

No. 11-16173

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

◆◆◆◆◆
WAYNE TALEFF., *et al.*
Plaintiffs-Appellants,
v.

SOUTHWEST AIRLINES CO., GUADALUPE HOLDINGS CORP., and
AIRTRAN HOLDINGS, INC.,
Defendants-Appellees.

◆◆◆◆◆
On Appeal of an Interlocutory Order of the
United States District Court for the Northern District of California
(Case No. 3:11-CV-2179-JW)

◆◆◆◆◆
**EMERGENCY MOTION FOR INJUNCTION
SEEKING TEMPORARY “HOLD SEPARATE” ORDER PENDING
DISPOSITION OF MALANEY, ET AL., V. UAL CORPORATION,
ET AL.**

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CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of the stock of any plaintiff.

MOTION

Pursuant to Federal Rule of Appellate Procedure 8(a), plaintiffs-appellants Wayne Taleff, *et. al.*, by and through their undersigned attorneys, hereby move this Court for a “hold separate order” enjoining defendants Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings (“AirTran”), their officers, directors, employees, agents, and all persons acting in concert with them or subject to their direction or control, from combining their assets, operation, or management in any way, pending this court’s issuance of a decision in the *Malaney, et al., v. UAL Corporation, et al*, Case No. 10-17208, which is scheduled for oral argument before this court on May 10, 2011.

This court is scheduled to hear oral argument on *Malaney, et al. v. UAL Corporation, et al.*, tomorrow, May 10, 2011. The outcome of *Malaney* will have a substantial impact on the competitive structure and nature of the airline industry in the United States. Accordingly, Plaintiff seeks a “hold separate order” to enjoin Southwest’s acquisition of AirTran until the matter of *Malaney* is decided.

Grounds for this motion are that the plaintiffs will suffer irreparable harm if the assets of the merged companies are not held separately; the threatened harm to the plaintiffs if the “hold separate order” is not issued greatly outweighs the threatened injury to the defendant if the order issues; there is a high probability that plaintiffs will succeed on the merits in establishing that the merger violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18; and the public interest strongly favors granting the preliminary injunction.

A “hold separate” order is a less drastic form of preliminary relief which permits the challenged transaction to go forward, but requires the acquiring company to preserve the acquired company as a separate and independent entity during the course of antitrust proceedings. *Federal Trade Comm’n v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075, n.7 (D.C. Cir. 1981). “The aim of such an order is to maintain an acquired unit as a viable competitor while the litigation unfolds, and to safeguard ‘unscrambled’ the assets acquired so that they may be divested effectively should the [plaintiff] ultimately prevail.” *Id.*

NATURE OF URGENCY

Tomorrow, this Court is scheduled to hear oral argument in the *Malaney, et al. v. UAL Corporation, et al.* on Tuesday, May 10, 2011. The decision of this court in that case involving that merger will have a substantial effect on the airline industry and the case presently before this court.

Southwest and AirTran formally closed their merger on May 2, 2011. Defendants have indicated that they will move to integrate their operations. The urgency of this emergency motion is aimed at temporarily stopping this integration through issuance of a “hold separate” order, pending disposition of the *Malaney, et al. v. UAL Corporation, et al.* Every day that lapses without such an order will increase the irreparable harm and the hardship of both the courts and the plaintiffs in “unscrambling” the merged entity should it be found illegal.

JURISDICTION

Plaintiffs are authorized to bring this motion under Federal Rule of Appellate Procedure 8(a)(2). Although Fed.R.App.P. 8(a)(1) requires that “a party must ordinarily move first in the district court” under Fed.R.Civ.P. 62(c), it authorizes parties to move in the Court of Appeals where “moving first in the district court would be impracticable.” Fed.R.App.P. 8(a)(2)(A). The defendants closed their transaction one week ago, on May 2, 2011. On Wednesday, May 4, 2011, the district court denied plaintiffs’ motion for a temporary restraining order, which is based on a legal standard similar to the standard governing motions for injunctions pending appeal. Therefore, it is impracticable to move the district court for the requested relief because (1) it has just denied plaintiffs’ motion for a temporary restraining order and would more than likely deny plaintiffs’ motion for injunction pending appeal; and (2) there is insufficient time to move the district court, given the pending consummation of defendants’ merger. 16 Wright, Miller, Cooper & Gressman, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3954 (1977) at 381, n. 5 (“[i]mpracticability of obtaining relief in the district court might be shown by the fact that ... the need for relief is so immediate that an application to the district judge would unduly prolong the crisis, or that prior actions or statements of the district judge indicate the improbability of any relief being granted”) (citing, *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5th Cir. 1964)).

This Court has jurisdiction over the underlying appeal of the district court's denial of plaintiffs' motion for a temporary restraining order under 28 U.S.C § 1292(a)(1).

STATEMENT OF THE CASE

A. Nature of the Action

This is a private antitrust action brought by forty-three airplane travelers seeking to enjoin as violative of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, the proposed merger of Southwest Airlines and AirTran Airlines. The merger closed on May 2, 2011. The merger will combine two low cost carrier airlines, with a combined market share of 75% of the low cost carrier airline market in the United States. App 12.

B. Procedural History

Defendants announced their plans to merge on September 27, 2010. On Wednesday, April 27, 2011, Southwest and AirTran announced that the Department of Justice the Antitrust Division of the United States Department of Justice (DOJ) had terminated its Hart-Scott-Rodino Act review and the closing of its investigation of the airlines' pending merger. Plaintiffs filed their complaint on May 3, 2011. On May 3, 2011, plaintiffs moved the district court to issue a temporary restraining order to enjoin defendants' from completing and consummating their merger.

C. Disposition Below

On May 4, 2011, the district court entered an order denying plaintiffs' motion for temporary restraining order. The court based its decision on two conclusions: first, that plaintiffs failed to demonstrate they will be subject to immediate irreparable injury as "these contentions lack the sense of immediacy necessary to justify such an extraordinary remedy"; and second, that Plaintiffs failed to establish likelihood of success on the merits for an action seeking solely prospective relief because the Defendants had closed their merger the day before the action was filed. App. 2.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960, available at 2010 U.S.App.LEXIS 15537, *9 (9th Cir. 2010) (citing, *Winter v. Natural Res. Def. Council*, ___ U.S. ___, 129 S. Ct. 365, 374 (2008)). In *Alliance for the Wild Rockies*, this Circuit adopted a version of this standard referred to as the "serious questions" test, which posits that "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." *Id.* at *10-*11.

ARGUMENT

I. THIS COURT’S DECISION IN *MALANEY* WILL HAVE A SUBSTANTIAL IMPACT ON THE COMPETITIVE STRUCTURE AND NATURE OF THE AIRLINE INDUSTRY IN THE UNITED STATES

At issue in *Malaney* is the merger of United and Continental airlines. Parallel to the present case, *Malaney*, is a private antitrust action brought by forty-nine commercial airline consumers seeking to enjoin further completion, and ultimately divestiture, of the merger between United and Continental as violative of Section 7 of the Clayton Antitrust Act, 15. This merger if allowed to proceed will ultimately create the largest airline in the world. Further, the airline industry is becoming increasingly concentrated. Including the United Continental merger, the top 9 largest airlines will have merged into 6 firms controlling a full 90% of the market – within less than 24 months. This Court’s decision in *Malaney* will have serious consequences in the airline industry. App. 12. A preliminary injunction enjoining the Southwest-AirTran merger pending disposition of *Malaney* is imperative, as the Southwest-AirTran merger will even further concentrate the industry.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS’ FAILED TO ESTABLISH IMMEDIATE IRREPARABLE INJURY BECAUSE THE MERGER HAD CLOSED ONE DAY BEFORE

In its decision, the district court ruled that the plaintiffs “failed to establish that they will be subject to immediate irreparable injury” and that “these contentions lack the sense of immediacy necessary to justify such an extraordinary remedy.” App. 2.

In its ruling, the district court noted in particular that the Defendants' intention to eliminate first-class seating and to end flights into Dallas/Fort Worth International did not constitute the sense of immediacy necessary to issue a temporary restraining order. Further, the district court noted that despite Plaintiffs' contentions that the merger will result in concentration of ownership on a number of routes, that because the merger had closed the day before there lacked "the sense of immediacy necessary" to justify such an extraordinary remedy. Here, district court narrowed in on a lack of immediacy. It is clear that the harm is irreparable, not compensable in money damages, because the provision under which plaintiffs have sued, Section 16 of the Clayton Act (15 U.S.C. §26), provides *only* for injunctive relief. Accordingly, plaintiffs have shown irreparable harm.

Further, rather than consider the immediacy of the problem that plaintiffs and the courts would face in trying to unwind a consummated merger later found to be illegal or the fact that oral argument was set in *Malaney* in one week before this court, the district court instead determined that because the merger had closed the prior day, there was no sense of immediacy. Action will need to be taken and is currently being taken to merge operations of both Southwest and AirTran, that cause an "immediacy" in that undoing these steps to merge operations and the effects thereof, will be difficult if not impossible.

The district court should have recognized the difficulty plaintiffs' and the courts would face in having to *unscramble* a merger later found to be illegal. *Alliance for the Wild Rockies*, 613 F.3d 960, *27 ("[o]nce those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost"). Congress

itself has sought to avoid the monumental task of unscrambling an anticompetitive merger, describing a pre-merger injunction as

often the only effective and realistic remedy against large, illegal mergers – before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2637, 2627. The merger in this case involves tens of thousands of employees as well as the substantial comingling of each airline’s resources. App. 8-9.

The Defendants’ merger was formally consummated. Therefore, plaintiffs seek only a “hold separate” order, which is “less drastic” than a preliminary injunction. *Weyerhaeuser*, 665 F.2d at 1084. This court should have the opportunity to issue a decision in *Malaney* before these companies continue their march toward irreversible integration.

The district court erred in holding that the plaintiffs’ failed to show the requisite immediacy simply because the merger had closed the prior day. In fact, *because* the merger had closed the prior day and the airlines were moving forward to merge operations, there is the utmost sense of immediacy.

III. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANTS’ FAILED TO ESTABLISH LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE DEFENDANTS’ ACQUISITION OF AIRTRAN WAS COMPLETED THE DAY BEFORE THIS ACTION WAS FILED

Mergers that threaten the competitive vitality of United States markets are so vilified that Congress specifically wrote the statute to reach mergers whose anticompetitive effects were not *actually known*. Section 7 of the Clayton Act makes any merger illegal if its effect “*may* be substantially to lessen competition.” 15 U.S.C. § 18 (emphasis added). Congress used the word “may” in formulating its “expansive definition of antitrust liability” (*California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990)), to “indicate that its concern was with probabilities, not certainties.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

In a series of decisions which have never been overruled, the Supreme Court established a resolute intolerance for mergers that result in over-concentration of United States markets. These decisions, if applied to the present case, would by themselves require the instant merger to be enjoined.

Two central points are to be gleaned from these decisions. First, they adamantly strive to prevent “trends toward concentration”: “Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipency before that trend developed to the point that a market was left in the grip of a few big companies.” *United States v. Von’s Grocery Co.*, 384 U.S. 270, 277 (1966). Thus, “where concentration is gaining momentum in a market, we must be alert to carry out Congress’ intent to protect competition against ever-increasing concentration through mergers.” *Id.* Where market “concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 365, n.42 (1963).

Second, these cases enjoined mergers between two direct competitors in industries marked by a trend toward concentration, *even* where the increases in market share of the combined entity were slight:

In *Brown Shoe*, the named-defendant was the 4th largest shoe manufacturer with 6% of the market, and its competitor Kinney was the 12th largest firm with only 0.5%. In the shoe retailing market, Brown Shoe was the 3rd largest firm and Kinney was number eight. When the two firms proposed to merge, their combined share of the manufacturing market would only amount to 6%, while their combined share of the retail market would only be 9.5%. 370 U.S. at 297, 303, 327, 331, 346. The Supreme Court enjoined the merger.

In *United States v. Philadelphia Nat'l Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank, holding 36% of all assets in the area. 374 U.S. at 330-31, 364. The merger was enjoined.

In *United States v. Aluminum Co. of America (Alcoa)*, 377 U.S. 271, 278 (1964), Alcoa's acquisition of Rome Cable would have increased Alcoa's market share by *less than 1.5%*, from 27.8% to 29.1%. The merger was enjoined.

In *United States v. Continental Can Co.*, 378 U.S. 441, 445-46 (1964), the Supreme Court enjoined a merger between the 2nd largest metal container company in the country, with a 33% share of the can market, and the country's 3rd largest glass container company, with a share of 9.6% of the glass container market.

United States v. Von's Grocery Co., 384 U.S. 270 (1966) involved the proposed merger of Von's, the 3rd largest retail grocery store in Los Angeles with a 4.7% market share, and Shopping Bag, the 6th largest

grocery store controlling 4.2% of the market. The Supreme Court enjoined the merger.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966), the Supreme Court enjoined the merger of Pabst and Blatz, the 10th and 18th largest brewers in the United States, the combination of which would have resulted in just the 5th largest brewer with less than 5% of total domestic beer sales.

In *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner observed that these cases, taken together, prohibited “any nontrivial acquisition of a competitor”:

[These cases] seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words “may ... substantially ... lessen competition.” [¶] None of these decisions has been overruled.

Applied to this case, these decisions all but mandate that the merger here be enjoined. First, the airline industry is marked by a pattern of ever-increasing concentration, having been distilled down to only 5 major airlines from 34 in the last twenty-five years. App. 20. Of the seven low cost carrier airlines, Southwest is by far the dominant carrier, accounting for approximately 60% of the combined market share of the low-cost carriers that report data to the DOT. AirTran controls almost 15% of the LCC’s combined market share. The combined company would account for approximately 75% of the

combined market share of low cost carrier airlines in the United States. App. 12.

There exists an entire line of binding Supreme Court decisions which have been neither questioned nor overruled by the high court, which when reviewed in light of the merger currently before this court, show a likelihood of success on the merits.

IV. THE BALANCE OF HARMS TIP IN FAVOR OF PLAINTIFFS

The hardship plaintiffs and the courts would face in trying to unwind a consummated merger later found to be illegal is substantial. The court should place on the plaintiffs' side of the scale the difficulty the courts and plaintiffs would face in having to *unscramble* a merger later found to be illegal. *Alliance for the Wild Rockies*, 613 F.3d 960, *27 (“[o]nce those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost”). And as noted above, Congress itself has sought to avoid the monumental task of unscrambling an anticompetitive merger.

The defendants' side of the scale has grown lighter. On May 2, 2011, the defendants' merger was formally consummated. Therefore, plaintiffs seek only a “hold separate” order, which is “less drastic” than a preliminary injunction. *Weyerhaeuser*, 665 F.2d at 1084, preventing these companies' further movements toward irreversible integration.

V. THE PUBLIC INTEREST STRONGLY FAVORS GRANTING THE PRELIMINARY INJUNCTION

The public interest prong of the preliminary injunction standard requires the Court to consider “whether there exists some critical public interest that would be injured by the grant of preliminary relief.” *Independent Living Center of Southern California, Inc. v. Jolly*, 572 F.3d 644, 659 (9th Cir. 2009) (quotation and citation omitted); *see also Johnson v. Couturier*, 572 F.3d at 1082 (recognizing Congressional intent in enacting statutes at issue; finding public interest favored preliminary injunction); *Christian Schmidt Brewing*, 600 F.Supp. at 1332-33 (enjoining merger; injunction will not injure and may serve public interest).

To the contrary, here the public interest is served by granting the injunction and maintaining a competitive airline industry. *See, e.g., Philadelphia Nat’l Bank*, 374 U.S. at 366 n 43 (citations omitted) (“The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served”); *AlliedSignal*, 183 F.3d at 577 (recognizing that “[i]f the merger were to lead to noncompetitive prices ..., this would be a significant harm to [the plaintiffs], and the public”; preliminary injunction affirmed). After the merger, the public will face fewer choices for non-stop and connecting routes; will be faced with monopolies at the route and airport levels; and will pay the correspondingly higher fares.

Moreover, the public has an interest in vigorous enforcement of the antitrust laws. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms”).

Similarly, the public has an interest in effective private enforcement of antitrust laws. *See, e.g., Perma Life Mufflers*, 392 U.S. at 139 (“[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat” to deter antitrust violations).

CONCLUSION

Plaintiffs do not seek a lengthy stay – only the amount of time sufficient for this Court to decide *Malaney*. Plaintiffs respectfully pray for an order of this Court temporarily requiring defendants to hold their assets separately until this Court can hear and rule on *Malaney*.

May 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 9, 2011, I served the foregoing motion and appendix on counsel for defendants by sending a .pdf version of this brief to the following persons at the following email addresses:

Counsel for Southwest Airlines Co. Steven Sunshine: Steven.Sunshine@skadden.com

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And by placing a true and correct copy in a sealed envelope with first-class postage thereon fully prepaid, addressed as noted above, and deposited in the United States mail for pickup and delivery at San Francisco, California.

May 9, 2011

/s/ Jamie L. Miller

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Wayne Taleff, et al.,

NO. C 11-02179 JW

Plaintiffs,

**ORDER DENYING PLAINTIFFS' *EX*
PARTE MOTION FOR A TEMPORARY
RESTRAINING ORDER**

v.

Southwest Airlines Co., et al.,

Defendants.

Presently before the Court is Plaintiffs'¹ Motion for a Temporary Restraining Order.²

Plaintiffs allege that Defendants are attempting to effectuate an unlawful combination with Airtran Airlines Corp. ("Airtran"), following Defendants' acquisition of Airtrain on May 2, 2011.³

A temporary restraining order may be issued if the plaintiff has established: (1) a likelihood of success on the merits and the possibility of immediate irreparable injury; or (2) the existence of

¹ Plaintiffs are Wayne Taleff, Katherine R. Arcell, Judy Bray, Jose M. Brito, Jan Marie Brown, Robert D. Conway, Judy Cranwell, Rosemary D'Augusta, Brenda K. Davis, Pamela Faust, Carolyn Fjord, Don Freeland, Ted Friedli, Donald V. Fry, Gabriel Garavanian, Harry Garavanian, Yvonne Jocelyn Gardner, Lee M. Gentry, Jay Glikman, Valarie Ann Jolly, Gail S. Kosach, John Lovell, Michael Malaney, Len Marazzo, Lisa McCarthy, Michele McKechnie, Patricia Ann Meeuwesen, Cynthia Prosterman, Deborah M. Pulfer, Dana L. Robinson, Robert A. Rosenthal, Bill Rubinsohn, Sondra K. Russell, Sylvia N. Sparks, June Stansbury, Clyde D. Stensrud, Gary Talewsky, Annette M. Tippetts, Diana Lynn Ultican, J. Michael Walker, Pamela S. Ward, David P. Wendell and Christine O. Whalen.

² (hereafter, "Application," Docket Item No. 2.)

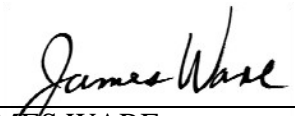
³ (Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, hereafter, "Motion," Docket Item Nos. 8, 9.)

1 serious questions going to the merits and that the balance of hardships tips heavily in its favor. See
2 Metro Publ'g, Ltd. v. San Jose Mercury News, 987 F.2d 637, 639 (9th Cir. 1993).

3 In this case, Plaintiffs contend that, should the unlawful merger be effectuated, Defendants
4 intend to eliminate first-class seating and to end flights into Dallas/Fort Worth International.
5 (Motion at 5.) Upon review, the Court finds that Plaintiffs have failed to establish that they will be
6 subject to immediate irreparable injury. In particular, while Plaintiffs contend that the unlawful
7 merger will result in concentration of ownership on a number of routes, by Plaintiffs' own reports,
8 Defendants completed acquisition of Airtrain the day before this Motion was filed. (Id. at 3, 5.)
9 Further, although Plaintiffs' contend that Defendants intend to end flights into Dallas/Fort Worth
10 International on an "orderly and reasonable schedule" and to "eventually" cut first-class seating,⁴
11 these contentions lack the sense of immediacy necessary to justify such an extraordinary remedy.
12 Finally, Plaintiffs' contentions that future concentration of the industry could possibly be "a good
13 long-term trend," are equally insufficient to establish that Plaintiffs will be subject to immediate
14 irreparable injury without the requested remedy. (Id. at 6.) Additionally, given the fact that
15 Defendants' acquisition of Airtran was completed the day before this action was filed, Plaintiffs fail
16 to establish likelihood of success on the merits for an action seeking solely prospective relief.

17 Accordingly, the Court DENIES Plaintiffs' Motion for an Temporary Restraining Order.

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19 Dated: May 4, 2011



JAMES WARE
United States District Chief Judge

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27 ⁴ (Id. at 5.)
28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: May 4, 2011

Richard W. Wieking, Clerk

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JW

2179

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Stensrud, Gary Talewsky, Annette M. Tippetts,
Diana Lynn Ultican, J. Michael Walker,
Pamela S. Ward, David P. Wendell, Christine
O. Whalen,

Plaintiffs,

v.

SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP.,
AIRTRAN HOLDINGS, INC.,

Defendants.

CASE NO.:

**COMPLAINT FOR
INJUNCTIVE RELIEF
AGAINST VIOLATIONS OF
SECTION 7 OF THE
CLAYTON ANTITRUST ACT**

1
far

1 Plaintiffs are and will be direct purchasers of airline tickets for travel within the United
2 States. The plaintiffs bring this action under Section 16 of the Clayton Antitrust Act, 15 U.S.C.
3 §§ 18, 26, to enjoin and prohibit the merger of the defendants Southwest and AirTran. Plaintiffs
4 complain and allege as follows:

6 INTRODUCTION

7 1. On September 27, 2010, the defendants announced that they had agreed to combine
8 in an all stock transaction, valued at more than \$1.4 billion, merging Southwest Airlines Co.
9 (“Southwest”) and Southwest’s wholly owned subsidiary Guadalupe Holdings Corp.
10 (“Guadalupe”), with AirTran Airways (“AirTran”), eliminating the substantial competition
11 between them. It is proposed that the unlawful combine would operate under the Southwest
12 name.

13 2. “Low cost carriers” (LCCs) operate on a point-to-point basis and travel high
14 density routes rather than to and from small communities. The largest U.S. LCCs are Southwest
15 Airlines, JetBlue, Spirit Airlines, Virgin Airlines, Allegiant, AirTran, Frontier, and Sun Country
16 Airlines. In contrast, “network carriers,” operate on a “hub-and-spoke” business model. There
17 are six major U.S. network carriers: United, Continental, American Airlines, Delta Airlines, U.S.
18 Airways, and Alaska Airlines.

19 3. Defendants Southwest and AirTran are both low cost carriers.

20 4. The effect of the announced merger between Southwest and AirTran may be
21 substantially to lessen competition, or to tend to create a monopoly, in the transportation of airline
22 passengers in the United States and certain submarkets and in violation of Section 7 of the
23 Clayton Antitrust Act, 15 U.S.C. § 18.

24 5. The probable and planned anticompetitive effects of this unlawful combination
25 are increases in prices and fares, elimination and/or curtailment of services, elimination or
26 curtailment of frequency of flights, curtailment of capacity of aircraft and available seats for
27 passage, elimination of tens of thousands of jobs, the deterioration of quality of service, the
28 addition of charges for amenities otherwise considered part and parcel of the service, the

1 elimination or substantial cutback of traffic to hubs, the creation of monopolies for passenger
 2 air traffic from and to major cities, and the encouragement and trend to further concentrate the
 3 industry toward ultimate monopoly.

4 6. Plaintiffs are individuals who have purchased airline tickets for travel within the
 5 United States in the past, and expect to continue to do so in the future. They are threatened with
 6 loss or damage by the defendants' merger in violation of Section 7 in the form of higher ticket
 7 prices and diminished service, and, accordingly, they bring this action for preliminary and
 8 permanent injunctive relief against the merger pursuant to Section 16 of the Clayton Antitrust
 9 Act, 15 U.S.C. § 26.

10 **JURISDICTION**

11 7. This action is brought under Section 16 of the Clayton Antitrust Act, 15 U.S.C.
 12 §26, to prohibit the consummation and the effectuation of defendants' planned unlawful
 13 merger in violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. §18. This Court has
 14 subject matter jurisdiction of the federal antitrust claims asserted in this action under Section
 15 16 of the Clayton Antitrust Act, 15 U.S.C. §26, and Title 28 United States Code Sections 1331
 16 and 1337.

17 **THE PARTIES**

18 8. Each of the plaintiffs named herein below is an individual and a citizen of the
 19 state listed as the address for each such plaintiff, and in the four years next prior to the filing
 20 of this action, each plaintiff has purchased airline tickets for travel within the United States,
 21 and each plaintiff expects to continue to purchase airline tickets for travel within the United
 22 States in the future:

23 Katherine R. Arcell, 4427 S. Miro St., New Orleans, LA 70125;

24 Judy Bray, 1126 Hill Circle, Colorado Springs, CO 80904;

25 Jose' M. Brito, 100 California Avenue, Reno NV 89509;

26 Jan Marie Brown, 975 Kennedy Dr., Carson City, NV, 89706;

27 Robert D. Conway, 6160 W Brooks Ave., Las Vegas, NV 89108;

Judy Crandell, 9135 Rain Dance Way, Reno, NV 89506;
Rosemary D'Augusta, 347 Madrone St., Millbrae, CA 94030;
Brenda K. Davis, 11022 Old Military Trail, Forney, TX, 75126;
Pamela Faust, 6227 Whileaway Dr., Loveland, Ohio 45140;
Carolyn Fjord, 4405 Putah Creek Road, Winters, CA 95694;
Don Freeland, 73801 White Sands Dr., Thousand Palms, CA 92276;
Ted Friedli, 50 Atlantic Ave., Long Branch, NJ 07740;
Donald V. Fry, 6740 Northrim Ln., Colorado Springs, CO 80919;
Gabriel Garavanian, 104 Sequoia Road, Tyngsboro, MA 01879;
Harry H. Garavanian, 14 Stavely Street, Lowell, MA 01852;
Yvonne Jocelyn Gardner, 10-Gold Coin Ct., Colorado Springs, CO 80919;
Lee M. Gentry, 7021 Forestview Dr., West Chester, OH 45069-3616;
Jay Glikman, 4265 Marina City Dr #809, Marina del Rey, CA 90292;
Valarie Ann Jolly, 2121 Dogwood Loop, Mabank, TX 75156;
Gail S. Kosach, 4085 Ramrod Cir., Reno, NV 89519;
John Iverson Lovell, 2581 Knightsbridge SE, Grand Rapids, MI 49546;
Michael C. Malaney, 5395 Egypt Creek NE., Ada, MI 49301;
Len Marazzo, 1260 Springer Ct., Reno, NV 89511;
Lisa Ruth McCarthy, 35 Lancashire Place, Naples, FL 34104;
Michele McKechnie, 411 Westover Dr., Euless, TX 76039;
Patricia Ann Meeuwsen, 1062 Wedgewood, Plainwell, MI 49080;
Cynthia Prosterman, 527 20th Ave., San Francisco, CA 94121;
Deborah M. Pulfer, 16264 E. Mason Rd., Sidney, OH 45365;
Dana L. Robinson, 127B Palm Bay Terrace, Palm Beach Gardens, FL 33418;
Robert A. Rosenthal, 4659 Bridle Pass Drive, Colorado Springs, CO 80923;
Bill Rubinsohn, 261 Old York Road, Jenkintown, PA 19046;
Sondra K. Russell, 1206 N. Loop 340, Waco, TX 76705;
Sylvia N. Sparks, 3320 Conte Drive, Carson City, NV 89701;

1 June Stansbury, 363 Smithridge Park, Reno, NV 89502;
2 Clyde D. Stensrud, 1529 10th St W., Kirkland, WA 98033;
3 Wayne Taleff, 768 Farmsworth Ct., Cincinnati, OH 45255;
4 Gary Talewsky, 12 Courtland Dr., Sharon, MA 02067;
5 Annette M. Tippetts, 2783 East Canyon Crest Dr., Spanish Fork, Utah 84660;
6 Diana Lynn Ultican, 9039 NE Juanita Dr, #102, Kirkland, WA 98034;
7 J. Michael Walker, 11865 Heather Ln., Grass Valley, CA 95949;
8 Pamela S. Ward, 1322 Creekwood Dr., Garland, TX 75044;
9 David P. Wendell, 100 Vine St., Reno, NV 89503;
10 Christine O. Whalen, 1131 Pine St., New Orleans, L, 70118;

11 9. Defendant Southwest Airlines Co. ("Southwest") is a corporation incorporated
12 under the laws of the State of Texas with its principal place of business in Dallas, Texas.

13 10. As of September 30, 2010, Southwest was the largest air carrier in the United
14 States, as measured by the number of *domestic passengers carried*.

15 11. Southwest had a market share of approximately 14.2% in 2010, the 2nd largest
16 domestic market share, as measured by *revenue passenger miles*.

17 12. Southwest is engaged in the business of transporting passengers and cargo and
18 has approximately 35,000 full-time employees.

19 13. Southwest uses the "Point to Point" flight routing system, serving 72 cities in 37
20 states, with more than 3,400 flights a day coast-to-coast.

21 14. Defendant Guadalupe Acquisition Corp., ("Guadalupe") is a Nevada corporation
22 and wholly-owned subsidiary of Southwest. Southwest and/or Guadalupe may be collectively
23 referred to herein as Southwest.

24 15. Defendant AirTran Holdings, Inc. ("AirTran") is a corporation incorporated
25 under the laws of the State of Nevada with its principal place of business in Orlando, Florida.
26 AirTran through its wholly-owned subsidiary AirTran Airways, Inc., operates scheduled
27 airline service throughout the United States.
28

1 16. AirTran is the seventh largest domestic carrier, with more than 19.5 billion
2 RPMs in 2010.

3 17. AirTran has more than 1,000 daily departures, primarily in the Eastern and
4 Midwestern United States, serving over 70 destinations in the United States, Mexico, and the
5 Caribbean.

6 18. AirTran employed approximately 8,300 employees as of February 25, 2011.

7 **NATURE OF TRADE AND COMMERCE**

8 19. The relevant product and geographic markets for purposes of this action are the
9 transportation of airline passengers in the United States, and the transportation of airline
10 passengers to and from the United States on international flights to Mexico and the Caribbean.

11 20. Southwest and AirTran are substantial rivals and competitors in the relevant
12 market.

13 21. Southwest and AirTran are substantial potential rivals and potential competitors
14 in the relevant market.

15 22. Not only do Southwest and AirTran provide competing passenger service
16 against each other on a number of passenger routes, but also they are potentially able to
17 provide competing passenger service against each other on any route anywhere in the United
18 States if they believe it would be profitable to do so.

19 23. Southwest has the capability to serve every major market in the United States.

20 24. AirTran has the capability to serve every major market in the United States.

21 25. The behavior of Southwest is constrained by the actual and potential competition
22 from AirTran throughout the entire relevant market and submarkets.

23 26. The behavior of AirTran is constrained by the actual and potential competition
24 from Southwest throughout the entire relevant market and submarkets.

25 27. The market for the transportation of airline passengers in the United States is in
26 and part of interstate commerce, makes extensive use of the instrumentalities of interstate
27 commerce, and substantially affects interstate commerce. Airline passengers travel in a
28

1 continuous and uninterrupted flow of interstate commerce. Airline travel is a continuous and
2 uninterrupted flow of interstate commerce. Materials used in the construction of airplanes are
3 purchased and shipped in a continuous and uninterrupted flow of interstate commerce.

4 28. Any restraint of trade in the transportation of airline passengers in the United
5 States, including the restraints specifically alleged in this complaint, directly and substantially
6 restrains and affects interstate commerce.

7 **CONDUCT GIVING RISE TO VIOLATIONS OF LAW**

8
9 29. On September 27, 2010, Southwest and AirTran announced that they had
10 entered into a definitive merger agreement for Southwest to acquire AirTran, in a deal valued
11 at approximately \$1.4 billion, or \$3.4 billion including AirTran's debt and capitalized aircraft-
12 operating leases.

13 30. The new airline will operate under the Southwest name.

14 31. The merging companies are AirTran and Guadalupe Holdings Corp., a Nevada
15 corporation and wholly owned subsidiary of Southwest Airlines. Guadalupe will be merged
16 into AirTran, which will then become a wholly owned subsidiary of Southwest Airlines.

17 32. After the merger closes, AirTran will be merged into a new limited liability
18 company set up as a Texas company, LLC Sub, which will become a wholly owned subsidiary
19 of Southwest.

20 33. The chief executive officer of the combined company will be Gary Kelly, the
21 current chairman, president, and CEO of Southwest.

22 34. Bob Fornaro, chairman, president, and CEO of defendant AirTran, will continue
23 to be involved in the integration of the two companies.

24 35. Through secret and private meetings, Mr. Kelly of Southwest met on more than
25 one occasion with Mr. Fornaro of AirTran.

26 36. One or more the secret and private meetings of Mr. Kelly and Mr. Fornaro were
27 carried on outside of their offices, including hotels.
28

1 37. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
2 discussed the purposes and probable effects of the merger.

3 38. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
4 discussed airline fares in general and specifically.

5 39. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
6 discussed the frequency of flights.

7 40. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
8 discussed the elimination or curtailment of the use of hubs.

9 41. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
10 discussed the curtailment of capacity.

11 42. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
12 discussed the firing of employees.

13 43. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
14 discussed the type of aircraft to be eliminated.

15 44. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
16 discussed the charges for services previously given to passengers for free.

17 45. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
18 discussed the potential fare increases in the monopoly submarkets that would be created by the
19 combine.

20 46. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
21 discussed the potential fare increases in the duopoly submarkets created by the combine.

22 47. The combined company will carry over 113 million passengers per year, provide
23 access to more than 106 destinations from coast to coast, Mexico and the Caribbean, with 685
24 all-Boeing aircraft, and employ approximately 43,000 employees.

25 48. Defendants Southwest and AirTran are both low cost carriers ("LCCs").

26 49. Only seven true low-cost carriers now compete in the U.S. market.
27
28

1 50. Of the seven LCCs, Southwest is by far the dominant carrier, accounting for
2 approximately 60% of the combined market share of the *low-cost carriers* that report data to
3 the DOT.

4 51. AirTran controls almost 15 percent of the LCC's combined market share of the
5 *low-cost carriers* that report data to the DOT.

6 52. The combined company would account for approximately 75% of the combined
7 market share of the low cost carriers.

8 53. Pre-merger, Southwest's *overall* domestic market share is approximately 14.2%.

9 54. Pre-merger, AirTran's *overall* domestic market share is approximately 3.4%.

10 55. Combined, Southwest and AirTran will have more than 98 billion RPMs.
11 Domestically, their combined market share as measured by RPM's would be 17.7%.

12 56. If the merger is consummated, it will result in lower capacity; that is, fewer seats
13 in the sky, which, in turn, will result in higher ticket fares for consumers.

14 57. Defendants' merger would take place in and further concentrate an already
15 highly concentrated market, characterized by mergers, including the most recent merger of
16 United and Continental Airlines in 2010, which made United the world's largest carrier.

17 58. The top 9 competitors will have concentrated into 6 – controlling a full 90% of
18 the market – in just 24 months. The recent United-Continental merger has further
19 concentrated the market with an acquisition of major participants: United was the third largest
20 airline in the United States measured by 2009 operating revenue, with 14.2% of the market,
21 while Continental was the fourth largest airline, with 10.7% of the market. The combined
22 airline, with 25.0% share of the market, is now effectively the largest airline in the world,
23 along with Delta.

24 59. In addition, defendants themselves are the products of mergers and acquisitions.

25 60. In 1985, Southwest bought MuseAir, renamed it TranStar Airlines.

26 61. In 1993, Southwest bought MorrisAir, a competing airline based on Salt Lake
27 City, Utah; and in 2008, Southwest acquired assets from bankrupt ATA airlines.
28

1 57. In 1997, ValuJet announced it would merge with the much smaller Airways
2 Corporation, parent of AirTran Airways. The merged company would retain the AirTran
3 name.

4 62. Others mergers include that between Northwest and Republic Airlines in 1986,
5 and between U.S. Airways and America West in 2005.

6 63. According to Jeffrey Breen, President of Cambridge Aviation Research, "We
7 find more airports and routes red-flagged in our analysis of this proposed merger than for
8 United-Continental."

9 64. A recent report by Cambridge Aviation Research on the Southwest-AirTran
10 merger, red-flagged 33 routes, including 16 pushed into monopoly status as a result of the
11 merger.

12 65. Jeffrey Breen of Cambridge Aviation Research notes that, "We find the most
13 cause for concern in Baltimore and Orlando which together account for more than 80% of
14 passengers traveling along red-flagged routes."

15 66. At the airport level, 18 U.S. airports are red-flagged for increases in market
16 concentration exceeding DOJ guidelines. From most-affected to least: Baltimore (BWI),
17 Chicago Midway (MDW), Orlando International (MCO), Houston Hobby (HOU), Tampa
18 (TPA), Indianapolis (IND), Fort Meyers (RSW), Columbus (CMH), Buffalo (BUF),
19 Milwaukee (MKE), Jacksonville (JAX), Fort Lauderdale (FLL), San Antonio (SAT), New
20 Orleans (MSY), Kansas City (MCI), St. Louis (STL), Palm Beach (PBI), and Las Vegas
21 (LAS).

22 67. The new combined company's dominance at the airports listed above is
23 substantially likely to result in higher fare prices for flights to or from those airports.

24 68. Of the 33 routes red-flagged, 16 are pushed into monopoly status. The red-
25 flagged route list includes the combined carrier's second-busiest route, Baltimore-Orlando,
26 whose one million annual passengers stand to lose airline choice as this proposed merger
27 pushes the route into monopoly.
28

69. Defendants have overlapping non-stop flights on 19 routes, including, Baltimore-Boston; Baltimore-Ft. Lauderdale; Baltimore-Indianapolis; Baltimore-Jacksonville; Baltimore-Orlando; Baltimore-Milwaukee; Baltimore-New Orleans; Baltimore-Tampa; Baltimore-Fort Myers, FL.; Chicago Midway-Fort Myers, FL.; Indianapolis-Tampa; Las Vegas-Milwaukee; Orlando-Buffalo, Orlando-Columbus, OH; Orlando-Indianapolis; Orlando-Chicago Midway; Orlando-Milwaukee; Orlando-Philadelphia; and Orlando-Pittsburgh.

70. If the Southwest and AirTran combination were allowed, the airline would account for nearly 95 percent of available seat miles on offer at Chicago-Midway International Airport, 92 percent at Hobby Airport in Houston, and 70 percent of Baltimore/Washington International Airport.

71. If the Southwest and AirTran combination were allowed, the merger will reduce the number of competitors in 127 nonstop and connecting markets and will reduce the number of competitors from two to one in 14 nonstop and connecting markets.

72. Defendant Southwest says it intends an "orderly and reasonable schedule" for ending flights at Dallas/Fort Worth International following the carriers' merger.

73. Former U.S. Rep. Jim Oberstar, Chairman of the House Transportation and Infrastructure Committee from 2007 until 2011, has stated that, "The future of competition among airlines at every level of the industry, legacy and low-cost alike, is at stake in the Southwest-AirTran merger."

74. Defendants compete now on hundreds of domestic connecting routes, where competition will be reduced or eliminated as a result of defendants' merger.

75. The potential for increased collusion among the remaining airlines is significant, because the domestic passenger airlines, including, *inter alia*, these defendants, have in the past colluded to fix prices with regard to airfares, surcharges, and cargo prices, and to fix other terms and conditions of air transportation and travel.

76. In addition to the degree of market concentration, there are significant barriers to entry in the relevant market, as well as a history of a lack of successful new entry. The relevant market has been characterized by the exit, rather than the entry, of firms. The

1 prospect of new entry is therefore unlikely to eliminate any of the anticompetitive effects that
2 will eventuate from the defendants' merger and the increasingly concentrated structure of the
3 relevant market.

4 77. The defendants' proposed merger will cause harm to consumers, including the
5 plaintiffs, by generating higher airfares, by reducing the number of flights on particular routes,
6 and by eliminating air service to smaller communities. Consumers, including the plaintiffs,
7 will thus pay more for less airline service than would be the case in the absence of defendants'
8 merger.

9 78. The defendants' proposed merger is also likely to lead to other mergers and
10 further concentration in the already highly concentrated relevant market. American Airlines,
11 which until the Delta-Northwest merger was the largest domestic airline, will likely combine
12 with another carrier, like U.S. Airways, the only remaining medium-sized carrier. Both of the
13 CEO's of American and U.S. Airways have already indicated publicly of their approval of the
14 elimination of capacity and of their desire to further concentrate the industry and eliminate
15 even more capacity, with the obvious result of higher fares.

16 79. There are 29 major airports in the United States, located in the following cities:
17 Atlanta, Baltimore, Boston, Charlotte, Chicago, Dallas, Denver, Detroit, Fort Lauderdale,
18 Houston, Las Vegas, Los Angeles, Miami, Minneapolis, New York, Newark, Orlando,
19 Philadelphia, Phoenix, Portland, Salt Lake City, San Diego, San Francisco, Seattle, Tampa,
20 and Washington D.C.

21 80. Each major U.S. passenger airline, including LCC defendants Southwest and
22 AirTran, has the ability and financial capacity to offer competitive flights between any two
23 major cities in the United States, whether or not they are currently offering such flights.

24 81. Each major U.S. passenger airline, including LCC defendants Southwest and
25 AirTran, has the ability and financial capacity to establish a competitive presence in any of the
26 major airports located throughout the United States by, inter alia, leasing or otherwise utilizing
27 terminal slots, hiring employees, and directing more flights to and from the given airport.
28

1 82. Since the LCCs and major airlines already offer flights to and from various
2 major U.S. cities, each such airline, including defendants Southwest and AirTran necessarily
3 has the managerial expertise to offer similar flights between any two major cities in the United
4 States.

5 83. The major U.S. passenger airlines, including LCC defendants Southwest and
6 AirTran, frequently trade, sell, lease or purchase slots from other airlines in each of the major
7 29 airports throughout the United States.

8 84. The LCCs and major U.S. passenger airlines with significant market share in
9 specific regions or major airports, including defendants Southwest and AirTran, endeavor to
10 keep other LCCs and major airlines from entering the market with competitive flights.

11 85. On information and belief, each of the LCCs and major U.S. passenger airlines,
12 including defendants Southwest and AirTran, has created internal documents reflecting a
13 financial and economic cost/benefit analysis of increasing its presence in each or many of the
14 major U.S. airports.

15 86. On information and belief, each of the LCCs and major U.S. passenger airlines,
16 including defendants Southwest and AirTran, has created internal documents reflecting its
17 analysis of how the market for air transportation would be impacted within each regional
18 market or major U.S. airport by the entry of another LCC or major U.S. passenger airline into
19 that region or major airport.

20 87. The entry of Southwest or AirTran into regions or major airports that are
21 dominated, controlled, or serviced by other LCCs or major passenger airlines would result in
22 lower prices, increased service levels, and/or other pro-competitive effects on flights within
23 the region to or from the given major airport.

24 88. As the foregoing paragraphs show, the effect of the defendants' merger, if
25 consummated, may be substantially to lessen competition, or to tend to create a monopoly in
26 the relevant markets.

27 89. By reason of the defendants' proposed merger, the plaintiffs are threatened with
28 loss or damage in the form of higher ticket prices and diminished service. If the defendants'

1 merger is consummated, the plaintiffs will sustain irreparable harm for which damages will be
 2 unable to compensate plaintiffs, in that service once lost cannot easily be restored.
 3 Accordingly, plaintiffs bring this action for both preliminary and permanent injunctive relief
 4 against defendants' merger.

5 **VIOLATION ALLEGED**

6 **Clayton Act, Section 7**

7 90. The conduct of defendants described hereinabove, specifically their agreement
 8 to merge, constitutes a violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, in
 9 that the effect of the proposed merger of defendants may be substantially to lessen
 10 competition, or to tend to create a monopoly in the transportation of airline passengers in the
 11 United States and the transportation of airline passengers to and from the United States on
 12 international flights; by reason of which violation the plaintiffs are threatened with loss or
 13 damage in the form of higher ticket prices and diminished service, as well as irreparable harm
 14 for which damages will be inadequate to compensate plaintiffs, such that plaintiffs are entitled
 15 to bring suit under Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, to obtain
 16 preliminary and permanent injunctive relief against defendants' merger, and to recover their
 17 cost of suit, including a reasonable attorney's fee.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, plaintiffs demand the following relief from this Honorable Court:

20 A. Declaring, finding, adjudging, and decreeing that the agreement of the
 21 defendants to merge violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18.

22 B. Preliminarily enjoining the defendants from consummating their merger during
 23 the pendency of this action.

24 C. Permanently enjoining the defendants from consummating their merger.

25 D. Awarding to plaintiffs their cost of suit, including a reasonable attorney's fee,
 26 as provided by Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26.

27 E. Granting to plaintiffs such other and further relief to which they may be entitled
 28 and which the Court finds to be just and appropriate.

1
2
3
4
5 Dated: May 3, 2011
6

7 ALIOTO LAW FIRM

8
9 By: 

10 Thomas Pier
11 ALIOTO LAW FIRM
12 225 Bush Street, 16th Floor
13 San Francisco, CA 94104
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EXHIBIT A

Origins of Legacy Airlines and Southwest

History of Mergers and Acquisitions

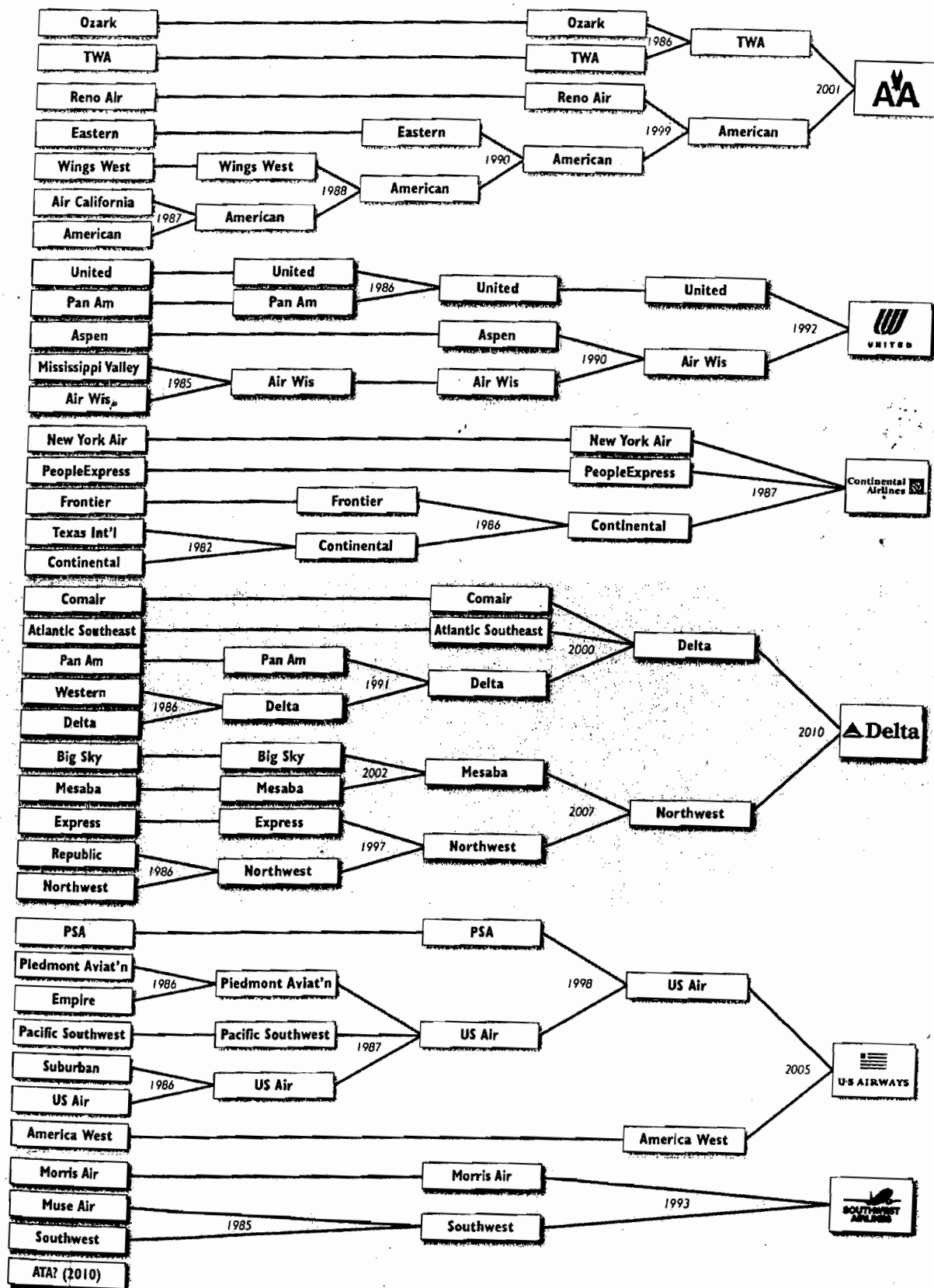


EXHIBIT B



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Airline Activity : National Summary (U.S. Flights)

	2010 *	2011 *	Change
Enplaned Passengers (million)	619	630	1.8%
Departures (000)	9,189	9,121	-0.7%
Freight/Mail (million lbs)	19,053	19,924	4.6%
Load Factor (%)	81.3	82.3	1.0 points
Airlines with scheduled service	103	99	-3.9%

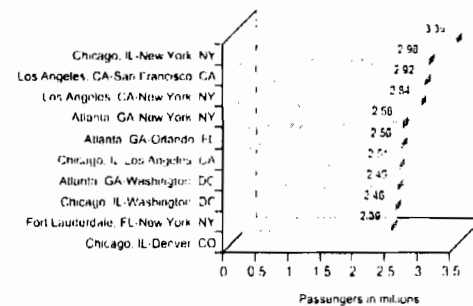
* 12 months ending January of each year

Airline Domestic Market Share February 2010 - January 2011

Airlines	Share
Delta	16.6%
Southwest	14.2%
American	13.6%
United	10.1%
US Airways	7.8%
Continental	7.3%
JetBlue	4.4%
AirTran Corporation	3.4%
Alaska	3.3%
SkyWest	2.1%
Other	17.2%

Market share based on Revenue Passenger Miles February 2010 - January 2011.

Top Domestic Routes February 2010 - January 2011



Based on enplaned passengers of all airports for a city pair February 2010 - January 2011.

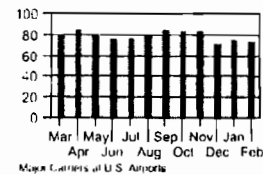
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At a Glance

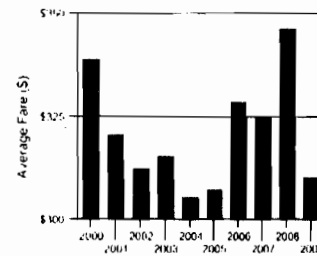
Percent of U.S. Flights On Time (2010-2011)



Click a bar for details. Mouseover it for percentage.

Average Air Fares

Average Domestic Airline Fares



Click a bar for details. Mouseover it for total.

FILED
2011 MAY -3 P 3:43
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Theresa D. Moore (SBN 99978)
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JW

Wayne Taleff *et al.*

Plaintiffs,

v.

SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP.,
AIRTRAN HOLDINGS, INC.,

Defendants.

CASE NO.:

CV 11 2179

PLAINTIFFS' NOTICE OF
MOTION AND MOTION
FOR A TEMPORARY
RESTRAINING ORDER

Date:

Time:

Judge:



1 **PLAINTIFFS ABOVE-NAMED**, by and through their undersigned attorneys,
2 hereby move this Court for a Temporary Restraining Order enjoining defendants above-
3 named, their officers, directors, employees, agents, and all persons acting in concert with
4 them or subject to their direction or control, from completing and consummating the
5 transaction merging Southwest Airlines and AirTran Airlines, as described more fully in
6 paragraphs 1, 4, 5, and 6 of the Complaint.

7
8 The grounds for this motion are that the plaintiffs will suffer irreparable harm if said
9 transactions, arrangements, and agreements are consummated and completed; there is a high
10 probability that plaintiffs will succeed on the merits in establishing that the contemplated
11 transactions, arrangements, and agreements violate United States antitrust laws; and the
12 public interest strongly favors granting the preliminary injunction.

13
14 This motion is based on the Complaint and all of the files and proceedings herein,
15 including the supporting memorandum of law.

16 A certificate pursuant to F.R.C.P 65(b) is attached hereto.

17
18 Dated: May 3, 2011

19
20
21 ALIOTO LAW FIRM

22
23 By: 

24 Thomas Paul Pier
25 ALIOTO LAW FIRM
26 225 Bush St., 16th Floor
27 San Francisco, CA 94104
28 Telephone: (415) 434-8900
 Facsimile: (415) 434-9200
 E-mail: jmiller@aliotolaw.com

CERTIFICATE PURSUANT TO
F.R.C.P 65(b)

I, Thomas Paul Pier, hereby certify as follows:

On May 2, I attempted to contact counsel for Southwest Airlines and AirTran Airlines in order to notify them of our intention to seek a Temporary Restraining Order from this Court.

By conducting an on-line search, I was able to determine that Southwest's general counsel is Ms. Madeleine Johnson. At approximately 2:00 PM PST, I called 214-792-4000 and was connected to her office, but I was thereafter informed by her assistant, Ms. Teri Lambert, that Ms. Johnson was not available. I asked for, and received an e-mail address (teri.lambert@wnco.com) to which I sent the following message:

Ms. Lambert,

Please be so kind as to forward to Ms. Madeleine Johnson.

Thank you.

Tom Pier

SENT VIA E-MAIL TO MS. TERI LAMBERT

Ms. Johnson,

I am an attorney with the Alioto Law Firm. We represent a group of consumers who intend to file suit, pursuant to Sections 7 and 16 of the Clayton Antitrust Act, 15 U.S.C. Sec. 26, to enjoin Southwest's proposed acquisition of AirTran Airways.

Pursuant to F.R.C.P. 65(b), please take NOTICE that tomorrow, May 2 or as soon as practicable, we will be filing a motion for a Temporary Restraining Order in United States District Court for the Northern District of California seeking an Order from the Court enjoining Southwest and/or Guadalupe Holdings Company from acquiring AirTran Airways.

I will be sending you all documents related to this matter as soon as they are filed with the Court.

Should you have any questions regarding this matter, please contact me via return e-mail here or at our offices at 415-434-8900.

My regards,

Tom Pier


1 I did not receive a reply.

2 Very shortly thereafter, I attempted to contact Mr. Steven Rossum, who is identified
3 on AirTran's website as his general counsel. At approximately 2:05 PM PST I called 407-
4 318-5600 x5117 and was connected to Mr. Rossum's voice-mail. I left a detailed message
5 identifying myself stating that we intended to file a motion for a Temporary Restraining
6 Order to enjoin Southwest's proposed acquisition of his company. I also sent an e-mail to
7 steven.rossum@airtran.com substantively similar to the above e-mail. I did not receive a
8 reply to either the voice message or e-mail.

9 The reasons supporting the claim that notice should not be required are set forth in the
10 Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order that
11 accompanies this motion.

12 I declare, under penalty of perjury and the laws of the state of California, that the
13 foregoing is true and correct to the best of my recollection.

14 Executed this 3rd day of May, 2011 at San Francisco, California.

15 
16 _____
17 Thomas Paul Pier

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Wayne Taleff, *et al.*

Plaintiffs,

v.

SOUTHWEST AIRLINES CO.,
GUADALUPE HOLDINGS CORP.,
AIRTRAN HOLDINGS, INC.,

Defendants.

CV 11

CASE NO.:

2179

MEMORANDUM IN
SUPPORT OF
PLAINTIFFS' MOTION
FOR A TEMPORARY
RESTRAINING ORDER

Date:
Time:
Judge:

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INTRODUCTION

Plaintiffs above-named, by and through their undersigned attorneys, hereby move this Court for an order enjoining defendants above-named, their officers, directors, employees, agents, and all persons acting in concert with them or subject to their direction or control, from completing and consummating Southwest Airlines Corporation and/or Guadalupe Holdings Corporation's acquisition of AirTran Airlines Corporation, as described more fully in paragraphs of the Complaint.

The merger between the defendants will increase the size of what is already the nation's largest low cost carrier ("LCC") and will eliminate a significant competitor in the market for air transportation to, from and within the United States. The effect of the merger will be to substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Plaintiffs, persons who have and plan to purchase tickets for airline travel, bring this action to obtain injunctive relief against the defendants' unlawful combination pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

On April 26, 2011, a potential obstacle to the merger- the filing of a complaint by the United States Department of Justice to enjoin the merger- was eliminated when the DOJ stated that it had closed its investigation. The defendants have made known their intention to begin to effectuate their combination at the earliest possible time and commencing as early as May 2, 2011.

In addition to the above, the related case of *Malaney et al. v. United Airlines*, (Case No. 3:10-CV-02858 RS) is currently scheduled for hearing before the 9th Circuit Court of Appeal on May 10th, 2011, a mere 7 days from now. *Malaney* is

another Section 7 case seeking to enjoin the proposed merger of United Airlines and Continental Airlines. The outcome of *Malaney* will have a substantial impact on the competitive structure and nature of the airline industry in the United States. Accordingly, Plaintiff seeks a temporary restraining order to enjoin Southwest's acquisition of AirTran until the matter of *Malaney* is heard.

FACTUAL BACKGROUND

Plaintiffs in this action are persons who have purchased airline tickets for domestic travel in the past and each continues to do so in the future. (Compl. ¶ 8.)

Southwest Airlines is engaged in the business of transporting passengers and cargo in the United States. Southwest has approximately 35,000 employees and earned a net income of approximately \$459 million on \$12.1 billion revenue in 2010. Also in 2010, Southwest logged approximately 78 billion revenue passenger miles ("RPMs") (Pier Dec. ¶ 2¹). As measured by RPMs, Southwest is the second largest carrier in the United States, with a domestic market share of 14.2%. (Pier Decl, ¶ 3.)

AirTran Airlines is engaged in the business of transporting passengers and cargo in the United States. AirTran has approximately 8,300 employees and logged 19.5 billion RPM. As measured by overall domestic market share is 3.4% by RPM, ranking it as the eighth largest carrier overall. (Pier Decl. ¶¶ 4,3.)

In the so-called low cost carrier market, typified by point-to-point service (rather than hub-and-spoke service) Southwest is the dominant carrier, accounting

¹ "Pier Decl." refers to the declaration of Thomas Paul Pier, attached hereto.

for 60% of the LCC market, while AirTran currently controls 15 percent (Pier Decl., ¶ 5.)

On September 27, 2010, defendant airlines Southwest Airlines and AirTran Airlines announced their intention to combine in a \$1.4 billion transaction. (Pier Decl. ¶ 6.)

On April 26, 2011, the DOJ announced that it had closed its investigation of Southwest's acquisition of AirTran. (Pier Decl. ¶ 7.)

On May 2, 2011, it was reported that Southwest Airlines had completed its acquisition of AirTran Airlines. (Pier Decl. ¶ 8.)

Industry analysts expect that "full integration" of the two airlines will take between one year and 18 months. (Pier Decl. ¶ 9.)

ARGUMENT

I. STANDARDS FOR TEMPORARY RESTRAINING ORDER.

The standards for the issuance of a temporary restraining order or preliminary injunction require the moving party to satisfy one of two tests:

Finally, to establish entitlement to a preliminary injunction, a plaintiff must prove either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor.

Arizona Minority Coalition for Fair Redistricting the Arizona Independent Redistricting Commission, 366 F. Supp. 2d 887, 895 (D. Ariz. 2005); *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 293 (9th Cir. 1989); *GoTo.Com, Inc. v.*

1 *Walt Disney Co.*, 202 F.3d 1199, 1204-05 (9th Cir. 2000); *Raich v. Ashcroft*, 352 F.3d
 2 1222, 1227 (9th Cir. 2003), vacated and remanded on other grounds sub nom.,
 3 *Gonzalez v. Raich*, 545 U.S. 1 (2005).² “These two formulations ‘represent two
 4 points on a sliding scale in which the required degree of irreparable harm increases
 5 as the probability of success decreases.’” *Arizona Redistricting*, 366 F. Supp. 2d at
 6 895, quoting *Hunt v. NBC*, 872 F.2d at 293.

7 Here, plaintiffs clearly satisfy either of the two tests and are entitled to
 8 a temporary restraining order.

9 10 A. Irreparable Harm to Plaintiffs

11
12 Paragraph 5 of the Complaint sets forth the harm that is reasonably
 13 probable to occur to plaintiffs should defendants consummate their merger,
 14 including but not limited to, increases in prices and fares, elimination and/or
 15 curtailment of services, elimination or curtailment of frequency of flights,
 16 curtailment of capacity of aircraft and available seats for passage, elimination of
 17 tens of thousands of jobs, the deterioration of quality of service, the addition of
 18 charges for amenities otherwise considered part and parcel of the service, the
 19 elimination or substantial cutback of traffic to hubs, the creation of monopolies for
 20 passenger air traffic from and to major cities, and the encouragement and trend to
 21 further concentrate the industry toward ultimate monopoly.

22
23
24 ² In *Raich v. Ashcroft*, *id.*, the Court also adverted to “the traditional test for granting
 25 preliminary injunctive relief [which] requires the applicant to demonstrate: (1) a likelihood of success
 26 on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors
 the applicant; and (4) whether any public interest favors granting an injunction.” Whatever test is
 used, plaintiff is entitled to a temporary restraining order, as shown *infra*.

Southwest Airlines and AirTran currently operate overlapping non-stop flights on 19 routes. (Pier Decl. ¶ 6.) According to a recent report by Cambridge Aviation Research, the proposed merger between Southwest and AirTran will lead to significantly increased concentration in at least 33 routes, including 17 routes that will be pushed to monopoly status as a result of the merger. Additionally, market concentration will grow to exceed DOJ guidelines in at least 18 airports (Pier Decl. ¶ 10). The result of this increase in concentration will be diminished competition and increased prices and reduced services, including the elimination of flights on some routes.

Indeed, Southwest has already signaled its intention to eliminate first-class seating and to cut some airport services. On April 29th, a mere three days after the Department of Justice announced it was dropping its investigation of the Southwest/AirTran deal, Southwest announced that it intends an “orderly and reasonable schedule” for ending flights at Dallas/Fort Worth International. (Pier Decl., ¶ 11.) On May 2, 2011 a Southwest spokesperson was reported to have said that single-class cabins are possibly one of “the biggest changes [AirTran] passengers will eventually see.” (Pier Decl., ¶ 9.) And recently, AirTran CEO Robert Fornaro reportedly said it would be the “right thing to do” for Southwest to eventually drop AirTran’s first-class seats. (Pier Decl., ¶ 8.)

Finally, recent mergers in the airline industry have had a snowball effect, resulting in even further concentration. The merger of Southwest and Airtran is already promising to have a similar effect. On April 7, 2011, US Airways CEO Doug Parker stated that his was the only dominant carrier remaining which has yet to enter into a merger, but signaled his willingness to do so, stating “there’s one big deal and that’s with US Airways” and “any of the three of them [United-

1 Continenatl, Delta, or American] at the right time could do something with us.”
 2 (Pier Decl., ¶ 12.) Further, Continental CEO Jeff Smisek recently signaled that he
 3 anticipates even further concentration in the industry. On April 21, 2011, when
 4 asked, in light of the recent deals involving Delta/Northwest, United/Continental,
 5 and Southwest/AirTran, if the industry was fully consolidated Smisek stated “I
 6 don’t think it’s there yet. I think consolidation is a good long-term trend for this
 7 business.” (Pier Decl., ¶ 13.)

8 **B. Likelihood of Success on the Merits**

9
 10 Under long-established Supreme Court precedent, the defendants’
 11 combination presents a clear and egregious violation of Section 7 of the Clayton Act.
 12 Under § 7 of the Clayton Act, mergers are prohibited if their result may be a
 13 substantial lessening of competition, or a tendency to create a monopoly. Since the
 14 thrust of the statute is prospective, designed “primarily to arrest apprehended
 15 consequences of inter-corporate relationships before those relationships could work
 16 their evil. . . .,” a transaction which *may* have the proscribed anticompetitive effects
 17 is prohibited. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597
 18 (1957); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

19
 20 Thus, if there is a “reasonable probability” that the merger will
 21 substantially lessen competition or tend to create a monopoly, it is prohibited under
 22 Section 7. *Brown Shoe Co. v. United States*, 370 U.S. at 323; *FTC v. Procter &*
 23 *Gamble Co.*, 386 U.S. 568, 577 (1967). By using these terms in Section 7, “which
 24 look not merely to the actual present effect upon future competition, Congress
 25 sought to preserve competition among many small businesses by arresting the trend
 26 toward concentration in its incipency before that trend developed to the point that

1 a market was left in the grip of a few big companies.” *United States v. Von’s*
2 *Grocery Co.*, 384 U.S. 270, 277 (1966).

3 In determining whether a horizontal merger such as those occurring here
4 may “substantially” lessen competition, the merger must be “functionally viewed, in
5 the context of its particular industry.” Thus, the court is to examine factors such as
6 market share, degree of market foreclosure, barriers to entry, extent of
7 concentration in the industry, and trends toward concentration in the industry.
8 *See, e.g., United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v.*
9 *Philadelphia Nat’l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*,
10 *supra*. All of these factors strongly militate here in favor of injunctive relief, given
11 the existence of high entry barriers, increasing concentration, and the high barriers
12 to entry in the airline industry.

13
14 As noted by Judge Posner in *Hospital Corp. of Am. v. Federal Trade Comm’n*,
15 807 F.2d 1381, 1385 (7th Cir. 1986), the Supreme Court in the 1960s decided a
16 number of cases that “seemed, taken as a group, to establish the illegality of any
17 non-trivial acquisition of a competitor, whether or not the acquisition was likely
18 either to bring about or shore up collusive or oligopoly pricing.” As aptly
19 summarized by Judge Posner, “The elimination of a significant rival was thought by
20 itself to infringe the complex of social and economic values conceived by a majority
21 of the Court to inform the statutory words ‘may . . . substantially . . . lessen
22 competition.’” *Id.* The decisions cited by Judge Posner include *Brown Shoe Co. v.*
23 *United States*, 370 U.S. 294 (1962); *United States v. Aluminum Co. of Am.*, 377 U.S.
24 271 (1964); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); and *United*
25 *States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

1 In *Brown Shoe*, the Supreme Court enjoined a merger of firms with a
 2 combined share of 7.2 percent of United States retail shoe stores and 2.3 percent of
 3 total retail shoe outlets in the United States. In doing so, the Supreme Court was
 4 particularly concerned with the historical trend of increasing concentration through
 5 mergers in the shoe industry. In *United States v. Aluminum Co. of Am.*, 377 U.S.
 6 271 (1964), the Supreme Court enjoined Alcoa's acquisition of Rome Cable, although
 7 the acquisition added only 1.3 percent to Alcoa's share of the aluminum conductor
 8 market. In *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), the Supreme
 9 Court enjoined a grocery merger that resulted in a combined share of 7.5 percent of
 10 the retail grocery market in Los Angeles. In *United States v. Pabst Brewing Co.*,
 11 384 U.S. 546 (1966), the Court enjoined a beer merger where the combined share of
 12 the merged company was 4.49 percent of beer sales nationally. As in *Brown Shoe*,
 13 the Court's decision in these cases turned in large part on the historical trend of
 14 increasing concentration through mergers in each industry. As Judge Posner aptly
 15 observed, "None of these decisions has been overruled." 807 F. 2d at 1385.

16 Moreover, the Supreme Court has also made clear that courts may not
 17 approve acquisitions that will lead to excessive market foreclosures, even of failing
 18 companies, unless there is "no other prospective purchaser," which is certainly not
 19 the case here. *Citizen Publishing Co. v. United States*, 394 U.S. at 137;
 20 *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930).

21 Here, the Section 7 violation is indisputable. If allowed to combine, the new
 22 entity will gain substantial market share nationwide and in selected markets and a
 23 significant competitor will be eliminated. In the overall nationwide air travel
 24 industry, Southwest is the second largest carrier in the United States, with a
 25 domestic market share of 14.2% as measured by revenue passenger miles ("RPMs").
 26

1 AirTran's overall domestic market share is 3.4% by RPM, ranking it as the eighth
 2 largest carrier. (Pier Decl., ¶ 3.) By this measure, the combined entity will control
 3 17.7% of the domestic market of RPM. In the so-called low cost carrier market,
 4 typified by point-to-point service (rather than hub-and-spoke service) Southwest is
 5 the dominant carrier, accounting for 60% of the LCC market, while AirTran
 6 currently controls 15 percent. (Pier Decl., ¶ 5.) Consequently, the merged entity
 7 will control 75% of the LCC market. Such an acquisition easily amounts to more
 8 than the "non-trivial acquisition of a competitor" required for a violation of Section 7
 9 under the cited Supreme Court cases.

10 Nor can there be any issue with regard to the plaintiffs' standing to
 11 obtain injunctive relief against the defendants' violations. *Reilly v. The Hearst*
 12 *Corp.*, 107 F.Supp.2d 1192, 1194-95 (N.D. Cal. 2000) . In the cited case, this Court
 13 held that plaintiff Reilly had standing as a newspaper subscriber to bring federal
 14 antitrust claims challenging Hearst's acquisition of *The San Francisco Chronicle*.
 15 According to this Court in *Reilly*, "...as a consumer of newspaper news, features,
 16 and opinions, he is entitled to prove that the challenged transactions cause injury to
 17 competition for readers among economically viable newspapers." *Id.* Here, all
 18 plaintiffs are "consumers" of the defendants' product, *viz.* they have in the past, and
 19 intend in the future, to purchase tickets for airline transportation to, from and
 20 within the United States.

21 It is also important to note that the standing requirements under
 22 Section 16 of the Clayton Act to obtain injunctive relief are different from and less
 23 stringent than those under Section 4 applicable to damage claims. *Cargill, Inc. v.*
 24 *Monfort of Colorado, Inc.*, 479 U.S. 104, 111(1986); *Hawaii v. Standard Oil Co. of*
 25 *Cal.*, 405 U.S. 251, 261 (1972); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*,

1 754 F.2d 404, 407-08 (1st Cir. 1985); *Lucas Auto. Eng'g, Inc. v.*
 2 *Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998).

3 Accordingly, plaintiffs have clearly shown a sufficiently substantial
 4 likelihood of success on the merits to warrant a preliminary injunction.

5 6 C. The Alternative Test.

7
8 Temporary restraint relief is also available to a plaintiff showing "that
 9 serious questions going to the merits were raised and the balance of hardships tips
 10 sharply in his favor." *Arizona Redistricting*, 366 F.Supp.2d at 895; *Hunt v. NBC*,
 11 872 F.2d at 293. Plaintiffs have shown a likelihood of success on the merits *supra*,
 12 and the balance of hardships also tips heavily in plaintiffs' favor.

13 As demonstrated *supra*, Plaintiffs stand a reasonable probability of
 14 irreparable harm through reductions in service, increase in fees and fares, and the
 15 elimination of routes. This harm, in particular the elimination of first-class service
 16 currently available on all of AirTran flights, and the elimination of AirTran service
 17 to Dallas/Fort Worth International, is not compensable by money damages. In
 18 contrast, Defendants will take over a year to effectuate the integration of the two
 19 companies, and will not be harmed by a delay of their merger until a time that a
 20 motion for preliminary injunction can be heard.

21
22 //

23
24 //

25
26 //

CONCLUSION

On the basis of the foregoing arguments and authorities, plaintiffs respectfully pray that this Court enter the temporary restraining order requested and preclude defendants from consummating and completing the transactions, agreements, and combination described in paragraphs 1, 4, 5, and 6 of the Verified Complaint until the Court can hear and decide a motion for a preliminary injunction.

Dated: May 3, 2011

ALIOTO LAW FIRM

By: 

Thomas Paul Pier

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Facsimile: (415) 434-9200

**DECLARATION OF THOMAS PAUL PIER
IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING
ORDER.**

Wayne Taleff et al. v. Southwest Airlines et al.

1. My name is Thomas Paul Pier. I am duly licensed to practice law in the State of California, and I have been admitted to practice law in the United States District Court, Northern California. My California Bar Association identification number is 235740. The matters stated herein are based on my personal knowledge and I am competent to testify thereto.

2. On or about May 2, 2011 I visited www.southwest.com whereon I read that Southwest has approximately 35,000 employees, had a net income of approximately \$459 million on \$12.1 billion revenue, and logged approximately 78 billion revenue passenger miles in 2010. A printout of the website is attached as Exhibit 1.

3. On or about May 2, 2011, I visited <http://www.transtats.bts.gov/>, whereon I read a report stating that Southwest is the number 2 carrier in terms of Revenue Passenger Miles in the United States with 14.2% of the market and that AirTran is the number 8 carrier with 3.4% of the market. A printout of the article is attached as Exhibit 2.

4. On or about May 2, 2011, I visited <http://www.insideairtran.com/?p=3559> whereon I read a report stating that AirTran has approximately 8,300 employees. A printout of the article is attached as Exhibit 3.

*Declaration of Thomas Paul Pier in Support of
Plaintiffs' Motion for a Temporary Restraining Order*

5. On or about May 2, 2011, I visited

<http://aviationblog.dallasnews.com/archives/2010/10/oberstar-urges-justice-antitrust.html>

whereon I read an article dated October 8, 2010 in which United States Representative Jim Oberstar was quoted as saying that Southwest accounts for approximately 60% of the combined market share of the low-cost carriers and that AirTran controls 15% of that market. A printout of the article is attached as Exhibit 4.

6. On or about May 2, 2011 I visited

[http://www.usatoday.com/money/industries/travel/2010-09-27-southwest-airtran-](http://www.usatoday.com/money/industries/travel/2010-09-27-southwest-airtran-merger_N.htm#)

[merger_N.htm#](http://www.usatoday.com/money/industries/travel/2010-09-27-southwest-airtran-merger_N.htm#), whereon I read an article dated September 28, 2010 in which it was stated, in sum or substance, that Southwest and AirTran overlap on 19 non-stop routes. The article also stated that Southwest announced its planned acquisition of AirTran on September 28, 2010. A printout of the article is attached as Exhibit 5.

7. On or about May 2, 2011, I visited the United States Department of Justice

website (www.justice.gov) whereon I read a press release stating that the DOJ had closed its investigation of Southwest's acquisition of AirTran. A printout of the press release is attached as Exhibit 6.

8. On or about May 2, 2011, I visited [http://www.huffingtonpost.com/huff-](http://www.huffingtonpost.com/huff-wires/20110502/us-southwest-grows-up)

[wires/20110502/us-southwest-grows-up](http://www.huffingtonpost.com/huff-wires/20110502/us-southwest-grows-up) whereon I read an article in which AirTran CEO Robert Fornaro was paraphrased as stating, in sum or substance, that Southwest will eventually drop AirTran's first-class seats and that it is the right thing to do. A printout of the article is attached as Exhibit 7.

9. On or about May 2, 2011, I visited

<http://travel.usatoday.com/flights/story/2011/05/Southwest-closes-on-AirTran-deal->

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Plaintiffs' Motion for a Temporary Restraining Order*

today-What-can-passengers-expect/46701882/1 whereon I read an article in which Whitney Eichinger, identified as a spokesperson for Southwest Airlines was reported to have said, in sum or substance, that Southwest's policy of not charging a fee for the first two checked bags, and its single-class cabins are possibly the biggest changes passengers will eventually see. The article also stated that industry analysts expect that the full integration of the two airlines will take between one year and 18 months. A printout of the article is attached as Exhibit 8.

10. On or about May 2, 2011, I visited <http://www.prweb.com/releases/cambridge-aviation-201011/southwest-airtran-report/prweb4780284.htm> whereon I read an article dated November 12, 2010 in which it was stated, in sum or substance, that the proposed merger of Southwest and AirTran will result in significantly increased concentration in at least 33 routes, including 17 routes that will be pushed in to monopoly status as a result of the merger. The website also stated that market concentration will grow to exceed DOJ guidelines in at least 18 airports. A printout of the article is attached as Exhibit 9.

11. On or about May 2, 2011, I visited <http://travel.usatoday.com/flights/post/2011/04/southwest-airlines-airtran-love-field-dfw/168174/1> whereon I read an article dated April 29, 2011 which it was stated, in sum or substance, that Southwest has an 'orderly plan' to drop AirTran's DFW service. A printout of the article is attached as Exhibit 10.

12. On or about May 2, 2011, I visited <http://www.bloomberg.com/news/print/2011-04-06/us-airways-sees-one-big-deal-left-for-u-s-airline-mergers.html>, whereon I read an article dated April 6, 2011, in which US

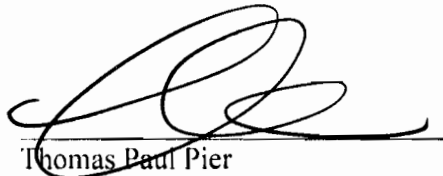
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Plaintiffs' Motion for a Temporary Restraining Order*

Airways CEO Doug Parker was quoted as saying "There is one big deal left, and that's with US Airways" and "any of the three of them [United-Continental, Delta, or American] at the right time could do something with us." A printout of the article is attached as Exhibit 11.

13. On or about May 2, 2011, I visited http://money.cnn.com/2011/04/19/news/companies/jeff_smisek_united_continental.fortune/index.htm whereon I read an article in which Continental CEO Jeff Smisek stated that he did not feel the airline industry was fully consolidated and that he felt that consolidation is a good long-term trend. A printout of the article is attached as Exhibit 12.

I declare, under penalty of perjury and the laws of the State of California, that the foregoing is true and correct.

Executed this 3rd day of May, 2011 at San Francisco, California.



Thomas Paul Pier

*Declaration of Thomas Paul Pier in Support of
Plaintiffs' Motion for a Temporary Restraining Order*

EXHIBIT 1

Fact Sheet



Related Information

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Leadership

Gary Kelly, Chairman of the Board, President & Chief Executive Officer

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Headquarters

P.O. Box 36611
2702 Love Field Drive
Dallas, TX 75235

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About the Company

Southwest Airlines was incorporated in Texas and commenced Customer Service on June 18, 1971, with three Boeing 737 aircraft serving three Texas cities-Houston, Dallas, and San Antonio. Today, Southwest operates 548 Boeing 737 aircraft among 72 cities. Southwest topped the monthly domestic originating passenger rankings for the first time in May 2003. Yearend results for 2010 marked Southwest's 38th consecutive year of profitability. Southwest became a major airline in 1989 when it exceeded the billion-dollar revenue mark. Southwest is the United States' most successful low fare, high frequency, point-to-point carrier. Southwest operates more than 3,400 flights a day coast-to-coast, making it the largest U.S. carrier based on domestic passengers carried as of September 30, 2010.

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Daily Departures

More than 3,400 flights a day.

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Employees

Nearly 35,000 total Employees throughout the Southwest system.

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Stock

Common stock is traded under the symbol "LUV" on the NYSE.

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2010 Financial Statistics

Net income: \$459 million

Net income, excluding special items: \$550 million

Total passengers carried: 88 million

Total RPMs: 78 billion

Average passenger load factor: 79.3 percent

Total operating revenue: \$12.1 billion

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Cities Served

Southwest flies to 72 cities in 37 states.

[View City Chart](#)

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Fleet

Southwest currently operates 548 Boeing 737 jets (as of December 31, 2010)

[View Chart](#)

The Company's fleet has an average age of approximately 11.21 years.

The average aircraft trip length is 648 miles with an average duration of one hour and 52 minutes.

Southwest aircraft fly an average of 6 flights per day, or almost 10 hours and 51 minutes per day.

Southwest was the launch customer for the Boeing 737-700 in 1997. Southwest was also a launch customer for the Boeing 737-500 and 737-300 series aircraft.

Southwest recently completed updating its original color scheme of gold, red, and orange paint with the addition of Canyon Blue. Three Next-Generation Boeing 737 aircraft will continue flying with a commemorative livery of Desert Gold to honor the carrier's original three cities-Dallas, Houston, and San Antonio.

Performance-enhancing Blended Winglets have been added to our fleet of 737-700s, and all new 737-700 aircraft arrive from Boeing with Blended Winglets installed. Additionally, Southwest began installation of Blended Winglets on some of our 737-300 aircraft in early 2007; installation of Blended Winglets on these aircraft was completed as of the end of second quarter 2010.

Southwest tested WiFi on four of our airplanes, and in late 2009, we made the decision to begin installing satellite-delivered broadband from our WiFi provider, Row 44, on the rest of our fleet. We currently estimate that our entire fleet will be WiFi enabled in the 2013 timeframe.

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Top Ten Airports by Departures

(As of March 27, 2011)

[View Chart](#)

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Customer Support & Services Centers

Southwest Airlines currently operates six Customer Support and Services Centers located in Albuquerque, Chicago, Houston, Phoenix, Oklahoma City, and San Antonio.

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Fun Facts

Southwest received 143,143 resumes and hired 2,188 new Employees in 2010.

In 2010 Southwest served 63.5 million cans of soda, juices, and water; 13.6 million alcoholic beverages; 19 million bags of pretzels; 87.6 million bags of peanuts; 18.4 million Select-A-Snacks; and 29 million other snacks.

Southwest consumed approximately 1.4 billion gallons of jet fuel in 2010.

In 2010, Southwest moved 176 million pounds of cargo.

The shortest daily Southwest flight is between Ft. Myers (RSW) and Orlando (MCO) (133 miles). The longest daily Southwest flight is between Providence (PVD) and Las Vegas (LAS) (2,363 miles).

Southwest has 1,208 married couples. In other words 2,416 Southwest Employees have spouses who also work for the Company.

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southwest.com

As of November 12, 2010, Customers can book service from 20 Southwest Cities to five Volaris Mexican destinations (Cancun, Guadalajara, Morelia, Toluca/Mexico City, and Zacatecas), for travel starting December 1, 2010. The new service will connect through Los Angeles International Airport, Oakland International Airport, and San Jose International Airport and will create up to 85 additional flight itineraries.

During 2010, online bookings reached 84 percent via [southwest.com](#).

More than 11 million people subscribe to Southwest's weekly Click 'N Save e-mails.

During 2010, approximately 79 percent of Southwest Customers checked in online or at a kiosk.

66 percent of Fortune 500 Companies are enrolled in SWABIZ.

Southwest was the first airline to establish a home page on the Internet. Initially, five Employees comprised Southwest's web site development team, and the site took about

nine months to create.

In September 2010, **southwest.com** was the 2nd largest travel site and largest airline site in terms of unique visitors (source: Comscore MediaMetrix). Nielsen/Netratings also reported that **southwest.com** was the largest airline site in terms of unique visitors.

The "Southwest Shortcut" feature on **southwest.com** is the first online tool that helps Customers find the lowest fare based on availability over an entire month.

DING!, a downloadable desktop application, available for both PC and MAC users, was introduced in February 2005, to notify Customers of exclusive hot offers. Southwest was the first airline to implement this type of tool. Additionally, a mobile version of DING!, for the iPhone™, was introduced in December 2009; Blackberry™ and Android™ versions of the DING! application were released in December 2010. Southwest is the first airline to offer this application on all three mobile platforms.

In addition to flights, Customers are also able to make car, hotel, cruise, and complete vacation package reservations on **southwest.com**.

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Distinctions

Southwest's Average passenger fare is \$130.27 one-way, and the average passenger trip length is about 885 miles.

Southwest Airlines has consistently received the lowest ratio of complaints per passengers boarded of all Major U.S. carriers that have been reporting statistics to the Department of Transportation (DOT) since September 1987, which is when the DOT began tracking Customer Satisfaction statistics and publishing its Air Travel Consumer Report.

The airline adopted the first profitsharing plan in the U.S. airline industry in 1973. Through this plan and others, Employees own about 5 percent of the Company stock.

The airline is about 82 percent unionized.

Southwest Airlines is a member of the *FORTUNE* 500.

The Ronald McDonald House program, cornerstone of the Ronald McDonald Children's Charities, is the primary corporate charity of Southwest Airlines. Annually, the Company sponsors the Southwest Airlines LUV Classic golf tournament and Party golf tournament whose proceeds benefit various Ronald McDonald Houses totaling close to \$12 million over the past 25 years.

Southwest was one of very few companies in the United States to produce an integrated report on the triple bottom line of Performance, People, and Planet. The 2009 Southwest Airlines One Report™.

Harvard University wrote the first case study on integrated reporting about Southwest Airlines and its 2009 Southwest Airlines One Report™. The case was taught for the first time in October 2010.

In October 2009, Southwest Airlines introduced the "Green Plane," a test for eco-friendly cabin materials that are recyclable and lighter weight, saving up to five pounds per seat thus saving fuel and reducing emissions.

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Recognitions

In March 2011, Southwest Airlines ranked fourth on *Fortune's* World's Most Admired Company list and is the highest ranking commercial airplane.

In March 2011, PR News CSR Awards named Southwest Airlines Best Annual Report for the 2009 Southwest Airlines One Report™.

In January 2011, TLG Communications awarded Southwest Airlines to its list of Top 10 US Business Thought Leaders.

Southwest Airlines was recognized as a Top Employer in *G.I. Job's* 2011 list of Top 100 Military Friendly Employers.

Southwest Airlines was listed in Computerworld's 2010 "Best Places to Work in IT."

In December 2010, Southwest Airlines was named "Best Low Cost Airline in North America" by *Business Traveler Magazine*.

In December 2010, Southwest Airlines topped the list of the 50 best U.S. places to work by *Glassdoor.com*.

In November 2010, the Zagat Airline Survey ranked Southwest Airlines #1 in the following categories: Top Website; Best Customer On-Time Estimate; Best Luggage Policy; Best Value; and Best Checkin Experience for Domestic Airlines.

In November 2010, Southwest Airlines was named "Favorite Domestic Airline" and recognized as having the "Friendliest Flight Attendants and Crew" in a poll by *Smarter Travel* readers.

In November 2010, *Security Magazine* recognized Southwest Airlines in their 2010 Security 500 list of best-managed security organizations, and was the only airline to make *Security's* list.

In November 2010, Southwest Airlines was listed as one of the Top 50 Companies

Recognized as Leaders in Corporate Social Responsibility by the Boston College Center for Corporate Citizenship and Reputation Institute.

In October 2010, Southwest Airlines was awarded with Logistics Magazine's Quest for Quality Award for the 14th year in a row, receiving the highest score among all airlines in categories such as: On-time Performance, Value, Information Technology, Customer Service, and Equipment & Operations.

In October 2010, Southwest Airlines was named the recipient of the Williams Trophy for Southwest's environmental stewardship and leadership in Required Navigational Performance. The Williams Trophy is awarded to recognize leadership and vision in aviation or Space that has enriched the quality of life on Earth.

In October 2010, Southwest was ranked - # 142 on the list of 500 on *Newsweek's* 2010 Green Rankings.

In October 2010, www.nutsaboutsouthwest.com was inducted into PRNews' Hall of Fame after winning Best Corporate Blog for three years in a row.

In October 2010, Anna Aero awarded Southwest Airlines with the Anna Aero US Annie Prize 2010 for the "Airline with the Most New Routes."

In September 2010, Southwest Airlines was listed among the Top 60 companies for Diversity by *Hispanic Business* magazine.

In July 2010, Executive Travel named Southwest Airlines the "Best North American Low Cost Airline" in the 2010 Leading Edge Awards.

In June 2010, the American Customer Satisfaction Index ranked Southwest Airlines number one among all airlines for the 17th year in a row.

In May 2010, Southwest Airlines was named as one of MSN Money's "10 Companies That Treat You Right."

In May 2010, Southwest Airlines ranked seventh-up from tenth in 2009-in MSN Money's Customer Service Hall of Fame.

In May 2010, Southwest Airlines was recognized by Smarter Traveler as having the most generous awards availability by having seats available for 99.3 percent of the award trips.

In April 2010, Southwest Airlines was added to the Los Angeles Business Journal's 2010 Business Hall of Fame.

In April 2010, Southwest Airlines ranked as the top-rated brand among the nation's small- and mid-sized-business owners and top executives, in the Biz Journals Digital Network, for a second year in a row.

In March 2010, Outside Magazine ranked Southwest Airlines #12 in their Editor's Choice Awards.

In March 2010, Southwest Airlines was awarded the Diamond Award, at the Air Cargo World awards ceremony, with the highest overall airline score leading all airlines in the Performance and Value categories.

In February 2010, Southwest Airlines was recognized in Business Week's list of "Customer Service Champs."

In February 2010, Business Week released its 2009 Top 20 Best Companies for Leadership list-Southwest Airlines ranked #21

In January 2010, Southwest Airlines was recognized by *Vault.com* for having one of the Top 10 Internships in America for 2010.

Southwest Airlines Cargo was recognized for its excellence in air cargo for the sixth straight year, named "Airline of the Year" by the Express Delivery & Logistics Association (XLA). Southwest Airlines has placed on XLA's Airline of the Year list for nine consecutive years. In addition, Southwest Cargo won XLA's award for Excellence in web site and technology.

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Revised: March 27, 2011

EXHIBIT 2


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Airline Activity : National Summary (U.S. Flights)

	2010 *	2011 *	Change
Enplaned Passengers (million)	619	630	1.8%
Departures (000)	9,189	9,121	-0.7%
Freight/Mail (million lbs)	19,053	19,924	4.6%
Load Factor (%)	81.3	82.3	1.0 points
Airlines with scheduled service	103	99	-3.9%

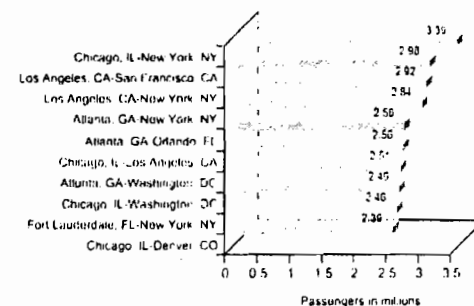
* 12 months ending January of each year

Airline Domestic Market Share February 2010 - January 2011

Airlines	Share
Delta	16.6%
Southwest	14.2%
American	13.6%
United	10.1%
US Airways	7.8%
Continental	7.3%
JetBlue	4.4%
AirTran Corporation	3.4%
Alaska	3.3%
SkyWest	2.1%
Other	17.2%

Market share based on Revenue Passenger Miles February 2010 - January 2011.

Top Domestic Routes February 2010 - January 2011



Based on enplaned passengers of all airports for a city pair February 2010 - January 2011.

Research and Innovative Technology Administration (RITA) • U.S. Department of Transportation (US DOT)
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EXHIBIT 3



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Acquisition Update: Bob Fornaro and Gary Kelly Testify in Milwaukee on Proposed Acquisition

Posted on 25 February 2011



On Friday, February 25, 2011, Bob Fornaro and Gary Kelly testified before Senator Herb Kohl (D-WI), chairman of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights committee in Milwaukee concerning the proposed acquisition of AirTran Airways by Southwest Airlines and its potential impact in Milwaukee.

A number of issues were raised by Sen. Kohl during the question and answer portion of the hearing, including continued expansion in Milwaukee, our marketing agreement with SkyWest and local employment issues. As with other commercially-sensitive topics, we are prohibited from sharing detailed performance and financial information with Southwest while we await final approval from the Department of Justice and our shareholders. With that in mind, most answers were in the context of final decisions not being made until a comprehensive review can take place.

Below is Bob's written testimony. To view Gary's written testimony, [click here](#) or visit LowFaresFarther.com.

**STATEMENT
OF
ROBERT L. FORNARO
CHAIRMAN, PRESIDENT AND
CHIEF EXECUTIVE OFFICER OF AIRTRAN HOLDINGS**

BEFORE

**THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS**

FEBRUARY 25, 2011

Chairman Kohl:

Good morning and thank you for convening this hearing and affording AirTran the opportunity to address the Subcommittee regarding these important issues.

On behalf of the 8,300 hardworking men and women of AirTran Airways, it is my sincere pleasure to appear before you today to talk about AirTran's presence in Wisconsin and AirTran's plans to join forces with Southwest Airlines. I am proud to represent our Crew Members and to be able to report that AirTran Airways continues to perform exceedingly well and get high industry rankings[1] for customer service and on-time performance. Senator Kohl, one of the reasons that General Mitchell International Airport has continued to expand and has become an important part of economic growth in this region, has been your support of the airport and steps you have taken to support airport operations and funding. Thank you on behalf of AirTran and the communities in Greater Milwaukee, Southeast Wisconsin, and Northern Illinois. I would like to acknowledge as well the support we have received over the years from the community and their representatives -- Barry Bateman and Tim Sheehy -- they both do an excellent job and play a key role in the economic development of the Greater Milwaukee area.

As you know, a longstanding and high priority for AirTran has been the continued expansion of our Milwaukee network. Milwaukee is now our third largest market behind Atlanta and Orlando. Since initiating service to Milwaukee in the summer of 2002 with four daily flights to two markets (Atlanta and Orlando), AirTran has grown consistently and now offers more than 55 daily departures to 25 nonstop markets. As a result of AirTran providing increased competition, General Mitchell International is one of the very few airports in the U.S. that reported increased traffic over the last few years -- in fact, over the past five quarters, the number of Milwaukee passengers has grown by double digit percentages while nearby Chicago O'Hare passenger numbers have declined. I'm proud to say that AirTran played an integral role in the records set here and is now the largest carrier, by market share, at General Mitchell[2].

In 2007, we outlined publicly our expansion plans and our vision that Milwaukee was an untapped resource. We strongly believed then, and continue to believe now, that General Mitchell International has not reached its full potential. I am confident that quality service and low fares along with the strong business base in Southeast Wisconsin could greatly expand the market. As evidenced by the record number of passengers at General Mitchell, we've realized some of that potential.

The business and economic challenges we face today as a company and as an industry have increased substantially since 2007. We continue to deal with very high fuel costs and an uncertain economy, particularly for domestic U.S. travel. Growth in this environment is exceedingly difficult. When we began negotiations with Southwest last summer, jet fuel was about \$85 per barrel -- as of this past Wednesday jet fuel was more than \$125 per barrel. To put that into perspective Mr. Chairman, every \$10 dollars in fuel cost per barrel adds more than \$90 million in annual expense to our bottom line. Managing the volatility of fuel is a key reason AirTran has agreed to merge with Southwest Airlines. We believe this merger will create growth opportunities for both of our airlines that would not happen independently. Equally important, this deal is good for our shareholders, the employee Crew Members of AirTran, and the communities we serve, including Southeast Wisconsin and Northern Illinois. Combining the AirTran network with Southwest will allow us to take advantage of the Southwest's unparalleled history of financial performance and Southwest's substantial resources- these will create growth opportunities, provide career certainty for our employees in Milwaukee and elsewhere, and tremendous benefits to consumers -- especially here in the Milwaukee region.

When we have the necessary federal regulatory approvals and can talk with our prospective Southwest colleagues about market specifics -- it will be my recommendation to Gary Kelly, Southwest's Chairman and CEO, and to his management team, that Milwaukee continues to be a key market for growth. It is one of the great assets of this merger.

AirTran has had a strong commitment to the people and businesses of Wisconsin in both good times and challenging times. It would be an understatement to say that the last several years have been difficult for the airline industry -- this industry has faced historic challenges brought on by volatile fuel prices and a weak economy. AirTran has not been an exception to or immune from these difficulties. To weather the storm in 2008 we had to dramatically restructure our fleet plan, sell existing aircraft, and defer new Boeing deliveries in order to restore profitability. Since 2008, AirTran sold or deferred 47 Boeing jets. Nonetheless, our commitment to, and belief in Milwaukee, has not waned. In fact, Milwaukee has been one of the few bright spots over the past few years. Despite shrinking our capacity, we have continued to grow our operations at General Mitchell. Since 2008, while our domestic network became smaller, we've grown Milwaukee by adding ten new destinations in 2008, another five in 2009, and six more last year. Equally important, we doubled our employee headcount in Milwaukee in each of the last four years, and established a line maintenance station and pilot and flight attendant crew bases here in 2010. AirTran now directly employs more than 330 people based in Milwaukee. Our payroll for 2010 exceeded \$6.5 million and will be nearly \$8 million this year. In addition, last year AirTran spent approximately \$12 million in Wisconsin for non-payroll goods

and services and paid more than \$5 million in taxes.

Milwaukee is an integral component of AirTran's network, and we are also proud to be an active partner in the broader life of the community beyond our role of providing safe, affordable, and reliable air service. Therefore, as part of our expanding presence, we have welcomed the opportunity to play a major role in community service to the entire Milwaukee area. We do so by working with local businesses, sponsoring teams like the Milwaukee Brewers and Marquette University Golden Eagles, and by assisting multiple local groups including the YMCA, the Hunger Task Force, Habitat for Humanity, the Milwaukee Film Festival and the Wisconsin State Fair, as well as being able to play a role in bringing back the Great Circus Parade in 2009. In fact, last week we announced our renewal of our sponsorship with the YMCA of Metropolitan Milwaukee Summer Camp program. I am especially proud to say that we sponsor the Donald Driver Foundation and that Donald is an AirTran endorser – it was great to see him and the Packers win the Super Bowl. All of our Crew Members are proud of these efforts, and you can count on us to continue to work to help this community prosper and to assist those in need.

AirTran has played a major role in creating the type of competition Milwaukee needed to reach record levels in 2010. We are pleased that AirTran is now the largest carrier at Milwaukee. We expect that record growth at Mitchell Field could continue with our planned merger with Southwest Airlines. In fact, I sincerely believe this merger is necessary to reach the full potential of the Milwaukee marketplace. The combined networks and resources of AirTran and Southwest will create expansion opportunities that neither company could likely create on its own.

In today's economic and competitive environment, it will be exceptionally difficult for AirTran to fundamentally grow or increase competition. By joining forces with Southwest, the combined company will have the strength and resources to effectively grow and compete with the mega-legacy carriers like Delta, which merged with Northwest in 2008, and United-Continental, whose merger was approved in 2010.

Senator Kohl, we thank you and your staff for all you have done to promote this airport and community. We look forward to working with you and your colleagues, with local elected officials, with the airport, and with all the citizens of the Milwaukee area to expand our role as a partner in the growth and prosperity of the community.

I am proud that you have afforded me the opportunity to represent AirTran and its Crew members today.

1 | 2010 marks the third consecutive year AirTran Airways has been recognized for its outstanding operational performance as the number one low-cost carrier in the prestigious Airline Quality Rating (www.aqr.aero) and the sixth consecutive year the airline has been ranked in the top three among major U.S. airlines in this highly regarded, objective ranking. AirTran Airways continued its industry leading operational performance in 2010. Recognition of this customer service excellence culminated in the number one ranking in The Wall Street Journal's annual airline scorecard.

In addition to these operational milestones, AirTran Airways' traffic increased 5.3 percent to more than 19.5 billion revenue passenger miles on a 3.3 percent rise in available seat miles during the year. The airline's load factor increased 1.6 points to 81.4 percent, and the number of enplaned passengers increased 3 percent to 24.7 million. Each of these metrics represents all-time records for the airline.

2 The benefits of AirTran's commitment to growth were clear when the airport announced on January 26, 2011 that a record number of passengers, 9,848,377, were boarded in 2010 at General Mitchell International Airport. The total is 1.9 million more than the 7,935,124 passengers served in 2009, a 24.11 percent increase. The airport broke the 8 million mark in October and the 9 million mark in November. Airport Director Barry Bateman has remarked, "Passengers in Wisconsin, Chicago, northern Illinois and Rockford are taking full advantage of airfares on average \$93 lower than O'Hare's, plus the ease and convenience of Mitchell."



Have Questions?

**AirTran Crew Members Give Their
Favorite Travel Tips on CNN**

EXHIBIT 4

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Oberstar urges Justice antitrust officials to take a close look at Southwest-AirTran merger



By Terry Maxon/Reporter
tmaxon@dallasnews.com | Bio
12:53 PM on Fri, Oct 8, 2010 | Permalink

U.S. Rep. Jim Oberstar hasn't met an airline merger or acquisition he likes. The Southwest Airlines-AirTran Airways deal is no exception.

The Minnesota Democrat has sent a letter to the U.S. Department of Justice asking Justice officials to subject the Southwest-AirTran deal "to the most rigorous scrutiny."

"With this merger, the U.S. airline industry will be continuing down the path of consolidation, which I believe, will lead to less service, higher prices, and fewer choices for consumer," Oberstar wrote in a letter to Christine Varney, assistant attorney general over the antitrust division.

Here are his main points:

- Will the merger cause more mergers among low-cost carriers, of which there are only a handful? The disappearance of low-fare carriers would put less pressure on network carriers to hold down prices.
- Southwest's costs have risen much faster than those of network carriers, and its fares have risen faster than its competitors. Oberstar said he was "concerned that the 'Southwest Effect' may have run its course."
- Southwest is in business to make money, and less competition from other low-fare carriers may cause Southwest to follow the fares of network carriers.
- Southwest and AirTran combined would dominate Chicago Midway, Houston Hobby and Baltimore, leaving little competitive room for other low-cost carriers.

In a Sept. 29 interview, Southwest chairman and CEO Gary Kelly strongly disagreed with suggestions that the proposed merger would cause Southwest to raise fares. Oberstar obviously isn't convinced.

Oberstar also opposed the 2008 merger of Delta Air Lines and Northwest Airlines and the 2010 merger of United Airlines and Continental Airlines. Here's a sound bite from his comments to United and Continental at a June hearing that focused on their deal:

"You guys hate competition. You want to be the competitor who dominates the market - each one of you, not just you: Northwest-Delta, American - all the rest. I've seen it over all the years of deregulation."

Keep reading for the pertinent excerpts from his Thursday letter to Varney.

Oberstar wrote:

"Southwest's acquisition of AirTran presents the Antitrust Division with new but important questions about the future role of low-cost carriers in promoting competition. Is this merger likely to encourage other mergers involving low-cost carriers? Will other low-cost carriers find themselves less able to survive against a larger Southwest and pursue mergers either with each other or with Southwest or a network carrier? What would be the implications of a decline in the number of low-cost carriers and/or an increase in Southwest's share of the low-cost sector of the industry?"

"Only seven true low-cost carriers now compete in the U.S. market. Of those seven, Southwest is by far the dominant carrier, accounting for approximately 60 percent of the combined market share of the low-cost carriers that report data to the DOT. AirTran controls almost 15 percent of

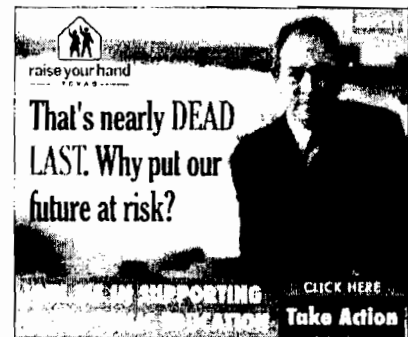
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Terry Maxon and Eric Torbenson write about items of interest to travelers and the aviation community.

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AIRLINE INDUSTRY STORIES

With hoopla, Southwest Airlines closes its purchase of rival AirTran Holdings

Southwest Airlines executives get ready to check out AirTran

AirTran to stay at D/FW for a while longer

Sorting out Southwest-AirTran operations to take time

Spirit Airlines arrives in North Texas with spoof of wedding

Boeing says factory defect likely led to hole in Southwest jet

Antitrust regulators OK Southwest-AirTran merger

Safety board finds rivet problems on damaged Southwest Airlines jet

CATEGORIES

3 idle thoughts for Friday

AAdvantage

AMR

Accidents

those low-cost carriers' combined market share

"If this merger and those that follow decrease the competition Southwest faces from other low-cost carriers, low-cost carriers as a group may exert much less competitive discipline on network carriers. Their number will have been reduced, and the product of the Southwest-AirTran merger would, by all measures be a large airline with less ability and incentive to continue to apply downward pressure to air fares in relevant markets.

"There is a serious question as to the extent to which we can continue to rely on Southwest alone for the so-called 'Southwest Effect' on air fares in markets in which Southwest is the only low-cost carriers competing with network carriers. Southwest's costs are increasing due to the seniority of its workforce, the end of its long-held advantage on fuel costs from favorable hedging positions, and its entry into high-cost markets such as New York LaGuardia, Boston, and Minneapolis-St. Paul.

"Like all carriers' costs, Southwest's cost per available seat mile (CASM) has increased over the last 10 years, according to data reported to the DOT. But the rate at which Southwest's costs are increasing has far outpaced increases to its competitors' costs. While the domestic CASM among network carriers increased by approximately 22 percent from 2000 to 2010, Southwest's CASM increased by 43 percent during the same period.

"At the same time, Southwest's revenue per available seat-mile (RASM) has gradually risen to near-parity with the RASM figures of its network competitors, and Southwest's average fare has increased while the average fares of network carriers have tended to decrease. With Southwest's costs on a fast trajectory upward, and its RASM in parity with that of network carriers, I am concerned that the 'Southwest Effect' may have run its course.

"As Southwest's costs come closer to those of network carriers, it has less ability to offer significantly lower fares. And a decline in the number of other low-cost carriers may lessen Southwest's incentives to compete by offering low fares. No airlines offers low fares out of a sense of philanthropy to the traveling public, like any airline, Southwest is ultimately concerned with the bottom line, and if it is not faced with potential competition from other low-cost carriers, Southwest may decide that it would be more profitable to follow the fares of network carriers, rather than force fares down.

"Apart from the likelihood that this merger will encourage other mergers, this merger itself has substantial problems. The recently updated Horizontal Merger Guidelines look to, among other things, the effects of a merger on the prospects for competitors' entry into relevant markets where anticompetitive conduct might otherwise occur.

"In this case the prospect for competitive entry into many major markets is limited because the combined airline would account for nearly 95 percent of available seat miles on offer at Chicago-Midway International Airport, 92 percent at Hobby Airport in Houston, and 70 percent of Baltimore/Washington International Airport. In light of the fact that the merger will reduce the number of competitors in 127 nonstop and connecting markets and will reduce the number of competitors from two to one in 14 nonstop and connecting markets, the combined airline's potential domination of important airports raises serious competitive concerns.

"One of the few remaining low-cost carriers could theoretically enter affected markets. New entry, however, may not be enough to remedy the adverse effects of allowing these airports to be dominated to such a substantial degree by a single carrier. I urge the Antitrust Division to rigorously apply the Guidelines when determining whether the combined carrier's market share would rise to an anticompetitive level in any relevant market.

"In sum, the future of competition among airlines at every level of the industry, legacy and low-cost alike, is at stake in the Southwest-AirTran merger and should frame the Justice Department's review. I urge the Antitrust Division to consider this merger's special significance to the evolution of the U.S. airline industry, and to take all available action, including the pursuit of injunctive relief, to remedy any anticompetitive effects that may flow from Southwest's acquisition of AirTran. Competition and innovation by low-cost carriers must be preserved."

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EXHIBIT 5



Low-fare king Southwest to buy AirTran for \$1.4 billion

Updated 9/28/2010 12:17 PM

By Dan Reed and Charisse Jones, USA TODAY



By Michael Dwyer, AP

An AirTran jet leaves Logan International Airport in Boston in this file photo.

Southwest Airlines said Monday that it will buy smaller rival AirTran for \$1.4 billion, creating the most expansive network of any low-cost carrier in the U.S. and giving the feisty airline a chance to grab business travelers in the nation's busiest markets.

If the merger is approved by regulators, Southwest, which already carries more domestic fliers than any other U.S. airline, will for the first time go head to head with Delta on its home turf at Atlanta's Hartsfield-Jackson International, the busiest passenger airport in the world. It will gain access to Reagan Washington National Airport and capture increased share at Boston Logan and New York LaGuardia.

The deal would give Southwest its first flights outside the continental United States by continuing AirTran's service to Mexico and the Caribbean.

The merger continues an industrywide trend of consolidation, which has seen United Airlines and Continental announcing their intention to join operations Friday, potentially creating the largest carrier in the world, and Delta and Northwest joining forces in 2008.

WHERE THEY FLY: Airports served by Southwest, AirTran

COMPETITION: Merger would be bad news for rivals

READ: The airlines' press release

AIRFARES: How will they be affected?

But the latest deal would unite two airlines that have prospered by keeping a tight rein on costs and marketing low domestic fares, while offering little or no international service. Southwest is about five times larger than AirTran — with \$11 billion in 2009 revenue to AirTran's \$2.3 billion and 3,200 daily departures to AirTran's 686.

"The acquisition of AirTran represents a unique opportunity to grow Southwest Airlines' presence in key markets we don't yet serve and takes a significant step toward positioning us for future growth," Southwest CEO Gary Kelly said.

AirTran CEO Bob Fornaro stressed in a conference call with reporters on Monday that AirTran had "done a lot with not much" in terms of financial resources, but that it was becoming less clear that AirTran had the ability to grow and remain competitive in an industry where the size of a carrier's route network is increasingly important.

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"Southwest has, relative to AirTran, vast resources," Fornaro said. It became clear that "we could do more with Southwest resources" than AirTran could do on its own.

Southwest and AirTran said the combined airline would fly more than 100 million passengers a year out of more than 100 airports in the U.S., Caribbean and Mexico. And by creating a truly nationwide low-cost carrier, the merger will make Southwest a tougher competitor in the lucrative domestic business-travel market.

"Southwest is making a conscious effort to be the first truly national low-cost carrier, to have a domestic route network that is as comprehensive as the legacy network carriers," says Daniel Kasper, head of the transportation practice for economic and financial consulting firm LECG.

Invading bigger markets

Southwest, which initially concentrated on midsize towns and secondary airports, has in the last two decades gotten steadily more aggressive in taking on conventional airlines in large markets. AirTran is its largest acquisition but not its first: Southwest bought Muse Air and Morris Air in the 1980s and defunct discounter ATA's assets in 2008.

The deal to purchase AirTran will give Southwest a footprint in virtually every large and midsize U.S. city.

In addition to gains at major portals such as LaGuardia and Reagan National, Southwest would pick up AirTran's service at Charlotte and Memphis and its large operation in Atlanta.

Among the other 38 airports that AirTran serves but Southwest currently does not: Miami, Des Moines, Wichita and outside the U.S. in Cancun, Mexico; San Juan, Puerto Rico; and Aruba.

A merger will open up more choices to budget-conscious leisure travelers as well as business fliers, experts say, and could take the so-called Southwest effect that compels other carriers to match the carrier's low fares to every corner of the country.

"If you want to fly on a low-cost carrier, your options in terms of places you can reach on that carrier will have increased even though the number of low-cost carriers will have decreased by one," Kasper says.

"America needs this now," says Tom Parsons of BestFares.com. "With this deal you can now go just about anywhere in the country, and to the Caribbean and Mexico, on Southwest. ... All the legacy airlines will have to set their prices based on whatever Southwest does."

Other carriers may also have to worry about the new mega-carrier in their midst. American, once the biggest airline in the U.S., fell behind in size and global reach when Delta acquired Northwest Airlines two years ago, and now may be further challenged by the United-Continental merger and the proposed combination of Southwest and AirTran, some analysts say.

"This puts more pressure on AMR (American's parent company), which will find it even more difficult to merge its way to prosperity because the remaining potential merger partners offer far less attractive financial and strategic benefits," says Vicki Bryan, an analyst at Gimme Credit, an independent research service on corporate bonds. "AMR has been scrambling to reinvent its business model, and following the United/Continental and Southwest/AirTran mergers it could be potentially without dominance in any lucrative market."

Other carriers that may be threatened by the wave of consolidation include US Airways, which merged with America West in 2005; Alaska; and JetBlue.

Terms of Monday's deal call for AirTran stockholders to get a combination of Southwest common stock and cash valued at \$7.25 to \$7.75 per share, depending on the price of Southwest stock prior to the merger. At least \$3.75 will be

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cash, the companies say.

Airline-industry insiders long have considered a Southwest-AirTran merger to be inevitable because the combination of their two networks, which overlap on only 19 routes, could have significant appeal to travelers.

Travelers see upside

Some travelers were pleased with the prospect of a broader route system that gives them more appealing destinations when they redeem their loyalty program points, as well as the chance that Southwest's entry into new markets could drive down ticket prices at other airlines as well.

New Southwest flights to cities now served by AirTran "can help restrain" other airlines from setting high airfares and fees, says Dave Simonson, the president of a computer consulting company in Antioch, Tenn., who's flown more than 40 Southwest flights since the beginning of last year.

But others worried that the best aspects of each airline — be it Southwest's customer service or AirTran's assigned seating — could be lost in the merger.

"The Southwest culture is unbelievable, and its employees have the highest passion I've ever seen in the industry," says Don Schmincke, a Baltimore-based author and speaker. "Can they convert AirTran employees?"

DaWane Wanek of Sugar Land, Texas, says he stopped flying AirTran and other airlines connecting through Atlanta because of flight delays and missed connections. Atlanta's Hartsfield-Jackson airport has one of the worst records of all airports for on-time flight arrivals and departures, according to Transportation Department statistics for the first seven months this year.

"I am concerned that Southwest can handle bringing the beast — Atlanta — into the network," says Wanek, a sales director in the computer hardware industry.

But some perks are set to remain. Southwest, which prides itself on not charging for the first two checked bags, unlike most of its peers, will maintain that policy at the merged airline, eliminating AirTran's bag fees.

AirTran's planes will also become a single class, like Southwest, and be painted in Southwest's colors.

AirTran was founded in 1992 as ValuJet Airlines.

The company nearly failed following the 1996 crash of ValuJet Flight 592 into the Florida Everglades, which killed all 110 people on board. In 1997 it merged with the much smaller parent company of Orlando-based AirTran. The damaged ValuJet name was jettisoned, and the company quickly acquired younger aircraft to replace the small fleet of nearly 30-year-old McDonnell Douglas DC-9s it had flown since its launch.

The merger with Southwest must be approved by U. S. regulators and AirTran's shareholders. Southwest expects the government approval of the deal sometime in the first half of next year.

After that, Kelly said, it should take no more than 24 months for the two carriers' operations to be fully merged.

Contributing: Barbara Hansen, Gary Stoller

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Contributing: Barbara Hansen, Gary Stoller

OVERLAPPING ROUTES

Southwest and AirTran overlap on only these 19 non-stop routes. Their combined share of scheduled seats this month:

Route	Share
Baltimore Boston	80%
Baltimore Fort Lauderdale	100%
Baltimore Indianapolis	100%
Baltimore Jacksonville	100%
Baltimore Orlando	100%
Baltimore Milwaukee	100%
Baltimore New Orleans	100%
Baltimore Tampa	100%
Baltimore Fort Myers, Fla	100%
Chicago Midway Fort Myers, Fla	100%
Indianapolis Tampa	100%
Las Vegas Milwaukee	79%
Orlando Buffalo	72%
Orlando Columbus, Ohio	100%
Orlando Indianapolis	100%
Orlando Chicago Midway	100%
Orlando Milwaukee	73%
Orlando Philadelphia	44%
Orlando Pittsburgh	100%

Source: USA TODAY analysis of September airline schedule. data provided by OAG--Official Airline Guide

EXHIBIT 6

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STATEMENT OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF SOUTHWEST'S ACQUISITION OF AIRTRAN

WASHINGTON — The Department of Justice's Antitrust Division issued the following statement today after announcing the closing of its investigation into the proposed acquisition of AirTran Airways by Southwest Airlines Company:

After a thorough investigation, the division determined that the merger is not likely to substantially lessen competition. The merged firm will be able to offer new service on routes that neither serves today, including new connecting service through Atlanta's Hartsfield Jackson International Airport from cities currently served by Southwest to cities currently served by AirTran. The division said that the presence of low cost carriers like Southwest and AirTran has been shown to lower fares on routes previously served only by incumbent legacy carriers.

Although there are overlaps on certain nonstop routes, the division did not challenge the acquisition after considering the consumer benefits from the new service. Also, the airports affected by the overlaps are not subject to restrictions on slots or gate availability. Where such restrictions exist, entry by other airlines may be particularly difficult.

Southwest Airlines is based in Dallas. In 2010, it had revenues of \$12.1 billion carrying approximately 88 million passengers. Southwest serves 72 cities in the United States. AirTran is based in Orlando. In 2010, it had revenues of \$2.6 billion carrying approximately 25 million passengers. AirTran serves 69 cities in the United States, Mexico and the Caribbean.

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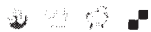
EXHIBIT 7

EXHIBIT 7

Osama's Legacy Is American Drift

This Could Be The Worst Summer Ever For Teen Jobs

Southwest buys AirTran, grows even bigger



DAVID KOENIG | May 2, 2011 04:47 PM EST | **AP**

DALLAS — Southwest Airlines is looking more and more like the big airlines it loves to needle.

The once-quirky upstart flies to the big, busy airports it used to shun. It lets travelers cut in front of the boarding line — for a fee. Its overhauled frequent-flier program is more complicated, like others in the industry.

Now comes Southwest's boldest move, its \$1 billion purchase of AirTran Airways, completed Monday. All these changes are designed to help Southwest compete better for high-fare business travelers.

By acquiring AirTran, Southwest increases passenger traffic by 25 percent. It gains AirTran's hub in Atlanta, a business-travel center that had been missing from Southwest's route map. It gains a toehold at Washington's Reagan National and adds gates at New York's LaGuardia, two airports favored by business travelers over nearby Southwest locations.

It will rival Delta and the combined United and Continental as the biggest airline by passenger-carrying capacity within the U.S., according to aviation data firm OAG. It already flies more than 100 million domestic passengers per year, the most of any airline, but most of them are vacationers who pay lower fares than corporate travelers.

The new frequent-flier program was designed expressly to reward customers for buying more-expensive tickets, something business travelers do when they make last-minute travel plans. It sent the message that Southwest wants business travelers, even at the expense of angering longtime leisure customers. The average fare on Southwest has risen about 12 percent a year recently, but the airline would like to push that even higher.

Southwest is no longer the undisputed king of cheap flights. A new breed of ultra-low fare airlines have sprung up. Some mid-price competitors, such as JetBlue and Virgin America, have more amenities. Fare watchers say that, at times, United, Delta, American or US Airways offer lower fares on some routes.

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Nor is Southwest the lowest-cost operator anymore. Spirit Airlines, Allegiant Air — and AirTran — have lower costs per mile, partly because they pay employees less, but also because Southwest's maintenance costs have risen as its fleet has aged. The big network airlines such as United and Delta have spent the past decade cutting labor and other costs and boosting efficiency.

CEO Gary Kelly insists that Southwest is "still a low-cost airline and the low-fare leader."

But Ray Neidl, an analyst with Maxim Group, said there isn't much of a cost difference with other airlines anymore.

Southwest, Neidl says, "has grown up. They are becoming more of your classic airline, though they don't want to admit it." But he acknowledges that consumers still associate Southwest with low fares.

Southwest remains the most powerful price-setter in the industry, capable of forcing others to roll back fare increases on coach tickets. And it retains vestiges of its maverick past.

The airline doesn't charge for the first two checked bags or for changing a reservation. It doesn't assign seats or have first-class cabins or airport lounges.

Still, Southwest is able to make a profit even when others are losing money because it keeps boosting revenue. Thanks to a 12 percent surge in traffic – far better than at other big airlines – and higher average fares, Southwest' first-quarter revenue climbed 18 percent, compared with 11 percent at United Continental and 13 percent at Delta.

Southwest earned \$5 million while its four biggest rivals lost a combined \$1 billion in the quarter.

The gap between revenue and costs is wider at Southwest than at low-cost rivals including Spirit and Allegiant, even with their lower wages. Southwest also tops JetBlue and AirTran in the revenue-versus-cost measure, according to a recent study by management-consulting firm Oliver Wyman.

Southwest grew rapidly in the 1980s and '90s by adding new cities, mostly secondary airports that were less crowded, letting Southwest turn its planes around after just a few minutes at the gate.

But business travelers prefer close-in airports. In New York, they would rather fly out of LaGuardia than Islip, Long Island. Washington Reagan is more convenient to them than Baltimore-Washington International. So Southwest decided to go where the business fliers were – New York, Boston, San Francisco, Denver and Philadelphia. The airline has paid the price -- its on-time performance has slipped, but that seems to be a sacrifice Kelly is willing to make.

Buying AirTran allows Southwest to fill the last gaping hole in its route map: Atlanta. There, AirTran has a profitable hub despite competing with Delta. Bob Jordan, the Southwest executive who will run AirTran, thinks Atlanta can become Southwest's biggest base within a few years, surpassing Las Vegas and Chicago. Southwest also gains a foothold at Washington's Reagan National and picks up AirTran's gates at LaGuardia.

AirTran could run as a separate airline into 2013. Southwest will eventually drop AirTran's bag fees and first-class seats. AirTran CEO Robert Fornaro says that's the right thing to do. "Southwest's brand is bigger; it's better known. They've got a product that works."

Antitrust regulators saw no reason to block the AirTran deal. Some consumer advocates say it's not likely to send prices higher.

"As long as you have a strong Southwest and smaller independent airlines like JetBlue and Alaska, I don't see any monopolistic pricing in the domestic market," said Ed Perkins, an author of travel books and former travel editor for Consumer Reports.

The average trip on Southwest is shorter than on many other airlines, so it competes against the cost of driving as well. For the last week in May, Southwest recently had fares as low as \$49 each way from Dallas to Houston. With gas at \$4 a gallon, a traveler making the same trip in a car that gets 20 mpg would spend \$48 on fuel.

Southwest also gets AirTran's routes to the Caribbean and Mexico. Southwest only recently began selling travel to Mexico on planes operated by a partner, Mexico's Volaris.

Darryl Jenkins, an aviation consultant, says buying AirTran gives Southwest enough growth opportunities to last five or 10 years. By that time, he says, the domestic leader might be ready to consider flights to Europe and other international destinations. That would make it – again – even more like the big, legacy airlines.

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EXHIBIT 8

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Is the Southwest-AirTran merger a good deal for fliers?

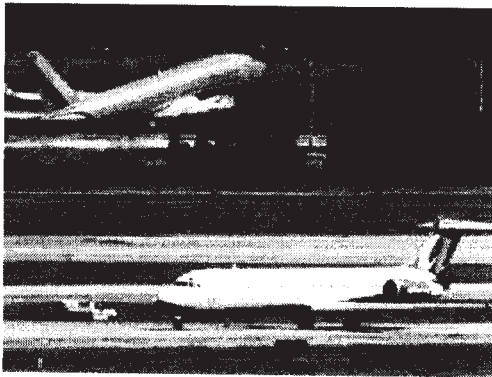
By Charisse Jones, USA TODAY

Updated 16h 18m ago

60 | 7

Share

Southwest Airlines plans to close on its purchase of AirTran Monday, creating the nation's first megasize, low-cost airline.



A Southwest jet takes off as an AirTran plane rolls to its gate at Orlando International.

By George Skene, AP

A Southwest jet takes off as an AirTran plane rolls to its gate at Orlando International.

By George Skene, AP

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Travelers shouldn't be affected by it, the Justice Department said last week in approving the deal, the third merger of big U.S. airlines in three years. "The merger," the department said, "is not likely to substantially lessen competition," and will enable the combined airlines to serve new routes that neither flew before. In addition, the department's monopoly watchdogs noted, when Southwest and AirTran have entered markets and competed with the so-called legacy airlines, such as Delta and American, ticket prices tend to drop.

That may be true in the short run, and even the long run, some observers say. But others aren't as sure. Some predict fares will rise as industry competition is winnowed. Some airports want to make sure they

aren't abandoned when the combined airline decides its schedule in coming months. And some highly sought business travelers, accustomed to the reserved seating and business-class section offered by AirTran, may balk at Southwest's open-seating policy and single-class cabins.

With Southwest already flying more domestic passengers than any other U.S. airline, and set to fly to more than 100 cities once it combines with AirTran, there also are questions about whether the newly combined airline will be able to maintain its upstart status or become just another big network airline.

- **TODAY IN THE SKY:** Southwest has 'orderly' plan to drop AirTran's DFW service

"Nothing changes for passengers on Monday or in the weeks or even few months following financial close," says AirTran spokesman Christopher White. "Our customers will continue to book flights at AirTran.com, fly on AirTran jets staffed by AirTran employees, and our policies will remain in place as we begin to integrate."

Full integration will likely take a year to 18 months, analysts say. But ultimately, the merger is creating a single discount carrier that will be a force to be reckoned with.

"It makes Southwest that much more useful as an airline to that many more people," says Henry Harteveltdt, travel industry analyst with Forrester Research. "I think we'll have a formidable low-cost airline now, and what this means is Southwest is no longer a niche airline. And they will increasingly be going up against the big boys."

Southwest will be able to challenge Delta at its Atlanta hub, thanks to AirTran's base at Atlanta's Hartsfield-Jackson International, the world's busiest airport. It will also be moving into or growing its presence at airports such as Washington's Reagan National and New York's La Guardia, and fly international flights to Mexico and the Caribbean, destinations currently served by AirTran.

Changes in store

Southwest's policy of not charging a fee for the first two checked bags, and its single-class cabins are possibly the biggest change passengers will eventually see, says Southwest spokeswoman Whitney Eichinger.

Some industry experts also expect lower fares, the hallmark of both carriers, to remain.

"Southwest has really carved its place out in the market on the basis of offering lower fares than legacy carriers overall. ... I don't expect that to change," says Dan Kasper, an airline consultant at Compass Lexecon, an economic consulting firm, who says he was not involved with the merger.

But other fare watchers expect prices to eventually rise. The number of industry players is shrinking, with Delta and Northwest uniting in 2008, and Continental and United merging last year.

Besides the escalating cost of fuel that's causing a general uptick in fares, George Hobica of Airfarewatchdog.com notes that even before the merger, Southwest sometimes charged more than competitors who engaged in vigorous sales.

"Fares are going to go up, there's no question," says Hobica, who thinks airlines such as Spirit or Frontier are truer low-fare carriers. "They're going to cut capacity, and any overlapping routes (between the two separate carriers) will be more expensive."

Basili Alukos, an airline analyst for investment research firm Morningstar, says fares will initially drop, particularly in Atlanta, as Southwest makes a play for a larger pool of passengers. But, he says, "in the long run, because there are fewer competitors, I would expect prices to rise."

Becoming a major player

While the merger gives Southwest the opportunity for growth, some say it also places additional pressures on the airline.

"Southwest is all of a sudden going to be a big player in markets with a very, very tough audience to please, like the Northeast," says analyst Harteveltdt. "They'll have to compete with on-time performance and facilitating efficient connections."

"There are going to be a lot of airline travelers, leisure and business, who are going to be looking at the landscape and asking themselves, 'Just because I've always done business with a certain airline, does it mean I should continue to do business with that carrier?'"

Southwest, which inspires fierce loyalty among its fliers, will face the challenge of holding onto AirTran passengers who may not like its recently revamped frequent-flier program.

And corporate fliers tend to like assigned seats and premium cabin sections, which the airline does not offer.

"It wouldn't surprise me that some travelers might decide that they prefer those amenities," says Kasper.

Kasper adds, though, that Southwest has aggressively courted business travelers in recent years. It's offered advanced boarding, for instance, which has had some appeal.

"In all of the major markets they're in, they fly a lot of flights," he says. "And frequency is a business traveler's friend."

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EXHIBIT 9



New Cambridge Aviation Research Report: Antitrust Concerns Unlikely to Stop Southwest-AirTran Merger

The proposed merger between Southwest Airlines and AirTran Airways is likely to pass antitrust review according to a new report from Cambridge Aviation Research. Baltimore's BWI suffers the greatest reduction in competition due to the merger.

Cambridge, MA (PRWEB) November 12, 2010

The proposed merger between Southwest and AirTran is unlikely to be blocked on antitrust grounds according to a new report from Cambridge Aviation Research. The Quick Take report, "Southwest's proposed merger with AirTran likely to pass antitrust review," uses domestic market share data to estimate the effects of the proposed merger on competition at the industry-, airport-, and route-levels. The report quantifies likely reductions in competition for each overlap market using the Herfindahl-Hirschman Index and compares them to merger guidelines recently updated by the Department of Justice.

"We find more airports and routes red-flagged in our analysis of this proposed merger than for United-Continental, but fewer passengers are likely to be affected," said Jeffrey Breen, president of Cambridge Aviation Research and lead author of the report. The report similarly red-flags 33 routes, including 16 pushed into monopoly status. "We find the most cause for concern in Baltimore and Orlando which together account for more than 80% of passengers traveling along red-flagged routes," Breen added, "but competitors are already established at these airports who could choose to serve many of these routes."

Key findings include:

- The proposed merger would return domestic market concentration to the levels of the late 1990s. Even on the heels of the recent Delta-Northwest and United-Continental mergers, the combination of Southwest and AirTran would merely return the market to the levels of competition present in the late 1990s and well below the DOJ's threshold for "moderate" concentration.
- At the airport level, 18 U.S. airports are red-flagged for increases in market concentration exceeding DOJ guidelines. From most-affected to least: Baltimore (BWI), Chicago Midway (MDW), Orlando International (MCO), Houston Hobby (HOU), Tampa (TPA), Indianapolis (IND), Fort Meyers (RSW), Columbus (CMH), Buffalo (BUF), Milwaukee (MKE), Jacksonville (JAX), Fort Lauderdale (FLL), San Antonio (SAT), New Orleans (MSY), Kansas City (MCI), St. Louis (STL), Palm Beach (PBI), and Las Vegas (LAS).
- Of the 33 routes red-flagged, 16 are pushed into monopoly status. The red-flagged route list includes the combined carrier's second-busiest route, Baltimore-Orlando, whose one million annual passengers stand to lose airline choice as this proposed merger pushes the route into monopoly.

The Quick Take report is 18 pages long, contains 8 figures, and 4 tables (also provided in expanded spreadsheet form) and is available for purchase and download from <http://www.cambridge.aero/store>

About Cambridge Aviation Research

Cambridge Aviation Research has provided custom research and analysis to select industry clients since 2005. With the recent launch of syndicated research offerings, our insight and analysis can help a wider audience navigate these challenging times for the industry.

###

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EXHIBIT 10

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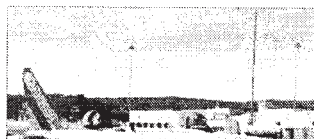
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Southwest has 'orderly' plan to drop AirTran's DFW service

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By Ben Mutzabaugh, USA TODAY

Southwest Airlines says it intends an "orderly and reasonable schedule" for ending flights at Dallas/Fort Worth International, the only one of AirTran's destinations that Southwest plans to drop following the carriers' merger.



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Southwest flies to Dallas Love Field, though the fine print in the Wright Amendment compromise prevents the carrier from simultaneously serving both DFW and Love Field. "We have said we will not serve DFW indefinitely," Southwest spokeswoman Brandy King says in an e-mail to Today in the Sky. "We're still working on the specific timing but in any event, we will take care of customers. AirTran customers holding a DFW reservation should continue with their travel plans. It is our intent to put into motion an orderly and reasonable schedule for relocating to Love Field, with appropriate notices and accommodations for Customers so that they have adequate time to adjust their travel plans."

There had been some speculation on aviation-themed sites like airliners.net as to whether Southwest/AirTran would be forced to pull the plug on the DFW service Monday, the day the merger officially closes.

"There is a process that we will have to work through post close but it's too early to discuss specifics," King says. "Our focus will be on Customers and providing them adequate notice and time to adjust their travel plans."

Outside of DFW, Southwest has said it intends to keep flying to all of AirTran's other destinations for an indefinite period following the merger.

Southwest says some of those destinations could be reevaluated down the road, but -- for now -- all except DFW will remain in the carriers' route maps.

Posted Apr 29 2011 1:09PM

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bravenav

1:47 PM on April 29, 2011

To meet the requirements of the Wright amendment, DFW service would have to be discontinued prior to SOC, which is still a bit off in the future.

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
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ga_westga_87

2:05 PM on April 29, 2011

bravenav: actually the agreement is southwest or any subsidiary cannot operate out of both airports....


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10:18 PM on April 29, 2011

Seems to me if they are operating under two certificates still then Air Tran should still be able to serve DFW.


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I thought the Wright Amendment went away?

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EXHIBIT 11

Bloomberg

US Airways Chief Parker Sees 'One Big Deal Left' for U.S. Airline Mergers

By Mary Schlangen Stein - Apr 6, 2011

US Airways Group Inc. (LCC) Chief Executive Officer Doug Parker said he sees "one big deal left" in the U.S. airline industry, with the carrier possibly tying up with its three largest competitors.

"That deal could happen one day, or it might not," Parker told reporters today in Tempe, Arizona, where the airline is based. US Airways is the smallest full-fare U.S. carrier, behind United Continental Holdings Inc. (UAL), Delta Air Lines Inc. (DAL) and AMR Corp. (AMR)'s American Airlines.

"There is one big deal left, and that's with US Airways," said Parker, 49. "I believe any of the three of them at the right time could do something with us if we wanted to and they wanted to."

Parker's comments reinforced his support for industry consolidation after three failed attempts at mergers since 2006. He fell short in a hostile bid that began that year to acquire Atlanta-based Delta, and talks collapsed in 2008 and 2010 on a tie-up with the former United Airlines.

"They want to be prepared for whatever may come down," said Robert W. Mann, president of R.W. Mann & Co., a Port Washington, New York-based consultant. "That's been their consistent theme."

US Airways fell 5 cents to \$8.40 at 4:15 p.m. in New York Stock Exchange composite trading. The shares have declined 16 percent this year.

United and Continental Airlines Inc. merged last year to form United Continental, leapfrogging Delta to become the world's biggest carrier. Delta achieved that status by buying Northwest Airlines Corp. in 2008, vaulting past American.

JetBlue, Alaska

A merger involving US Airways is much less likely with a smaller carrier, such as JetBlue Airways Corp. (JBLU) or Alaska Air Group Inc. (ALK), President Scott Kirby said in an interview. Those airlines have cost structures or networks that wouldn't complement those of US Airways, Kirby said.

Size matters for airlines because larger networks help carriers attract corporate contracts for business

travelers, who are prized because they pay the highest fares. US Airways is fifth in the U.S. by traffic, after United Continental, Delta, American and discounter Southwest Airlines Co. (LUV)

US Airways is working to keep operating costs lower than those of larger rivals and boost revenue after its 2010 profit snapped two years of losses. The airline has risen to near the top of the industry since 2007 in government rankings of on-time arrivals, baggage handling and consumer complaints.

Not for Sale

"We're not putting the company up for sale," Chief Financial Officer Derek Kerr said in an interview. "Our focus is not consolidation."

US Airways wants to "be in a position, if there's more consolidation, we're there and ready and strong enough to make our own decision versus being in a position where we have to be taken over," he said.

The company in its current form was created in 2005 when Parker, then CEO of America West Holdings LLC, orchestrated a merger with the old US Airways, which was in bankruptcy.

"There's no doubt that a merger would be in the best interest of our employees," said Steve Johnson, executive vice president for corporate and government affairs. "We can't afford to pay our employees what they pay at American, Delta and United. Everyone would be paid more under a merger."

US Airways workers will still be paid less after they negotiate new labor contracts because the carrier must maintain lower costs than its larger competitors, he said.

To contact the reporter on this story: Mary Schlangenstein in Tempe, Arizona, at maryc.s@bloomberg.net

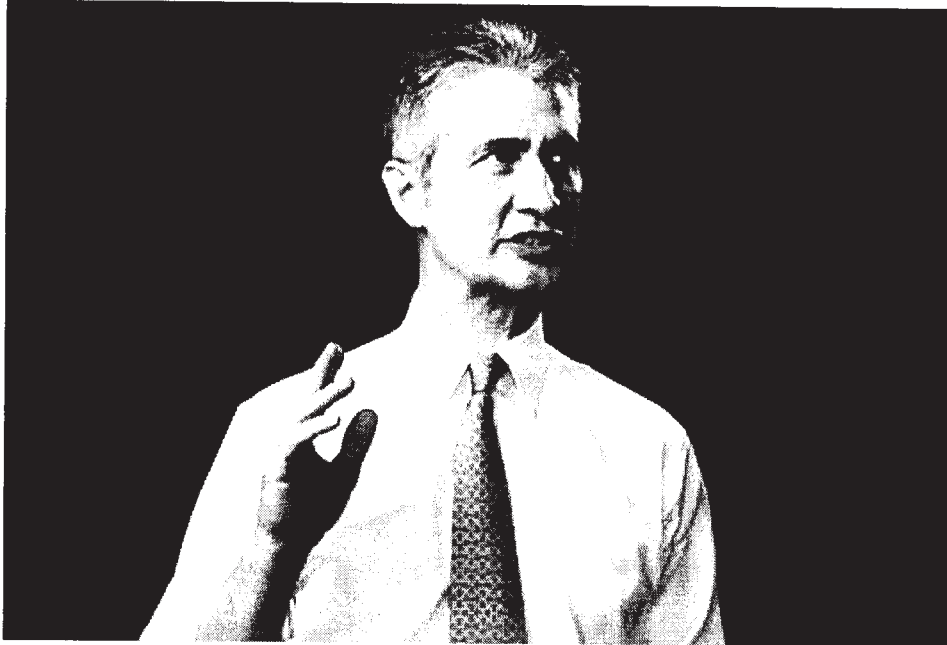
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EXHIBIT 12

Leadership by Geoff Colvin

Jeff Smisek: United Continental's king of the skies



editor-at-large April 21, 2011 9:54 AM ET

Interview by Geoff Colvin, senior-

FORTUNE -- When United and Continental merged last year to create the world's largest carrier, the official announcements never came out and stated the deal's true rationale: to blend Continental's management with United's scale. That's one reason former Continental chief Jeff Smisek is CEO of the new company. While he's scrupulous about calling the combination a merger of equals, nearly all of top management hails from Continental, which was far more successful than United over the past 15 years, despite being smaller. United, with a history of nasty labor relations, even went through bankruptcy from 2002 to 2006.

Smisek, 56, is a former corporate lawyer who learned his airline skills the hard way as part of the team that rescued Continental from near death in the mid-1990s. That turnaround, one of the most dramatic in recent business history, has become a classic case study. Smisek now commutes between home in Houston, Continental's base, and the new airline's headquarters in United's (UAL) hometown, Chicago. He talked recently with *Fortune's* Geoff Colvin about running a company that spends \$25,000 a minute on fuel, how to build a new corporate culture, being relentlessly honest with employees and customers, and much else. Edited excerpts:

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Q: Your business is a barometer of the economy. What's it showing you now, in the U.S. and globally?

A: We're a business-oriented airline. We love all our customers -- we just love some more than others, and those are the business travelers. Business travel is coming back, and that's a show of strength in the economy. You see it across all geographic sectors. The tragedy in Japan aside, Asia's been very strong. Latin America has been good. Transatlantic has been strong, despite what you read about Portugal, Ireland, Greece, and Spain. And the domestic system has been coming back as well. So you can see the economy recovering through the growth of business travel and high load factors.

What did the recession teach you?

What we learned is the importance of capacity discipline. Ours has been an industry where it's very easy to add seats, through increased frequencies, flying the aircraft longer, or taking delivery of additional aircraft. In the recession we were very disciplined in getting our capacity down, and as we saw the recovery with high fuel prices, we've been very disciplined at United and across the industry in making sure we've got the right level of capacity and not supplying overcapacity, driving down pricing.

You pay a lot of attention to the price of oil. What's your expectation?

To say we pay a lot of attention to it is an understatement. That's our single highest cost. At today's prices we burn \$25,000 of jet fuel a minute at United Airlines. For the amount of money we pay for fuel, we could buy a brand-new Airbus A380, the big airplane, every week and throw it away. I've got no more insight into where the price is going to go than any other person. If I knew that, I wouldn't be an airline executive, that's for sure.

Do you hedge it?

We do. We hedge it in a couple of ways. We hedge the short term through traditional derivative products, but that just lets you muscle through a period of crisis or high prices. Our best hedge is our fleet. We've got a modern and fuel-efficient fleet. We have great focus on operational efficiency. We've put winglets [upturned wing tips, which increase fuel efficiency] on over 300 of our aircraft. We just continue to go on and on focusing on operational efficiency.

We've seen a lot of big deals in this industry in the past few years -- Delta/Northwest, United/Continental, Southwest/AirTran. How close is the industry to being fully consolidated in the U.S.?

I don't think it's there yet. I think consolidation is a good long-term trend for this business. This business has had very low barriers to entry historically and has had high barriers to exit because everybody who touches us makes money, and they don't want us to die. And we've had a great deal of fragmentation, not only domestically but internationally as well.

Video: Smisek on a successful merger

There's more room for consolidation, even in the U.S., and there's considerable room overseas, not only in Europe but also in Asia and certainly in Latin America. There's a lot more consolidation to come. It's a natural product of a highly fragmented, capital-intensive industry, and certainly the merger efficiencies are real. That's why we merged. And in a network business you want a big network, and we have the biggest network in the world because of our merger.

Is there a threat to airline brands as a result of code sharing? I can go online and buy a ticket on United, but when I get to the airport, I'm on a US Airways airplane.

We need to be careful in the industry to make sure customers understand what code sharing is and what it is not. Code sharing is a way to, in effect, build a synthetic network that you alone would not build. There are basic standards of safety and reliability that we won't alter, but each company has its own service delivery and its own brand. There is a risk there, and we need to make sure people understand that when they're flying on a code-share flight operated by another carrier, they may not get the same quality of service, in the example you used, say, that you would expect from United.

You're now integrating a huge merger, creating the world's largest airline. In a J.D. Power customer satisfaction survey last year, Continental was above average in customer satisfaction, while United was below average. How do you make sure the combined airline doesn't just end up in the middle?

It's a great question, and a lot is going to be based on the culture we develop. I'm a big believer in culture, especially in a service business, and what we're creating is a culture based on what I like to say are the two things my mommy taught me: Treat other people like you'd like to be treated, and never tell a lie.

If you have a workforce that enjoys each other, they trust each other, they trust management, they're proud of where they work -- then they're going to deliver a good product. You can lecture and train, but unless they really believe in who they work for and are proud of who they work for, and trust each other and trust management, you won't get that.

Video: \$25,000 a minute on jet fuel

My management team and I are spending a lot of time on developing the new culture. It won't be precisely Continental's culture, and it sure won't be United's old culture. It'll be something that takes what I hope to be the best of both. We're very focused on that because you do run the risk in any integration of ending up with mediocrity.

This was and is a merger of equals. That doesn't mean coin flips. It means picking the very best of each carrier and bringing them together.

United has a history of very contentious labor relations. Why should the old United employees believe that things are going to be any different now?

One, there's been a wholesale management change. That's very visible: It's a different management style, and I think that makes a difference. Two, they understand what we're building here. These are airline professionals, and they understand that this is their chance in a lifetime to build a spectacular carrier that they will really enjoy working for, that'll provide them some career stability they've not had in the past, and will improve wages and benefits because of profitability. No amount of words mean anything if you're not making money, and they see this is the chance to have a business that makes money throughout the cycle and that can deliver great benefits to all our constituencies, including employees.

You were on the team that saved Continental in the mid-'90s. What did you learn from that experience that's applicable here?

A couple of things. Our business plan is the Go Forward Plan [a short statement of company objectives on marketing, finance, operations, and employees] we were using at Continental for 16 years. It's a really simple plan. It's easy to understand, no matter if you're a pilot or on the ramp or a tech-ops person. That focuses everybody on what's important. It's one piece of paper. I tell my co-workers, if you're doing something and you can't trace it back to the Go Forward Plan, stop what you're doing and do something else. What you're doing is not worthwhile if you can't trace it back to this plan.

Second, one of the things I learned in the Continental turnaround is to treat people like you want to be treated. You're honest and direct with them. If someone comes to you with a silly idea, you don't pat them and say, "Oh, yeah, that's interesting, I'll consider it." You say, "No, I disagree," and you tell them why.

Video: Why Smisek reads all his emails

When we closed the merger, I did 16 CEO exchanges around the system where I met with my co-workers. I'd stand up and answer any question they wanted. They were not used to that at United, I can assure you. They were at Continental.

I'm starting on a round in Europe next week. I'll do Asia, I'll do Latin America, and then I'll start more in the U.S. again, just being visible, answering people's questions, and being honest with them. "When are you going to snap me back to the wages I had in the year 2000?" Answer: never. That was a different time, and you will never be paid like you were in 2000. We're in a different business now. Low-cost carriers used to be a small percentage of the U.S. market. Now they're a giant piece. Business has changed, and people respect you when you're honest.

That's what I ask all our employees to do, and the same thing with customers. If we've got a delay and we don't know why, just say it. "I don't know why, but I'll try to figure it out, and as soon as I know, I'll let you know." Customers much prefer honesty to being given the runaround.

What are the most important issues facing United Continental now?

Certainly integrating these two carriers. Technology is a huge issue because we are functionally technology companies with wings. There are a lot of big systems we have to bring together. There are issues with bringing the work groups together. We're a highly unionized carrier. In some cases we have work groups represented by the same union; in some cases we have work groups represented by different unions, and we have to elect a union to represent all of them; and in some cases we have work groups where at Continental the co-workers did not have a union and at United they do have a union -- they've got to decide whether they want a union.

You mention the integration challenge. You have hundreds of airplanes, thousands of employees, millions of customers -- it's hard to think of a business with more moving parts. Integrating the IT systems must be a huge job. How's it going?

It's akin to changing the engine while the airplane's in flight. We're being thoughtful about it. We've broken the IT down into the basic set of about 15 platforms. We are not only understanding all the interdependencies and prioritizing the integration, but also not picking an industry-leading third-party system, because of the migration risk. What we're typically doing is picking one [airline's] system or the other and migrating that. We'll have plenty of time to go to the cutting-edge system later. I just want to make sure above all that we land safely.

An airline is more vulnerable to disruptions than many other businesses. So many things can go wrong. The snowstorms this past winter --

Volcanoes.

Volcanoes. You can't predict this stuff, and it can cost you millions of dollars. What have you learned about preventing disruptions when they can be prevented, and handling them when they happen?

A lot of things you can't prevent, whether it's fuel costs or the terrible tragedy in Japan or volcanoes or SARS -- there's nothing you can do to prevent it. What you can do is respond thoughtfully but rapidly. We are professional crisis managers in the airline business, and we're very good at it. We remain calm. We have great data systems to

help us make good decisions. One thing we are very good at is making decisions and moving swiftly, because you can have all kinds of theoretical discussions, but the person at the gate says, "Do we push back or not?" And you have to be able to answer that question.

You were a partner at a big, famous law firm, Vinson & Elkins, which you left to join Continental in 1995. Things have turned out pretty well, but at the time, that was an enormous gamble. Why did you do it?

I was being offered a job as general counsel, and I had some preliminary discussions partly as a favor to a friend of mine who had set it up. The person who was talking to me asked if I wanted to meet the new CEO [Gordon Bethune]. Well, if you're a partner at a big law firm, and you have an opportunity to meet the CEO of a company that's really broken and in a mess, you get in sales mode. I thought, "Oh, this is great. I can sell lots of legal services to this guy." What I didn't realize is, Gordon Bethune was a far better salesman than I will ever be. He sold me on the dream of turning Continental around, and I must say I've had the time of my life. It's been enormously fun and very rewarding.

Would you advise young people today to plan their career, or take an approach more like yours?

Look, I started out -- I was going to get a Ph.D. in economics, and I went to MIT. I dropped out. I worked in New York for a bank for a couple of years. I went to law school, principally because I wanted to be near my girlfriend. Then she moved to Houston, and I followed her for love, and we got married. I was an M&A and securities lawyer for many years. I went into the airline business. I could never have planned this out -- trust me. I had an opportunity to move from a cushy job as a partner to a very difficult and at the time dicey company, but I took that opportunity, and I've never regretted it. ■