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.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

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JURISDICTIONAL STATEMENT

Plaintiffs Wayne Taleff, et al., ("Plaintiffs") are and will be forty-three direct purchasers of airline tickets from one or both Defendants Southwest and AirTran ("Defendants") for travel within the United States. Plaintiffs commenced this action to obtain injunctive relief, pursuant to § 16 of the Clayton Act, 15 U.S.C. §26, against the unlawful merger of Southwest and AirTran. The district court had subject matter jurisdiction under § 16 of the Clayton Act (15 U.S.C. § 26), 28 U.S.C. §§ 1331 (federal question), and 1337 (commerce and antitrust regulation).

Defendants filed a Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6). The lower court dismissed Plaintiffs' First Amended Complaint and entered final judgment on November 30, 2011, disposing of all Plaintiffs' claims. (Volume I Excerpts of Record ("ER") 1-13.) Plaintiffs filed a timely Notice of Appeal on December 15, 2011. (II ER 19.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Is laches a proper defense in an action brought under § 16 of the Clayton Act seeking divestiture, where plaintiffs' complaint is filed before the end of the analogous four-year statute of limitations period set forth in the Clayton Act?

2. A conflict of law exists in this Circuit which deprives private litigants of a remedy under § 16 of the Clayton Act. The lower court in this case held that an action for divestiture under § 16 of the Clayton Act must be filed before a merger closes. The court in the Western District of Washington in *Cassan Enterprises, Inc., et al. v. Avis Budget Group, et al.* (W.D.WA March 11, 2011), Case No. C10-1934-JCC, held that under a standing inquiry, plaintiffs seeking relief under § 16 of the Clayton Act do not have standing until after agency review is completed. Taken together, these cases leave private plaintiffs without time to file an action. When may a private plaintiff bring an action for divestiture under § 16 of the Clayton Act?

3. Whether this court is free to ignore a line of Supreme Court decisions interpreting § 7 of the Clayton Act, which taken together, mandate divestiture in this case?

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action brought under § 16 of the Clayton Act, 15 U.S.C. § 26, for injunctive relief by forty-three purchasers of airline tickets for travel in the United States. Plaintiffs' Complaint alleges that the merger of Southwest Airlines and AirTran violates § 7 of the Clayton Act, 15 U.S.C. § 18. Section 7 of the Clayton Act proscribes any merger the effect of which "may be substantially to lessen competition."

Plaintiffs brought suit under § 16 of the Clayton Act, 15 U.S.C. § 26, which entitles "any person…to sue for and have injunctive relief…against threatened loss or damage by a violation of the antitrust laws." Through their complaint, Plaintiffs seek Southwest's divestiture of AirTran and the reinstatement of competition between these major competitors. Private parties are

authorized and encouraged to seek divestiture to remedy violations of § 7. *California v. American Stores., supra,* 495 U.S. 271, 282.

B. Course of Proceedings

Defendants announced their plans to merge on September 27, 2010. On Wednesday, April 26, 2011, the Antitrust Division of the United States Department of Justice (DOJ) announced that it had terminated its Hart-Scott-Rodino Act review and the closing of its investigation of the airlines' pending merger. (Exhibit A.) Plaintiffs filed their complaint on May 3, 2011, and on the same day moved the district court to issue a temporary restraining order ("TRO") to enjoin Defendants' from completing or otherwise consummating their merger. (II ER 112.) The district court denied the TRO the following day without a hearing. (I ER 16.)

On May 9, 2011, Plaintiffs filed a Notice of Appeal to this Court from the May 4, 2011, order of the district court. Defendants filed a Motion to Dismiss the appeal on May 12, 2011, which was granted on June 2, 2011.

Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") in the district court pursuant to Fed. R.

Civ. Proc. 12(b)(6) on August 8, 2011. Plaintiffs requested limited discovery in the form of limited depositions and Defendants' production of documents pursuant to the Hart-Scott Rodino Act. The district court entered an order on August 23, 2011, continuing the scheduled case management conference and staying discovery pending disposition of the Motion to Dismiss. (I ER 14.)

C. Disposition Below

On November 30, 2011, the district court entered an order granting Defendants' Motion to Dismiss. (I ER 4.) The court held that Plaintiffs have not demonstrated that, "they are entitled to the 'extreme remedy of divestiture." (citation omitted) (I ER 9:10-11.) In its order, the district court found that because Plaintiffs delayed filing their suit until after Defendants' merger had already closed, the remedy of divestiture was unavailable to Plaintiffs. (I ER 10:7-9.) The court also found that: 1) Plaintiffs had not demonstrated that the remedies at law, such as monetary damages, would be inadequate (I ER 9:12-14.); 2) that Plaintiffs did not demonstrate that the balance of hardships tipped in their favor (I ER 9:14-17.); and 3); that Plaintiffs did not demonstrate that the public interest

would not be disserved by an order of divestiture (I ER 10:1-3.). Finally, the district court denied further amendment of the Complaint as "futile." (I ER 12:9.)

STATEMENT OF FACTS

On September 27, 2010, Defendants announced that they had agreed to combine in an all stock transaction, valued at more than $1.4 billion. (II ER 93; FAC ¶ 1.) This combination eliminated competition between the two largest Low-Cost Carriers, companies which operate on a point-to-point basis and travel high density routes rather than to and from small communities. In contrast to the LLCs are the "Network" carriers, which operate on a "hub-and-spoke" business model. (II ER 93; FAC ¶ 2.)

By reason of the combination, the planned anticompetitive effects of this unlawful combination were increases in prices and fares, elimination and/or curtailment of services, elimination or curtailment of frequency of flights, curtailment of capacity of aircraft and available seats for passage, elimination of tens of thousands of jobs, the deterioration of quality of service, the addition of charges for amenities otherwise considered part and parcel of the service, the

elimination or substantial cutback of traffic to hubs, the creation of monopolies for passenger air traffic from and to major cities, and the encouragement and trend to further concentrate the industry toward ultimate monopoly. (II ER 93; FAC ¶ 5.)

Plaintiffs are individuals who have purchased airline tickets from one or both of the Defendants in the past and expect to continue to do so in the future. They are threatened with loss or damage in the form of higher ticket prices and diminished service. (II ER 94; FAC ¶ 6.)

As of September 30, 2010, Southwest was the largest air carrier in the United States, as measured by the number of domestic passengers carried. (II ER 96; FAC ¶ 10.) Southwest had a market share of approximately 14.2% in 2010, the 2nd largest domestic market share, as measured by revenue passenger miles. (II ER 96; FAC ¶ 11.) 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. (II ER 96; FAC ¶ 13.)

AirTran is the seventh largest domestic carrier, with more than 19.5 billion RPMs in 2010. (II ER 97; FAC ¶ 16.) AirTran has

more than 1,000 daily departures, primarily in the Eastern and Midwestern United States, serving over 70 destinations in the United States, Mexico and the Caribbean. (II ER 97; FAC ¶ 17.)

Southwest and AirTran are substantial actual and potential rivals; and neither is a failing company. (II ER 97; FAC ¶ 22.) Furthermore, not only do Southwest and AirTran provide competing passenger service against each other on a number of passenger routes, but also they are potentially able to provide competing passenger service against each other on any route anywhere in the United States if they believe it would be profitable to do so. (II ER 97; FAC ¶ 24.) Both Southwest and AirTran have the capability to serve every major market in the United States. (II ER 97; FAC ¶ 25.) Because of this ease of entry by these experienced airlines, the behavior of each is constrained by the actual and potential competition from the other throughout the United States. (II ER 97-98; FAC ¶¶ 27-28.)

SUMMARY OF ARGUMENT

The doctrine of laches has been misused in antitrust actions to restrain the private enforcement of the antitrust laws. In effect,

private litigants seeking relief under § 16 of the Clayton Act have no meaningful recourse. The Supreme Court in *California v. American Stores Company, supra,* 495 U.S. 270, upheld private litigants' right to seek divestiture against threatened loss or damages by violation of the antitrust laws. In contravention to the authority of this Circuit, district courts have held that laches can bar a private right of action for divestiture, even before a merger closes. These decisions and the decision by the lower court in this case ignore law established long ago by this Court, holding that presumptively, when an action is filed within the analogous statute of limitations, laches does not apply.

Moreover, it has been held that a private litigant bringing an action for relief under § 16 of the Clayton Act lacks standing while a merger is still under agency review. *See Cassan Enterprises, Inc., et al. v. Avis Budget Group, et al.* (W.D.WA March 11, 2011), Case No. C10-1934-JCC (Exhibit B) If, as the courts have held, laches bars an action for relief under § 16 after a merger is closed and a plaintiff threatened with antitrust injury lacks standing during agency review, there is effectively no remedy available to a private litigant under § 16 of the Clayton Act. Taken together, these holdings

deprive private litigants of time to bring an action. In this instance, there were six days between the DOJ's announcement that the merger had closed and the closing of Defendants' merger. The decisions of the lower court and the court in *Cassan* cannot be reconciled.

In this action, Plaintiffs filed their Complaint one day after Defendants closed their merger—well within the four-year statute of limitations established by the Clayton Act. Ultimately, the lower court's error in holding that laches barred Plaintiffs' action tainted its analysis in balancing the harms for injunctive relief and in its denial of amendment of Plaintiffs' Complaint. The Complaint therefore survives and the decision of the district court must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews de novo the dismissal of a complaint under Rule 12(b)(6). *Kendall v. Visa U.S.A., Inc.* (9th Cir. 2008) 518 F.3d 1042, 1046. On a motion to dismiss, the Court is required to accept as true all of the factual allegations contained in the complaint. *Bell*

Atlantic Corp., v. Twombly (2007) 550 U.S. 544, 555-556. A complaint attacked for failure to state a claim "does not need detailed factual allegations." *Id.* at 555. "Specific facts are not necessary; the statement need only give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Erickson v. Pardus* (2007) 551 U.S. 89, 93 (citing *Twombly*, 550 U.S. at 555).

The complaint must state a claim that is "plausible on its face." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[D]etermining whether" such an inference may reasonably be drawn is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

The standard governing permanent injunctive relief requires a plaintiff to establish (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. *Northern Cheyenne Tribe v. Norton* (9th Cir. 2007) 503 F.3d 836, 843.

II. LACHES DOES NOT BAR PLAINTIFFS' CLAIM

Laches has been misapplied in antitrust cases, improperly suppressing the private enforcement of the antitrust laws. Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States* (1961) 365 U.S. 265, 282.

This Court has held that presumptively, an action for injunctive relief is not barred by laches if filed within the analogous statute of limitations period. *See Jarrow Formulas, Inc. v. Nutrition Now. Inc.* (9th Cir. 2002) 304 F.3d 829; *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.* (9th Cir. 1982) 688 F.2d 689, 694; *Internet Specialties West, Inc. v. Milon-Digiorgio Enterprises* (9th Cir. 2009) 559 F.3d 985. The district court in this case improperly held that laches barred Plaintiffs' action, which was filed just one day after the closing of Defendants' merger.

In its November 30, 2011, Order Granting Defendants' Motion to Dismiss, the lower court held that:

> Moreover, the Court finds that because Plaintiffs delayed in filing their suit until after Defendants' merger had already been consummated, the remedy of divestiture is now unavailable to Plaintiffs. (I ER 10:7-9.)

In its opinion, the lower court mistakenly relied upon *Garabet v. Autonomous Technologies Corporation* (C.D. Cal. 2000) 116 F.Supp.2d 1159 and *Ginsburg v. InBev NV/SA* (8th Cir. 2010) 623 F.3d 1229, decisions holding in contravention to the prior authority of this Court, that laches can bar an action brought under § 16 of the Clayton Act seeking permanent injunctive relief, without consideration of the analogous statute of limitations and even before a merger has closed. The law of this Circuit, however, is clear—that if an action is filed within the analogous statute of limitations time period, as it was in the case currently before this Court, the presumption that laches does not bar Plaintiffs' action must be applied.

A. Laches is Presumptively Inapplicable to Actions Filed within the Analogous Four-Year Statute of Limitations Period in the Clayton Act

Section 7 of the Clayton Act prohibits acquisitions that may tend "substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, and contains a four-year statute of limitations for private actions, 15 U.S.C. § 15b. Generally, a Section 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition. *Concord Boat Corp. v. Brunswick Corp.* (8th Cir. 2000) 207 F.3d 1039, 1050.

The doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims. Whether a statute of limitations would bar a comparable action at law is one consideration in determining whether the length of delay was unreasonable and whether the potential for prejudice was great. *Goodman v. McDonnell Douglas, Corp.* (8th Cir. 1979) 606 F.2d 800, 804.

While laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable. E.*g., Shouse v. Pierce County,* 559 F.2d 1142, 1147 (9th Cir. 1977) ("It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitations in an analogous action at law has run.") *Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* (9th Cir. 2002) 304 F.3d 829, 836.

This analogous statute of limitations guideline in determining laches was expressly applied to antitrust suits by this Court in *Aurora.* "The four-year statute of limitations period in the Clayton Act furnishes a guideline for computation of the laches period in antitrust suits." *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.*, 688 F.2d 689, 694 (9th Cir. 1982), *citing, International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* (9th Cir. 1975) 518 F.2d 913, 926.

In *Aurora Enterprises, Inc., v. National Broadcasting Company, supra,* 688 F.2d 689, plaintiffs, commonly controlled television production companies involved in developing the television series Bonanza and the High Chaparral, sued Defendant National Broadcasting Company and others, which had purchased from plaintiffs the right to broadcast Bonanza and Chaparral. The plaintiffs sued defendants for four federal antitrust violations and for various state law claims, which were dismissed by the district court. The plaintiffs appealed the dismissal of their federal and state law claims.

The court in *Aurora, supra,* 688 F.2d at 693, first reviewed whether or not plaintiffs' claims that the tying of network exhibition rights to syndication rights unreasonably restrained trade were barred by the statute of limitations. After determining that none of the exceptions to the statute of limitations applied, the Court then turned to laches. *Id.* at 694. In *Aurora*, this Court determined that laches did apply because plaintiffs had filed their action outside the analogous four-year statute of limitations period:

> The four-year statute of limitations period in the Clayton Act furnishes a guideline for computation of the laches period in antitrust suits. [citation omitted] If the district court had explicitly applied that guideline, it would have correctly dismissed a request for injunctive relief on the ground of laches. *Id.* at 694.

If the district court in the present case had considered the analogous statute of limitations period and properly applied the presumption against laches, it would have come to a very different conclusion than the Court in *Aurora.* Defendants Southwest and AirTran closed their merger on May 2, 2011. (I ER 16.) One day after, on May 3, 2011, Plaintiffs filed their Complaint for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, far from the end of the analogous statute of limitations period. As in *Aurora* and *Jarrow Formulas, Inc., supra,* this Court has long-held that if an action is filed within the applicable statute of limitations period, a presumption against laches must be applied.

Moreover, the Eighth Circuit considered the analogous statute of limitations in reviewing whether laches barred a challenge to an airline merger brought under § 16 Clayton Act, eleven years after the merger closed. Here, the court applied the analogous statute of limitations to determine whether laches

barred plaintiffs' action. In *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.* (8th Cir. 2004) 392 F.3d 265, plaintiffs challenged the merger of Northwest Airlines, the then eighth largest airline in the United States merged with Republic Airlines, the then ninth largest airline in the United States. Plaintiffs filed suit eleven years after the merger alleging that the merger violated § 7 of the Clayton Act.

The court in *Midwestern* first analyzed the applicable statute of limitations for a § 7 claim and the availability of the holding-and-use theory to toll the statute of limitations. The court in *Midwestern* recognized that injuries caused by a merger might not materialize until after the four-year limitation period has expired. In that instance, the court noted that when the plaintiff has not been injured yet, the statute of limitations does not begin to run until plaintiff suffers injury. *Machinery Co., Inc. v. Northwest Airlines, Inc., supra,* 392 F.3d 265, 276, citing *Concord Boat Corp. v. Brunswick Corp.* (8th Cir. 2000) 207 F.3d 1039, 1051.

The *Midwestern* court then turned to the issue of whether the equitable relief sought was barred by laches. Here, in holding that laches did bar Plaintiffs' claim because it was filed years after the four-year statute of limitations, the court indicated that, "Whether a statute of limitations would bar a comparable action at law is one consideration in 'determining whether the length of delay was unreasonable and whether the potential for prejudice was great,' *id.,* we have already held, of course that Midwestern's damages claims are barred by the four-year statute of limitations." *Machinery Co., Inc. v. Northwest Airlines, Inc., supra,* 392 F.3d 265, 277.

In the instant case, Plaintiffs filed their Complaint well within the four-year statute of limitations period set forth in the Clayton Act. The district court failed to apply the mandatory authority of this Circuit—the presumption against laches set forth in *Aurora, Jarrow Formulas Inc., Internet Specialties West, Inc.,* and accordingly erred.

B. The District Court's Reliance on *Ginsberg* and *Garabet* is Misplaced and Ignores the Mandatory Authority of this Circuit

The cases relied upon by the district court, *Ginsberg*, an Eighth Circuit case, and *Garabet,* a case from the Central District of California, do not follow the mandatory authority of this Circuit set forth in *Aurora, Jarrow Formulas, Inc.,* and *Internet Specialties West, Inc.* The cases relied upon by the district court make the same fatal error that the lower court made in this case—failure to consider the analogous statute of limitations and apply the presumption against laches.

The reasoning relied upon by the district court in *Garabet* and parroted in *Ginsberg* is fundamentally flawed. In *Garabet v. Autonomous Technologies Corporation, supra,* 116 F.Supp.2d 1159, Plaintiff Garabet and others asserted that the merger of the two defendant corporations, Autonomous Technologies Corp. and Summit Technology, Inc. as well as their June 1998 agreement constituted restraints of trade and monopolization in violation of § 7 of the Clayton Act. On summary judgment, defendants argued

that plaintiffs were barred by the doctrine of laches from pursuing any equitable remedy. *Id.*

In *Garabet,* it was publically announced on March 24, 1999, that the FTC had decided not to challenge the acquisition of ATC. Over one month later, on April 29, 1999, the merger was consummated. On the date of the closing of the merger and over one month after Summit publicly disclosed that the FTC had decided not to challenge the acquisition, plaintiffs filed suit. *Garabet v. Autonomous Technologies Corporation, supra,* 116 F.Supp.2d at 1161.

The court in *Garabet* held that laches barred plaintiffs' equitable remedies. *Garabet v. Autonomous Technologies Corporation, supra,* 116 F.Supp.2d 1159, 1174. This decision fails to apply the rule recognized by this Court in *Aurora, Jarrow,* and *Internet Specialties West, Inc.* holding that presumptively laches does not apply when an action has been filed within the time set forth in the analogous statute of limitations.

Garabet also misapprehended the court's decision in *California v. American Stores Co.* (1990) 495 U.S. 271. In

American Stores, the Supreme Court upheld a private plaintiffs' right to the remedy of divestiture*:*

> § 16 'states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order…Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." 754 F.2d, at 416. We agree that the plain text of § 16 authorizes divestiture decree to remedy § 7 violations. *California v. American Stores Company, supra,* 495 U.S. 271, 282.

The court in *Garabet*, misinterpreted *American Stores* in its application of the doctrine of laches and created a new standard unsupported by the authority of this Circuit. In *American Stores*, the Court referenced laches:

> "[m]oreover, equitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest." *California v. American Stores Company, supra,* 495 U.S. 271, 282.

The Supreme Court did not create a new rule in referring to laches in *American Stores.* This Court's decision in *Aurora* in 1982, eight years before the Supreme Court's holding in *American Stores*, applied the doctrine of laches in a private action seeking injunctive relief.

Moreover, the government has always had broad latitude to bring an action to redress a violation of § 7 of the Clayton Act. *See United States v. Greater Buffalo Press, Inc.* (1971) 402 U.S. 549, 556 (divestiture sought 15 years after violation, "the passage of time per se is no barrier to divestiture of stock illegal acquired."); *United States v. E.I. DuPont De Nemours & Co.* (1961) 366 U.S. 316 (divestiture over 40 years after violation); *United States v. El Paso Natural Gas Co.* (1964) 376 U.S. 651 (divestiture 7 years after violation); *United States v. Von's Grocery Co.* (1966) 384 U.S. 270 (divestiture approximately 6 years after violation).

The *Garabet* court, in holding that laches barred private plaintiffs' equitable remedies in § 7 cases, without looking to the analogous statute of limitations as a guideline, concocted a new rule unsupported by the Supreme Court in *American* and by the prior authority of this Court in *Aurora, Jarrow Formulas,* and *Internet Specialties West, Inc.*.

The court in *Ginsburg v. InBev NV/SA* (8th Cir. 2010) 623 F.3d 1229 repeated and exacerbated the error made in *Garabet* by failing to analyze the analogous statute of limitations. The court

in *Ginsburg* went as far as to hold that laches had been triggered when plaintiffs waited just two months after the *announcement* of their agreement before filing suit, even though the merger did not close until some two months after plaintiffs filed their Complaint in September 2008. *Id.* at 1235. The court in *Ginsburg* relied on *Garabet,* which also failed to consider the analogous statute of limitations and apply the presumption against laches.

The decisions in *Garabet, Ginsburg*, and the lower court in this case encourage corporations to swiftly close mergers to cut off § 7 claims. The court in *Midwestern Machinery v. Northwest Airlines* (8th Cir. 1999) 167 F.3d 439, 442, warned of the danger posed by such holdings:

> As noted, after the merger was completed, Republic's stock was turned in and extinguished. Northwest views this action as significant for the purposes of section 7. If extinguishing stock eliminated section 7 claims, corporations could seek to use this approach as an antitrust shelter and the speed at which it is accomplished would control the existence of a claim. The plain language of section 7 does not support such a result.

C. Under the Current Standards Governing Actions for Injunctive Relief Brought Under § 16 of the Clayton Act, Private Litigants Have No Meaningful Remedy

The doctrine of laches and the standards governing the timing of an action for injunctive relief under § 16 of the Clayton Act have been so contorted that effectively there is no recourse available to private litigants. *Cassan Enterprises, Inc., et al. v. Avis Budget Group, et al.* (W.D.WA March 15, 2011), Case No. C10-1934-JCC (Exhibit B) is one example of the dilemma private litigants face. In *Cassan,* plaintiffs brought an action for injunctive relief under § 16 of the Clayton Act, alleging that the proposed merger by defendants Avis Budget Group and Dollar Thrifty Automotive violated § 7 of the Clayton Act.

On October 5, 2010, defendants announced their intention to seek regulatory approval for the proposed acquisition. (Exhibit B at 2:21-24.) On November 30, 2010, while the FTC was still reviewing the merger, plaintiffs filed the complaint in the Western District of Washington, seeking preliminary and permanent injunctive relief under § 16 of the Clayton Act. In its order

granting the defendants' motion to dismiss, the court dismissed plaintiffs' case *because* it was still under review by the FTC:

> It is self-evident that Plaintiffs have not suffered any injury from the proposed acquisition: *It has not yet taken place*… Defendants properly note that the Federal Trade Commission is still reviewing the proposed acquisition, and that aspects of the acquisition may change as a result of the Commission's review. (citation omitted) The proposed acquisition therefore still lacks shape, which means that the extent and nature of Plaintiffs' injuries are entirely speculative. (Exhibit B at 5:11-12; 16-19.)

The *Cassan* court went on to address plaintiffs' arguments that the Commission's review process cannot insulate a proposed merger from judicial review *via* agency approval:

> Because the collaboration between Defendants and the Commission is likely to change aspects of the proposed merger, this Court properly considers the review process as part of the standing inquiry. As Judge Easterbrook of the Seventh Circuit has explained: "Until agencies have had their say, it is impossible to perform the sort of antitrust analysis that is integral to a potential competition case, and therefore would be a waste of everyone's time to process." *South Austin Coalition Community Council, et al., v. SBC Communications, Inc.* 191 F.3d 842, 845 (7th Cir. 1999). (Exhibit B at 5, fn 1.)

In the case currently before this court, Southwest and AirTran closed their merger just six days after the DOJ announced it had cleared the merger. If a private litigant is

barred by laches from bringing an action after the closing of a merger, as the district court held in this case, and lacks standing before an agency has completed its review as the court held in *Cassan*, a private litigant threatened with an antitrust injury effectively has no recourse under § 16. These decisions deprive a private antitrust litigant of time to file an action under § 16 of the Clayton Act. In this case, there were six days between the DOJ's announcement that their investigation had ended and the closing of the merger by Defendants. The speed at which corporations can close a merger should not and cannot control the existence of an action under § 16.

The Supreme Court in *American Stores* underscored the importance of the private right of action in enforcement of the antitrust laws:

> The Act's provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect "*may* be substantially to lessen competition." Clayton Act § 7, 38 Stat. 731, 15 U.S.C. § 18 (emphasis supplied). *California v. American Stores Company, supra,* 495 U.S. 271, quoting *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 323.

The standards articulated by courts for bringing a § 16 action for injunctive relief are confused and contradictory. The lower court erred when it did not employ the presumption against laches that applies when an action is filed within the analogous statute of limitations.

III. THE LOWER COURT'S MISAPPLICATION OF LACHES INFECTED ITS ANALYSIS OF THE BALANCE OF HARMS

The district court never considered whether divestiture would be effective to remedy the harms alleged by Plaintiffs because the court never considered all the harms alleged by Plaintiffs. This mistake and the court's erroneous conclusion that laches barred Plaintiffs' action infected its analysis in balancing the harms for injunctive relief. The district court held that Plaintiffs are not entitled to divestiture because 1) they "have not demonstrated that the remedies at law, such as monetary damages, would be inadequate." (I ER 9:12-13) and 2) that Plaintiffs have not demonstrated that the "public interest would not be disserved by a permanent injunction." (I ER 10:2-4)

The lower court ignored numerous allegations in the FAC by Plaintiffs demonstrating irreparable harm, including reductions in service and an end in service at Dallas-Fort Worth airport. These services, once lost, cannot be restored and accordingly are injuries not compensable at law or by money damages. While ignoring harms alleged by Plaintiffs, the lower court also took into consideration information outside the FAC in balancing the harms.

The lower court also not only overlooked a line of Supreme Court cases that mandate merger in this case, but also discounted the public's interest in enforcement of the antitrust laws and in protection against injury from the loss of competition brought about by a violation of §7 of the Clayton Act. Lastly, the anticompetitive effects alleged by Plaintiffs in the FAC have occurred, as have the harms they alleged.

A. This Court's Review is Limited by a Lack of Factual Background

This Court's review of the availability of divestiture in this case is severely limited by the utter lack of a factual background. The lower court stayed all discovery in the case,

including discovery of any documents already produced to the Department of Justice pursuant to the Hart-Scott Rodino Act. (I ER 14.) In granting Defendants' Motion to Dismiss, the court held that "Plaintiffs have failed to meet their burden of demonstrating that the balance of equities tips in their favor." (I ER 10:4-5.) The lower court's decision essentially required Plaintiffs to prove their case without the opportunity for discovery to develop a factual background of any kind.

This Court in *United States v. Coca-Cola Bottling Company of Los Angeles* (9th Cir. 1978) 575 F.2d 222, noted the difficulties of reviewing the availability of an equitable remedy (in that instance, rescission in a § 7 case) without a factual background:

> We note at the outset that this case is before us in a unique posture. The district judge has not held a trial on the merits and has not decreed any final relief…Thus our review of the legal issues involved the availability of rescission in Clayton s 7 cases is *conducted largely in the abstract*. And our review of the factual availability of the remedy in this case is significantly restricted by the lack of a well-developed factual background. (Emphasis added.)

In the case currently before the Court, the lower court denied Plaintiffs the opportunity to develop a factual background. Therefore, a review by this Court of the availability of an

equitable remedy is severely limited because it must be conducted entirely in the abstract.

B. Plaintiffs Need Only Demonstrate a Threat of Injury

§ 16 of the Clayton Act empowers any person threatened with injury by a violation of the Sherman or Clayton Acts to seek injunctive relief in the federal courts. To support a permanent injunction, it is not necessary to prove actual existing injury to the plaintiff; rather, it is enough that the plaintiff demonstrates a "threat" of significant harm to it if such relief is not granted. See *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 130. Actual injury need not be shown.

The lower court never articulated the proper threat of injury standard for injunctive relief for actions brought under § 16 of the Clayton Act.

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C. The Lower Court Ignored the Anticompetitive Effects of the Merger Alleged by Plaintiffs in the FAC Demonstrating Irreparable Injury

i. Elimination of Services That Cannot Be Restored Demonstrates Irreparable Injury

Plaintiffs alleged irreparable injury in their FAC but it was completely overlooked by the lower court. The lower court held that Plaintiffs did not demonstrate that money damages would be inadequate. The court adds that, "in fact, the harm which Plaintiffs allege will ensue from the merger is expressed in terms of monetary damages." (I ER 9:11-13.) The court's holding overlooks and mischaracterizes allegations in the FAC and does not apply the appropriate standard for actions for injunctive relief brought under § 16 of the Clayton Act –a threat of significant harm.

When plaintiff suffers "substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.* (1st Cir. 1996) 102 F3d 12, 18. The legal remedy (damages) need not be wholly ineffectual. Rather, it must be "seriously deficient as compared to the harm

suffered." *FoodComm Int'l v. Barry* (7th Cir. 2003) 328 F3d 300, 304.

Plaintiffs have alleged that Defendants' merger violates § 7 of the Clayton Act. In the FAC, Plaintiffs alleged the following threats of significant harm resulting from Defendants' merger (II ER 93; FAC ¶ 5.):

- Increases in prices and fares (II ER 101-103; FAC ¶68-69, 76-77, 79.)
- Elimination and/or curtailment of services; (II ER 103; FAC ¶ 79.)
- Elimination or curtailment of frequency of flights; (II ER 102-103; FAC ¶ 71, 73, 76, 79.)
- Curtailment of capacity of aircraft and available seats for passage; (II ER 100, 103; FAC ¶ 58, 79.)
- Elimination of tens of thousands of jobs; (II ER 93; FAC ¶ 5.)
- The deterioration of quality of service; (II ER 103; FAC ¶ 79.)
- The addition of charges for amenities otherwise considered part and parcel of the service; (II ER 103; FAC ¶ 79.)
- The elimination or substantial cutback of traffic to hubs; (II ER 102; FAC ¶ 71, 73.)
- The creation of monopolies for passenger air traffic from and to major cities; and (II ER 101-102; FAC ¶ 65-68, 70, 72-74.)

- The encouragement and trend to further concentrate the industry toward ultimate monopoly; (II ER 97, 100-103, 108-111; FAC ¶ 20-27, 51-57, 59-64, 78, 80, Exhibit A, Exhibit B.)

Plaintiffs alleged irreparable injury in that flight route availability and other services will be reduced or eliminated. Lost service and competition cannot be restored through damages.

The FAC alleges that the combined AirTran and Southwest entity will control over 75% of the LCC market in the United States and that the merger further concentrates an already concentrated industry. (II ER 97, 100-103, 108-111; FAC ¶¶ 20-27, 51-57, 59-64, 78, 80, Exhibit A, Exhibit B.) The FAC alleges that 16 routes were pushed into monopoly status as a result of the merger. (II ER 101; FAC ¶ 66.) The merger reduces the number of competitors in 127 nonstop and connecting markets and reduces the number of competitors from two to one in 14 nonstop and connecting markets. (II ER 102; FAC ¶ 73.) The FAC further alleges that the merged Southwest-Airtran entity intends to end flights at Dallas/Forth Worth International. (II ER 102; FAC ¶ 74.) Damages cannot restore service at Dallas-Forth Worth

International or competition where routes have been pushed into monopoly status. Indeed, lessening of competition "is precisely the kind of irreparable injury that injunctive relief under § 16 of the Clayton Act was intended to prevent." *California v. American Stores Company* (1989) 492 U.S. 1301, 1304.

Public injury results whenever there is an assault upon the principle of free and unhampered competition. Plaintiffs and the public have already sustained injuries alleged by Plaintiffs in the FAC. Damages cannot restore lost services. Damages cannot restore operating routes once lost. Damages cannot restore service at Dallas Fort-Worth by AirTran. Damages cannot reinstate the competition lost when Defendants merged.

D. Under a Line of Supreme Court Precedent, Divestiture Must Ultimately be Mandated

A line of Supreme Court precedent, which has never been overruled and which was ignored by the district court, established a resolute intolerance for mergers that result in over-concentration of United States markets. Under the authority of these cases, an order of divestiture must ultimately by mandated in this case. See *Brown Shoe, Co. v. United States* (1962) 370 U.S.

294; *United States v. Aluminum Co. of Am.* (1964) 377 U.S. 271; *United States v. Continental Can Co.* (1964) 378 U.S. 441; *United States v. Pabst Brewing Co.* (1966) 384 U.S. 546; *United States v. Philadelphia National Bank* (1963) 372 U.S. 321; *United States v. Von's Grocery Co.* (1966) 384 U.S. 270.

Each of these Supreme Court cases was later discussed by Judge Posner in *Hospital Corp. of America v. Federal Trade Commission* (7th Cir. 1986) 807 F.2d 1381, 1385, 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.

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E. The Lower Court Improperly Considered Matters Outside the FAC

i. Only Allegations in the Complaint May Be Considered

As this Court has previously held, only matters inside the complaint can be considered when ruling on a 12(b)(6) motion to dismiss:

> When ruling on a motion to dismiss, we may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.' " (citation omitted) *Manzarek v. St. Paul Fire & Marine Ins. Co* (9th Cir. 2008) 519 F.3d 1025, 1030.

Where the district court considered *matters outside the pleadings* in making its decision, the dismissal will be reviewed as a *summary judgment* motion. FRCP 12(d); *Jacobson v. AEG Capital Corp.* (9th Cir. 1995) 50 F3d 1493, 1496 --court took judicial notice of prior bankruptcy proceedings; *Del Monte Dunes at Monterey, Ltd. v. City of Monterey* (9th Cir. 1990) 920 F2d 1496, 1507–1508 —court considered affidavits and exhibits submitted in support of and in opposition to motion to dismiss.

In footnote 8 of the lower court's order, the court quotes at length from Defendants' Motion to Dismiss in support of the balance of hardships purported by Defendants:

> Defendants contend that the balance of hardships 'tilts heavily in favor of Defendants.' In support of this proposition, Defendants contend that the hardship for Defendants would be extreme, arguing that "a divestiture would be extremely difficult to accomplish *at all*, given that the merger has already closed, AirTran no longer exists as a separate entity, and Southwest and AirTran operations, finances and personnel have already been substantially integrated." (Id. emphasis in original.).) By contrast, Defendants contend, it is wholly speculative what harm, if any, Plaintiffs would suffer if divestiture is not ordered, given that Plaintiffs do not allege "how often [they] use air travel" or how "their plans for the future…conceivably could be affected by the merger." (Id. at 14.) (I ER 10, fn 8.)

Here, the lower court improperly relied on information outside the FAC—Defendants' assertions that "finances and personnel have already been substantially integrated." *Id.*

> Court: What persuades me and the argument that I'm listening hard to hear you counter is the fact that the lawsuit was filed after the merger was completed. And the remedy that is being sought would require the breakup of a now consolidated enterprise.
>
> Mr. Alioto: Yes.
>
> The Court: **And it's so consolidated now that I don't see any easy way to do that.** (emphasis added.) (II ER 67-68:24-25; 1-8.)

Consideration of information outside the Complaint is implicit in the court's statement that Defendants were "so consolidated now that I don't see any easy way to do that [order divestiture]," and in the court's request that Plaintiffs counter this argument. (II ER 67-68:24-25; 1-8) There was no discovery on this matter and no evidence before the court about how consolidated Defendants' operations were—other than the fact that the merger had closed on May 2, 2011. Moreover, recent reports indicate that Southwest and AirTran will not completely merge operations until 2015. (Exhibit C.)

F. The Lower Court Did Not Consider Its Own Broad Discretion to Tailor Injunctive Relief

It is well-known that district courts have broad discretion in matters of remedy in antitrust cases:

> Many opinions of the Court in such cases observe that '(t) he formulation of decrees is largely left to the discretion of the trial court * * *,' (citations omitted) '(t)he determination of the scope of the decree to accomplish its purpose is particularly the responsibility of the trial court,'…These expressions are not, however, to be understood to imply a narrow review here of the remedies fashioned by the District Court's in antitrust cases. On the contrary, our practice, particularly in cases of direct appeal from a decree of a single judge, is to examine the District Court's action closely

> to satisfy ourselves that the relief is effective to redress the antitrust violation proved. *United States v. E.I. Du Pont de Nemours and Company*, supra, U.S. 316, 322.

In balancing the harms, the district court did not consider its own broad discretion to tailor appropriate relief to redress violation of § 7 of the Clayton Act. It cannot be determined that the balance of harms tips in Defendants' favor without analyzing the precise remedy or the threat of harm to Defendants. Divestiture need not be immediate. The court could order divestiture in phases, subject to certain interim injunctive relief, to assuage real or imagined short-term harm.

Furthermore, economic hardship alone cannot tip the harms in Defendants' favor in the face of a violation of § 7:

> Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the later remedy because of economic hardship, however severe, may result. **Economic hardship can influence choice only as among two or more effective remedies.** If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. *United States v. E.I. Du Pont de Nemours and Company*, *supra*, U.S. 316, 330. (emphasis added)

In balancing the harms, the district court gave weight to a perceived economic hardship to Defendants without any evidence of what that economic hardship would be, without a consideration of the effectiveness of divestiture to remedy the harms alleged by Plaintiffs, and without full consideration of all the harms alleged by Plaintiffs.

G. Protection Against Threat of Injury from Violation of § 7 of the Clayton Act Serves the Public Interest

i. The Supreme Court and This Court Recognize the Public's Interest in Vigorous Enforcement of the Antitrust Laws

"Divestiture itself is an equitable remedy designed to protect the public interest." *United States v. E.I. Du Pont de Nemours and Company*, *supra,* U.S. 316, 326. The lower court improperly held that Plaintiffs have not demonstrated that injunctive relief would be in the public interest. The court dismissed the public's interest in protection against violation of the antitrust laws and the public's interest in the enforcement thereof, holding that Plaintiffs', "…contention that the public interest 'is always served by the competition of two significant rivals...' does not constitute a

demonstration that the public interest 'would not be disserved' by an order of divestiture." (I ER 10:1:3.)

Public injury necessarily results from any act the effect of which is "substantially to lessen competition or tend to create a monopoly" under Clayton Act § 7, and it has long been recognized that the public interest is served by enforcement of the antitrust laws:

> In principle, any practice that impedes or otherwise interferes with the natural flow of interstate commerce, even if there is no evident harm to the economy as a whole, because the victim's business is so minimal that its destruction made little impression upon the economy, is nonetheless injurious to the public interest. Accordingly, *public injury necessarily* results whenever there is an assault upon the principle of free and unhampered competition, as expressed in the antitrust laws…*Therefore, the complaint need not allege injury to the public; the allegation is superfluous.* 1 Callman on Unfair Comp., Tr. & Mono. § 4:24 (4th Ed.) (Emphasis added.)

The Supreme Court and this Court have recognized the public's interest in vigilant enforcement of the antitrust laws:

> Private treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws.' *Olympic Refining Company v. Carter* (9th Cir. 1964) 332 F.2d 260, 264, citing *Lawlor v. National Screen Serv. Corp.* (1955) 349 U.S. 322, 329.

The Supreme Court has held that the very purpose of giving private parties treble-damage and injunctive remedies was, "not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. (citations omitted) Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other remedies is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Zenith Radio Corporation v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 130-131.

Plaintiffs in an action for injunctive relief brought under of § 16 of the Clayton Act must plead facts demonstrating a "threat" of injury. Plaintiffs have done so. It is in the public's interest to enforce the antitrust laws against a merger that violates § 7 Clayton Act: a merger that is harmful to competition in an already concentrated market; one that causes increases in prices to consumers and decreases services available to consumers.

As succinctly expressed by the Supreme Court in the

Radovich case, the antitrust laws "protect the victims of the forbidden practices as well as the public…Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of section 5 of the Clayton Act…In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is *specifically* set forth by Congress in those laws." *Radovich v. National Football League* (1957) 352 U.S. 445, 453.

The courts have not only long recognized the public's interest in enforcement of the antitrust laws but they have also warned against burdening enforcement because any activity that threatens commerce, even if there is no evident harm to the economy as a whole, is injurious to the public interest.

H. The Anticompetitive Effects Alleged by Plaintiffs Occurred

The anticompetitive effects alleged by Plaintiffs—the harms alleged by Plaintiffs in the FAC—have occurred. AirTran has dropped 15 cities from its service map, fares have increased, capacity is reduced, and further concentration in the airline industry is imminent.

i. 15 Cities Have Been Dropped from AirTran's Service Map Since the Merger

In the FAC, Plaintiffs alleged that services to cities will be cut as a result of the Southwest-AirTran merger. (II ER 100, 102-103; FAC ¶ 58, 71, 73, 76, 79.) Since the Southwest-AirTran merger closed, services to 15 cities once served by AirTran have been dropped. (Exhibit D.) Service at Allentown, PA; Lexington, KY; Harrisburg, PA; Huntsville, AL; Sarasota, FL and White Plains, NY will be dropped in August 2012. *Id.* Previously, in November 2011, Southwest announced it would drop service at Asheville, NC; Atlantic City, NJ; Bloomington/Normal, IL; Charleston, WV; Dallas/Fort Worth, TX; Knoxville, TN; Miami, FL; Moline/Quad Cities, IL; and Newport News, VA. (Exhibit E.)

Moreover, Southwest announced it would end service between Pittsburgh and Philadelphia in January 2012. That end in service could take at least 100 potential Southwest seats a day out of the market for would-be standby travelers. These local service cuts affect hundreds of US Airways employees who commute to Philadelphia from their homes in the Pittsburg region. When there are more employees than available seats,

commuting US Airline employees turned to Southwest. Commuting US Airways workers previously could fly standby on Southwest at no cost through a reciprocal airline agreement that allowed Southwest employees to fly free on US Airways. (Exhibit F.)

ii. Air Fares Have Increased and Capacity is Reduced

Following Defendants' merger, airfares have increased industry wide for travel within the United States, as alleged by Plaintiffs in the FAC. (II ER 101-103; FAC ¶68-69, 76-77, 79.)

As of April 2, 2012, airlines had pushed through three industry wide fare increases in 2012. (Exhibit G.) There were nine airfare hikes in 2011 compared to only three in 2010. *Id.*

On April 2, 2012, it was reported that United Continental planned to cut its overall capacity for 2012 by 1.5 percent and that other carriers also planned to trim capacity for 2012. (Exhibit G.)

iii. Southwest Is Selling 88 Boeing 717s Acquired from AirTran

Southwest announced it is selling 88 Boeing 717s that it

acquired when it purchased AirTran. Southwest CEO Gary Kelly announced that, "Southwest is searching for 'an opportunity to place the 717s with another airline." (Exhibit H.)

iv. Job Losses in the Airline Industry

Job cuts have been reported by Delta Air Lines and American Air Lines. American Airlines plans to slash 13,000 jobs to cut costs and terminate employee pension plans in 2012. (Exhibit I.)

2000 workers took employee buyouts and early retirements offered by Delta in 2011. Delta President Edward Bastian in early February 2012, announced that additional job cuts were likely, "we're going to be looking at other ways to reduce headcount and we are considering and I'd expect we'll probably be announcing soon another early retirement opportunity for our employees." (Exhibit I.)

v. Further Consolidation of the Airline Industry

The trend in concentration in the airline industry continues as American Airlines has signaled that it is open to merger. US Airways is the most talked about possible partner for American.

A US Airways-American merger would reduce the number of network carriers from four to three and will create the largest airline in the world. Tim Horton, CEO of American Airlines' parent AMR Corp., said, "We're not opposed to consolidation in the industry, and I wouldn't rule it out for American as things develop." (Exhibit J.)

Moreover, on April 20, 2012, US Airways took a step toward merging with American Airlines and reached an agreement with American's unions on what a combined airline would look like. (Exhibit K.)

IV. THE LOWER COURT ERRED BY DENYING AMENDMENT OF PLAINTIFFS' COMPLAINT

Dismissal without leave to amend is improper unless "it is clear, upon *de novo* review, that the complaint would not be saved by any amendment." *Carvalho v. Equifax Information Services, LLC* (9th Cir. 2010) 629 F3d 876, 892–893 (emphasis in original; internal quotes omitted); *Manzarek v. St. Paul Fire & Marine Ins. Co.* (9th Cir. 2008) 519 F3d 1025, 1031 (9th Cir. 2008). There is a strong presumption in favor of granting leave to amend. The court, however, in relying upon its erroneous assessment that

laches barred Plaintiffs from seeking divestiture compounded that error by denying Plaintiffs' the opportunity to amend their Complaint.

The district court denied amendment holding, "Plaintiffs are not entitled to an order of divestiture, the Court finds that further amendment would be futile." (I ER 12:9.) The Court's error in holding that laches barred Plaintiffs from seeking divestiture tainted its analysis in denying amendment. As a consequence, amendment of the Complaint was improperly denied.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

May 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 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 9,110 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

May 4, 2012

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STATEMENT OF RELATED CASES

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

CERTIFICATE 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 by using the appellate CM/ECF system on May 4, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Joseph M. Alioto, certify that this brief is identical to the version submitted electronically on May 4, 2012.

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