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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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND IN SUPPORT OF DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Date: November 3, 2011
Time: 6:30 p.m.
Courtroom: Courtroom 15, 18th Floor
Before: Hon. James Ware

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I. INTRODUCTION

In Defendants' opening brief in support of their Motion to Dismiss Plaintiffs' Amended Complaint ("Motion to Dismiss"), Defendants demonstrated that Plaintiffs' First Amended Complaint for Injunctive Relief Against Violations of Section 7 of the Clayton Antitrust Act ("Amended Complaint") fails, as a matter of law, for two independent reasons and thus must be dismissed. First, Plaintiffs have failed to plead a plausible, cognizable relevant market, which is a necessary predicate for every claim made under Section 7 of the Clayton Act, 15 U.S.C. § 18. Second, the Amended Complaint seeks only injunctive relief, and Plaintiffs' tardy efforts to unwind a $1.4 billion merger do not and cannot satisfy the standards for such extraordinary relief. In Plaintiffs' Opposition to Defendants' Motion to Dismiss Complaint and Opposition to Defendants' Request for Judicial Notice ("Opposition"), Plaintiffs do not counter either of Defendants' arguments.

First, incredibly, with regard to the relevant market Plaintiffs simply ignore the Ninth Circuit's decision in *Malaney v. UAL Corp.*, No. 10-17208, 2011 WL 1979870 (9th Cir. May 23, 2011), which is dispositive in the instant case. In *Malaney*, the Ninth Circuit rejected the plaintiffs' allegation—identical here—that, for purposes of antitrust analysis, the geographic dimension of a relevant airline market is nationwide in scope. *Id.* at **1-2. Plaintiffs' purported relevant product markets necessarily fail because they are each tied to the same "national" geographic market rejected in *Malaney*. Consequently, Plaintiffs' Amended Complaint must be dismissed on this ground alone, and Plaintiffs have no argument to the contrary. Instead, Plaintiffs argue the truism that the Supreme Court has held that mergers violate the antitrust laws if there is a substantial lessening of competition in a properly defined relevant market, and they ignore that those same Supreme Court cases require that a cognizable relevant market be established as a threshold matter, which Plaintiffs fail to do as a matter of law.

Second, Defendants set out an independent argument that the Amended Complaint must be dismissed because, as a matter of law, Plaintiffs are not entitled to the extraordinary remedy of unwinding the $1.4 billion merger when they cannot show, on the face of their Amended Complaint, any of the factors required for equitable relief. Plaintiffs miscast this as a "standing"

issue, and then respond simply by repeating a few of the deficient allegations of their Amended Complaint. Therefore, Defendants' argument for dismissal stands unrebutted.

II. ARGUMENT

A. Plaintiffs Fail to Plead a Plausible Relevant Market

In their Motion to Dismiss, Defendants demonstrated that the Amended Complaint fails to allege a plausible relevant market, a threshold element of a Section 7 claim, and therefore must be dismissed for failure to state a claim. (Mot. to Dismiss at 6-9.) In particular, the Ninth Circuit's decision in *Malaney* explicitly held that an alleged air transportation market that is national in geographic scope "fail[s] to establish a relevant market for antitrust analysis, a 'necessary predicate' for making a claim under § 7 of the Clayton Act." 2011 WL 1979870, at *1 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). In response, Plaintiffs completely ignore this directly applicable precedent, which arose in litigation that includes 40 of the 43 same Plaintiffs in the instant suit.

Instead of addressing *Malaney*, which is fatal to the Amended Complaint, Plaintiffs argue that Defendants have "conspicuously ignored" Supreme Court precedent. (Opp'n at 1.) Plaintiffs then embark on a long-winded and irrelevant exegesis on various Supreme Court cases. (Opp'n at 8-11.) Plaintiffs are wrong. Those cases in no way undermine—and indeed support—the fundamental principle that defining a cognizable relevant market is a "necessary predicate" to stating a Section 7 claim. *See Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854, 2009 WL 4723739 (N.D. Cal. Dec. 2, 2009); *see also Malaney*, 2011 WL 1979870, at *1 (citing *Brown Shoe*, 370 U.S. at 324). Thus, Defendants' Motion to Dismiss and the *Malaney* decision are entirely consistent with Supreme Court precedent, which requires the definition of a relevant market as a threshold step of Section 7 analysis. *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974). Further, as *Brown Shoe* and its progeny instruct, "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.'" (Mot. to Dismiss at 7 (quoting *Brown Shoe Co. v. United States*, 370 U.S. at 325).) This is precisely what the Ninth Circuit did in *Malaney*, 2011 WL 1979870, at *1, and what Defendants have argued in the instant case.

Plaintiffs criticize Defendants for failing to analyze separately the "relevant product market" in terms of its "product" and "geographic" dimensions. (Opp'n at 2.) Ironically, Plaintiffs then proceed to ignore entirely the geographic dimension of the relevant market—which was the subject addressed by *Malaney*. To be clear, Plaintiffs' alleged LCC market fails as a matter of law with respect to both its geographic dimension and its product dimension.

First, in applying *Brown Shoe*, *Malaney* held that a national geographic market in air transportation is too broad to be a relevant market for antitrust purposes. *See* 2011 WL 1979870 at *1. Applying the Supreme Court's standard of interchangeability of use to determine the relevant market, the Ninth Circuit rejected a national market in favor of a city-pair market, using the very example that Plaintiffs criticize Defendants for using: that a flight from Seattle to Miami would not be interchangeable with a flight from San Francisco to Newark. *(Compare id. with* Opp'n at 2.) *Malaney*'s holding on the relevant geographic market applies equally regardless of whether the relevant product market consists of all passenger air transportation or, as Plaintiffs now seem to be focused, passenger air transportation only by so-called Low Cost Carriers ("LCCs"). Thus, regardless of how Plaintiffs define their purported relevant product markets, those markets necessarily fail because they are each tied to the same "national" geographic market rejected in *Malaney*.

Second, Plaintiffs argue that they have properly alleged a relevant product market consisting of air transportation by LCCs. (Opp'n at 5 (citing Am. Compl. ¶ 24).) Plaintiffs are wrong. An LCC product market is implausible and therefore fails as a matter of law. (Mot. to Dismiss at 6 (discussing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).) Here, Plaintiffs' allegation of a relevant product market limited to LCCs not only is contrary to common sense, but Plaintiffs have chosen to ignore their own allegations that *all* major U.S. passenger airlines—not just the LCCs—"ha[ve] 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. ¶¶ 82-85.) In other words, so-called LCCs and legacy carriers offer air transportation services in direct competition for passengers. Plaintiffs' own allegations are thus fatal to their alleged LCC relevant product market, which is in any event tied to Plaintiffs' implausible and non-

cognizable "national" geographic market.

In sum, Plaintiffs have failed to allege any cognizable relevant product market within any cognizable relevant geographic market, and their Amended Complaint must be dismissed on this ground alone. The Ninth Circuit's decision in *Malaney* is directly applicable and dispositive.

B. Plaintiffs Are Not Entitled to the Extraordinary Relief Sought

In addition to failing to counter Defendants' argument that the Amended Complaint does not state a cognizable relevant market, Plaintiffs' Opposition also fails to counter Defendants' argument that the Amended Complaint should be dismissed as a matter of law because the only remedy it seeks—an injunction to unwind the $1.4 billion merger of Southwest and AirTran, which closed nearly five months ago—could never be granted. Defendants' Motion to Dismiss identifies the four factors that Plaintiffs must prove to be entitled to injunctive relief, and then explains why Plaintiffs are necessarily deficient on every factor. (Motion to Dismiss at 11-17.) Those factors are: (1) irreparable injury; (2) inadequacy of monetary damages; (3) whether remedy in equity is warranted in light of the balance of hardships; and (4) the public interest. (Mot. to Dismiss at 11 (citing *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007).)[1] Plaintiffs do not disagree with this standard, and instead simply state in conclusory terms that they have alleged all of these elements in the Amended Complaint. (Opp'n at 15.)

Notably, Plaintiffs' Opposition ignores two critical and inherent deficiencies that pose a bar to injunctive relief, both going to the balance-of-hardships consideration.[2] First, as explained in the Motion to Dismiss, the expense and burden of unwinding a $1.4 billion merger that closed several months ago and has already resulted in significant operational, financial, and workforce integration of the two firms dwarfs any speculative hardship suggested by these 43 individuals. (Mot. to

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[1] Plaintiffs' Opposition mischaracterizes this as a "standing" issue. (Opp'n at 14). It is not. Although Defendants do not concede that any of the Plaintiffs have standing, Defendants' Motion to Dismiss did not argue that Plaintiffs lack standing.

[2] Plaintiffs also offer nothing but conclusory statements in response to Defendants' arguments regarding the other factors—namely, irreparable harm, inadequacy of money damages, and public interest. Each of these factors is addressed in Defendants' Motion to Dismiss, and Defendants have nothing to add to those unrebutted arguments. (Mot. to Dismiss at 11-12 (no irreparable injury); 12-13 (no inadequacy of money damages); and 15 (no public interest in unwinding merger).)

Dismiss at 13-14.) Contrary to Plaintiffs' suggestion, this is not a "standing" issue, but rather a question of balancing hardships for purposes of considering whether injunctive relief could ever be appropriate in these circumstances. Plaintiffs' only response, that "there is no hardship whatsoever to the Defendants" (Opp'n at 15), is preposterous, and appears to be based on a counter-factual world view in which the merger had not been consummated.

Second, Plaintiffs do not have any response to the argument that their own delay in bringing suit makes a belated attempt at an injunction inequitable. (Mot. to Dismiss at 14-5 (citing cases).) It is undisputed that Plaintiffs waited more than seven months after the merger was announced and after the merger had already closed to bring suit. Plaintiffs assert only that "[t]he bold statement of the Defendants will not change the facts as alleged and the law as stated by the Supreme Court" (Opp'n at 14), but Plaintiffs do not identify what "statement of the Defendants" or Supreme Court holdings they have in mind. Indeed, the Supreme Court has noted that private plaintiffs who bring "belated attacks" to unwind a merger may face equitable bars to such extraordinary equitable relief. *See Cal. v. Am. Stores Co.*, 495 U.S. 271, 295 (1990). Furthermore, Defendants' argument with respect to the inappropriateness of injunctive relief as a matter of law is supported squarely by *Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8th Cir. 2010), in which the Eighth Circuit affirmed the district court's judgment on the pleadings for defendants and dismissal of a lawsuit challenging InBev's acquisition of Anheuser-Busch.[3] Plaintiffs conspicuously ignore *Ginsburg* and its holding, likely because the equitable considerations weighing against an injunction in this case are even stronger than in *Ginsburg*.

C. Defendants' Exhibits Are All Judicially Noticeable

Instead of placing their arguments in an opposition to Defendants' Request for Judicial Notice, Plaintiffs curiously offer summary assertions regarding exhibits which are undoubtedly proper subjects of judicial notice. First, Plaintiffs assert that Exhibit 1 (the DOJ press release) is

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[3] In *Ginsburg v. InBev NV/SA*, the only remedy remaining was permanent injunctive relief against a merger that had already been consummated. 623 F.3d 1229, 1233 (8th Cir. 2010). The Eighth Circuit determined, as a matter of law, that the plaintiffs could not be entitled to injunctive relief in light of equitable considerations, namely the plaintiffs' own delay in bringing suit and their inability to secure a preliminary injunction. *Id.*

hearsay and was not offered for a non-hearsay purpose. However, Defendants offered Exhibit 1 to establish the fact that the DOJ had reached certain conclusions about the merger, not to prove the truth of those conclusions. This is not hearsay. *CarrAmerica Realty Corp. v. nVidia Corp.*, No. C 05-00428 JW, 2010 WL 2629760, *3 n.3, *4 (N.D. Cal. June 29, 2010) (granting request for judicial notice of a press release over hearsay objections because the release was "not admitted for the truth of its contents, but to show that" there was "no attempt to conceal the[ ] plans from the public"). This is precisely what Defendants have done in offering the press release. *See, e.g., U.S. SBA v. Alto Tech Ventures, LLC*, No. 07-4530 SC, 2008 WL 5245903, at *5 (N.D. Cal. Dec. 17, 2008) (taking judicial notice of a complaint over hearsay objections because courts are permitted to "take notice of the fact that the . . . complaint was filed," rather than of the underlying factual allegations); *cf. In re Wilson*, No. 05-65161-12, 06-60369-12, 2007 Bankr. LEXIS 359, *64 (Bankr. D. Mont. Feb. 7, 2007) ("The Court can judicially notice what has been filed in the Court docket, but that does not mean that the Court can judicially notice the truth of the facts asserted in the documents filed in the court record. . . ."). Moreover, Plaintiffs should be estopped from asserting that the Court should not take judicial notice of Exhibit 1 because they asked the Court to consider it in their Motion for a Temporary Restraining Order. (Pls' Mot. for TRO, Pier Decl. at Ex. 6.) *See also Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) ("Judicial estoppel should be employed when a litigant is 'playing fast and loose with the courts,'" and when "'intentional self-contradiction is being used as a means of obtaining unfair advantage. . . . '" (citation omitted)). Last, even if the press release were considered to be hearsay, it would fall within the public records exception since it constitutes the "factual findings resulting from an investigation made pursuant to authority granted by law," Fed. R. Evid. 803(8)(C). *See Zeigler v. Fisher-Price, Inc.*, 302 F. Supp. 2d 999, 1021 n.10 (N.D. Iowa 2004) ("To the extent the press release can be construed as stating conclusions or opinions of the [Consumer Products Safety Commission], it also was admissible under [Rule] 803(8)(C)."); *see also Byrd v. ABC Prof'l Tree Serv.*, No. 1:10-cv-0047, 2011 WL 2194137, at *4 n.3 (M.D. Tenn. June 6, 2011) (finding that "the DOL's February 2007 press release" fell within Rule 803(8)).

Plaintiffs also summarily assert that Exhibit 2 is incomplete without offering any

explanation or identification of what, in fact, is purportedly missing. This is not sufficient for excluding the exhibit. *See Chau v. First Fed. Bank*, No. 5:10-cv-396-JMH, 2011 WL1769355, at *1 n.2 (E.D. Ky. May 9, 2011) (taking judicial notice of court record over incompleteness objection where certain transcripts were not included). Filings like this are routinely subjects of judicial notice and Plaintiffs have provided no reason for this situation to be any different. *See, e.g.*, *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (taking judicial notice of an SEC filing); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (same); *In re Computer Scis. Corp. Derivative Litig.*, No. CV 06-05288 MRP, 2007 WL 1321715, at *7 n.5 (C.D. Cal. Mar. 26, 2007) (same).

Last, Plaintiffs object to Exhibit 4 because it is purportedly irrelevant. However, as Defendants' Motion makes clear, Exhibit 4 demonstrates Plaintiffs' willingness to accept a monetary remedy, which is squarely inconsistent with the prerequisites for obtaining equitable relief. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006). Indeed, courts will turn to evidence, like Exhibit 4, in determining the suitability of monetary relief for purposes of assessing the propriety of injunctive relief. *See Malaney v. UAL Corp.*, No. 10-cv-2858 (N.D. Cal. order entered Aug. 11, 2010) (rejecting plaintiffs' assertion that evidence of prior settlements is irrelevant to issue of irreparable damages).

III. CONCLUSION

For the foregoing reasons and those set out in Defendants' Motion to Dismiss, Defendants respectfully request that the Court dismiss the action, with prejudice.

DATED: September 28, 2011

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