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' PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING *EN BANC*

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Petitioners, a group of airline travelers and travel agents, hereby petition this Court for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and suggest that rehearing be *en banc*, pursuant to Rule 35.

INTRODUCTION

The United States airline industry has become increasingly concentrated through a series of mergers. The number of major U.S. airlines has been reduced from seven to four in just a few years (Delta-Northwest in 2008; United-Continental in 2010; Southwest-Airtran in 2011; and American-US Airways in 2013.) Petitioners herein brought suit to enjoin the acquisition of AirTran Airways by Southwest Airlines as violative of Section 7 of the Clayton Act, 15 U.S.C. § 18, in that the effect of the merger would be to "substantially lessen competition or tend to create a monopoly."

Section 7 of the Clayton Act was intended by Congress to stop trends in concentration. The panel's decision ignores and fails to address a line of binding Supreme Court precedent, which when taken together, stand for the proposition that in an increasingly concentrated market, any non-trivial acquisition of a significant rival is presumptively illegal. The panel's decision improperly concludes that Petitioners have "offered no evidence of threatened or actual specific injuries to themselves." (Opinion at 2.) Price increases and reductions in service alleged in the Complaint are precisely the type of injury the antitrust laws are intended to prevent. Additionally, the Panel overlooked or misapprehended Plaintiffs' requests for judicial notice, which were improperly denied without a hearing and which include facts

demonstrating that amendment of the Complaint in this case would not be futile. Accordingly, Petitioners respectfully request that this Court grant rehearing, or alternatively, rehearing *en banc*.

FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT

Rehearing or rehearing *en banc* is warranted because the panel decision raises a question of exceptional importance and directly conflicts with a long line of well-established decisions by the Supreme Court of the United States. The grounds for the Petition are that, in the opinion of Petitioners, the decision by the panel on February 4, 2014, overlooks and/or misapprehends material points of fact and law, including the line of Supreme Court precedent which has never been overruled.

Rehearing is necessary to ensure the uniformity of the Court's decisions and to correct the irreconcilable differences between the panels' holding here and the well-established authority of the Supreme Court.

The memorandum decision by the panel raises the exceptional question as to whether the lower courts are free to ignore a line of binding Supreme Court precedent, which demonstrate that the elimination of a significant rival in a nontrivial transaction is presumptively illegal. In such circumstances, the decisions by the Supreme Court plainly and clearly enjoin and prohibit such acquisitions, and the failure by the panel to apply those decisions must be reheard and the rehearing should be *en banc*.

ARGUMENT

I. THE PANEL'S OPINION IGNORES A LINE OF BINDING SUPREME COURT PRECEDENT

The memorandum decision by the panel overlooked, indeed in the opinion of the petitioners, simply ignored, the binding decisions by the Supreme Court of the United States in Section 7 cases, in which the statute's concern about the lessening of competition or the tendency to create a monopoly is to be judged. Those Supreme Court decisions are *Brown Shoe, Co. v. United States,* 370 U.S. 294 (1962), *United States v. Philadelphia Nat'l Bank,* 372 U.S. 321 (1963), *United States v. Aluminum Co. of America et al.,* 377 U.S. 271 (1964), *United States v. Vons Grocery Co. et al.,* 384 U.S. 270 (1966), *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966). Under the authority of the Supreme Court, Defendants' merger was and is presumptively illegal.

Judge Posner summarized this line of binding Supreme Court precedent as *establishing the illegality of any nontrivial acquisition of a competitor*:

> The Commission's detailed analysis of those effects fills most of a 117-page opinion that, whatever its substantive merits or demerits, is a model of lucidity. The Commission may have made its task harder (and opinion longer) than strictly necessary, however, by studiously avoiding reliance on any of the Supreme Court's section 7 decisions from the 1960s except *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), which took an explicitly economic approach to the interpretation of the statute. The other decisions in that decade-in particular *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Aluminum Co. of America,* 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); *United States v. Von's Grocery Co.,* 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), and *United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966)-*seemed, taken as a*

> *group, to establish the illegality of any nontrivial acquisition of a competitor,* whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. *The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may ... substantially ... lessen competition." Hospital Corp. of America v. F.T.C*, 807 F.2d 1381, 1385. [Emphasis added.]

In the above-mentioned line of precedent, the Supreme Court simultaneously established a resolute intolerance for mergers that result in over-concentration of United States markets. The panel ignored these decisions.

These Supreme Court cases establish two fundamental themes with respect to merger legality. First, they adamantly strive to prevent any "trend toward concentration," as forcefully explained by the Court in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966):

> Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.

Thus, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers." *Id.* As the Court put it in *Philadelphia Nat'l Bank*, 374 U.S. at 365, n.42, where market "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Second, the cases not only enjoined, but required divestiture, of mergers involving two direct competitors in concentrated industries, even where the increases

in market share of the combined entity were *slight*, in some cases, less than 2%. These two fundamental principles clearly establishing the law are echoed through each case.

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

In *Philadelphia National Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank in the market, with 36% of all assets. 374 U.S. at 330-31, 364. Moreover, the merger would have resulted in intense concentration of the market: the first and second largest firms would have controlled 58% of the market, and the top four firms would have controlled 77% of the market. *Id*. at 331. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant increase of concentration in the market, were both so high as to be *presumptively* illegal. Based on the "intense congressional concern with the trend toward concentration," the Court dispensed with the plaintiffs' need for "elaborate proof of market structure, market behavior, or probable anticompetitive effects" and instead established a presumption of illegality for any merger that results in a combined-firm market share of 30%. This case similar

market data as those deemed presumptively illegal in *Philadelphia National Bank*.

In *Alcoa*, 377 U.S. 271, the Supreme Court ordered Aluminum Company of America to divest itself of Rome Cable Corporation where Alcoa's market share of 27.8% had been increased by merely 1.3% through the acquisition of Rome. The decision was driven by what the Supreme Court considered to be unacceptably high levels of concentration in the aluminum wiring industry. In that case, Alcoa was the leading producer of aluminum conductor, with 28% of the market. *Id*. at 278. Alcoa plus Kaiser, the second leading competitor, together controlled 50% of the market. *Id*. The top three competitors had a combined market share of 76%. *Id.* Nine firms in total – including Rome with only 1.3% of the market – controlled 95% of all aluminum created in the United States. *Id*. In the narrower submarket of insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures, the Supreme Court deemed both of these markets "highly concentrated." The market concentrations in the present case are almost identical.

Continental Can, 378 U.S. 441, concerned the market for glass and metal containers with the following competitive positions: American Can (26.8% market share), Continental Can (21.9%), Owens-Illinois Glass (11.2%), Anchor-Hocking Glass (3.8%), National Can (3.3%) and Hazel-Atlas Glass (3.1%). 378 U.S. at 461, n.11. Some 125 other firms manufactured the remaining 30% of the market units. *Id*. at 445-446 (75 to 90 other firms manufacturing metal containers; 39 other firms

manufacturing glass containers). The 2nd largest competitor, Continental Can, acquired the 6th competitor, Hazel-Atlas. The acquisition would have only increased Continental's market share from 21.9% to 25%, and it still would not have become the largest player in the market. Nevertheless, the Supreme Court ordered divestiture. It reasoned that the acquisition not only increased Continental's market share by 14%, it also "reduced from five to four the most significant competitors who might have threatened its dominant position." 378 U.S. at 461. The resulting percentage of the combined firm of 25% "approaches that held presumptively bad" in *Philadelphia National Bank*, "and is almost the same as that involved in [*Alcoa*]." *Id.* Thus, the Court held, "[t]he case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 346). The trend toward concentration and the resultant market shares in the present appeal dwarf those found in *Alcoa*.

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

Supreme Court stated that "the basic purpose" of the law "was to prevent economic concentration in the American economy by keeping a large number of small competitors in business," *id*. at 275, and that "congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *Id*. at 277. In his concurring opinion, Justice White interpreted the majority decision as establishing the following rule:

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

Id. at 281 (White, J., concurring). Here, the top four firms, now control nearly 90% of the market.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court again ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550. "In accord with" the cases already discussed above, the Court "h[e]ld that the evidence on competition ... was sufficient to show a violation of § 7 ...." *Id*. at 551-52. As in *Von's*, the Court relied heavily on evidence indicating that the merger had taken place "in an industry marked by a steady trend toward economic concentration," *id*. at 550, and then went on to "hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." *Id*. at 552-53.

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

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

There is little question that, under the authority of these cases, an order of divestiture must ultimately be mandated in this case. First, the airline industry is highly concentrated: The top four firms have a combined 87% of all sales and the number of competitors gone from seven to four in just a few years: in 2008, Delta, merged with Northwest; in 2010, United and Continental merged to create the then-largest airline in the world; in 2011, Southwest merged with low-cost carrier, AirTran; and in 2013, American Airlines and US Airways merged, creating a new largest airline in the world.

The decisions by the Supreme Court of the United States should and must be honored. In Section 7 cases, regardless of whether a particular judge or panel agrees or disagrees with those decisions, the Supreme Court has emphasized that a trend toward concentration, even

in situations with very small market percentages, was and is a primary concern of Congress and that should and must be followed.

II. THE PANEL OVERLOOKED OR IGNORED THAT LESSENING OF COMPETITION IS PRECISELY THE TYPE OF INJURY THE ANTITRUST LAWS ARE INTENDED TO PREVENT

The panel erred in holding that "Appellants' asserted injuries are limited, however. They offer no evidence of threatened or actual specific injuries to themselves, and proffer no support for their generalized claims of injury to consumers and competition." (Opinion at 2.) In *California v. American Stores Co.* 492 U.S. 1301, 1304-1305 (1989), Justice O'Connor held that, "lessening of competition 'is precisely the type of irreparable injury that injunctive relief under Section 16 of the Clayton Act was intended to prevent.'" In other words, the lessening of competition is the injury to a consumer.

In *California v. American Stores*, 492 U.S. at 1304, Justice O'Connor held that the private plaintiffs had "made an adequate showing of irreparable injury" to the consumers of California through a lessening of competition. The applicant therein, California's attorney general brought the action on behalf of himself and *parens patriae* as a private plaintiff. *Id.* at 1302. Nothing in Justice O'Connor's decision required the attorney general himself to demonstrate injury by listing the specific grocery stores where he shopped, how much he spent there, or some other similar showing.

Plaintiffs are individuals who are passenger and travel agents who have purchased airline tickets from Defendants in the past and who are expected to do so in the future. They are threatened with losses by

reason of Defendants' merger in violation of Section 7 of the Clayton Act in the form of significant threats of higher prices for fares, diminished services, loss of flights, curtailment of capacity of aircraft and available seats, deterioration of quality of service, and lessening of competition. The injuries alleged in the Complaint were summarized in Appellants' Opening Brief at 33-35. The panel overlooked these allegations, including the allegation that the merged entity intended to and did in fact, end service at Dallas-Fort Worth.

In reality, any argument as to whether Plaintiffs, individually and personally, will be harmed by this merger is tantamount to a challenge of Plaintiffs' standing. But Plaintiffs' standing to bring this action is clear, having been settled in two cases in the Northern District of *California, Reilly v. Hearst Corp.*, 107 F.Supp.2d 1192, 1194-95 (N.D. Cal. 2000) and *Reilly v. MediaNews Group, Inc.*, 2007 WL 1068202 (N.D. Cal. Apr. 10, 2007).

III. THE PANEL'S OPINION OVERLOOKS OR MISAPPREHENDS THAT PLAINTIFFS DID NOT DELAY IN FILING THEIR ACTION

The panel's opinion holds that, "In addition, as the district court noted, Appellants delayed filing suit until roughly seven months after learning of the proposed transaction, and thus allowed the deal to close.." (Opinion at 2.) But Plaintiffs filed their Complaint just one week after the DOJ announced it had closed its investigation. (See Op. Br. at 25-28). The panel ignored the conflict of law that 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. The panel's decision ignores and fails to address this conflict of law within this Circuit.

IV. THE PANEL'S DENIAL OF PLAINTIFFS' REQUESTS FOR JUDICIAL NOTICE OVERLOOKS OR MISAPPREHENDS THAT FEDERAL RULE OF EVIDENCE 201 REQUIRES AN OPPORTUNITY TO BE HEARD

The Panel's decision declined to "take notice of Appellants' other submitted materials because they are either inappropriate for judicial notice under Federal Rule of Evidence 201 and/or irrelevant under Rule 401." Under Federal Rule of Evidence 201, "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." The panel denied Plaintiffs the opportunity to be heard on the propriety of judicial notice and the nature of the fact to be heard because it denied Plaintiffs request for oral argument[1]. The Panel overlooked or misapprehended that Federal Rule of Evidence 201 provides explicitly for a right to be heard.

[1] After the panel issued its notice that the matter would be submitted without oral argument, Plaintiffs filed a motion requesting oral argument, which was denied by the Panel.

V. IN RULING THAT AMENDMENT WOULD BE FUTILE, THE PANEL OVERLOOKED OR MISAPPREHENDED THE MATERIALS PLAINTIFFS SUBMITTED FOR JUDICIAL NOTICE

In the briefing, Appellants argued that the lower court erred by denying leave to amend the complaint[2]. But the Panel held that, "Appellants have neither proposed any specific amendments that would redress the fatal defects in their plea for relief nor request any other form of remedy…" (Opinion at 3.) The Panel overlooked and/or misapprehended that Plaintiffs submitted a number of news articles which reported price increases following the merger and service reductions, all of which include facts that could be alleged in an amended complaint[3]:

- USA Today Article, January 20, 2012, "Southwest Announces Which AirTran Cities 'Make the Cut.'" (May 8, 2012, Request for Judicial Notice ("First RJN," Exhibit D).
- Cheapflights.com Article, July 28, 2011, "Southwest Cuts Several Routes." (First RJN, Exhibit E).
- Pittsburgh Tribune-Review, September 8, 2011, "Southwest Cuts to Pinch Employees." (First RJN, Exhibit F)

[2] In the lower court, Plaintiffs amended their complaint once, but this was as a matter of right, before Defendants filed their motions to dismiss. The court refused to grant Plaintiffs' leave to add additional factual allegations to their complaint.

[3] Additionally, the panel's opinion erroneously states that Plaintiffs, "have already amended their pleadings and litigated the availability of divestiture twice without success." (Opinion at 3.) But it is not clear what the Court is referring to, since this appeal is the first time this issue has been briefed. This is the first time Plaintiffs have "litigated the availability of divestiture."

- Bloomberg Businessweek, April 2, 2012, "Forget Gas Prices—Air Fares are Getting More Painful." (First RJN, Exhibit G)
- Tulsa World, March 27, 2012, "Southwest Airlines Has No Plans for Furloughs, CEO Tells Workers." (First RJN, Exhibit H)
- Reuters.com, February 2, 2012, "Delta Says Unit Revenue Up, May Cut Jobs." (First RJN, Exhibit I)
- Dallas News, March 16, 2012, "Chicago Tribune: American CEO is Open to Merger, but Not Now." (First RJN, Exhibit J)
- USA Today, April 22, 2012, "American Merger Could Mean Higher Fares, Analysts Warn." (First RJN, Exhibit K).

Additionally, Plaintiffs submitted a Request for Judicial Notice of a June 19, 2012, GAO Report entitled, "Airline Mergers: Issues Raised by the Proposed Merger of American Airlines and US Airways." The panel overlooked or misapprehended that this report includes highly relevant information regarding the anticompetitive effects of Defendants merger, capable of accurate and ready determination (as it is a publicly available document published by a governmental agency), including the following:

> Finally, DOJ and DOT's analysis of merger impacts have relied on an expectation that entry by low cost airlines, especially Southwest, would check airline fare increases following a merger. However, that practice might erode as Southwest expansion has slowed and it recently merged with a key low cost rival, reducing the number of low cost airlines that might challenge post merger fare increases.... More recently though, a 2013 study suggests that the Southwest Effect may not be as prominent following a merger. This study found that Southwest raised fares in markets

> following the mergers of Delta–Northwest and US Airways–America West more than average fare increases overall, unless another low cost airline was already in that market. The merger of Southwest with a key rival in 2011 could further lessen the potential that Southwest would deter or counteract higher fares in markets following a merger.

January 8, 2014, Request for Judicial Notice, Exhibit D at p. 8.

VI. THE PANEL'S DENIAL OF ORAL ARGUMENT WAS A DENIAL OF DUE PROCESS

On January 2, 2014, the Court advised the parties that this appeal would be submitted without oral argument under Federal Rule of Appellate Procedure 34(a)(2). On January 10, 2014, Plaintiffs filed a demand for oral argument, arguing that oral argument should be held as a matter of due process. The panel denied Plaintiffs request. The panel overlooked or misapprehended that this denial resulted in a denial of due process to Plaintiffs, including the denial of the opportunity to be heard on the requests for judicial notice as required by Federal Rule of Evidence 201.

CONCLUSION

For the reasons set forth above, the Court should grant rehearing or rehearing *en banc*.

Respectfully submitted:

March 4, 2014

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc:

Proportionately spaced, has a typeface of 14 points or more and contains 4,033 words

March 4, 2014

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