No. 11-17995

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.

Appeal from the United States District Court
for the Northern District of California
Case No. 11-cv-02179-JW
The Honorable James Ware

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

Southwest Airlines Co. has no parent corporation. Capital Research Global Investors and PRIMECAP Management Company are the only shareholders known to own 10% or more of Southwest Airlines Co. stock. Southwest Airlines Co. is the parent of AirTran Holdings, LLC, which is the successor to AirTran Holdings, Inc. following the acquisition of AirTran Holdings, Inc. by Southwest Airlines Co. AirTran Holdings, Inc. ceased to exist following its acquisition by Southwest Airlines Co. and, therefore, has no parent corporation or beneficial owners. Guadalupe Holdings Corp. ceased to exist following the acquisition of AirTran Holdings, Inc. by Southwest Airlines Co. and, therefore, has no parent corporation or beneficial owners.

STATEMENT CONCERNING ORAL ARGUMENT

In accordance with Rule 34(a) of the Federal Rules of Appellate Procedure, Appellees state that oral argument is unnecessary because the district court's opinion is clear and comprehensive, and well-supported by the record. The decisional process would not be significantly aided by oral argument.

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JURISDICTIONAL STATEMENT

Appellees Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings, Inc. (collectively, "Defendants" or "Appellees") concur with the Jurisdictional Statement contained in the opening brief ("OB") of Plaintiffs-Appellants, except Appellees disagree with Appellants' characterization of the merger of Southwest Airlines and AirTran Airways as "unlawful."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, based on its application of the four-part test that a plaintiff must meet to obtain permanent injunctive relief, the district court properly dismissed Plaintiffs-Appellants' amended complaint for failure to allege a plausible set of facts that would entitle them to the extreme remedy of post-consummation divestiture of Southwest's $1.4 billion acquisition of AirTran.

2. Whether, in the alternative, Plaintiffs-Appellants' amended complaint should be dismissed on the ground that it fails to state a claim against Defendants-Appellees under Section 7 of the Clayton Act, 15 U.S.C. § 18, for failure to plead a facially plausible, legally cognizable relevant market.

STATUTORY ADDENDUM

The pertinent statutes in this case, 15 U.S.C. §§ 18 and 26, are reproduced in full in the Addendum to this brief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Plaintiffs-Appellants are 43 individuals who sought, after the fact, to block the consummation of Southwest Airlines Co.'s ("Southwest's") $1.4 billion acquisition of AirTran Holdings, Inc. ("AirTran"). The proposed transaction was publicly announced on September 27, 2010. (Excerpt of Record ("ER") Vol. II, at 93 ¶ 1.) Seven months later, on April 26, 2011, the U.S. Department of Justice Antitrust Division ("DOJ") announced its clearance of the merger without conditions, finding that the transaction was not only unlikely to substantially lessen competition, but was actually likely to *benefit* competition. (Supp'l ER, at 12 (Request for Judicial Notice ("RJN") Ex. 1).) A week later, and consistent with Southwest's prior announcements (e.g., Supp'l ER, at 215 (RJN Ex. 9)), the parties consummated the transaction on May 2, 2011. (ER Vol. I, at 6.) Southwest acquired AirTran on that day, and AirTran ceased to exist as a separate entity. (Supp'l ER, at 16-17 (RJN Ex. 2).)

The day *after* the merger closed, on May 3, 2011, Plaintiffs filed their initial complaint in this action, seeking declaratory and injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, alleging that Defendants' merger was likely to result in a substantial lessening of competition in violation of Section 7 of the Clayton Act 15 U.S.C. § 18. (ER Vol. I, at 6.) At the same time, Plaintiffs filed an *ex parte* motion for a temporary restraining order ("TRO") that purported

to attempt to block the already-closed merger. (ER Vol. I, at 6.) On May 4, 2011, the district court denied *sua sponte* the TRO because, among other reasons, of "the fact that Defendants' acquisition of Airtran was completed the day before this action was filed." (Id. at 16-17.) Plaintiffs appealed the non-appealable TRO denial to this Court, coupling it with an "emergency" motion seeking a hold-separate order from this Court pending resolution of their appeal challenging a *different* airline merger. (Supp'l ER, at 168-84 (RJN Ex. 8) (Emergency Motion for Injunction Seeking Temporary "Hold Separate" Order Pending Disposition of Malaney, et al. v. UAL Corporation, et al.).) That emergency motion was denied as moot when this Court dismissed Plaintiffs' interlocutory appeal for lack of jurisdiction. (Supp'l ER, at 1 (Order Dismissing Appeal for Lack of Jurisdiction).) In stark contrast to the Ninth Circuit proceedings, Plaintiffs never moved in the district court for a hold-separate order nor, following the TRO denial, moved for any other form of preliminary injunctive relief. Thus, the only remaining relief for Plaintiffs to request is divestiture, which would be very complicated at this point, given that the transaction closed more than a year ago and Plaintiffs never sought the preliminary injunctive relief of a hold-separate from the district court.

In the course of the earlier Ninth Circuit proceedings, Defendants noted fatal pleading flaws in Plaintiffs' initial complaint, including Plaintiffs' failure to plead a plausible, cognizable relevant market because their allegation of a

"national" market in air passenger travel (as opposed to a "city pair" market) was too broad in geographic scope to be plausible. Subsequently, on May 20, 2011, Plaintiffs filed their First Amended Complaint for Injunctive Relief Against Violation of Section 7 of the Clayton Act ("Amended Complaint"). (ER Vol. II, at 92-111.) Plaintiffs' Amended Complaint added an alleged submarket consisting of "low cost carriers" ("LCCs"), but maintained the unsupported and facially implausible position that air travel markets are nationwide in geographic scope. (Id. at 97 (Am. Compl. ¶ 19).) Plaintiffs also added a request for a hold-separate order to their Prayer for Relief, (id. at 105), but they never moved for such relief from the district court.

On August 8, 2011, Defendants moved to dismiss the Amended Complaint, and oral argument was heard on November 3, 2011. Defendants raised two independent arguments for dismissal. First, Plaintiffs' alleged "national" relevant market in air passenger transportation does not define a plausible, cognizable relevant market for purposes of antitrust analysis under Section 7 of the Clayton Act, and thus fails to satisfy a threshold requirement for a Section 7 claim. Second, even assuming, *arguendo*, that Plaintiffs had alleged a legally cognizable relevant market, applying the four-factor test for permanent injunctive relief, the Amended Complaint must be dismissed as a matter of law because it fails to allege

a plausible set of facts (together with judicially-noticeable facts) that would entitle Plaintiffs to the extreme remedy of post-consummation divestiture.

On November 30, 2011, the district court dismissed the Amended Complaint, with prejudice, based on the second of the two grounds noted above. (ER Vol. I, at 9.) Because the court determined the issue to be dispositive that Plaintiffs were not entitled to permanent injunctive relief, the district court expressly did not reach the alternative ground at issue whether Plaintiffs had alleged "a plausible relevant market for purposes of Section 7 of the Clayton Act." (Order at 9 n.12.)

At bottom, Plaintiffs made a number of choices in this litigation, and they must now live with those choices. They chose not to file suit or a TRO request seeking to block the consummation of the transaction until after the transaction had closed, despite having seven months' notice. They chose not to seek the preliminary injunctive relief of a hold-separate order from the district court, instead appealing a non-appealable TRO denial to this Court and coupling it with seeking a hold-separate order pending disposition of their appeal of an entirely different airline merger case (Malaney).[1] They chose to define a

[1] Malaney v. UAL Corp., No. 3:10-CV-02858-RS (N.D. Cal. filed June 29, 2010), is a private challenge by 49 individuals to the merger of United Air Lines and Continental Airlines. Southwest is not a party to that action, but 40 of the Plaintiffs are among the plaintiffs in Malaney and the Plaintiffs' counsel is also

(cont'd)

"national" relevant market notwithstanding that most of the same plaintiffs are involved in a litigation in which the court directly rejected the same relevant market definition based on long-standing precedent. See Malaney v. UAL Corp., 2010 WL 3790296, at *12 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)). Plaintiffs must now live with those choices, which individually and collectively mandate affirmance of the district court's opinion dismissing the case, with prejudice.

SUMMARY OF ARGUMENT

The district court correctly dismissed Plaintiffs-Appellants' Amended Complaint based on Plaintiffs' failure to allege a plausible set of facts that entitle them to relief. Chief Judge Ware carefully applied this Court's four-part test used to determine whether the balance of equities tips in favor of the party seeking permanent injunctive relief. (ER Vol. I, at 8.) That test provides that a party seeking injunctive relief must demonstrate: "'(1) that it has suffered an irreparable

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counsel for the Malaney plaintiffs. Unlike the present case, Malaney was filed before the United/Continental merger closed and the plaintiffs there sought a preliminary injunction prior to closing, which was denied after an evidentiary hearing. No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010), aff'd, 434 F. App'x 620 (9th Cir.), cert. denied, 132 S. Ct. 855 (2011). The Malaney case was dismissed with prejudice on December 29, 2011, Malaney v. UAL Corp., No. C 10-02858 RS, 2011 WL 6845773 (N.D. Cal. Dec. 29, 2011), appeal docketed, No. 12-15182 (9th Cir. Jan. 26, 2012), and that dismissal is on appeal to this Court. The Malaney litigation is discussed in Part II, infra.

injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) (citation omitted). After considering the facts as alleged in the Amended Complaint and additional judicially-noticeable facts, and applying those alleged facts through the lens of Bell Atlantic Corp. v. Twombly, 550 U.S. (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009), the district court found, as a matter of law, that Plaintiffs failed to establish the factors.

The balance of hardships weighs particularly heavily against Plaintiffs, given their seven-month delay after public announcement of the planned merger, as does the public interest, given the failure of Plaintiffs to plead a plausible antitrust case (with no cognizable relevant market) and the U.S Department of Justice's finding that the merger would in fact have *pro*-competitive benefits. (Supp'l ER, at 12 (RJN Ex. 1).) Accordingly, the district court held that Plaintiffs had not "demonstrated that they are entitled to the 'extreme remedy of divestiture.'" (ER Vol. I, at 4-13 (quoting Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 322 (3d Cir. 2007)).) Indeed, this is an even more compelling case for dismissal than the Eighth Circuit's decision in Ginsburg v. InBev NV/SA, 623 F.3d

1229 (8th Cir. 2010), in which that court explained that the denial of a preliminary injunction (which Plaintiffs here did not even seek) means that divestiture is no longer simple, easy, and sure as a matter of equity. Id. at 1235. For all of the above reasons, the dismissal was well founded and should be affirmed.

Alternatively, the district court's order dismissing the Amended Complaint may be affirmed based on Plaintiffs' failure to plead a plausible relevant market. See, e.g., Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998) ("If support exists in the record, the dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning."). Plaintiffs' alleged "national" relevant market in air passenger transportation does not define a plausible, cognizable relevant market for purposes of antitrust analysis under Section 7 of the Clayton Act, and thus fails to satisfy a threshold requirement for a Section 7 claim. See United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is a 'necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (citation omitted).

Appellants' principal argument – that the district court improperly dismissed the Amended Complaint on the basis of "laches" (OB at 8-9, 12-28) – is simply incorrect. The district court did not dismiss the complaint on that ground, and Defendants did not argue for dismissal on such ground. Plaintiffs' additional

arguments are equally faulty. First, Plaintiffs' argument that they demonstrated threatened harm under Section 16 of the Clayton Act ignores that their pleadings were deficient with respect to the four-factor test properly applied by the district court, and such argument likewise fails in light of their failure to define a plausible relevant market. Second, Plaintiffs' continued assertion that the district court (and this Court) have ignored Supreme Court precedent such as Brown Shoe Co. v. United States, 370 U.S. 294 (1962), is demonstrably incorrect. Third, their argument that the district court could have fashioned "tailored" injunctive relief ignores that the court found they are entitled to *no* relief. Finally, their assertions of post-record anticompetitive effects fail on the basis both of being based on extra-record evidence, which in any event consists of inadmissible hearsay, and legal irrelevance.

STANDARD OF REVIEW

This Court applies a *de novo* standard of review to an order granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. McNamara-Blad v. Ass'n of Prof'l Flight Attendants, 275 F.3d 1165, 1169 (9th Cir. 2002). In Twombly, the Supreme Court instructed that a complaint only survives dismissal under Rule 12(b)(6) if it pleads enough facts, as distinct from mere legal conclusions, to show that the claim is "plausible

on its face." 550 U.S. at 558-59, 570; see also Iqbal, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

The Court's "[r]eview is limited to the contents of the complaint" and all well-pleaded allegations are accepted "as true and construed in the light most favorable to the non-moving party." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.) (en banc), opinion amended by 275 F.3d 1187 (9th Cir. 2001). In ruling on a motion to dismiss for failure to state a claim, a court may consider, in addition to the pleadings, a matter that is properly the subject of judicial notice. E.g., Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) (on a motion to dismiss, a court "may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment"). The Court is not required to accept as true allegations that contradict matters properly subject to judicial notice or that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences drawn from the facts as pleaded. Sprewell, 266 F.3d at 988. On appeal, the judgment "may be affirmed on any proper ground," whether or not the district court relied on it. Steckman, 143 F.3d at 1295.

Although the Court reviews the district court's substantive decision of dismissal *de novo*, the Ninth Circuit recently confirmed that a district court's decision to deny leave to amend is reviewed under the abuse of discretion standard.

Alvarez v. Chevron Corp., 656 F.3d 925, 931 (9th Cir. 2011); see also Pardi v. Kaiser Found. Hosps. 389 F.3d 840, 853 (9th Cir. 2004) (holding that district court did not abuse its discretion in denying plaintiff leave to amend his complaint).

ARGUMENT

I. The District Court Properly Dismissed The Amended Complaint

The district court properly dismissed the Amended Complaint based on Plaintiffs' failure to allege a plausible set of facts that entitle them to equitable relief (divestiture), which was the only relief they were seeking. Section 16 of the Clayton Act provides a private cause of action for injunctive relief for a violation of the Clayton Act, including Section 7, "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." 15 U.S.C. § 26. Thus, general principles of equity apply to determine whether equitable relief under Section 16 is (or even could be) appropriate.

To obtain permanent injunctive relief, such as a divestiture, a plaintiff must prove "'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would

not be disserved by a permanent injunction.'" N. Cheyenne, 503 F.3d at 843 (citation omitted). Courts have recognized that divestiture is extraordinary relief, especially when sought by private actors, and therefore private parties seeking to unwind mergers bear an especially heavy burden. See Cal. v. Am. Stores Co., 495 U.S. 271, 295-96 (1990); Ginsburg, 623 F.3d at 1233.

Here, the district court considered the four factors required for permanent injunctive relief and correctly concluded that the Plaintiffs' Amended Complaint necessarily fell far short. (ER Vol. I, at 9-10.) Despite having amended their complaint, Plaintiffs failed to allege a plausible scenario in which the extreme remedy of divestiture could be permitted.

It is apparent from the face of the Amended Complaint and judicially noticeable facts that Plaintiffs could not sustain their heavy burden in seeking a divestiture. This is a $1.4 billion merger, which closed over a year ago, after the DOJ announced that it would not challenge the merger and that it anticipated pro-competitive benefits from the merger. Plaintiffs delayed for over seven months after the transaction was announced, and a week after the DOJ announcement, choosing to sue only after the transaction had closed, when AirTran no longer existed. At no time did Plaintiffs pursue a hold-separate order from the district court. Furthermore, the Plaintiffs' only allegations of harm, either to themselves or

to the public interest, are speculative and conclusory, at best. The district court was correct to dismiss this case without further waste of resources.

The district court's approach is supported by Ginsburg. In Ginsburg, the Eighth Circuit affirmed the dismissal of an antitrust case challenging InBev's $52 billion acquisition of Anheuser-Busch, id. at 1230-31, concluding that "divestiture, the only remedy [the plaintiffs] seek, would not be appropriate as a matter of law." Id. at 1233.

Ginsburg presents a similar situation as the present case, though with less delay on the part of those private plaintiffs. In Ginsburg, the plaintiffs had sued to block the InBev transaction in September 2008 in advance of its closing. Id. at 1231. A few weeks later, the plaintiffs sought a preliminary injunction, but that was denied in November 2008 and the acquisition immediately closed. Id. At that point, the defendants moved for judgment on the pleadings, which the district court granted on August 3, 2009. Id. at 1232. The Eighth Circuit affirmed the dismissal in October 2010. Id. at 1236.

Like the present case, the Ginsburg plaintiffs were seeking only injunctive relief. By the time the Eighth Circuit heard the appeal, "the *only* equitable relief to which [the plaintiffs] would be entitled, if they ultimately prevailed on [the merits], is divestiture." Id. at 1233. Even assuming, contrary to the holding of the district court, that the plaintiffs might be able to establish

liability, the Eighth Circuit logically observed that the court's next task would be the question of remedy. Id. Consequently, the Eighth Circuit considered what an equitable balancing of hardships would look like, and concluded that the "speculative and localized" alleged harm to the plaintiffs, even assuming it to be true, could not outweigh the certain "hardship and competitive disadvantage resulting from forced divestiture." Id. at 1235. "Accordingly," the Eighth Circuit held, "Plaintiffs' only available remedy is barred as a matter of law, and judgment dismissing their Complaint at this stage of the litigation was appropriate." Id. at 1236.

The Eighth Circuit also considered the Ginsburg plaintiffs' delay in filing suit as a factor that weighed against granting them a divestiture. Id. at 1235. In that case, the plaintiffs "waited nearly two months after [Anheuser-Busch] and InBev announced their agreement to merger before filing this lawsuit," and then waited weeks longer to move for a preliminary injunction. Id. The Ginsburg court found that, "[w]hen dealing with transactions of this nature, these were inexcusable delays." Id. Plaintiffs' delays in the instant case are far more egregious: They waited to sue until after the transaction had already closed, and they never sought timely preliminary injunctive relief, at least not in the proper forum. This case is a better candidate for dismissal than even Ginsburg, in light of the equities, given that Plaintiffs did not even attempt a pre-closing preliminary injunction.

For the same reasons as in Ginsburg, a divestiture would not be appropriate in the circumstances of this case, even assuming Plaintiffs' allegations to be true.

A. Plaintiffs Could Never Qualify For Permanent Injunctive Relief

1. There Is No Irreparable Injury

As a preliminary matter, any consideration of injury presumes that a cognizable relevant market exists within which an injury might be felt. "Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning." FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995). Judge Seeborg's decision in Malaney on remand from this Court is instructive regarding the significance of a plausible relevant market to any consideration of alleged injury. In the course of his discussion, Judge Seeborg explained that plaintiffs' "new averments concerning the harm that will allegedly befall plaintiffs are irrelevant in light of their failure to establish, first, a relevant market within which these harmful effects may be analyzed." Malaney v. UAL Corp., No. C 10-02858 RS, 2011 WL 6845773, at *5 (N.D. Cal. Dec. 29, 2011) (citing Cal. v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001)), appeal docketed, No. 12-15182 (9th Cir. Jan. 26, 2012). For the reasons discussed in Part II, infra, Plaintiffs failed to allege a plausible relevant market and so by definition they did not properly allege injury within such a market.

Even setting aside the problem with Plaintiffs' alleged relevant market, Plaintiffs' allegations of irreparable injury are deficient. Failure to plead irreparable injury warrants dismissal of the associated claim. See Graham v. Jones, 709 F. Supp. 969, 974 (D. Or. 1989) (granting motion to dismiss a claim seeking injunctive relief where the plaintiffs "have not alleged facts that indicate they are threatened by immediate and irreparable injury"). Moreover, under Twombly, conclusory allegations do not satisfy Plaintiffs' pleading obligations. 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (alteration in original)); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008) (explaining that to survive a motion to dismiss "claimants must plead not just ultimate facts (such as conspiracy) but evidentiary facts which, if true, will prove [all the elements of the claim]"); Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.").

Here, Plaintiffs have failed to plead evidentiary facts that would show they have suffered any injury, much less irreparable injury. The allegations of harm, collected in Appellants' Opening Brief at 33-34, are entirely conclusory. Also, it is unclear to what extent any of those conclusory harms even relate to the

Plaintiffs because there are no factual allegations that indicate how often Plaintiffs use air travel, let alone their travel histories on Southwest or AirTran or their plans for the future that conceivably could be affected by the merger, apart from the bare allegations that (1) "Plaintiffs are individuals who have purchased airline tickets for travel within the United States in the past, and expect to continue to do so in the future," (ER Vol. II, at 94 (Am. Compl. ¶ 6)), and (2) "in the four years next prior to the filing of this action, each plaintiff has purchased airline tickets for travel within the United States, and each plaintiff expects to continue to purchase airline tickets for travel within the United States in the future." (Id. (Am. Compl. ¶ 8).)

Twombly and its progeny are very clear: claims based on conclusory allegations, such as these, are subject to dismissal for failure to state a claim for which relief may be granted. E.g., Iqbal, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); Twombly, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."); Palestini v. Homecomings Fin., LLC, No. 10CV1049-MMA, 2010 WL 3339459, at *6 (S.D. Cal. Aug. 23, 2010) (dismissing claim where allegations of injury were only supported by "conclusory allegations" because although they "[we]re not required to present evidence of such injuries" they were "required to allege what injuries they have suffered"

above and beyond a "'formulaic recitation of the elements'" (quoting Iqbal, 129 S. Ct. at 1949)).

Furthermore, Plaintiffs' Amended Complaint alleges that other airlines have "the ability and financial capacity to establish a competitive presence in any of the major airports located throughout the United States." (ER Vol. II, at 103-04, ¶ 83.) If other airlines can enter, then logically they would step in to replace any lost services that are desired by air travelers. Plaintiffs' own allegations demonstrate that there is no irreparable harm.

2. Remedies Available At Law Are Not Inadequate

Appellants argue that the district court ignored allegations of non-monetary harm. Of course, as the district court recognized, any harm from alleged increases in fares would be compensable by monetary damages. (ER Vol. I, at 9.) And even the alleged qualitative harms can be economically compensated. For example, it defies common sense that no amount of money could compensate Plaintiffs for any harm due to the alleged "curtailment of services" or "curtailment of frequency of flight." Indeed, 21 of the 43 Plaintiffs were also plaintiffs in a lawsuit challenging the Delta/Northwest merger, likewise seeking only declaratory and injunctive relief, which settled for $5 million. (Supp'l ER, at 113 (RJN Ex. 4, at 629) (Excerpt of Transcript of Preliminary Injunction Hearing, Malaney v. UAL Corp., No. 10-cv-2858 (hearing held Aug. 31, Sept. 1 and Sept. 17, 2010)).) If a

monetary settlement was sufficient for the plaintiffs in the litigation against Delta/Northwest, there is no reason to think money would be insufficient here.

3. The Balance Of Harms Does Not Tip In Plaintiffs' Favor

Plaintiffs' alleged harms are necessarily de minimis, as well as speculative. Plaintiffs are a small number of individuals who purport to be air travelers. The Amended Complaint offers no clear allegations of future travel plans other than that these 43 individuals intend to fly again. For illustrative purposes only, consider the following example: if all 43 Plaintiffs fly twice per year, the average cost of a flight is $250, and the merger raises price by 10%, then the *total* damage to Plaintiffs in any year is *only* $2,150.

In contrast to Plaintiffs' de minimis and speculative "harms," the divestiture demanded by these 43 Plaintiffs would require the unwinding of a $1.4 billion merger. The cost of unwinding a transaction of this magnitude obviously would not be de minimis, given its sheer size and nature. See Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1235-36 (8th Cir. 2010) ("[A] court decree splitting up the combined entities would impose obvious hardship on the employees and distributors of [the acquired entity] and might well damage competition and consumers by crippling the operations of the largest domestic producer of immensely popular products."); cf. W. Airlines, Inc. v. Int'l Bhd. of Teamsters, 480 U.S. 1301, 1309 (1987) (temporarily staying labor-related injunction barring

airline merger, and noting, even in the *pre*-merger context, that the "cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost" and "[t]o assume that enjoining of the merger would do no more than preserve the 'status quo,' in the face of this upheaval, would be to blink at reality"). Furthermore, upon closing on May 2, 2012, AirTran ceased to exist as a separate company with its own corporate decision-making capabilities. (Supp'l ER, at 16-17 (RJN Ex. 2).) AirTran's Board disbanded, and AirTran's senior executives departed, with Southwest executives stepping in immediately to fill the leadership void. (Id.)

As the district court recognized, Plaintiffs' delay in bringing suit factors into the balance of harms. (ER Vol. I, at 10.) Indeed, "equity aids the vigilant, not those who slumber on their rights." Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234, 239 n.11 (9th Cir. 1989). These 43 individuals waited for *months* after the Southwest/AirTran merger was announced, until after the transaction had closed, to raise their concerns. Plaintiffs' own delay in filing suit (or even raising their concerns) resulted in a situation where, by the time suit was finally filed, the corporate eggs had been scrambled. Undoing a $1.4 billion merger that took place over a year ago would be complicated and costly, and it is implausible to assume, as Plaintiffs ask the Court to do, that the resulting unraveled

entities would be effective competitors. Ironically, in a recent challenge to another airline merger, the plaintiffs (most of whom are also among Plaintiffs here) themselves identified some of the obvious equitable problems with post-merger divestiture:

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

(Supp'l ER, at 159 (RJN Ex. 5).)

In this appeal, Plaintiffs raise for the first time the argument that they perhaps lacked standing to file suit until the DOJ had concluded its investigation. (OB at 25-28.) This argument is clearly pretext. Cassan Enterprises, Inc. v. Avis Budget Group, Inc., No. C10-1934-JCC (W.D. Wash. Mar. 11, 2011) (unpublished) (OB, Ex. B), the decision that supposedly binds Plaintiffs, was not issued until March 11, 2011, over five months after the Southwest/AirTran transaction was announced; therefore, Cassan's holding could not have been responsible for Plaintiffs' delay in filing their complaint. Also, at oral argument on November 3, 2011, the district court explicitly asked Plaintiff's counsel (who was also the plaintiffs' counsel in Cassan), "Was there anything that precluded the plaintiffs here from bringing this case back in September of 2010 when the merger was

announced?" (ER Vol. II, at 63.) Plaintiffs' counsel responded that Plaintiffs hoped the government might act to block the merger, while at the same time he strenuously maintained that Plaintiffs had no faith that the government would challenge it. (ER Vol. II, at 63-65.) Plaintiffs' counsel did not suggest that standing was lacking for private parties until the government investigation concluded.

Plaintiffs' reluctance to invoke Cassan is understandable. As far as Defendants are aware, the Ninth Circuit has never held that private plaintiffs must wait until the government has finished its investigation in order to file suit.[2] Indeed, private plaintiffs in this Circuit and others have challenged mergers before the conclusion of government investigations numerous times without any suggestion that standing is lacking in these circumstances. E.g., Ginsburg, 623 F.3d at 1231-32 (private challenge to InBev's acquisition of Anheuser-Busch brought on September 10, 2008, whereas DOJ investigation continued until November 14, 2008); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 321 n.12 (3d Cir. 2007) (private challenge to Qualcomm's acquisition of Flarion Technologies brought while DOJ investigation was pending); Transeuro Amertrans Worldwide Moving and Relocations Ltd. v. Conoco, Inc., 95 F. App'x 288, 289

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[2] The Cassan decision was not appealed.

(10th Cir. 2004) (private challenge to merger of Conoco and Phillips brought while FTC investigation was pending). It has even been the practice of Plaintiffs' counsel in past cases to file suit against mergers before the government investigation has concluded, including cases brought by most of these very same Plaintiffs, Malaney v. UAL Corp., No. 3:10-cv-02858 RS (N.D. Cal. June 29, 2010), and D'Augusta v. Northwest Airlines Corp., 3:08-cv-03007-VRW (N.D. Cal. June 19, 2008).

Finally, Plaintiffs' argument that they perceive themselves to be in a bind regarding standing is entirely irrelevant to their failure to plead a plausible relevant market. As discussed in Part II, infra, the case cannot go forward without a plausible relevant market, regardless of standing.

4. The Public Interest Does Not Favor An Injunction

Plaintiffs argue that Southwest's acquisition of AirTran is not in the public interest. To the contrary, the public interest would be *disserved* by a divestiture. "While the public certainly has a strong interest in the enforcement of the antitrust laws, it would not in any way serve those interests for the Court to enjoin activities that have not been shown to have anticompetitive tendencies." Delco LLC v. Giant of Md., LLC, Civ. No. 07-3522 (JBS), 2007 WL 3307018, at *20 (D.N.J. Nov. 8, 2007). Here, no plausible anticompetitive tendencies have even been alleged. Furthermore, the DOJ Antitrust Division, which serves the

public interest, decided not to challenge the Southwest/AirTran merger because it found, "[a]fter a thorough investigation, . . . that the merger is not likely to substantially lessen competition." (Supp'l ER, at 12 (RJN Ex. 1).) The DOJ Antitrust Division publicly announced that it "did not challenge the acquisition after considering the consumer benefits from the new service" expected on routes that neither Southwest nor AirTran served before the merger, "including new connecting service through Atlanta's Hartfield Jackson International Airport from cities currently served by Southwest to cities currently served by AirTran." (Id.) It cannot be in the public interest to force the unwinding of a $1.4 billion merger in the face of a strike suit by 43 individual Plaintiffs.

Furthermore, there is no public interest in entertaining facially deficient antitrust cases. The Amended Complaint is wholly conclusory with respect to the public interest and other factors required for injunctive relief, and it is utterly implausible with respect to the threshold element of a relevant market. The public interest is in stopping the progress of facially unsound complaints.

Appellants' argument that they were denied an opportunity to develop facts (OB at 29-30) ignores that fact development is unwarranted if a complaint does not articulate plausibly the required elements of a claim and the requested relief. The district court properly applied the Twombly standard and considered the facts as alleged in the complaint and material that was properly subject to

judicial notice.[3] It found the allegations did not establish a claim that could be entitled to the requested relief. In these circumstances, Twombly instructs that the court should dismiss the complaint and avoid the unnecessary burden and expense of fact development. 550 U.S. at 558 ("[W]hen the allegations in a complaint, however true, *could not raise a claim of entitlement to relief*, '"this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court."'" (alteration in original) (emphasis added) (citation omitted)); see also Kendall, 518 F.3d at 1042.[4]

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[3] Appellants' argument that the District Court improperly considered matters outside the complaint is also unavailing. As Appellants themselves concede, a court may also consider "matters properly subject to judicial notice." (OB at 37, quoting Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008) (internal quotation marks omitted) (citation omitted).) Here, the district court only considered the complaint and matters properly subject to judicial notice.

[4] United States v. Coca-Cola Bottling Co. of L.A., 575 F.2d 222 (9th Cir. 1978), cited by Plaintiffs, is inapposite. At least in the circumstances of that case, allegedly involving a simple asset acquisition that had not even been completed, the permanent injunctive relief sought by the Government could not be ruled out at the outset and therefore the Ninth Circuit concluded that the district court's grant of a preliminary injunction was not an abuse of discretion. Id. at 232 ("[W]e cannot say that there are no circumstances *in this case* in which rescission would be permissible." (emphasis added)). Here, by contrast, it is not at all possible that permanent injunctive relief could be appropriate. As the Ninth Circuit expressly recognized in Coca-Cola Bottling, "[e]ach case must be decided on the basis of the equities of its individual facts." Id.

B. The Rest of Plaintiffs' Arguments Are Faulty

1. Laches

Appellants' focus on the doctrine of laches is puzzling. (OB at 2, 8-9, 12-28.) The district court did not dismiss the Amended Complaint based on the doctrine of laches. There is no discussion of laches in the district court decision, and certainly no holding that the Plaintiffs' suit is barred by the doctrine of laches. Appellants also mischaracterize Ginsburg v. InBev NV/SA, 623 F.3d 1229 (8th Cir. 2010), as a decision based on the laches defense, which it clearly was not. The court in Ginsburg explicitly found that "even if Plaintiffs were not so dilatory as to trigger the defense of laches, their failure to obtain a preliminary injunction that would make the divestiture remedy 'easy to administer and sure' must be taken into account in fashioning an appropriate remedy some years later." Id. at 1235.[5] As in Ginsburg, the district court here considered various equitable factors, such as the balance of hardships, including but not limited to Plaintiffs' delay, and concluded, as a matter of law, that divestiture would not be appropriate. Id.

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[5] There is nothing incongruous with the district court drawing support from Antoine L. Garabet, M.D., Inc. v. Autonomous Technologies Corp., 116 F. Supp. 2d 1159, 1161 (C.D. Cal. 2000). The Garabet holding was phrased in terms of the doctrine of laches, but essentially Garabet held that where the plaintiffs made a strategic choice to delay suit for several months and then file to challenge a merger on the day of closing, they were not entitled to unwind the merger "as a matter of law." Id. at 1175. In reaching that conclusion, Garabet relied not just on the doctrine of laches, but also on a balancing of the harms, which is exactly the portion of Garabet cited by Chief Judge Ware. (ER Vol. I, at 11.)

Because Plaintiffs were only seeking divestiture, and that relief was not possible, the Amended Complaint was dismissed. Id. at 1236.

2. Threatened Harm

On appeal, Plaintiffs-Appellants argue that injunctive relief under Section 16 of the Clayton Act only requires a demonstration of a threat of harm, which Plaintiffs say they satisfied. (OB at 31.) Defendants' Motion to Dismiss did not challenge standing, and the district court did not dismiss the case due to any confusion about whether threatened harm can ever be actionable. Rather, Plaintiffs' pleadings were deficient with respect to the four-part test for injunctive relief discussed above.

Furthermore, Plaintiffs suggestion that they plausibly alleged threatened harm is incorrect. Bald assertions of threatened harm do not satisfy the Twombly standard. See discussion, supra, at 16.

3. Supreme Court Precedent

On appeal, Plaintiffs continue to argue that Supreme Court precedent mandates divestiture. (OB at 35-36.) The Supreme Court cases cited by Plaintiffs simply establish that mergers violate the antitrust laws if there is a substantial lessening of competition in a properly defined relevant market. E.g., United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966); United States v. Phila. Nat'l Bank, 374 U.S. 321, 356 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 346

(1962). These same Supreme Court cases also require that a cognizable relevant market be established as a threshold matter, which Plaintiffs here failed to do. E.g., United States v. Aluminum Co. of Am., 377 U.S. 271, 282 (1964); Brown Shoe, 370 U.S. at 335. Not only does Supreme Court precedent not support Plaintiffs' claims, it actually articulates grounds for dismissing them. As further discussed in Part II, infra, the Supreme Court in Brown Shoe specifically instructed that "[t]he 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." 370 U.S. at 325. Despite that clear instruction, Plaintiffs' Amended Complaint contains no allegations whatsoever about reasonable interchangeability of all air transportation nationwide, which is their alleged relevant geographic market, nor the cross-elasticity of demand for all flights nationwide.[6]

Furthermore, the Brown Shoe line of cases that Plaintiffs cite has no bearing on the balancing of equities and consideration of other factors required for a permanent injunction. Those decisions do not address the availability of injunctive relief, let alone the availability of such relief to a private party in the

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[6] "A passenger would never choose a flight from San Francisco to Newark as an alternative to a flight from Seattle to Miami, regardless of price." Malaney, 2011 WL 6845773, at *4 (explaining why a nationwide air transportation market is not plausible).

circumstances presented in this case. By contrast, the district court's dismissal on equitable grounds is entirely consistent with California v. American Stores Co., 495 U.S. 271 (1990). In American Stores, the Supreme Court noted that private plaintiffs who bring "belated attacks" to unwind a merger may face equitable bars to such extraordinary equitable relief. Id. at 295-96. Plaintiffs here are faced with just such an equitable bar, and Brown Shoe does not help them overcome it.

4. Tailored Injunctive Relief

Plaintiffs-Appellants also complain that the district court did not consider its own discretion to tailor injunctive relief. (OB at 39-41.) However, the district court correctly found that Plaintiffs could not be entitled to *any* injunctive relief due to a combination of factors, including but not limited to the balance of the obvious equities. The merger is consummated, and Plaintiffs chose to wait until after closing to file their suit. Any order to unwind will impose hardships on Defendants (and their employees, customers, and shareholders) regardless of the phases or timeframe in which such draconian relief might theoretically be ordered.[7]

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[7] Appellants cite United States v. E.I. DuPont De Nemours & Co., 366 U.S. 316 (1961), which rejected a remedy short of divestiture after a violation had already been found, but that case is inapposite. First, it was a Government enforcement action, not a private action. Even the majority in DuPont acknowledged that a divestiture might not be appropriate in a suit by private parties. Id. at 330 n.13 (citing Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co., 152 F. Supp. 387 (S.D. N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958)). Appellees are not aware of any cases in which a private plaintiff has forced a

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5. Assertions Of Post-Record Anticompetitive Effects

Plaintiffs argue on appeal, by reference to some newspaper articles outside the record, that anticompetitive effects have occurred. (OB at 44-48; Appellants' RJN, Exs. C-K.) For the reasons discussed in the Opposition to Appellants' Request for Judicial Notice, none of those extra-record articles are properly admissible now. Rule 10(a) of the Federal Rules of Appellate Procedure define the record on appeal as the copy of the docket, the transcript of the proceedings, and "the original papers and exhibits filed in the district court." None of Appellants' exhibits C through K were filed in the district court. Furthermore, in deciding a Rule 12(b)(6) motion (and considering such a decision on appeal), courts are limited to the contents of the complaint and judicially noticeable facts. Sprewell, 266 F.3d at 988 (explaining that review of a dismissal under Rule 12(b)(6) is limited to the contents of the complaint); Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) (material subject to judicial notice may be considered on a Rule 12(b)(6) motion). The newspaper articles comprising

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divestiture under Section 7 after the Government decided not to challenge a merger. Second, DuPont only involved the divestiture of stock holdings, not the untangling of a merger and attempted restoration of a headless company. Appellees are not aware of any merger challenge in which a private plaintiff won an order of divestiture of an entire company after deliberately waiting around for months and choosing to sue only after the merger closed and the Government announced that the merger was likely to have pro-competitive effects.

Appellants' exhibits C-K were not attached to their complaint and are not judicially noticeable for the reasons set out in the Opposition to Appellants' Request for Judicial Notice. But even if those articles were able to be considered now, none of them alter the consideration of the equities that led the district court to conclude that Plaintiffs' Amended Complaint should be dismissed because Plaintiffs are not entitled to the relief they seek.[8]

II. Plaintiffs Also Failed To State A Claim Because They Did Not Allege A Plausible Relevant Market

Although the district court dismissed on other proper grounds, Plaintiffs' Amended Complaint is also subject to dismissal for failure to plead a plausible relevant market.[9] A relevant market is a threshold element of a Section 7 claim. E.g., United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is a

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[8] New material that supposedly evidences anticompetitive effects also cannot cure the basic deficiency with Plaintiffs' alleged relevant market, which is discussed in Part II, infra. See Malaney, 2011 WL 6845773, at *5 ("[N]ew averments concerning harm that will allegedly befall plaintiffs are irrelevant in light of their failure to establish, first, a relevant market within which these harmful effects may be analyzed.").

[9] This Court can affirm for any reason supported by the record. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998) ("If support exists in the record, the dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning."); Gemtel Corp. v. Cmty. Redevelopment Agency of L. A., 23 F.3d 1542, 1546 (9th Cir. 1994) (disagreeing with the district court's grounds for dismissal, but nevertheless affirming dismissal on different grounds).

'necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (citation omitted). Consequently, many courts have dismissed antitrust complaints as a matter of law for failure to plead a cognizable relevant market. See, e.g., Wampler v. Sw. Bell Tel. Co., 597 F.3d 741, 746 (5th Cir. 2010) (affirming dismissal of antitrust claim for failure to allege a plausible geographic market); Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008) ("There are . . . some legal principles that govern the definition of an antitrust 'relevant market,' and a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable." (citing Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997))); Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., No. C-09-3854 MMC, 2010 WL 1541257, at *5 (N.D. Cal. Apr. 16, 2010) (dismissing lawsuit challenging merger of Pfizer and Wyeth on the grounds that plaintiffs failed to plead a facially plausible relevant market), aff'd, 433 F. App'x 598 (9th Cir.), cert. denied, 132 S. Ct. 852 (2011).

For purposes of antitrust analysis, a "relevant market" is defined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. at 325. "Whether products are part of the same or different markets under antitrust law depends on whether consumers view those products as reasonable substitutes

for each other and would switch among them in response to changes in relative prices." Apple, Inc. v. Pystar Corp., 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008); see also Golden Gate Pharmacy Servs., 2010 WL 1541257, at *2 (dismissing Second Amended Complaint challenging Pfizer's acquisition of Wyeth because plaintiffs failed to allege consumer behavior consistent with the broad alleged relevant markets).

In this case, Plaintiffs alleged only air travel markets of national scope:

> The relevant product and geographic markets for purposes of this action are the transportation of airline passengers *in the United States*. There are also submarkets, one of which is Low Cost Carriers ("LCCs") of airline passengers *in the United States*.

(ER Vol. II, at 97 (Am. Compl. ¶ 19) (emphases added).) Plaintiffs failed to allege that all flights in the United States are reasonably interchangeable, or even that all flights by LCCs in the United States are reasonably interchangeable, and indeed such an allegation would be absurd.

Malaney v. UAL Corp., No. C 10-02858 RS, 2011 WL 6845773 (N.D. Cal. Dec. 29, 2011), appeal docketed, No. 12-15182 (9th Cir. Jan. 26, 2012), is particularly instructive, because it involves a private antitrust challenge to another airline merger and even involves most of the same Plaintiffs as this case and the same Plaintiffs' counsel. In Malaney, a group of 49 individuals sued to block the merger of United Air Lines and Continental Airlines. As in this case, the Malaney

plaintiffs' alleged that the relevant market was air transportation on a nationwide basis.[10]

As an initial matter, the Malaney plaintiffs' bid for a pre-merger preliminary injunction failed, among other reasons, because "plaintiffs had not established a viable market, dooming their efforts to show that the impending merger would substantially lessen competition, and precluding a finding of plaintiffs' likelihood of success on the merits." Id. at *1 (summarizing deficiencies with the plaintiffs' alleged markets, including their alleged "national market"). As the district court explained, this Court affirmed the denial of the preliminary injunction, finding that the "'[p]laintiffs failed to establish a relevant market for antitrust analysis, a necessary predicate for making a claim under § 7 of the Clayton Act.'" Id. at *2.[11] In particular, the Court rejected, as a matter of law,

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[10] The Malaney plaintiffs also alleged some narrower markets, including certain airport-pair markets. The court found all of these market allegations to be deficient. See 2011 WL 6845773, at *1.

[11] On appeal, the Ninth Circuit agreed with the district court that city-pairs are the appropriate geographic markets in which to analyze airline mergers. Malaney v. UAL Corp., 434 F. App'x 620 (9th Cir.), cert. denied, 132 S. Ct. 855 (2011). The Ninth Circuit's Malaney reasoning is highly instructive:

> The city-pair market endorsed by the district court does satisfy the reasonable interchangeability standard. A price increase on a flight from San Francisco to Newark could be defeated by the threat of travelers switching to a flight from Oakland to LaGuardia. The city-pair market has also been endorsed as the most appropriate market for antitrust analysis by all academics and

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Plaintiffs' allegation that the relevant market was nationwide in scope. Paraphrasing this Court, the district court explained that "[a] passenger would never choose a flight from San Francisco to Newark as an alternative to a flight from Seattle to Miami, regardless of price." Id. at *4. Consequently, a national market in air transportation is not plausible on its face.

After the preliminary injunction denial was affirmed, United and Continental moved to dismiss the complaint for failure to state a claim due to the implausibility of the allegations of a relevant market. The Malaney plaintiffs "expressly refused to amend their pleadings to cure this [geographic] defect" with the market allegations, id., instead choosing "to re-litigate the viability of the national market, insisting that both [the district court] and the Ninth Circuit incorrectly rejected their previous position." Id. The district court had no choice but to dismiss the Malaney complaint with prejudice: "Because Plaintiffs' arguments on this issue have already been considered, discussed at length, and rejected, they need not be addressed again here." Id.

This Court's logic in rejecting the plausibility of a nationwide market in air transportation in Malaney is unassailable, and the same logic applies here,

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> government agencies in the record, including the Department of Justice and the Government Accountability Office.

Id. at 621.

where Plaintiffs have alleged only air transportation markets of nationwide scope.[12] Just as in Malaney, Plaintiffs here failed to plead a plausible relevant market. A nationwide market for air transportation could only be a relevant market for antitrust purposes if flights to and from disparate locales across the whole country were reasonably interchangeable, and that simply is not plausible. Plaintiffs' alleged relevant markets, which are both nationwide in scope, therefore fail as a matter of law.

III. **Amendment Would Be Futile**

The district court's decision to dismiss with prejudice was correct. Leave to replead is not warranted where amendment would be futile. Steckman, 143 F.3d at 1298. Further amendment would be futile here. No amendments could alter the equitable considerations that strongly weigh against a divestiture in the circumstances of this case. Also, Plaintiffs' initial complaint had failed to allege a plausible relevant market, and when Defendants pointed out this deficiency in their briefing on the Motion to Dismiss the Appeal, Plaintiffs amended their complaint to change the alleged market definitions but failed to cure the fundamental

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[12] The unpublished Ninth Circuit Malaney decision was issued after January 1, 2007, and therefore is citable pursuant to Federal Rule of Appellate Procedure 32.1 and Circuit Rule 36-3(b). The logic of Malaney is irrefutable, and so it is extremely persuasive authority, regardless of whether it is precedential under Circuit Rule 36-3(a).

deficiency. The district court did not abuse its discretion in concluding that further amendment would be futile. (ER Vol. I, at 12.)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that they are not aware of any related cases pending before this Court.

June 18, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,857 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

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STATUTORY ADDENDUM

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Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and

owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

PROOF OF SERVICE

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 on June 18, 2012. A copy will be served on counsel of record by operation of the Court's electronic filing system.

Respectfully submitted,

s/ Steven C. Sunshine
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