

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)**

◆
**PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANTS' OPPOSITION TO
EMERGENCY MOTION FOR INJUNCTION
SEEKING TEMPORARY "HOLD SEPARATE" ORDER PENDING
DISPOSITION OF MALANEY, ET AL., V. UAL CORPORATION, ET AL.
AND
REQUEST FOR RELIEF PENDING THIS APPEAL**

◆
JOSEPH M. ALIOTO (SBN 42680)
THERESA D. MOORE (SBN 99978)
THOMAS P. PIER (SBN 235740)
JAMIE L. MILLER (SBN 271452)
ALIOTO LAW FIRM
225 BUSH STREET
16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
JMILLER@ALIOTOLAW.COM
TMOORE@ALIOTOLAW.COM

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT	1
ARGUMENT	1
I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL PURSUANT TO 28 U.S.C.A. SECTION 1292 AND THIS COURT’S PRIOR HOLDINGS.....	2
A. Denial of the Temporary Restraining Order is Appealable because Denial of All Relief was Implied in the Denial by the District Court	3
B. Denial of the Temporary Restraining Order is Appealable because Denial of the Temporary Restraining Order was Tantamount to the Denial of the Preliminary Injunction .	5
1. The District Court’s Order had the Practical Effect of Denying a Preliminary Injunction	5
2. Denial of the Temporary Restraining Order is Resulting in Serious, Perhaps Irreparable Consequences.....	7
3. The District Court’s Denial of the Temporary Restraining Order is One that Can be Effectively Challenged Only by Immediate Appeal	7
II. FED. R. APP. P. 8 PERMITS APPELLANTS’ EMERGENCY MOTION.....	8
A. Moving for a Hold Separate Order from the District Court was Impracticable.....	8
B. The District Court Failed to Afford the Relief Requested	10
C. Appellants Were Not Required to First Seek a Hold Separate Order from the District Court.....	10
D. Appellants Request a Hold Separate Order Pending Disposition of this appeal	10
E. Appellants Have Provided this Court with a Sufficient Basis to Grant the Requested Relief.....	11

III. APPELLANTS HAVE MET THE APPLICABLE LEGAL
STANDARD FOR THE HOLD SEPARATE ORDER TO BE
GRANTED 11

 A. Relevant Product Markets Must be Defined Broadly
 Enough to Recognize Competition Where it Exists—The
 United States Commercial Airline Market is a Relevant
 Antitrust Market; Low Cost Carriers are a Submarket.. 12

 B. Appellants Have Established Irreparable Harm..... 16

 C. In Balancing the Equities, Appellees Significantly
 Overstate the Hardship of a Hold Separate Order..... 17

 D. A Hold Separate Order Serves the Public Interest,
 Pending Disposition of this Case..... 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

<i>Bennett v. Medtronic, Inc.</i> 285 F.3d 801 (9th Cir. 2002).....	5
<i>Brown Shoe, Co. v. United States</i> 370 U.S. 294 (1962)	12, 13, 14
<i>Federal Trade Comm’n v. Weyerhaeuser Co.</i> , 665 F.2d 1072 n.7 (D.C. Cir. 1981).....	17
<i>Hospital Corp. of America v. Federal Trade Commission</i> 807 F.2d 1381 (7th Cir. 1986).....	15
<i>Orange County v. Hongkong & Shanghai Banking Corp.</i> 52 F.3d 821 (9th Cir. 1995).....	3, 5
<i>Privitera v. California Bd. of Med. Quality Assurance</i> 926 F.2d 890 (9th Cir. 1991).....	2
<i>Religious Technology Center, Church of Scientology Intern., Inc. v. Scott</i> , 869 F.2d 1306.....	6
<i>United States v. Aluminum Co. of America et al.</i> 377 U.S. 271 (1964).....	14
<i>United States v. Pabst Brewing Co.</i> 384 U.S. 546 (1966).....	14
<i>Woratzek V. Arizona Bd. of Executive Clemency</i> 117 F.3D 400 (9th Cir. 1997)	3, 4

STATUTES

28 U.S.C. § 1292(a)(1)	2
Fed. R. App. P. 8(a)(2)(A).....	8, 10

SUMMARY OF THE ARGUMENT

This appeal comes to the Court on a challenge of the District Court's denial of Appellants' Motion for a Temporary Restraining Order. On May 9, 2011, Appellants filed an Emergency Motion for Injunction Seeking Temporary "Hold Separate" Order Pending Disposition of *Malaney, et al., v UAL Corporation, et al.* Today a ruling was issued in *Malaney, et al., v. UAL Corporation, et al.* Accordingly, Appellants request a "hold separate" order pending disposition of this appeal.

Appellees begin by challenging the jurisdiction of this Court to hear this matter. It is clear that this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292(a)(1) and law of this Court. Temporary restraining orders ("TRO") are appealable in certain circumstances, including if denial of all relief is implied in the denial of a TRO or if the denial of a TRO is tantamount to the denial of a preliminary injunction. Under either test, Appellants' appeal is permitted and this Court has jurisdiction to hear this matter.

Further, Appellees argue the Emergency Motion is not permitted pursuant to Federal Rule of Appellate Procedure 8. Appellants can and have demonstrated that Rule 8 permits this Emergency Motion because moving in the District Court was impracticable due to merging and integration of operations of the airlines and also given the nature of the ruling of the District Court.

Lastly, Appellees argue that Appellants have not met the applicable legal standard for a hold separate order. Appellees ignore a line of binding Supreme Court precedent and "brazenly" misstate the

holding by the Seventh Circuit in support of their argument. Further, Appellees overstate the hardship of a “hold separate” order, when in fact no joint operating certificate has been obtained and AirTran may well run as a separate entity until 2013. Appellants have met the applicable legal standard for this Court to grant a hold separate order pending disposition of this case, and as such, a hold separate order should be granted.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL PURSUANT TO 28 U.S.C.A. SECTION 1292 AND THIS COURT’S PRIOR HOLDINGS

Appellees mischaracterize and fail to recognize Ninth Circuit law as it pertains to the appeal of denials of temporary restraining orders. 28 U.S.C. § 1292(a)(1) provides that “the courts of appeals shall have jurisdiction of appeals from ... [i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions.” This court has made it clear that it takes a “pragmatic approach” to determining appealability pursuant to 28 U.S.C. § 1292(a)(1). *Privitera v. California Bd. of Med. Quality Assurance*, 926 F.2d 890, 893 (9th Cir. 1991).

The denial of a temporary restraining order may be appealed under 28 U.S.C. § 1292(a)(1) if denial of all relief was implied in that denial. *See Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400, 402 (9th Cir. 1997).

Appeal pursuant to Section 1292(a)(1) from the denial of a temporary restraining order is also permitted if the circumstances make

the denial tantamount to the denial of a preliminary injunction. *See Orange County v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 825 (9th Cir. 1995); *Religious Technology Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (record "unmistakably clear" denial of TRO was tantamount to denial of preliminary injunction); *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1986), cert. denied, 484 U.S. 815, 108 S. Ct. 67, 98 L. Ed. 2d 31 (1987) (denial of temporary restraining order decided merits and appellant's claims would become moot if it could not appeal, court would not require appellant to go through futile act of reapplying for permanent relief).

Under either exception, this court has jurisdiction to hear this case.

A. Denial of the Temporary Restraining Order is Appealable because Denial of All Relief was Implied in the Denial by the District Court

A temporary restraining order ("TRO") may be appealed under Section 1292(a)(1) if denial of all relief was implied in the denial. *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d at 402. The District Court's denial of Appellants' TRO implied denial of all relief by the very language of the Court's Order itself. Accordingly, Appellants properly appeal from the District Court's denial of a TRO.

In *Woratzeck*, an Arizona state prisoner sentenced to death appealed from the district court's denial of his motion for a temporary restraining order (TRO) and stay of his execution. Here, the court held that it had jurisdiction to consider Woratzeck's appeal of the TRO and

that it would “...not require [Woratzeck] to go through the futile act of reapplying for permanent relief and the denial of a TRO may be treated as a de facto denial of a permanent injunction.” *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400, 402 (9th Cir. 1997), citing, *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 (1987).

As in *Woratzeck*, reapplying for injunctive relief in the District Court would be a futile act. In its Order, the District Court held that, “Additionally, given the fact that Defendants’ acquisition of AirTran was completed the day before this action was filed, Plaintiffs’ fail to establish likelihood of success on the merits for an action seeking solely prospective relief.” (Order at 2:14-16). Here, the District Court makes clear that it views itself as unable to grant relief in light of the fact that the merger had closed the day before the filing of the Application for the TRO.

The District Court failed to distinguish between the closing of the merger on paper and a full consummation of the merger. The resulting need to integrate operations of the airlines, the fact the airline still operates under the AirTran name, that airline passengers continue to purchase tickets under the AirTran name and travel on flights in planes bearing the AirTran name, that there remains a fully functional AirTran website--all evidence the fact that the merger is not fully consummated. Any argument that the merger of the airlines is fully consummated is fiction.

The failure to distinguish between closing of the merger and consummation of the merger made clear that the District Court viewed

itself as unable to grant relief. Consequently, the District Court's conclusion in its denial of the TRO effectively denied Appellants' of all relief. As such, Appellants properly appeal denial of the TRO.

B. Denial of the Temporary Restraining Order is Appealable because Denial of the Temporary Restraining Order was Tantamount to the Denial of the Preliminary Injunction

This Court considers the effect of an order rather than its terminology. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801 (9th Cir. 2002). That the Order of the District Court is merely titled the denial of a TRO is not determinative. This Court and the Supreme Court have recognized that an order may be appealable under section 1292(a)(1) if it has the "practical effect" of denying a preliminary injunction. *Id.* at 804. In addition, the interlocutory order must not only (1) have "the practical effect of denying an injunction," but also (2) "must have 'serious, perhaps irreparable consequences,' " and (3) "be one that can be 'effectively challenged' only by immediate appeal." *Orange County v. HongKong and Shanghai Banking Corp. Ltd.*, 52 F.3d 821, 825 C.A.9 (Cal.) 1995, citing *Carson v. American Brands*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1353 (9th Cir.1990).

1. The District Court's Order had the Practical Effect of Denying a Preliminary Injunction

Appellees argue that the denial of the TRO was not akin to the denial of a preliminary injunction because there was not a hearing on the merits. A request for a hearing was made and denied by the

District Court. However, this is not required, as the Court noted in Footnote 6 of *Religious Technology Center, Church of Scientology Intern., Inc. v. Scott*, 869 F.2d 1306, 1309:

Arguably, one could read Andrus as laying down a black-letter rule that “a full adversary hearing” is a necessary, if not a sufficient, condition to the appealability of a denial of a TRO. We reject this wooden reading of Andrus. The teaching of Andrus is that a denial of a TRO is appealable if the circumstances make it unmistakably clear that the denial “is tantamount to the denial of a preliminary injunction.” There the circumstances included “a full adversary hearing,” which presumably means an evidentiary hearing; here the circumstances included a non-evidentiary adversary hearing at which all parties were represented. The record below makes it clear that an evidentiary hearing would have been pointless; in light of the district judge's ruling that Wollersheim barred all interlocutory relief, it would have been a waste of party and judicial resources to have conducted an evidentiary hearing.

Religious Technology Center makes clear that a full adversary hearing is not necessary and that it is the individual circumstances that are considered instead. The circumstances currently before this Court are such that there was no hearing held on the motion. However, the District Court made clear in its Order that prospective relief cannot be granted because the merger closed the day before, even though operations had yet to be merged and currently continue to be integrated. Moving for a preliminary injunction or other prospective relief in the District Court would have been futile. As such, the District Court's Order had the practical effect of denying a preliminary injunction.

2. Denial of the Temporary Restraining Order is Resulting in Serious, Perhaps Irreparable Consequences

As argued in Appellants' Emergency Motion, Appellants-Plaintiffs' have brought suit under Section 7 of the Clayton Act, which provides for *injunctive relief*, in preventing the illegal merger of corporations that may substantially lessen competition. Section 7 of the Clayton Act provides for injunctive relief in recognition of the dangers to the public and consumers of illegal mergers. Every day that corporations are permitted to integrate operations pursuant to an illegal merger, results in the likelihood that the integration of operations and merger will have lasting anticompetitive effects on the airline industry that harm consumers and cannot be undone.

3. The District Court's Denial of the Temporary Restraining Order is One that Can be Effectively Challenged Only by Immediate Appeal

In the District Court's Order denying the TRO, the Court held that "Given the fact that Defendants' acquisition of AirTran was completed the day before this action was filed, Plaintiffs fail to establish the likelihood of success on the merits for an action seeking solely prospective relief." (Order at 2:14-16). It is clear that the District Court viewed itself as being unable to grant prospective relief because the merger had closed the day before. Requesting other prospective relief in the District Court would have been futile and as such, immediate appeal was the only other alternative.

In light of the foregoing analysis, the District Court's denial of the TRO was in effect the denial of a preliminary injunction. As a result, the order denying the TRO by the District Court is appealable pursuant to Section 1292(a)(1).

II. FED. R. APP. P. 8 PERMITS APPELLANTS' EMERGENCY MOTION

Federal Rule of Appellate Procedure 8(a)(2)(A) clearly permits a motion for an order suspending, modifying, restoring, or granting an injunction while an appeal is pending, "the motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." The Emergency Motion is permitted by Fed. R. App. P. 8 because it was both impracticable to move in the district court and because the denial by the district court of the temporary restraining order made clear that it would not grant prospective relief and accordingly failed to grant the relief requested.

A. Moving for a Hold Separate Order from the District Court was Impracticable

As explained in the Emergency Motion (Emergency Motion at 4) moving for a Hold Separate Order would have been impracticable because of the nature of the urgency of the matter. Appellees closed their merger on May 2, 2011. The District Court denied Appellants' Motion for a TRO on May 4, 2011. Every day that passes, Appellees continue to integrate operations and the nature of the urgency increases

as does the danger of irreparable harm and hardship of unscrambling an illegal merger.

Moving the District Court for a Hold Separate Order would also have been impracticable because the District Court viewed itself as unable to grant prospective relief, “Additionally, given the fact that Defendants’ acquisition of AirTran was completed the day before this action was filed, Plaintiffs fail to establish the likelihood of success on the merits for an action seeking solely prospective relief.” (Order at 2: 14-16). Appellants contend not that they are unable to show likelihood of success on the merits, but rather, that the District Court viewed itself as being unable to grant prospective relief. Therefore, moving for a Hold Separate Order in the District Court would have been impracticable.

Further, Appellees contend that Appellants delayed seven months to bring this action. That is not the case. This action was brought promptly after the Department of Justice announced its decision to close its investigation of the Southwest-AirTran merger on April 26, 2011. Appellees fail to recognize that the announcement by the Department of Justice that it had closed its investigation and would permit the Southwest-AirTran merger did not become widely reported until April 26, 2011, by the Department of Justice. (Decl. T. Pier, Exhibit 6). Appellants filed their Complaint and Motion for a Temporary Restraining Order on May 3, 2011, one week after the announcement by the Department of Justice and one day after the closing of the merger by Southwest and AirTran. Appellants did not

delay bringing this action and moving for a Hold Separate Order from the District Court would have been impracticable.

B. The District Court Failed to Afford the Relief Requested

It is clear that the District Court viewed itself as being unable to grant prospective relief because the merger had closed the day before. (Order at 2:14-16). However, Appellees still must merge operations and will continue to do so. Reports show that AirTran could run as a separate entity until 2013 (Decl. T. Pier, Exhibit 7 at 2). Prospective relief in the form of a Hold Separate Order is a form of prospective relief that is still available since operations have not been fully integrated. The District Court's refusal to grant prospective relief is a failure to grant the relief requested here.

C. Appellants Were Not Required to First Seek a Hold Separate Order from the District Court

Federal Rule of Appellate Procedure 8(a)(2)(A) permits a motion for an order suspending, modifying, restoring, or granting an injunction while an appeal is pending, if the motion shows that moving "first in the district court would be impracticable" or "that, a motion having been made, the district court denied the motion or failed to afford the relief requested". Appellants have shown above that the Motion for a Hold Separate Order would have been both impracticable due to the urgency of the matter and the District Court's view that it could not grant prospective relief.

D. Appellants Request a Hold Separate Order Pending Disposition of this appeal

Appellees argue that a Hold Separate Order pending disposition of another case is prohibited by Rule 8.

In light of this Court's issuance of a ruling in the matter of *Malaney, et al., v. UAL Corporation, et al.*, today, May 23, 2011, Appellants request a Hold Separate Order pending disposition of this appeal for the reasons set forth in their Emergency Motion and this Reply.

E. Appellants Have Provided this Court with a Sufficient Basis to Grant the Requested Relief

Appellees argue that Appellants have not complied with Rule 8(a)(2)(B). However, Appellants in the Appendix attached to their Emergency Motion included a Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Declaration of Thomas Paul Pier in Support of the Motion for a TRO, with supporting facts. (Emergency Motion Appendix at 27 and 42).

Further, Appellees argue that Appellants have not complied with the requirements of Ninth Circuit Rule 27-3 for "emergency motions" by not submitting the required "Circuit Rule 27-3 Certificate", stating facts showing the nature of the emergency. In effect, Appellants have complied with this requirement in the section entitled "Nature of the Urgency" in the Emergency Motion (Emergency Motion at 3).

III. APPELLANTS HAVE MET THE APPLICABLE LEGAL STANDARD FOR THE HOLD SEPARATE ORDER TO BE GRANTED

Appellees again argue that Appellants have not supported their request for relief with facts. Plainly, this is not the case. Supporting documents are attached to the Memorandum in Support of Plaintiffs'

Motion for a Temporary Restraining Order and a Declaration of Thomas Paul Pier in Support of the Motion for a TRO (See Emergency Motion Appendix at 27 and 42).

A. Relevant Product Markets Must be Defined Broadly Enough to Recognize Competition Where it Exists—The United States Commercial Airline Market is a Relevant Antitrust Market; Low Cost Carriers are a Submarket

Appellees argue that Appellants have failed to allege a “plausible ‘relevant market’” and so have not shown a likelihood of success on the merits. Appellees ignore a line of binding Supreme Court precedent. Defining a relevant market is not an end in itself, but rather a means for deducing the effect of the merger on competition within the market or markets identified. “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe, Co. v. United States*, 370 U.S. 294, 325 (1962).

The United States Commercial Airline market is a relevant market. Low cost carriers of airline passengers in the United States is a submarket. (Plaintiffs’ First Amended Complaint, Exhibit A at ¶19). The *Cellophane-Brown Shoe* rule does not require Appellants to demonstrate that every product in the market is a substitute for every other product in the market. A market does not fail because it includes products that are not substitutes for one another and the Supreme Court has never demanded such specificity in defining a relevant market. In fact, practically all of the markets construed by the

Supreme Court have included products within them that are patently non-substitutable.

In *Brown Shoe*, 370 U.S. at 325, the Supreme Court introduced the concept of submarkets for the purposes of antitrust review. The “outer boundaries of the product market” in *Brown Shoe*, consisted of all “footwear” *Id.* at 326 (holding that submarkets consist of men’s, women’s and children’s shoes implies that the overall market is all footwear nationwide). Clearly, this market included men’s, women’s and children’s shoes—products that do not serve perfectly interchangeable end uses for consumers.

Further, the identification of submarkets of “Men’s,” “Women’s,” and “Children’s” shoes in *Brown Shoe* also included non-interchangeable substitutes. As Appellees argue in this case, in *Brown Shoe*, the defendant argued that “children’s shoes [does not] constitute [] a single line of commerce” since “a little boy does not wear a little girl’s black patent leather pump,” and “a male baby cannot wear a growing boy’s shoes.” *Brown Shoe*, 370 U.S. at 323. The Supreme Court rejected these arguments, reasoning that “the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists.” *Id.* at 326.

The Supreme Court admonished lower courts not to use the “interchangeability” standard to thwart enforcement of the Clayton Act: “[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition.” *Brown Shoe*, 370 U.S. at 326.

The practice of defining markets broadly for the purposes of Section 7 is present in a line of Supreme Court precedent which has never been overruled (Exhibit B at 10-16).

Brown Shoe and the cases cited by Appellants in *Malaney* directly contradict the necessity that city pairs and/or airport pairs are the relevant markets, rather than a national market or a low cost carrier submarket. Requiring overly detailed specificity within the airline market violates the Supreme Court's admonition not to use interchangeability to obscure competition. *Brown Shoe*, 370 U.S. at 326.

In *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), in which there was a nationwide relevant market for beer sales, the Supreme Court ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550.

Further in *United States v. Aluminum Co. of America et al.*, 377 U.S. 271 (1964), the relevant market was a nationwide market defined as the aluminum conductor market. Here, the Supreme Court found that the merger of Alcoa, #1 in the subconductor market and Rome Cable Co., #9 in the subconductor market violated Section 7 of the Clayton Act. *Id.* at 277-281. The merger in the case currently before this Court is even more alarming than the one in *Alcoa*. Southwest accounts for approximately 60% of the combined market share of the low-cost carriers that report data to the DOT. (Compl. ¶50). AirTran

controls almost 50% of the LCC's combined market share of the low cost carriers that report data to the DOT. (Compl. ¶51). The combined company would account for approximately 75% of the combined market share of the low cost carriers. (Compl. ¶52).

Any conclusion that Southwest, AirTran, United, Continental, and other airlines do not compete against one another in the United States is as unsupportable under the law as it is belied by common sense.

Appellees argue that Appellants cannot establish that the merger is likely to substantially lessen competition where the DOJ concluded its investigation. This argument is irrelevant, and the conclusion of the DOJ does not create a presumption in the law. The DOJ did not approve the merger, it simply did not object to it. This private right of action is not incumbent upon the investigation of the DOJ, which can sway with the political winds.

Lastly, Appellees contend that Appellants "brazenly misrepresent" the Seventh Circuit's decision in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381 (7th Cir. 1986). It is, however, Appellees who brazenly misrepresent this holding.

The words of the court in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d at 1385-1386 speak for themselves:

The Commission's detailed analysis of those effects fills most of a 117-page opinion that, whatever its substantive merits or demerits, is a model of lucidity. *The Commission may have made its task harder (and opinion longer) than strictly necessary, however, by studiously avoiding reliance on any of the Supreme Court's section 7 decisions from the 1960s except [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), which took an explicitly economic approach to the interpretation of the statute. The other decisions in that decade-in particular [Brown Shoe Co. v. United States](#), 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); [United](#)*

States v. Aluminum Co. of America, 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); United States v. Von's Grocery Co., 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), and United States v. Pabst Brewing Co., 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966)-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.” [emphasis added]. (*Ibid*).

None of these decisions has been overruled. Although both United States v. General Dynamics Corp., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974), and United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975) (both discussed in our recent decision in Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1336-37 (7th Cir.1986)), refused to equate the possession of a significant market share with a significant threat to competition, these cases involved highly unusual facts, having no counterpart in this case, that required discounting large market shares. In *General Dynamics* the shares were of current sales (of coal) made pursuant to long-term contracts entered into a long time ago; future sales would depend on uncommitted reserves, and one of the acquired firms had no uncommitted reserves. In *Citizens & Southern* the acquired banks were already under the effective control of the acquirer (they were its “de facto branches”), so that the formal merger had little competitive significance. (*Ibid*).

Further, Appellants in support of their argument cite *United States v. General Dynamics, Corp.*, 415 U.S. 486, 497-511, which the Court held above, “involves highly unusual facts, having no counterpart in this case.” *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d at 1386.

B. Appellants Have Established Irreparable Harm

Appellants are and will be the direct purchasers of airline tickets for travel within the United States furnished by Appellees, as well as other major United States passenger airline carriers. Appellants are forty-three individual purchasers of commercial passenger airline travel

for their personal use. Many plaintiffs in this case are plaintiffs in the *Malaney, et al., v. UAL Corporation, et al.*, matter some of which gave live testimony demonstrating harm in that case and are also plaintiffs in this case. (Exhibit B at 5-7).

Once again Appellees argue that Appellants delayed in bringing this action. Again, this is not the case. Appellants did not delay in bringing this action for 7 months. Appellants waited to bring action only to determine what action the Department of Justice would take. The Department of Justice issued a press release on April 26, 2011. (Decl. T. Pier, Exhibit 6). Appellees closed their merger on May 2, 2011. There was little time to bring this action, and Appellants did not delay. Appellants' Complaint was filed in the District Court on May 3, 2011, one week after the announcement by the Department of Justice and one day after the merger closed. The irreparable harm in unscrambling a merger later found to be illegal was not brought on by delay by Appellants but by the little time between the announcement of the closing of the investigation by the Department of Justice and the closing of the merger by Appellees.

C. In Balancing the Equities, Appellees Significantly Overstate the Hardship of a Hold Separate Order

Appellees overstate the harm that a hold separate order would cause. 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.*

By its very nature, the relief Appellants request is appropriate during the pendency of these proceedings, and sways the balance of equities in Appellants’ favor. A hold separate order permits a transaction to go forward, simply requiring the entities to remain separate. Further, reports show that AirTran could run as a separate entity until 2013, despite Appellees’ arguments that “significant integration has already taken place” and “there would be no one left to lead a separate AirTran”. (Decl. T. Pier, Exhibit 7 at 2) and (Opp. at 17). A joint operating certificate will not even be issued until 2012. (Req. for Jud. Notice, filed May 13, 2011, Ex. A). Airtran could run as a separate entity until 2013, three weeks have passed since the closing of the merger, and Appellees have not yet acquired a joint operating certificate—the balance of equities falls in favor of Appellees.

Lastly, Appellees again argue that Appellants have delayed in bringing this action. This is not the case and has been addressed twice above.

D. A Hold Separate Order Serves the Public Interest, Pending Disposition of this Case

Appellees argue that the determination by the Department of Justice “undercuts” the public’s interest in vigorous enforcement of antitrust laws and unlawful mergers. Following Appellees’ logic, the decision of the Department of Justice is a conclusive determination of

the legality of the merger and judicial review is unnecessary.

Appellants hardly need to point out that the Department of Justice investigates mergers based upon Horizontal Merger Guidelines and not binding Supreme Court precedent. Further, the Department of Justice did not approve the merger, it simply did not object to it. It is in the public's interest that antitrust laws are vigorously enforced, and accordingly, that a Hold Separate Order is granted pending disposition of this case, as it will have major ramifications upon the airline industry and consumers of airline travel.

CONCLUSION

In light of the foregoing, Appellants respectfully pray for an order of this Court temporarily requiring Appellees to hold their assets separately pending disposition of the appeal of this case.

May 23, 2011

Respectfully submitted,

ALIOTO LAW FIRM

By: /s/ Jamie L. Miller

Jamie L. Miller

ALIOTO LAW FIRM
 225 Bush Street
 16th Floor
 San Francisco, California 94104
 Telephone: (415) 434-8900
 Facsimile: (415) 434-9200
 jmill@aliotolaw.com

Attorneys for Appellants

EXHIBIT A

Joseph M. Alioto (SBN 42680)
 Theresa D. Moore (SBN 99978)
 Thomas P. Pier (SBN 235740)
 Jamie L. Miller (SBN 271452)
 ALIOTO LAW FIRM
 225 Bush Street, 16th Floor
 San Francisco, CA 94104
 Telephone: (415) 434-8900
 Facsimile: (415) 434-9200
 Email: tpier@aliotolaw.com
 Email: tmoore@aliotolaw.com
 Email: jmiller@aliotolaw.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Wayne Taleff, Katherine R. Arcell, Judy Bray,)
 Jose' M. Brito, Jan Marie Brown, Robert D.)
 Conway, Judy Crandell, 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 Meeuwsen, 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, Christine)
 O. Whalen,)

Plaintiffs,

v.

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

Defendants.

CASE NO.:

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

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:

5 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;

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

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

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

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

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

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

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

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

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

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. There are also submarkets, one of
10 which is Low Cost Carriers (“LCCs”) of airline passengers in the United States.

11 20. Southwest is by far the dominant carrier among LCCs in the United States and
12 Airtran is their next rival among LCCs in the United States.

13 21. There is substantial concentration in both markets and a trend toward even
14 further concentration and lessening of competition in the relevant markets.

15 22. Southwest and AirTran are substantial rivals and competitors in the relevant
16 market.

17 23. Southwest and AirTran are substantial potential rivals and potential competitors
18 in the relevant market.

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

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

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

25 27. The behavior of Southwest is constrained by the actual and potential competition
26 from AirTran throughout the entire relevant market and submarkets.
27
28

1 28. The behavior of AirTran is constrained by the actual and potential competition
2 from Southwest throughout the entire relevant market and submarkets.

3 29. The market for the transportation of airline passengers in the United States is in
4 and part of interstate commerce, makes extensive use of the instrumentalities of interstate
5 commerce, and substantially affects interstate commerce. Airline passengers travel in a
6 continuous and uninterrupted flow of interstate commerce. Airline travel is a continuous and
7 uninterrupted flow of interstate commerce. Materials used in the construction of airplanes are
8 purchased and shipped in a continuous and uninterrupted flow of interstate commerce.

9 30. Any restraint of trade in the transportation of airline passengers in the United
10 States, including the restraints specifically alleged in this complaint, directly and substantially
11 restrains and affects interstate commerce.

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

13 31. On September 27, 2010, Southwest and AirTran announced that they had
14 entered into a definitive merger agreement for Southwest to acquire AirTran, in a deal valued
15 at approximately \$1.4 billion, or \$3.4 billion including AirTran's debt and capitalized aircraft-
16 operating leases.

17 32. The new airline will operate under the Southwest name.

18 33. The merging companies are AirTran and Guadalupe Holdings Corp., a Nevada
19 corporation and wholly owned subsidiary of Southwest Airlines. Guadalupe will be merged
20 into AirTran, which will then become a wholly owned subsidiary of Southwest Airlines.

21 34. After the merger closes, AirTran will be merged into a new limited liability
22 company set up as a Texas company, LLC Sub, which will become a wholly owned subsidiary
23 of Southwest.

24 35. The chief executive officer of the combined company will be Gary Kelly, the
25 current chairman, president, and CEO of Southwest.

26 36. Bob Fornaro, chairman, president, and CEO of defendant AirTran, will continue
27 to be involved in the integration of the two companies.
28

1 37. Through secret and private meetings, Mr. Kelly of Southwest met on more than
2 one occasion with Mr. Fornaro of AirTran.

3 38. One or more the secret and private meetings of Mr. Kelly and Mr. Fornaro were
4 carried on outside of their offices, including hotels.

5 39. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
6 discussed the purposes and probable effects of the merger.

7 40. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
8 discussed airline fares in general and specifically.

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

11 42. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
12 discussed the elimination or curtailment of the use of hubs.

13 43. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
14 discussed the curtailment of capacity.

15 44. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
16 discussed the firing of employees.

17 45. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
18 discussed the type of aircraft to be eliminated.

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

21 47. At one or more of the secret and private meetings, Messrs. Kelly and Fornaro
22 discussed the potential fare increases in the monopoly submarkets that would be created by the
23 combine.

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

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

50. Defendants Southwest and AirTran are both low cost carriers (“LCCs”).

51. Only seven true low-cost carriers now compete in the U.S. market.

52. Of the seven LCCs, 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.

53. AirTran controls almost 15 percent of the LCC’s combined market share of the *low-cost carriers* that report data to the DOT.

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

55. Pre-merger, Southwest’s *overall* domestic market share is approximately 14.2%.

56. Pre-merger, AirTran’s *overall* domestic market share is approximately 3.4%.

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

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

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

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

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

62. In 1985, Southwest bought MuseAir, renamed it TranStar Airlines.

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

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

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

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

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

67. Jeffrey Breen of Cambridge Aviation Research notes that, "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."

68. 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).

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

70. 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,

1 whose one million annual passengers stand to lose airline choice as this proposed merger
2 pushes the route into monopoly.

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

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

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

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

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

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

24 77. The potential for increased collusion among the remaining airlines is significant,
25 because the domestic passenger airlines, including, *inter alia*, these defendants, have in the
26 past colluded to fix prices with regard to airfares, surcharges, and cargo prices, and to fix other
27 terms and conditions of air transportation and travel.
28

1 78. In addition to the degree of market concentration, there are significant barriers to
2 entry in the relevant market, as well as a history of a lack of successful new entry. The
3 relevant market has been characterized by the exit, rather than the entry, of firms. The
4 prospect of new entry is therefore unlikely to eliminate any of the anticompetitive effects that
5 will eventuate from the defendants' merger and the increasingly concentrated structure of the
6 relevant market.

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

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

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

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

27 83. Each major U.S. passenger airline, including LCC defendants Southwest and
28 AirTran, has the ability and financial capacity to establish a competitive presence in any of the

1 major airports located throughout the United States by, inter alia, leasing or otherwise utilizing
2 terminal slots, hiring employees, and directing more flights to and from the given airport.

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

7 85. The major U.S. passenger airlines, including LCC defendants Southwest and
8 AirTran, frequently trade, sell, lease or purchase slots from other airlines in each of the major
9 29 airports throughout the United States.

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

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

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

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

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

91. By reason of the defendants' proposed merger, the plaintiffs are threatened with loss or damage in the form of higher ticket prices and diminished service. If the defendants' merger is consummated, the plaintiffs will sustain irreparable harm for which damages will be unable to compensate plaintiffs, in that service once lost cannot easily be restored. Accordingly, plaintiffs bring this action for both preliminary and permanent injunctive relief against defendants' merger.

VIOLATION ALLEGED

Clayton Act, Section 7

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

PRAYER FOR RELIEF

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

- A. Declaring, finding, adjudging, and decreeing that the agreement of the defendants to merge violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18.
- B. Preliminarily enjoining the defendants from consummating their merger during the pendency of this action.
- C. Permanently enjoining the defendants from consummating their merger.
- D. If defendants have closed, completed, or consummated their merger, require defendants to hold their assets separate and apart and/or order divestiture.

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

3 F. Granting to plaintiffs such other and further relief to which they may be entitled
4 and which the Court finds to be just and appropriate.

5
6 Dated: May 20, 2011

7 ALIOTO LAW FIRM

8
9 By: /s/ Joseph M. Alioto
10 Joseph M. Alioto
11 ALIOTO LAW FIRM
12 225 Bush Street, 16th Floor
13 San Francisco, CA 94104
14 Telephone: (415) 434-8900
15 Facsimile: (415) 434-9200
16 Email: jmalieto@aliotolaw.com
17 Email: tpier@aliotolaw.com
18 E-mail: tmoore@aliotolaw.com
19 E-mail: jmiller@aliotolaw.com
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CERTIFICATE OF SERVICE

Jamie L. Miller hereby declares:

I am employed in the City and County of San Francisco, California. I am over the age of 18 years and am not a party to the case herein. My business address is 225 Bush Street, 16th Floor, San Francisco, California 94104.

On May 20, 2011, I served the attached document entitled:

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

I served this document on the following parties via First-Class U.S. mail by placing a true and correct copy in a sealed envelope with first-class postage thereon fully prepaid and deposited for pick-up by United States Postal Service addressed as follows:

Counsel for Defendants Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings, Inc.

Steven Sunshine Sara Bensley Skadden, Arps, Slate, Meagher & Flom, LLP 1440 New York Avenue, N.W. Washington, D.C. 20005-2111	Steven.Sunshine@skadden.com Sara.Bensley@skadden.com Phone: 202.371.7032 Phone: 202-371-7860 Fax: 202-661-8321
Allen Ruby Skadden, Arps, Slate, Meagher & Flom, LLP 525 University Avenue, Ste 1100 Palo Alto, CA 94301	allen.ruby@skadden.com Phone: 650-470-4500 Fax: 650.798.6585

I also served the above document on the parties by email transmission by emailing to the above-referenced email addresses.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and this declaration was executed this 20th day of May, 2011.

/s/ Jamie L. Miller
Jamie L. Miller

EXHIBIT A

Origins of Legacy Airlines and Southwest

History of Mergers and Acquisitions

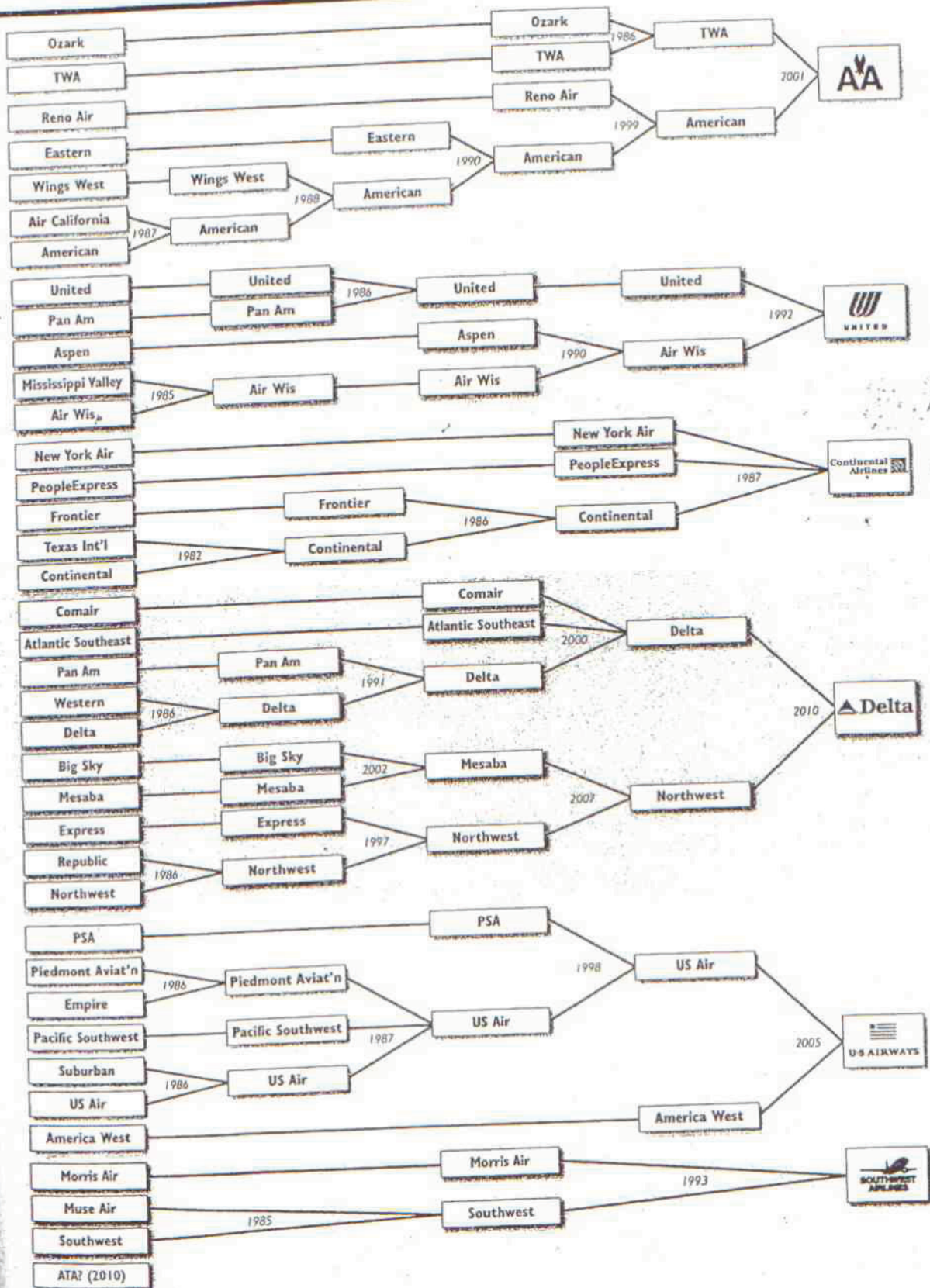



EXHIBIT B


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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%

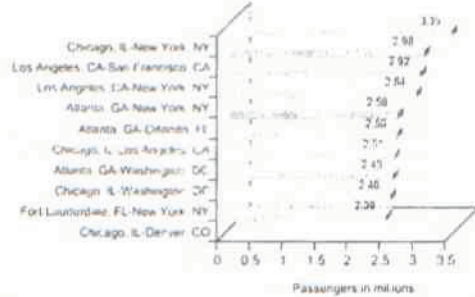
* 12 months ending January of each year

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.

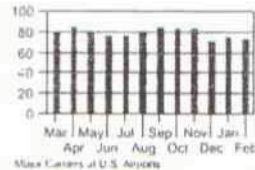
Top Domestic Routes February 2010 - January 2011



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

At a Glance

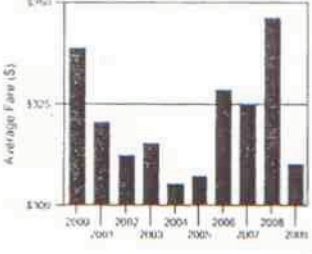
Percent of U.S. Flights On Time (2010-2011)



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Average Domestic Airline Fares



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EXHIBIT B

No. 10-17208

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

♦————♦
MICHAEL MALANEY., *et al.*
Plaintiffs-Appellants,

v.

UAL CORPORATION, UNITED AIR LINES, INC. and
CONTINENTAL AIRLINES, INC.,
Defendants-Appellees.

♦————♦

On Appeal of an Interlocutory Order of the
United States District Court for the Northern District of California
(Case No. 3:10-CV-02858-RS)

♦————♦

APPELLANTS' OPENING BRIEF

♦————♦

DANIEL R. SHULMAN, *pro hac vice*
JULIE L. BOEHMKE, *pro hac vice*
JEREMY L. JOHNSON, *pro hac vice*
GRAY PLANT MOOTY
500 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402
TEL: (612) 632-3335
FAX: (612) 632-4335
DANIEL.SHULMAN@GPMLAW.COM

JOSEPH M. ALIOTO (SBN 42680)
THERESA D. MOORE (SBN 99978)
ANGELINA ALIOTO-GRACE (SBN 206899)
JOSEPH M. ALIOTO, JR. (SBN 215544)
THOMAS P. PIER (SBN 235740)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
JALIOTOJR@ALIOTOLAW.COM

Counsel continued next page

GIL D. MESSINA, *pro hac vice*
MESSINA LAW FIRM PC
961 HOLMDEL ROAD
HOLMDEL, NJ 07733
TEL: (732) 332-9300
FAX: (732) 332-9301
GMESSINA@MESSINALAWFIRM.COM

JACK W. LEE
DEREK HOWARD
MINAMI TAMAKI LLP
360 POST STREET, 8TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108
TEL: (415) 788-0204
FAX: (415) 398-3887
JLEE@MINAMITAMAKI.COM

Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE.....	1
A. Nature of the Case	1
B. Course of Proceedings	2
C. Disposition Below.....	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	7
ARGUMENT.....	9
I. STANDARD OF REVIEW	9
II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO FOLLOW A LINE OF BINDING SUPREME COURT CASES, BASING ITS DECISION INSTEAD ON ERRONEOUS LEGAL STANDARDS	10
A. The United States Commercial Airline Market Is A Relevant Antitrust Market	10
B. The U.S. Airline Industry Is Highly Concentrated, It Is Trending Toward Further Concentration, And The Merged Entity Is Presumptively Illegal	17
III. THE DISTRICT COURT’S ERROR IN REJECTING THE BINDING SUPREME COURT CASES INFECTED ITS ANALYSIS OF PLAINTIFFS’ IRREPARABLE HARM.....	29
IV. THIS APPEAL PRESENTS A LIVE CONTROVERSY	35
CONCLUSION.....	37
CERTIFICATE OF COMPLIANCE	38
STATEMENT OF RELATED CASES.....	39

TABLE OF AUTHORITIES

Cases	Pages
<i>Alliance for the Wild Rockies v. Cottrell</i> 613 F.3d 960, Case No. 09-35756, slip op. 10855 (9 th Cir. Jul. 28, 2010)	9, 10, 34, 36
<i>Brown Shoe, Co. v. United States</i> 370 U.S. 294 (1962)	passim
<i>Hospital Corp. of America v. Federal Trade Commission</i> 807 F.2d 1381 (7 th Cir. 1986)	23, 25
<i>United States v. Aluminum Co. of Am. (Alcoa)</i> 377 U.S. 271 (1964)	passim
<i>United States v. Continental Can Co.</i> 217 F.Supp. 761 (S.D.N.Y. 1963)	15
<i>United States v. Continental Can Co.</i> 378 U.S. 441 (1964)	passim
<i>United States v. E. I. duPont de Nemours & Co.</i> <i>(Cellophane)</i> 351 U.S. 377 (1956)	10, 11, 12
<i>United States v. General Dynamics Corp.</i> 415 U.S. 486 (1974)	24, 25
<i>United States v. Pabst Brewing Co.</i> 384 U.S. 546 (1966)	22
<i>United States v. Philadelphia Nat’l Bank</i> 201 F.Supp. 348 (E.D.Pa. 1962)	14
<i>United States v. Philadelphia Nat’l Bank</i> 372 U.S. 321 (1963)	13, 18, 19
<i>United States v. Von’s Grocery Co.</i> 384 U.S. 270 (1966)	18, 21, 22
<i>Winter v. Natural Res. Def. Council</i> 555 U.S. ___, 129 S.Ct. 365, 374 (2008)	9, 10

TABLE OF AUTHORITIES – CONT'D

Statutes	Pages
15 U.S.C. § 18.....	1
15 U.S.C. § 26.....	1
28 U.S.C. § 1292.....	1
28 U.S.C. § 1331.....	1
28 U.S.C. § 1337.....	1
Other Authorities	
2A PHILLIP E. AREEDA, ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (3 rd ed. 2007)	29
H.R. Rep. No. 1373, 94 th Cong., 2d Sess. 5 (1976), <i>reprinted in</i> 1976 U.S. Code Cong. & Ad. News 2637.....	34
U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992 as revised Apr. 8, 1997)	27
U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010).....	27, 28

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Mike Malaney, *et al.* are purchasers and users of airline travel services sold and furnished by defendants United Airlines, Inc. and Continental Airlines, Inc., (collectively “Airlines”) as well as other major United States passenger airline carriers. Plaintiffs commenced this action to obtain injunctive relief preventing the Airlines from merging in violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. The District Court had subject matter jurisdiction under Section 16 of the Clayton Act (15 U.S.C. § 26), and 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce and antitrust regulation).

Plaintiffs moved the district court for a preliminary injunction preventing Airlines “from completing and consummating” the proposed merger. (Volume II Excerpts of Record (“ER”) 135.) The district court denied the motion on September 27, 2010. (I ER 1.) Plaintiffs filed a timely notice of appeal on October 1, 2010. (II ER 27.) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

A. Nature of the Case

This 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 U.S.C. § 18.

B. Course of Proceedings

Airlines announced their plan to merge on May 3, 2010. Plaintiffs filed their complaint on June 29, 2010. (II ER 138.) On August 9, 2010, Plaintiffs moved the district court to preliminarily enjoin the proposed merger. (II ER 135.) After expedited and limited discovery, the district court conducted a two-day evidentiary hearing on August 31 and September 1, 2010. (II ER 186.) The parties each filed opening and reply memoranda, as well as various exhibits, affidavits, expert reports and designations of deposition transcripts. Oral argument and summation were conducted on September 17, 2010. (II ER 188.)

C. Disposition Below

On September 27, 2010, the district court entered an order denying Plaintiffs' motion for preliminary injunction. (I ER 1.) The court based its decision on three conclusions. First, the court identified – and then disregarded – an entire line of Supreme Court cases relied on by Plaintiffs. (I ER 11-13.) As a result, it determined that Plaintiffs failed to establish the United States commercial passenger air travel market as a relevant market for antitrust purposes. The court ruled, “plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami.” (I ER 21.)

Second, the district court further rejected the central thrust of the discarded Supreme Court cases, which hold that any significant merger between major competitors in a market showing a trend toward concentration establishes a prima facie violation of Section 7.

Disregarding this binding precedent, the district court held that “plaintiffs’ proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong.”

Finally, the court ruled that Plaintiffs “failed to demonstrate any irreparable harm as a result of the merger or that the balance of equities in this case tips at all, let alone sharply, in their favor.” (I ER 23.)

STATEMENT OF FACTS

United and Continental are major U.S. airline carriers. Both are considered “network carriers,” characterized as airlines operating on a “hub-and-spoke” business model. (I ER 2.) There are six major U.S. network carriers: United, Continental, American Airlines, Delta Airlines,¹ US Airways, and Alaska Airlines. (*Id.*) In contrast to network carriers, “low cost carriers” (LCCs) operate on a point-to-point basis and travel high density routes rather than to and from small communities. (I ER 3.) The largest U.S. LCCs are Southwest Airlines, JetBlue, Spirit Airlines, Virgin Airlines, Allegiant, AirTran, Frontier, and Sun Country Airlines. (*Id.*) However, only one of these LCC airlines is comparable to the major network carriers in generating revenue. As shown in the table below, besides Southwest, the largest LCC has only 2% of the national airline market.

The U.S. airline market has been trending rapidly toward greater and greater concentration, having been distilled down to five major

¹ Delta Airlines includes Northwest Airlines, with which it merged in 2009, creating the then-largest airline in the world.

airlines from thirty-four in the past twenty-five years. (II ER 75, 98.) In fact, the trend toward concentration is presently quickening. Last year, Delta, then the 3rd largest airline, merged with Northwest, then the 5th largest airline, to become the largest airline in the world (II ER 121); meanwhile, Southwest, the 5th largest airline, has announced its intention to merge with AirTran, the 7th largest airline. (I ER 3, n.2.) Combined with the merger of United and Continental, the top 9 largest airlines will have merged into 6 firms – controlling a full 90% of the market – within less than 24 months. The following table indicates the top eight airlines – including network carriers and LCCs – in the United States commercial airline market, as well as their market shares before and after the merger:

U.S. AIRLINE MARKET
(Operating Revenues, All U.S. Carriers, All U.S. Airports (\$000s))

Pre-Merger				Post-Merger			
<u>Rank</u>	<u>Airline</u>	<u>Rev's</u>	<u>Share</u>	<u>Rank</u>	<u>Airline</u>	<u>Rev's</u>	<u>Share</u>
1	Delta	28,910	25.1%	1	Delta	28,910	25.1%
2	Amer.	19,898	17.3%	2	Unit./Cont.	28,720	25.0%
3	Unit.*	16,359	14.2%	3	Amer.	19,898	17.3%
4	Cont.*	12,361	10.7%	4	US Air.	10,781	9.4%
5	US Air.	10,781	9.4%	5	S'west	10,350	9.0%
6	S'west	10,350	9.0%	6	Alaska	3,006	2.6%
7	Alaska	3,006	2.6%	7	Airtran	2,341	2.0%
8	Airtran	2,341	2.0%				
Total*		115,051		Total*		115,051	

Sources: figures marked by an asterisk from Bureau of Transportation Statistics, T1 Data, 2009; all other figures from II ER 84.

Thus, as a result of the merger, the top 2 firms now control over 50% of the market, the top 3 firms control 67%, and the top 5 major airlines now dominate the market with over 85%.

Plaintiffs are forty-nine individual purchasers of commercial passenger airline travel for their personal use. (I ER 5 (quoting Malaney Aff).) Each plaintiff has purchased such travel in the past five years and anticipates continuing to purchase air travel in the future. (*Id.*) Of the forty-nine plaintiffs, four gave live testimony at the hearing: Jan Marie Brown, Clyde Stensrud, Dana Robinson, and Michael Malaney.

Jan Marie Brown resides in Carson City, Nevada and has been a travel agent, has owned a travel agency, and has consulted for travel agencies for the past 23 or 24 years. (II ER 32:13-15; 32:18-33:5.) In the past five years, Ms. Brown has taken 17 flights on 9 separate trips. (II ER 132.) Ms. Brown travels by air to visit family and vacation in Ontario, California, Mexico, Tulsa, Wichita, Chicago, and Los Angeles. (II ER 39:5-11.) She anticipates flying to Los Angeles, and possibly Miami, Galveston, New Orleans, New York, and San Francisco in the near future. (II ER 39:11-25.) Ms. Brown testified that “it is 100 percent for sure that [she] will be” “traveling in the future to cities around the United States” by airplane. (II ER 40:8-11.) Ms. Brown brought this action out of a “fear[] that ... the bigger, stronger, more powerful airline will increase prices, reduce flights, reduce services and, also, I fear that customer service will get even worse.” (II ER 35:24-36:2.)

Clyde Stensrud resides in Kirkland Washington and has owned his own travel agency for the past 25 years. (II ER 41:22-24; 42:13-

17.) Mr. Stensrud takes golf vacations, arriving and returning by air, in Phoenix, Tucson, Palm Springs, and Hawaii, and is likely to return to these locations, as well as locations in Alabama and Florida, in the future. (II ER 44:18-45:17.) Mr. Stensrud is also a sports enthusiast and attends professional and collegiate football, basketball and baseball games throughout the country, including most recently, an NFL football playoff game in Green Bay and the NCAA Final Four basketball tournament in San Antonio. (II ER 45:21-46:2.) He anticipates traveling by air to various places throughout the country, including tours of major league baseball parks in Boston and New York, as well as other sporting events whose locations are yet to be determined. (II ER 46:12-23.) In the past five years, Mr. Stensrud has taken 28 flights on 12 separate trips. (II ER 151.) He brought suit out of a concern that the merger would adversely affect his personal travel, by increasing fares, increasing baggage and other fees, and would adversely affect service and flight availability. (II ER 43:22-44:8.) For the same reasons, Mr. Stensrud testified that his travel agency customers, and therefore his business, will likely be affected by the merger. (II ER 44:9-17.)

Dana Robinson resides in Palm Beach Gardens, Florida and previously owned a travel agency in Colorado for 23 years. (II ER 49:16-17; 50:6-11.) Ms. Robinson travels extensively, and within the past 18 months had 263,000 miles in her United Airlines frequent flyer account. (II ER 53:7-13.) Although now retired, Ms. Robinson continues to travel by air extensively for personal reasons. (II ER 57:6-7.) In the last five years, Ms. Robinson has taken 59 flights on 30 trips to Chicago; Denver; Harrisburg, Pennsylvania; Portland,

Maine; Phoenix; Las Vegas; Cleveland, Fort Lauderdale; and Little Rock. (II ER 133.) 75% of those flights were on United or Continental. (*Id.*) Ms. Robinson also has extensive future air travel planned to Chicago and Pennsylvania. (II ER 57:19-58:2.)

Mike Malaney resides in Grand Rapids, Michigan where he has owned and operated a travel agency for 30 years. (II ER 60:17-61:2.) In the past five years, Mr. Malaney has traveled by commercial air carrier to Orlando, Phoenix, Palm Springs, Milwaukee, Los Angeles, New York and San Francisco. (II ER 61:11-19.) Mr. Malaney has a trip planned in February, 2011 and anticipates traveling to Seattle and elsewhere in the future. (II ER 67:15-24.)

SUMMARY OF ARGUMENT

This appeal concerns the district court's refusal to follow authoritative Supreme Court precedent – precedent that, absent special proof, binds courts to enjoin, and even require divestiture, of any merger between significant rivals in a market trending toward concentration. The district court's refusal to follow the law was made stark by the powerful language of its decision. There, specifically identifying the cases at issue (I ER 11-12) the court simply declined to follow them, holding that the “approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong.” (I ER 13.) This fateful conclusion is the single reason behind the court's denial of the Plaintiffs' motion for preliminary injunction. That is to say, the holdings of the Supreme Court cases are dispositive on this appeal and mandate reversal.

The court's rejection of the Supreme Court cases manifest itself in three abuses of discretion. First, the district court applied the wrong standard in defining the relevant market. It concluded that the United States passenger air travel market was not cognizable because the Plaintiffs failed to demonstrate that all flights in the nation are competitive substitutes for all other flights, e.g., that "a flight from San Francisco to Newark" is a substitute for a flight "from Seattle to Miami." (I ER 21.) Under the Supreme Court cases, however, a plaintiff is under no obligation to demonstrate such specificity; rather, as long as it has been shown that flights in the United States serve the same general purpose, the plaintiffs have established a cognizable market.

Second, the court applied the wrong legal standard for determining the concentration levels in the U.S. airline market. Instead of applying the Supreme Court precedent, the court instead relied on the contrary tools published in the government's Horizontal Merger Guidelines. While the Merger Guidelines is an important and useful document for firms seeking to predict whether the government will exercise its prosecutorial discretion, it does not constitute the law. As the Guidelines themselves make clear, they are policy benchmarks that merely reflect the government's prosecutorial decision-making; they do not purport to establish the law, nor do they have the power to do so. Where the Merger Guidelines differ from binding Supreme Court authority, a district court's reliance on the former to the exclusion of the latter constitutes a *per se* abuse of discretion.

Third and finally, by applying the incorrect standard for defining the relevant market, the district court infected its own analysis of the Plaintiffs’ irreparable harm in this case. When analyzed with respect to the proper relevant market, the record plainly reflects that Plaintiffs are threatened with significant harm.

By applying the wrong legal standards to each of the decisive issues in this case, the district court erred as a matter of law and therefore abused its discretion. The decision below must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A district court’s denial of a preliminary injunction is reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960, ___, Case No. 09-35756, slip op. 10855, 10864 (9th Cir. Jul. 28, 2010). “An abuse of discretion will be found if the district court based its decision ‘on an erroneous legal standard or clearly erroneous findings of fact.’” *Id.* (citation omitted).

The standard governing the underlying motion for preliminary injunction requires a plaintiff to establish “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.” *Winter v. Natural Res. Def. Council*, 555 U.S. ___, 129 S.Ct. 365, 374 (2008). This Circuit applies the “serious questions” approach to the preliminary injunction standard. Under this approach, “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.” *Alliance for the Wild Rockies*, 613 F.3d at ___, slip op. 10855 at 10865.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO FOLLOW A LINE OF BINDING SUPREME COURT CASES, BASING ITS DECISION INSTEAD ON ERRONEOUS LEGAL STANDARDS

A. The United States Commercial Airline Market Is A Relevant Antitrust Market

The rules governing the definition of the relevant market in an antitrust case are well-established. “[C]ommodities reasonably interchangeable by consumers for the same purposes make up [the relevant market].” *United States v. E. I. duPont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 395 (1956). “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe, Co. v. United States*, 370 U.S. 294, 325 (1962). Defining a relevant market is not an end in itself, but rather the means for deducing the effect of the merger on competition within the market or markets identified.

Here, the district court misapprehended and misapplied the *Cellophane-Brown Shoe* rule, erroneously requiring the plaintiffs to demonstrate that every product in the market is a substitute for every other product in the market. The district court stated it this way:

First, “[t]he boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it,” *Brown Shoe*, 370 U.S. at 325, and plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami.

I ER 20-21. In other words, the district court held that plaintiffs’ market failed because it included products that were not substitutes for one another. But, in fact, the Supreme Court has never demanded such specificity in defining a relevant market, and there is *no* requirement that every product within the market be a substitute for every other product from the perspective of the consumer. This fundamental guiding principle is apparent in almost every Supreme Court decision since the Clayton Act’s amendment in 1950.

The earliest Supreme Court decision applying the market definition standard is the 1956 *Cellophane* case, 351 U.S. 377. There, the government alleged that duPont monopolized the cellophane market. *Id.* at 379. DuPont argued it had no monopoly, since the relevant market was not cellophane but “all flexible packaging material.” *Id.* The government sought to distinguish the end-uses of the various forms of “flexible wrapping” – such as paper and aluminum foil – which do not serve the same purpose as cellophane, which is “moistureproof.” *Id.* at 394, *see id.* at 384. The government argued – just as the district court reasoned here – that only those substitutes which are “substantially fungible with the . . . product” should be included in the market. *Id.* at 394. However, the Supreme Court rejected this proposed rule, holding that “it is [not] a

proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.” *Id.*

Next, in *Brown Shoe*, 370 U.S. 294, the Supreme Court reiterated the *Cellophane* standard; however, it also established, for the first time, the permissibility of relying on “submarkets” for purposes of antitrust review:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe, 370 U.S. at 325.

The “outer boundaries of the product market” in *Brown Shoe* consisted of *all* “footwear.” 370 U.S. at 326 (holding that submarkets consist of men’s, women’s, and children’s shoes implies per force that the overall market is all footwear). This market included within it men’s, women’s, and children’s shoes – products that plainly do not serve perfectly interchangeable end uses for consumers. For instance, a grown man faced with escalating men’s shoe prices cannot turn to infants’ boots as a substitute. But, this overall “footwear” market was nevertheless defined with respect to “the reasonable interchangeability of use or the cross-elasticity of demand

between the product itself and substitutes for it.” Although unstated in the opinion, the rationale of the holding demonstrates that the Court defined the overall market with respect to the broad, general purpose served by shoes – to cover and/or protect the feet.

Moreover, within this overall “footwear” market, *Brown Shoe* identified submarkets of “Men’s,” “Women’s,” and “Children’s” shoes. *Brown Shoe*, 370 U.S. at 326. But even these submarkets included non-interchangeable substitutes. For instance, the defendant argued that “children’s shoes [does not] constitute[] a single line of commerce” since “a little boy does not wear a little girl’s black patent leather pump,” and “a male baby cannot wear a growing boy’s shoes.” *Id.* at 327. The Supreme Court rejected these arguments, reasoning that “the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists.” *Id.* at 326.

The relevant product market in *United States v. Philadelphia Nat’l Bank*, 372 U.S. 321 (1963) also consisted of non-interchangeable products. There, the Supreme Court held that the proper market for Section 7 analysis was “commercial banking,” *id.* at 356, which consisted of various products (e.g., personal and business loans, mortgages, automobile loans, tuition financing, and credit cards) *and* services (e.g., estate planning, safe-deposit boxes, and investment advice). 374 U.S. at 326 and n. 5. Since a customer looking for a safe-deposit box cannot turn to an automobile loan as a substitute, this broadly defined market clearly contained non-interchangeable products – an observation not lost on the defendant

banks who argued that “commercial banking in its entirety is not a product line” because as to each product or service “there are different types of customers, different market areas, and, most importantly, different types of competitors and competition.” *United States v. Philadelphia Nat’l Bank*, 201 F.Supp. 348, 361 (E.D.Pa. 1962). Again, the Supreme Court rejected these arguments, determining with “no difficulty” that the relevant market included all the non-interchangeable products and services denoted by the general term “commercial banking.” 374 U.S. at 356.

The practice of defining markets broadly for purposes of Section 7 continued in *United States v. Aluminum Co. of Am. (Alcoa)*, 377 U.S. 271 (1964), which defined a broader market of “aluminum conductor” wiring. *Id.* at 277. The aluminum conductor market, in turn, consisted of two submarkets: “bare” and “insulated” wiring for use in overhead and underground electrical transmission, respectively. *Id.* at 274-275. However, since underground wiring “must be heavily insulated,” *id.* at 274, bare wiring *cannot as a physical matter* be used underground and is therefore categorically non-interchangeable with insulated wiring. The Supreme Court nevertheless classified both products as part of the same market because substitutability must be judged by the *general* purpose served by the product at issue, in *Alcoa*, “the purpose of conducting electricity.” *Id.* at 277.

Similar reasoning was applied in *United States v. Continental Can Co.*, 378 U.S. 441 (1964), a Section 7 challenge concerning an illegal merger of a glass bottle manufacturer and a maker of tin cans. In that case, the district court had held that the markets for glass containers and tin cans served different purposes and were therefore

separate; thus, the merger did not threaten to lessen competition in any market. *Id.* at 444. The Supreme Court reversed, finding that both markets were part of the overall container market. *Id.* at 457. But, most important for present purposes was the existence of *thousands* of idiosyncratic end uses of glass and tin containers. As the district court noted:

The different types of containers manufactured by these different industries are of wide varieties of sizes and shapes and are put to hundreds, if not thousands, of different end uses.

United States v. Continental Can Co., 217 F.Supp. 761, 780 (S.D.N.Y. 1963). These “thousands” of different uses for containers were found in industries as varied as soft drinks, canning, toiletry, cosmetics, medicines and health, and chemicals. 378 U.S. at 447. But, even though a soda-pop bottle is not a possible substitute vessel for a sardine canner, the Supreme Court had no trouble placing both containers into the overall market for purposes of judging the legality of the merger. The Supreme Court held, “we think the District Court employed an unduly narrow construction of ... ‘reasonable interchangeability of use or the cross-elasticity of demand’ in judging the facts of this case.” *Id.* at 452. Then, in an explanation seemingly directed at the district court in this case, the Court continued:

We reject the opinion below insofar as it holds that these terms as used in the statute or in *Brown Shoe* were intended to limit the competition protected by § 7 to competition between identical products Certainly, that the competition here involved ... is between products

with distinctive characteristics does not automatically remove it from the reach of § 7.

Id. at 452-453. The Supreme Court admonished lower courts not to use the “interchangeability” standard to thwart enforcement of the Clayton Act: “[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition, but to ‘recognize competition where, in fact, competition exists.’” *Id.* at 453 (quoting *Brown Shoe*, 370 U.S. at 326).

Finally, in *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966), burglar alarms were considered part of the same market as fire alarms because they both served the same purpose of protecting property, even though they are plainly not substitutes for one another. The Supreme Court explained:

We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service – the protection of property ... – that must be compared with all other forms of property protection.

Grinnell, 384 U.S. at 572.

These cases, all of which were presented to and disregarded by the district court, directly contradict the ruling below that the United States airline market cannot exist because a “flight from San Francisco to Newark” is not a competitive substitute for a flight “from Seattle to Miami.” The district court erred by failing to consider and analyze the general purpose of commercial air carriage: the long-distance transportation of passengers. Had the court properly analyzed this product and its “interchangeable” substitutes,

it would have considered, and then excluded, all other forms of transportation such as bus, car, rail, or boat. But, by requiring overly-detailed specificity within the airline market, the court abused its discretion and, in fact, violated the Supreme court's direct admonition that "[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition, but to 'recognize competition where, in fact, competition exists.'" *Continental Can*, 378 U.S. at 453 (quoting *Brown Shoe*, 370 U.S. at 326.) The district court's conclusion that United, Continental, American, Delta, US Airways, Southwest and other airlines do not compete against one another in the United States is as unsupportable under the law as it is belied by common sense.

B. The U.S. Airline Industry Is Highly Concentrated, It Is Trending Toward Further Concentration, And The Merged Entity Is Presumptively Illegal

In the same decisions creating the rules for defining relevant markets, the Supreme Court simultaneously established a resolute intolerance for mergers that result in over-concentration of United States markets. The district court here specifically refused to follow these decisions. (I ER 11-13.) Instead, it placed authority in the government's Horizontal Merger Guidelines. As a result, it applied the incorrect legal standard and abused its discretion.

The Supreme Court cases previously cited establish two fundamental themes with respect to merger legality. First, they adamantly strive to prevent any "trend toward concentration," as

forcefully explained by the Court in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966):

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.

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.* As the Court put it in *Philadelphia Nat’l Bank*, 374 U.S. at 365, n.42, 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.” Second, the cases not only enjoined, but required divestiture, of mergers involving two direct competitors in concentrated industries, even where the increases in market share of the combined entity were *slight*, in some cases, less than 2%. These two fundamental principles clearly establishing the law are echoed through each case.

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 *Philadelphia National Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank in the market, with 36% of all assets. 374 U.S. at 330-31, 364. Moreover, the merger would have resulted in intense concentration of the market: the first and second largest firms would have controlled 58% of the market, and the top four firms would have controlled 77% of the market. *Id.* at 331. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant increase of concentration in the market, were both so high as to be *presumptively* illegal. Based on the “intense congressional concern with the trend toward concentration,” the Court dispensed with the plaintiffs’ need for “elaborate proof of market structure, market behavior, or probable anticompetitive effects” and instead established a presumption of illegality for any merger that results in a combined-firm market share of 30%. This case provides almost identical market data as those deemed presumptively illegal in *Philadelphia National Bank*. Just as in that case, the merger here has resulted in the top two airlines (Delta and United/Continental) controlling over 50% of the market, while the top four firms (American and U.S. Airways) control 77%.

In *Alcoa*, 377 U.S. 271, the Supreme Court ordered Aluminum Company of America to divest itself of Rome Cable Corporation where Alcoa’s market share of 27.8% had been increased by merely 1.3% through the acquisition of Rome. The decision was driven by what the Supreme Court considered to be unacceptably high levels of concentration in the aluminum wiring industry. In that case, Alcoa

was the leading producer of aluminum conductor, with 28% of the market. *Id.* at 278. Alcoa plus Kaiser, the second leading competitor, together controlled 50% of the market. *Id.* The top three competitors had a combined market share of 76%. *Id.* Nine firms in total – including Rome with only 1.3% of the market – controlled 95% of all aluminum created in the United States. *Id.* In the narrower submarket of insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures, the Supreme Court deemed both of these markets “highly concentrated.” The market concentrations in the present case are almost identical.

Continental Can, 378 U.S. 441, concerned the market for glass and metal containers with the following competitive positions: American Can (26.8% market share), Continental Can (21.9%), Owens-Illinois Glass (11.2%), Anchor-Hocking Glass (3.8%), National Can (3.3%) and Hazel-Atlas Glass (3.1%). 378 U.S. at 461, n.11. Some 125 other firms manufactured the remaining 30% of the market units. *Id.* at 445-446 (75 to 90 other firms manufacturing metal containers; 39 other firms manufacturing glass containers). The 2nd largest competitor, Continental Can, acquired the 6th competitor, Hazel-Atlas. The acquisition would have only increased Continental’s market share from 21.9% to 25%, and it still would not have become the largest player in the market. Nevertheless, the Supreme Court ordered divestiture. It reasoned that the acquisition

not only increased Continental's market share by 14%,² it also "reduced from five to four the most significant competitors who might have threatened its dominant position." 378 U.S. at 461. The resulting percentage of the combined firm of 25% "approaches that held presumptively bad" in *Philadelphia National Bank*, "and is almost the same as that involved in [*Alcoa*]." *Id.* Thus, the Court held, "[t]he case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipency.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 346). The trend toward concentration and the resultant market shares in the present appeal dwarf those found in *Alcoa*.

In *Von's*, 384 U.S. 270, the Supreme Court "not only reverse[d] the judgment below but direct[ed] the District Court to order divestiture without delay." *Id.* at 279. That case involved the acquisition by *Von's*, which had merely a 4.7% share of the market, of *Shopping Bag*, with only a 4.2% of the market. *Id.* at 281 (White, J., concurring). The pre-merger market leader had only 8% of total market sales. *Id.* But, the growing number of grocery market chains and the shrinking number of independently-owned stores, *id.* at 272-273, resulted in the Court holding that "these facts alone are enough to cause us to conclude ... that the *Von's*-*Shopping Bag* merger did violate § 7." *Id.* at 273. The Supreme Court stated that "the basic purpose" of the law "was to prevent economic concentration in the

² In this case, the acquisition resulted in United and Continental's market shares almost doubling.

American economy by keeping a large number of small competitors in business,” *id.* at 275, and that “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.” *Id.* at 277. In his concurring opinion, Justice White interpreted the majority decision as establishing the following rule:

[W]here the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary.

Id. at 281 (White, J., concurring). Here, the top eight firms, including United and Continental, control more than 90% of the market.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court again ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550. “In accord with” the cases already discussed above, the Court “h[e]ld that the evidence on competition ... was sufficient to show a violation of § 7” *Id.* at 551-52. As in *Von’s*, the Court relied heavily on evidence indicating that the merger had taken place “in an industry marked by a steady trend toward economic concentration,” *id.* at 550, and then went on to “hold that a trend toward concentration in an industry, whatever its causes, is a

highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.” *Id.* at 552-53.

None of these Supreme Court cases has been overruled or even diminished by later opinions. Each of them was later discussed by Judge Posner in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), in which the Seventh Circuit 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.

There is little question that, under the authority of these cases, an order of divestiture must ultimately be mandated in this case. First, the airline industry is highly concentrated: The top 2 firms control more than half the U.S. airline sales, the top 3 firms control 67% of the market, and the top five firms have a combined 85% of all sales. Second, the industry has been 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. (II ER 75, 97.) This trend is quickly increasing in pace: in the past year, the then-3rd largest airline, Delta, merged with the then-5th largest airline, Northwest, to create the then-largest airline in the world. (II ER

121.) Furthermore, the current-5th largest airline, Southwest, has announced its intention to merger with the current-7th largest airline, AirTran. (I ER 3, n.2.) Including the merger challenged in this appeal, the top 9 competitors will have concentrated into 6 – controlling a full 90% of the market – in just 24 months. Third, the proposed merger further concentrates the market with an acquisition of major participants: United is the third largest airline in the United States measured by 2009 operating revenue, with 14.2% of the market, while Continental is the fourth largest airline, with 10.7% of the market. (*Id.*) The combined airline, with 25.0% share of the market, is now effectively the largest airline in the world, along with Delta. (*Id.*) (For a graphic representation of the Supreme Court cases discussed here as compared to the market shares in this appeal, see II ER 114-120.)

Of course, the district court could not, and did not, dispute that under these decisions, the merger here should be enjoined. Instead, it identified each of these Supreme Court cases and then specifically declined to follow them, stating that “plaintiffs’ proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong.” (I ER 13.)

In support of its conclusion, the district court relied on only one Supreme Court decision, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). The district court stated that “*General Dynamics* separately held that market share statistics alone are ‘not conclusive indicators of anticompetitive effects.’” (I ER 12 (citing *Gen. Dynamics*, 415 U.S. at 498).) But this out-of-context dictum is easily rebutted.

First, in *General Dynamics*, the Supreme Court never overruled, or even questioned, its earlier decisions. Second, the district court did not quote the entire passage from *General Dynamics*, which states that market share and concentration statistics are “of great importance”:

In *Brown Shoe v. United States*, we cautioned that statistics concerning market share and concentration, *while of great significance*, were not conclusive indicators of anticompetitive effects.

415 U.S. at 498 (emphasis added). Third, *General Dynamics*’ discount of the market shares was based on evidence of the “structure, history and probable future” of the coal industry, which included: (1) coal was losing market share to other sources of energy (*id.* at 499); (2) the electrical utility industry was becoming an ever-increasingly important consumer of coal (*id.*); and (3) most important, “nearly all coal” sold to those utilities was under long-term requirements contracts. *Id.* Thus, the market shares were discounted in *General Dynamics* because they were overblown by the utility purchases made under long-term contracts entered into long ago. In direct contrast, here: (1) the airline industry is growing; (Pls.’ Ex. 105, ex. 1); (2) it is concentrating at an ever-increasing rate; and (3) there are none of the long-term requirement contracts or other facts present here, as there were in *General Dynamics*, that resulted in Judge Posner distinguishing that case for its “highly unusual facts.” *Hospital Corp.*, 807 F.2d at 1385.

Instead of applying the Supreme Court law, the district court instead relied on statements from the Airlines’ expert which, in turn,

were based on analyses done under tools collected from the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. (I ER 21). Accordingly, the district court reasoned that the national airline market was not cognizable because “when concentration in the airline industry is measured on a national basis, taking into account all LCCs and network carriers, the Herfindahl-Hirschman Index³ is far below the Merger Guidelines threshold that would trigger DOJ scrutiny.” (*Id.*) But private plaintiffs are not required to show that a merger “would trigger DOJ scrutiny,” and where the Merger Guidelines conflict with Supreme Court precedent, as they do here, they cease to be even persuasive authority.

The origin of the Merger Guidelines is the 1982 Statement of Federal Trade Commission Concerning Horizontal Mergers, and the Merger Guidelines issued by the U.S. Department of Justice in 1984. In 1992, the two agencies jointly issued the Horizontal Merger Guidelines, which were then revised in 1997. Then, in 2010, the agencies issued their most recent revision.

The Merger Guidelines were never written or intended by the government to be used by courts of law as a substitute for legal precedent. This is manifest in the guidelines themselves. The 1997 revision describes the “purpose” of the guidelines as follows:

³ The Herfindahl-Hirschman Index (“HHI”) is used by the government to measure market concentration. Concentration is calculated by squaring the sums of the participants’ market shares. Thus, the HHI in a market with 5 competitors, each with 20% of the market would be: $20^2+20^2+20^2+20^2+20^2=2000$.

These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the ‘Agency’) They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers.

U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 0, p. 1 (Apr. 2, 1992 as revised Apr. 8, 1997). Moreover, the 1997 Guidelines state that they “may be revised from time to time as necessary to reflect any significant *changes in enforcement policy* or to clarify aspects of existing policy.” *Id.* at 1 n.4 (emphasis added). The 2010 Guidelines issue an almost identical explanation. U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 1, p. 1 (Aug. 19, 2010). Thus, the guidelines merely reflect prosecutorial discretion; they do not even purport to reflect the law. As further indication of this, the occasional guideline revisions are not necessarily grounded in case law development. For instance, until the 2010 Merger Guideline revisions, the government considered an HHI of 1,800 or higher to reflect a “highly concentrated” market that triggered enhanced scrutiny, even a presumption of illegality. 1997 MERGER GUIDELINES, § 1.51, p. 16. However, in 2010, the HHI threshold for presumptive illegality was increased by 40% to 2,500. 2010 MERGER GUIDELINES, § 5.3, p. 19. This drastic change in allowable concentration may reflect a change in the government’s prosecution policy, but it is not reflective of any development in the law. Notably, neither the HHI, nor the Merger Guidelines themselves, has ever been adopted by the Supreme Court.

In fact, at least as to their legal concentration thresholds, the Merger Guidelines directly conflict with the Supreme Court cases discussed above. As a result, neither the merger in *Alcoa* or *Continental Can*, for example, would even be challenged under the government's guidelines: the market shares in *Alcoa* would have resulted in an HHI value of only approximately 1,200 in the insulated aluminum conductor market, *Alcoa*, 377 U.S. at 278; while the HHI in the container market analyzed in *Continental Can* would have yielded a pre-merger HHI of, at most, 1,450 and a post-merger HHI of less than 1,600.⁴ *Continental Can*, 378 U.S. at 462, n.11. In short, the standards developed by the Supreme Court cases directly conflict with those incorporated by the Merger Guidelines. So, which of these mutually-exclusive standards must a district court apply? Between an internally-created policy statement reflecting governmental prosecutorial discretion – and a line of Supreme Court case law supported by detailed references to Congressional intent – the answer is clear. Where a district court disregards the latter in deference to the former, it has by definition abused its discretion.

⁴ In contrast, the post-merger HHI in this case, according to the Airlines' expert, is between approximately 1,900 and 2,450. (Pls.' Ex. 104, Ex. 29.)

III. THE DISTRICT COURT’S ERROR IN REJECTING THE BINDING SUPREME COURT CASES INFECTED ITS ANALYSIS OF PLAINTIFFS’ IRREPARABLE HARM

The district court ruled the Plaintiffs failed to prove they would be irreparably harmed by the merger.⁵ However, since a plaintiff’s harm must be analyzed with respect to a specific relevant market, a properly defined market is prerequisite. Here, since the district court rejected the U.S. airline market, it failed to analyze the Plaintiffs’ harm with respect to the correct market. Thus, the court’s error in analyzing the Plaintiffs’ harm is a result of its refusal to recognize the binding Supreme Court authority.

There are forty-nine plaintiffs in this case, but only four testified at the preliminary injunction hearing. Of those four, three provided lists of leisure flights they had taken in the past five years. According to those lists, Mr. Stensrud took 28 flights on 12 trips; Ms. Brown took 17 flights on 9 trips; and Ms. Robinson took 59 flights on 30 trips. (II ER 131-134.) Thus, these three plaintiffs have flown a

⁵ The Airlines have argued at various times in this proceeding that whatever harm experienced by the plaintiffs is not “irreparable” because it is compensable in money damages. This argument fails to account for the simple legal principle that money damages are not available for *future* threatened injuries. The injunction is necessary here to prevent the merger from causing future harm. 2A PHILLIP E. AREEDA, ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 326, p.21 (3rd ed. 2007) (“one receives damages for the consequences of previous violations and an injunction for threatened future violations, which are never recompensed by the damages award to the extent that the latter covers only the past”). Because there is no remedy at law for future threatened injury, Plaintiffs’ harm is irreparable.

total of 104 flights on 51 separate leisure trips or an average of 35 flights on 17 trips in the past five years. Using these numbers to extrapolate an estimate for the total number of flights taken by the entire group of forty-nine plaintiffs in the past five years yields extraordinary figures: 1,715 flights on 833 trips.⁶ Or, as stated on an annualized basis, the plaintiffs in this case take 343 leisure flights on 167 trips every year. Each and every one of these plaintiffs either testified or stated in a sworn affidavit that they would continue to use air travel in the future. (I ER 5.)

Notwithstanding that showing, the district court ruled that plaintiffs “failed to demonstrate any irreparable harm as a result of the merger” (I ER 23.) In support of its conclusion, the court made eight factual findings. However, none of these findings (even if true) can legally support the court’s conclusion. Each is irrelevant as a matter of law. The findings are as follows:

- (1) None of the plaintiffs flies regularly (I ER 23);
- (2) Only one of the four plaintiffs who testified (out of forty-nine total plaintiffs) is likely to fly United or Continental (*id.*);
- (3) None of the forty-nine plaintiffs resides near an airport with at least ten percent of the passengers served by United or Continental (*id.*);
- (4) Seven of the forty-nine plaintiffs have flown on a United/Continental “overlap route,” but only one plaintiff has taken such a flight more than once (*id.*);

⁶ Average of 35 flights and 17 trips multiplied by 49 plaintiffs.

(5) Only one plaintiff has flown or expressed a future intent to fly on one of the “thirteen airport-pairs” (*id.*);

(6) None of the plaintiffs travel regularly for business (*id.*);

(7) None of the plaintiffs, all current or former travel agents or travel agency owners, testified to specific effects the merger would have on their clients (*id.*); and

(8) Each of the plaintiffs who testified had an alternate airport and LCC-option available to them. (*Id.*)

First, six of these eight findings are legally irrelevant because they relate to harms within specific markets that are *narrower* than the legally cognizable U.S. airline market. Thus, Finding No. 3 concerns plaintiffs’ proximity to an airport where “at least ten percent” of the passengers are served by the Airlines, and the supporting evidence is paragraph 98 of the Airlines’ experts’ report. (I ER 23.) However, paragraph 98 of the expert’s report states an opinion as to harm in the “plaintiffs’ home airport” markets, not harm within the United States airline market. Similarly, Finding No. 4 concerns the frequency of travel over United/Continental “overlap routes” and is supported with reference to paragraph 106 of the expert’s report. (*Id.*) That paragraph concerns plaintiffs’ harm over specific “city-pair routes,” not harm in the U.S. airline market. Finding No. 5 is defective for the same reason; it concerns plaintiffs’ harm specific to only “thirteen airport-pairs.” Finding No. 6, concerning the frequency of plaintiffs’ business travel is also legally irrelevant, since the U.S. airline market includes both business and leisure travel, and the record indicates that plaintiffs’ leisure travel is extensive. (II ER 131-134.) Finding No. 7 concerns the merger’s

effect on Plaintiffs' clients. However, as the district court itself conceded, Plaintiffs' standing in this case is as consumers, not resellers or travel agents. (I ER 22 (“[a]s consumers of airline tickets, then plaintiffs have established standing ...”).) Finally, Finding No. 8 concerns the availability to Plaintiffs of “alternate airports and LLCs.” To the extent the district court relied on this fact to show that Plaintiffs would not be captive to a United/Continental monopoly at their home airport, it again fails to account for the harm Plaintiffs would encounter as consumers of flights throughout the United States.

Second, Finding No. 1 states that “none of the plaintiffs testified to having flown regularly.” While this may be technically true (though vague as to “regular”), the documentary evidence proves that Plaintiffs indeed take very regular leisure airplane trips. As calculated above, the forty-nine plaintiffs in this case take a total of approximately 343 leisure flights on 167 trips every year. On average, that comes out to approximately 7 flights and 3.5 trips annually per plaintiff. This, according to the district court, is insufficiently “regular” to demonstrate harm. But, it is difficult to imagine any full-time working American taking more than 3 vacations per year. While this number certainly does not compare to the number of trips taken by business travelers who commute by plane, a finding that 3 annual leisure airplane trips is “de minimus” (I ER 24) would act as a complete legal bar for any leisure airplane traveler seeking to bring suit under Section 7. This cannot be the law. The problem with the district court’s Finding No. 1 is that it fails to define the term “regular,” and without some benchmark, the

finding is literally meaningless. In the presence of such a benchmark – some reasonable standard for leisure airplane travel in the United States – it would seem uncontestable that plaintiffs have established extensive travel habits and certain future travel.

Finally, Finding No. 2 states that only one of four plaintiffs is likely to fly United or Continental. While this fact cuts both ways (that 25% of the plaintiffs are likely to fly United or Continental irrefutably establishes harm under the district court’s reasoning), it is nevertheless legally irrelevant. The relevant fact is that Plaintiffs will likely fly on *any* airline in the future. The danger of a merger is not only that it will eliminate direct competition between the two entities and raise the price of air fares on the merged airline. Rather, the danger from anticompetitive mergers is also that through overconcentration it facilitates collusion, even tacit collusion, among the remaining firms in the market, thereby tending to increase prices charged by *every* competitor. A consumer therefore suffers harm from an anticompetitive merger irrespective of the producer from which it purchases.

The district court also found that the balance of equities did not tip in plaintiffs’ favor. (I ER 23.) But in its balancing, the district court placed the wrong “harms” on the plaintiffs’ side of the scale. Rather than consider the hardship Plaintiffs and the courts would face in trying to unwind a consummated merger later found to be illegal, the district court instead weighed the injuries a plaintiff might later expect from transacting with a merged company – harms like the payment of higher prices for fares. The district court dismissed these harms totally out-of-hand, describing them as so

“insufficient[ly] show[n]” that “the Court need not address” the issue at all. (I ER 23.) But, the district court was incorrectly analyzing Plaintiffs’ possible future *damages*, not the hardship associated with having to dismantle a multi-billion dollar merger involving tens of thousands of employees.⁷

The district court should have weighed the hardship to plaintiffs of not enjoining a merger before trial – that is, 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 at ___, slip. op. at 10876 (“[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 identified the monumental hardship 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

⁷ Of course, even the court’s improper balancing of plaintiffs’ future damages must be rejected on its own terms, since its logical conclusion – that a group of consumers threatened with paying small increases in prices would never outweigh the cost of enjoining a multi-billion dollar merger – would thwart the Congressional intent that drove the creation of consumer actions under Section 16 of the Clayton Act.

involves “tens of thousands of employees” as well as the substantial comingling of each airline’s “capital and technology.” (I ER 24.) The hardship in unscrambling such a merger would be substantial.

The Airlines’ side of the scale has grown lighter. While their merger has been consummated, they are waiting for final approval from the Department of Transportation, and in the meantime have agreed to operate as separate entities. (Defs.’ Ex. 1076; II ER 186 (Dkt. Doc. No. 109-1).) That is, right now, the Airlines have already agreed with the government to indefinitely maintain their entities separate. Plaintiffs seek merely a continuation of the status quo until their claim can be resolved at a trial on the merits.

In sum, the district court’s failed analysis of the proper relevant market infected its analysis of the Plaintiffs’ harm. None of the factual findings relied on by the court are relevant to a proper analysis of the Plaintiffs’ harm in the U.S. airline market. Further, by confusing Plaintiffs’ potential future harm with the hardship of unscrambling a major merger, the district court failed to properly analyze the balance of hardships, thereby abusing its discretion.

IV. THIS APPEAL PRESENTS A LIVE CONTROVERSY

Airlines have argued this appeal is moot because they have formally consummated the proposed merger. (Defs.-Appellees’ Mot. Dismiss Appeal and Opp’n to Emergency Mot. for Inj. 7.) However, the motion below requested an injunction preventing Airlines from not just consummating, but also from “completing,” the proposed merger:

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* the proposed merger described in the Complaint herein, pending a final determination by the Court after trial as to whether a permanent injunction should issue, notwithstanding any interim approval by any government or regulatory agency or department.

(II ER 136 (emphasis added).) Although the merger has been formally consummated through the execution of written documents, it will not be fully “completed” – i.e. the operations will not be integrated as a practical matter – for many months. In fact, according to an Order Granting Exemption issued by the Department of Transportation on August 30, 2010, the Airlines represented to the government that, pending a final order on their transfer application, “upon consummation of the transaction, United and Continental will remain separate entities and will operate as separate brands.” (Defs.’ Ex. 1076; II ER 186 (Dkt. Doc. No. 109-1).) Relying on this representation, the Department of Transportation stated that “[a]s long as Continental and United remain separate entities, should we disapprove the proposed transfer either in whole or in part, United Continental Holdings could divest itself of Continental.” *Id.* Thus, until the merger is completed as both a legal and practical matter, this appeal presents a live controversy. *See Alliance for the Wild Rockies*. 613 F.3d at ___, slip op. 10855 at 10864 (appeal not moot where district court refused injunction, but

only “49% of the planned logging was completed” at time of oral argument.)

CONCLUSION

The decision of the district court should be reversed with direction to enjoin further completion of the merger pending trial on the merits.

October 29, 2010

Respectfully submitted,

ALIOTO LAW FIRM

By: s/ Joseph M. Alioto, Jr.

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to FED.R.APP.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 9,361 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

October 29, 2010

s/ Joseph M. Alioto, Jr.

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

STATEMENT OF RELATED CASES

No known case related to the instant appeal is currently pending in this Court.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 29, 2010.

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Counsel for United
Max R. Shulman
Stuart W. Gold
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Counsel for Continental
Patrick D. Robbins
Shearman & Sterling LLP
525 Market Street, Suite 1500
San Francisco, CA 94105

October 29, 2010

s/ Joseph M. Alioto, Jr.

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Joseph M. Alioto, Jr., certify that this brief is identical to the version submitted electronically on October 29, 2010.

November ____, 2010

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

9th Circuit Case Number(s) 11-16173

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