in antitrust cases).

B. Plaintiffs Have Failed To State A Section 7 Claim Because They Have Failed To Allege A Plausible Relevant Product Market

Plaintiffs' Amended Complaint claims that the merger of Southwest and AirTran violates Section 7 of the Clayton Act (Am. Compl. ¶ 92), which prohibits mergers that may substantially lessen competition in a relevant market.[7] "Defining and proving the relevant market for antitrust analysis is a 'necessary predicate' to Plaintiffs' success on the merits of their Clayton Act claim." *Malaney*, 2011 WL 1979870 at *1 (citing *Brown Shoe*, 370 U.S. at 324); *see also F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) ("Without a well-defined relevant market, an

[7] Section 7 prohibits any merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

examination of a transaction's competitive effects is without context or meaning."); *United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001) ("Not only is the proper definition of the relevant … market the first step in [a] case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anti-competitive effects of the transaction.").

Therefore, as a threshold matter, Plaintiffs must allege a *plausible* relevant market in order to survive dismissal of their antitrust claim. *See Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008) ("There are . . . some legal principles that govern the definition of an antitrust 'relevant market,' and a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable." (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997)); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 WL 1541257 at *5 (N.D. Cal. Apr. 16, 2010) (dismissing lawsuit challenging merger of Pfizer and Wyeth on the grounds that plaintiffs failed to plead a facially plausible relevant market), *aff'd*, No. 10-15978, 2011 WL 1898150 (9th Cir. May 19, 2011).

For purposes of antitrust analysis, a "relevant market" is defined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Although products "need not be perfectly fungible" to be included in the relevant market, they must be "sufficiently interchangeable that a potential price increase in one product would be defeated by the threat of a sufficient number of customers switching to the alternate product." *Malaney*, 2011 WL 1979870 at *1. "Whether products are part of the same or different markets under antitrust law depends on whether consumers view those products as reasonable substitutes for each other and would switch among them in response to changes in relative prices." *Apple, Inc. v. Pystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008); *see also Golden Gate Pharmacy Servs.*, No. C-09-3854 MMC, 2010 WL 1541257 at *2 (dismissing Second Amended Complaint challenging Pfizer's acquisition of Wyeth because plaintiffs failed to allege consumer behavior consistent with the broad alleged relevant markets).

Here, Plaintiffs' alleged relevant product markets are facially implausible, as the Ninth

Circuit recently found in *Malaney*. Plaintiffs allege only air travel markets of national scope as follows: "The relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States. There are also submarkets, one of which is Low Cost Carriers ("LCCs") of airline passengers in the United States." (Am. Compl. ¶ 19.) Plaintiffs fail to allege that all flights in the United States are reasonably interchangeable, or even that all flights by LCCs in the United States are reasonably interchangeable, and indeed such an allegation would be absurd.

In *Malaney*, the Ninth Circuit held that where the complaint had alleged a national market in air travel, "Plaintiffs failed to establish a relevant market for antitrust analysis, a necessary predicate for making a claim under § 7 of the Clayton Act." *Malaney*, 2011 WL 1979870 at *1. Affirming the district court's denial of a preliminary injunction to block the merger of United and Continental, the Ninth Circuit referred to Supreme Court precedent for the rule that a relevant market is to be determined based on "'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. at 325 (1962)). The national market in air travel alleged by the *Malaney* plaintiffs failed to meet this standard. Agreeing with the district court, the Ninth Circuit explained, "a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami. No matter how much an airline raised the price of the San Francisco-Newark flight, a passenger would not respond by switching to the Seattle-Miami flight." *Id.*

Here, as in *Malaney*, Plaintiffs have only alleged air travel markets that are nationwide in scope. Exactly as in *Malaney*, Plaintiffs here allege that "[t]he relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States." (Am. Compl. ¶ 19; Compl. for Inj. Relief Against Violations of Section 7 of the Clayton Act ¶ 29, *Malaney v. UAL Corp.*, No. 10-cv-2858 (N.D. Cal. filed June 29, 2010) (RJN Ex. 3 (*Malaney* Plaintiffs' Complaint).) *Malaney* squarely held that this is an improper relevant market for purposes of antitrust analysis, *Malaney* at *1, and, consequently, it does not satisfy Plaintiffs' obligation to plead a plausible relevant market.

Plaintiffs' Amended Complaint further alleges a "submarket" of "Low Cost Carriers

('LCCs') of airline passengers in the United States," (Am. Comp. ¶ 19), but this alleged nationwide submarket suffers from the same infirmity as the larger one consisting all air travel in the United States: Plaintiffs fail to plead sufficient facts to permit an inference of interchangeability among all so-called "LCC" flights in the United States, nor could they do so. Borrowing the example from *Malaney*, a passenger would not consider an LCC flight from San Francisco to Newark to be interchangeable with an LCC flight from Seattle to Miami, no matter how much an airline raised the price of the San Francisco-Newark flight.

Furthermore, Plaintiffs themselves allege that all carriers compete against all others. (Am. Compl. ¶ 82 ("Each major U.S. passenger airline, including LCC defendants Southwest and AirTran, has the ability and financial capacity to offer competitive flights between any two major cities in the United States, whether or not they are currently offering such flights."); ¶ 83 ("Each major U.S. passenger airline, including LCC defendants Southwest and AirTran, has the ability and financial capacity to establish a competitive presence in any of the major airports located throughout the United States by, inter alia, leasing or otherwise utilizing terminal slots, hiring employees, and directing more flights to and from the given airport.").) Thus, from the face of the Amended Complaint a submarket comprised only of so-called LCCs is implausible.

Plaintiffs must plead a plausible relevant market to survive dismissal, and because they have failed to do so, even after an attempt at amendment, the Amended Complaint must be dismissed on this ground alone.[8]

---

[8] Plaintiffs' Amended Complaint also fails for additional reasons, including the failure to allege any evidentiary facts establishing a plausible basis to believe that the merger may substantially lessen competition, an essential element of a Section 7 claim. *See, e.g., Kendall v. Visa*, 518 F.3d 1042, 1047-48 (9th Cir. 2008) (dismissing claim where "appellants pleaded only ultimate facts, such as conspiracy, and legal conclusions[, but] failed to plead the necessary evidentiary facts to support those conclusions"). Even assuming, *arguendo*, that Plaintiffs had alleged a proper relevant market, their allegations of harm to competition still would not satisfy the Rule 8 pleading standard as set out in *Twombly*, *Iqbal* and *Kendall*, because Plaintiffs assert the "probable and planned anticompetitive effects" of the merger in wholly conclusory terms, without reference to any evidentiary facts. (*See, e.g.*, Am. Compl. ¶¶ 5-6, 58, 80, 91.) Those allegations amount to nothing more than "[t]hreadbare recitals of the elements of a cause of action," and therefore are insufficient to show that the merger is likely to result in a substantial lessening of competition in any relevant market. *Iqbal*, 129 S. Ct. at 1949.

C. Plaintiffs' Claim Should Be Dismissed Because They Are Not Entitled To Injunctive Relief As A Matter Of Law

Plaintiffs are not entitled to injunctive relief. We are now at the ten-month mark after the proposed merger was announced in September 2010. Plaintiffs delayed for seven months after the announcement before finally filing their lawsuit on May 3, 2011, the day *after* the merger was consummated. Since the Southwest/AirTran merger closed approximately three months ago, AirTran as an independent public company no longer exists, the companies' boards of directors and management have combined, the companies' shareholders have combined, the companies' employees have largely combined and, in general, the companies' operations have been substantially integrated. (RJN Ex. 2 (AirTran's 8-K).) For the reasons stated below, Plaintiffs cannot make out any of the necessary elements to be entitled to injunctive relief and consequently, this action should be dismissed as a matter of law.

Section 16 of the Clayton Act provides a private cause of action for injunctive relief for a violation of the Clayton Act, including Section 7, "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue." 15 U.S.C. § 26.

Since the merger has already closed, the only Section 16 relief Plaintiffs might now seek is a divestiture. *See Ginsburg*, 623 F.3d at 1233 ("As the acquisition has now occurred, [plaintiffs] conceded at oral argument that the *only* equitable relief to which they would be entitled, if they ultimately prevailed on their potential competition theories, is divestiture." (emphasis in original)). Divestiture is an extreme remedy, and private plaintiffs shoulder a particularly heavy burden in seeking to undo an already-consummated merger, *Ginsburg*, 623 F.3d at 1233, and in fact a post-merger divestiture based on a private enforcement action would be unprecedented. Even with respect to a governmental enforcement action, the Supreme Court has cautioned that the mere availability of the divestiture remedy "does not, of course, mean that such power should be exercised in every situation in which the [federal] Government would be entitled to such relief."

California v. Am. Stores Co., 495 U.S. 271, 295 (1990). As a specific example, the Court explained that "equitable defenses such as laches … may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest." *Id.* at 296.

To obtain permanent injunctive relief, a plaintiff must prove "'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (quoting *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). As a matter of law, Plaintiffs' allegations do not satisfy any of these requirements, either singly or considered in combination.[9]

First, Plaintiffs have failed to plead evidentiary facts that would show they have suffered any injury, much less irreparable injury. Failure to plead this element, alone, requires dismissal of the associated claim, *e.g.*, *Graham v. Jones*, 709 F. Supp. 969, 974 (D. Or. 1974) (granting motion to dismiss a claim seeking injunctive relief where the plaintiffs "have not alleged facts that indicate they are threatened by immediate and irreparable injury"), as there is no point going forward with a claim for which the remedy sought is unavailable. Courts will not automatically assume that plaintiffs have suffered irreparable injury, and movants must assert sufficient evidence of irreparable harm in order for a court to grant the requested injunctive relief. *See, e.g.*, *Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp.*, Civ. No. 09-642-SLR, 2010 WL 3418203 at *2 (D. Del. Aug. 20, 2010) (denying plaintiff's request for permanent injunction due to plaintiff's failure to provide sufficient evidence of irreparable harm). Merely asserting a variety of conclusory and wholly speculative injuries, as Plaintiffs have done here, does not satisfy the requirement that a movant seeking a permanent injunction of a merger or acquisition demonstrate irreparable injury. *See Delco LLC v. Giant of Md., LLC*, Civ. No. 07-3522, 2007 WL 3307018 *19

[9] The requirements for preliminary injunctive relief are similar: Plaintiffs must establish a likelihood of success on the merits, irreparable harm, balance of harms tipping in their favor, and a public interest in an injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

(D.N.J. 2007); *Nat'l Credit Reporting Ass'n, Inc. v. Equifax, Inc.*, Civ. No. WDQ-08-2322, 2008 WL 4457781 *2 (D. Md. 2008) (denying plaintiffs' motions for Section 16 injunctive relief for alleged violations of Section 7 of the Clayton Act for movant's failure to demonstrate irreparable harm).

None of the purported injuries alleged by Plaintiffs in their Amended Complaint survives scrutiny. As an initial matter, because Plaintiffs failed to allege a plausible, cognizable relevant product market, by definition they cannot show any harm suffered in a relevant market. Further, even if they had alleged a plausible market, which they have not, Plaintiffs' own Amended Complaint controverts any claim of alleged harm. For example, Plaintiffs' allegation of a loss of service from AirTran due to reduced capacity (Am. Compl. ¶ 58) is controverted by their own allegations that "[e]very major U.S. passenger airline, including LCC defendants Southwest and AirTran, has the ability and financial capacity to offer competitive flights between any two major cities in the United States, whether or not they are currently offering such flights." (Am. Compl. ¶ 82; *see also* Am. Compl. ¶¶ 83-85.) Plaintiffs' own allegations show that Defendants' competitors stand ready, willing and able to offer Plaintiffs all of the services allegedly lost as a result of the merger.

Second, even if Plaintiffs could establish that they have suffered or may suffer an irreparable injury, Plaintiffs have not adequately alleged that money damages would be insufficient. Of course, to the extent the 43 individual Plaintiffs could prove their conclusory allegations that prices are likely to rise post-merger, and further assuming they could show harm to *themselves* as a result of such price changes, there is obviously a monetary remedy available at law adequate to compensate Plaintiffs' allegations of "higher ticket prices." (Am. Compl. ¶ 6.)

There is equally an adequate monetary remedy available for Plaintiffs' allegations of "diminished service," (Am. Compl. ¶ 6), for at least two reasons. Initially, the harms alleged by Plaintiffs, assuming there are any, would be readily monetizable, even with respect to the alleged reduction in flights and alleged deterioration of service. The expected consumer effects resulting from airline mergers can be monetized using economic modeling techniques. In addition, even though Plaintiffs have not sought money damages here, 21 of the 43 Plaintiffs were also plaintiffs

in a lawsuit challenging the Delta/Northwest merger, likewise seeking only declaratory and injunctive relief, which settled for $5 million. (RJN Ex. 4, at 629 (Excerpt of Transcript of Preliminary Injunction Hearing, *Malaney v. UAL Corp.*, No. 10-cv-2858 (hearing held Aug. 31, Sept. 1 and Sept. 17, 2010)).) If a monetary settlement was sufficient for the plaintiffs in that airline merger challenge, there is no reason to think money would be insufficient here.[10]

Third, the balance of hardships tilts heavily in favor of Defendants and thus does not permit injunctive relief. This is because the harm from unwinding the $1.4 billion merger would undoubtedly greatly exceed any of the alleged harms to these 43 Plaintiffs from the merger. A divestiture obviously would have a devastating effect on Southwest's shareholders, employees, and, indeed, the traveling public. Furthermore, a divestiture would be extremely difficult to accomplish *at all*, given that the merger has already closed, AirTran no longer exists as a separate entity, and Southwest and AirTran operations, finances, and personnel have already been substantially integrated. In the *Malaney* litigation, the plaintiffs themselves aptly explained some of the equitable problems with post-merger divestiture:

> "[D]ivestiture post-merger presents far too many problems to make it a preferable remedy to a preliminary injunction. First, it is obviously much easier to require people to stop what they intend to do than to require them to go back and undo what they have already done. Plaintiffs further presume that this Court has no great desire to put itself into the business of overseeing the unraveling and divestiture of a major merged network airline . . . ."

Plaintiffs' Post-Hearing Mem., *Malaney v. UAL Corp.*, No. 10-cv-2858 (N.D. Cal. Sep. 13, 2010) (RJN Ex. 5 (Plaintiffs' Post-Hearing Memorandum).) Given such obvious problems with divestiture as a suitable remedy, it is quite inexplicable that these Plaintiffs, almost all of whom were also plaintiffs in *Malaney*, chose not to challenge the Southwest/AirTran merger until after the merger had closed, when the extreme and difficult remedy of divestiture would be the only remedy left to seek.

In contrast to the obvious and severe harm that would result from a divestiture, it is wholly speculative what harm, if any, the 43 Plaintiffs might suffer if divestiture is denied. Indeed, there

[10] The ability to monetize any potential harms is, of course, a purely hypothetical point. Defendants do not concede that there has been or will be any harm from the merger.

are no factual allegations that indicate how often Plaintiffs use air travel, let alone their travel histories on Southwest or AirTran or their plans for the future that conceivably could be affected by the merger, apart from the bare allegations that (1) "Plaintiffs are individuals who have purchased airline tickets for travel within the United States in the past, and expect to continue to do so in the future," (Am. Compl. ¶ 6), and (2) "in the four years next prior to the filing of this action, each plaintiff has purchased airline tickets for travel within the United States, and each plaintiff expects to continue to purchase airline tickets for travel within the United States in the future." (Am. Compl. ¶ 8.) From the face of the Amended Complaint it is obvious that the balance of harms tips heavily toward Defendants and, consequently, an injunction requiring divestiture could never be granted.

The inequity of a post-merger divestiture is particularly obvious where the plaintiffs delayed their lawsuit until after the merger closed. Indeed, "equity aids the vigilant, not those who slumber on their rights." *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989). Here, Plaintiffs' own delay in bringing suit weighs against granting them injunctive relief. *NACCO Indus. v. Applica, Inc.*, No. 1:06-cv-3002, 2006 U.S. Dist. LEXIS 91940, at *32 (N.D. Ohio Dec. 20, 2006) ("plaintiffs were aware of a proposed merger well before the TRO [aimed at stopping the transaction] was filed" but nonetheless "waited until the eleventh hour to file" their complaint and request for injunctive relief). Not only did Plaintiffs delay bringing suit until more than seven months after the transaction was publicly announced and after it had already closed, but they also neglected to seek any kind of timely injunctive relief. Logically, if Plaintiffs wanted injunctive relief against Southwest and AirTran, they immediately should have asked the Court for a hold-separate order or a preliminary injunction to halt integration, instead of wasting time seeking a TRO to block the consummation of the already-consummated transaction, then trying to appeal the inevitable denial of that relief. Counsel representing Plaintiffs has indicated in lawsuits challenging other mergers that they fully appreciate the difference between a pre-merger TRO to block the consummation of transaction and a post-merger injunction requiring that assets be held separate. *Compare, e.g.*, Pls' Notice of Mot., Mot & Applic. for TRO and Order to Show Cause; Mem. of P&A in Supp. Thereof, *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 09-cv-

3854-MMC (N.D. Cal. Oct. 13, 2009) (seeking a pre-closing TRO to block the closing of the proposed merger) (RJN Ex. 6), *with* Pls' Notice of Mot., Mot & Applic. for TRO and Order to Show Cause; Mem. of P&A in Supp. Thereof, *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 09-cv-3854-MMC (N.D. Cal. Oct. 16, 2009) (seeking a post-closing hold-separate TRO to prohibit integration of the merged companies) (RJN Ex. 7). Given that the merger occurred months ago and Plaintiffs sat on their hands and continue to do so, it is apparent from Plaintiffs' own behavior that any perceived harm to them from the merger is minimal or nonexistent.

Finally, the public interest would be disserved by a divestiture. "While the public certainly has a strong interest in the enforcement of the antitrust laws, it would not in any way serve those interests for the Court to enjoin activities that have not been shown to have anticompetitive tendencies." *Delco LLC*, 2007 WL 3307018 at *20. Here, no plausible anticompetitive tendencies have been alleged. Furthermore, the DOJ Antitrust Division, which exists to serve the public, decided not to challenge the Southwest/AirTran merger because it found, "[a]fter a thorough investigation, . . . that the merger is not likely to substantially lessen competition." (RJN Ex. 1.) Further, the DOJ Antitrust Division stated that it "did not challenge the acquisition after considering the consumer benefits from the new service" expected on routes that neither Southwest nor AirTran served before the merger, "including new connecting service through Atlanta's Hartfield Jackson International Airport from cities currently served by Southwest to cities currently served by AirTran." (RJN Ex. 1.) It cannot be in the public interest to force the unwinding of a $1.4 billion merger in the face of a strike suit by 43 individual Plaintiffs, particularly where the DOJ Antitrust Division has concluded that the public is likely to benefit from the merger.

Ginsburg is instructive. *Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8th Cir. 2010). In that case, the Eighth Circuit affirmed the dismissal of a private antitrust suit challenging InBev's acquisition of Anheuser-Busch Companies, Inc., holding that the injunctive relief sought by the plaintiffs "is barred as a matter of law." *Id.* at 1236. There the potential transaction was highly publicized as of June 2008, and InBev reached a deal in July 2008 to buy Anheuser-Busch, the largest brewer in the United States, for $52 billion. *Id.* at 1230-31. The plaintiffs did not file their complaint until two months later, on September 10, 2008, "seeking orders preliminarily and

permanently 'enjoining [D]efendants from consummating their acquisition'." *Id.* at 1230 (alteration in original).

The *Ginsburg* plaintiffs unsuccessfully sought a preliminary injunction, with the district court concluding that it was "overwhelmingly likely that Plaintiffs cannot succeed on the merits" and that the plaintiffs' claim of antitrust injury was "speculative." *Id.* at 1232. The transaction closed that same day, "with no opposition by the government's antitrust enforcers," who had investigated the transaction and entered into a consent decree to resolve identified competitive concerns.[11] *Id.* at 1235. The plaintiffs then pursued an unsuccessful interlocutory appeal of the denial of the preliminary injunction, while the defendants moved for judgment on the pleadings. *Id.* at 1232. The private plaintiffs also unsuccessfully attempted to intervene in the district court approval proceedings for the consent decree between the DOJ Antitrust Division and the defendants, with the plaintiffs ultimately appearing as amici curiae in opposition to the consent decree. *Id.* On August 3, 2009, the district court in Minnesota granted defendants' motion for judgment on the pleadings, and about a week later a district court in the District of Columbia approved the DOJ Antitrust Division consent decree notwithstanding the plaintiffs' criticism. *Id.*

Thus, although the *Ginsburg* plaintiffs sued while the transaction was still pending, the multi-billion dollar deal was already consummated (with no objection from government regulators) by the time InBev and Anheuser-Busch moved for judgment on the pleadings. Against this backdrop, the Eighth Circuit noted that the only remaining remedy available at that point in time would be divestiture, which is the "most drastic" of antitrust remedies. *Ginsburg*, 623 F.3d at 1234. The court found that principles of equity demanded rejection of the divestiture remedy sought by the plaintiffs, who had delayed bringing suit for two months and then failed in their bid for a preliminary injunction. The Eighth Circuit summed up its affirmance of the dismissal of plaintiffs' action as follows:

> As the only equitable remedy Plaintiffs seek would not be appropriate, granting the relief they request on appeal would result only in extensive discovery and an unsuccessful trial that would

[11] The consent decree required the sale of InBev's Labatt USA assets to a government-approved buyer. *Ginsburg*, 623 F.3d at 1232.

> increase the cost of brewing and selling beers Plaintiffs drink. Increased costs inevitably lead to higher prices, the very economic injury Plaintiffs sued to prevent. We decline their request for a Pyrrhic procedural victory. When the issue is equitable remedies, procedural perfection must yield to practical reality.

Id. at 1236.

In sum, taken singly or balanced in combination, Plaintiffs have not pleaded the evidentiary facts necessary to showing, as a matter of equity, that they are entitled to permanent injunctive relief. Indeed, the clear balance of hardships weighs heavily in favor of Defendants, given the catastrophic effect a divestiture would have on the now-combined company and its now-combined board of directors, management, employees, and shareholders, as well as the increased cost and disruption to the millions of Southwest/AirTran customers beyond these 43 Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the action, with prejudice.[12]

DATED: August 8, 2011

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Steven C. Sunshine
STEVEN C. SUNSHINE
Attorneys for Defendants
SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP., and
AIRTRAN HOLDINGS, INC.

[12] Where amendment would be futile, no opportunity to replead is warranted. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (finding that leave to amend need not be granted when an amendment would be futile). Further amendment would be futile here. Plaintiffs' initial complaint had failed to allege a plausible relevant market, and when Defendants pointed out this deficiency in their briefing on the Motion to Dismiss the Appeal, Plaintiffs amended their complaint to change the alleged market definitions but failed to cure the fundamental deficiency. Similarly, no amendments could alter the equitable considerations that strongly weigh against an injunction.