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' REPLY BRIEF

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SUMMARY OF ARGUMENT

In *California v. American Stores* (1990) 495 U.S. 271, 296, the United States Supreme Court held that § 16 of the Clayton Act authorizes the remedy of divestiture for private plaintiffs alleging

violations of § 7 of the Clayton Act. Instead of affirming the right of a private litigants to seek divestiture under § 16 of the Clayton Act, subsequent decisions have eroded that right. These holdings have stripped down the availability of that remedy into virtual nonexistence.

Ginsburg v. InBev NV/SA (8th Cir. 2010) 623 F.3d 1229 and *Garabet v. Autonomous Technologies Corporation* (C.D. Cal. 2000) 116 F.Supp.2d 1159, bar a private plaintiff's right to injunctive relief even before a merger closes. These cases were relied upon by the district court in its decision and are one example of the way the right has been improperly limited.

The decision of the lower court is a non sequitur. Divestiture must available as a remedy after a merger is consummated. Even the lower court Judge was confused by cases holding that a plaintiff is barred from permanent injunctive relief before a merger has closed:

> The Court: ….I am somewhat confused, I'll tell you, why the law provides the remedy of divestiture and seems to take it away post-merger. It seems to me it's inconsistent to provide that as a remedy in the law and not allow it post-merger. (II ER 68:13-24.)

Ginsburg and *Garabet* contradict the law of this Circuit. The lower court and *Ginsberg* rely on *Garabet,* 116 F.Supp.2d 1159*,* which held that laches barred plaintiffs' claim. As detailed in the Opening Brief (at 14-20), the law of this Circuit requires application of a presumption against laches for actions filed within the analogous statute of limitations period. The court in *Garabet* did not apply the presumption against laches. Even if, as Defendants argue, the lower court held that the filing of the action one-day after the merger closed tipped the balance of equities in Defendants favor, this argument cannot be reconciled with the prior case law of this Circuit as it relates to laches because presumptively, Plaintiffs did not unreasonably delay bringing their action.

If this Court adopts the flawed reasoning of *Ginsburg v. InBev NV/SA,* it will effectively abandon the case law of this Circuit applying a presumption against laches to actions filed within the analogous statute of limitations. The court in *Ginsburg* engaged in an incomplete laches analysis and improperly went on to hold that an action for permanent injunctive relief not barred

by laches is barred by balancing the equities in Defendants' favor for "delay" in filing an action, even before a merger closes. The Defendants ask this Court to adopt the reasoning in *Ginsburg* to circumvent the test for laches.

Private plaintiffs' right to injunctive relief under § 16 of the Clayton Act has been improperly limited by holdings that private litigants do not have standing until agency review is complete. *Cassan Enterprises, Inc., et al. v. Avis Budget Group, et al.* (W.D.WA March 15, 2011), Case No. C10-1934-JCC, which is discussed in the Opening Brief (at 25-28), held that a private litigant does not have standing to bring an action for relief under § 16 of the Clayton Act until after agency review is complete. Defendants do not address this decision directly and its conflict with the decision of the lower court and the decision of the court in *Ginsburg*. Taken together, *Ginsburg* and *Cassan,* deprive a private litigant of any time to file an action.

Defendants also raise the issue of relevant product market, arguing that Plaintiffs have failed to allege a plausible relevant market. In support of that argument, Defendants cite the district

court decision in *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). That decision, which is currently on appeal before this Court, considered judicial estoppel and overlooked the admissions by airlines in *In re Air Passenger Computer Reservation Systems* (C.D. Cal. 1988) 694 F.Supp. 1443, wherein airlines admit the existence of a national market for air transportation. The court did not apply the admissions of the airlines in *In re Air Passenger Computer Reservations* to the "plausibility" requirements of *Twombly*.

Moreover, the *In re Air Passenger Computer Reservations Systems* case was not brought to this Court's attention when it rendered its decision in *Malaney v. UAL Corp* (2011) 434 F.App'x 620 (9th Cir.), cert. denied, 132 S.Ct. 855.

Cases addressing the timeframe for filing actions for permanent injunctive relief under § 16 of the Clayton Act improperly limit this important right. This case presents the Court with an opportunity to provide clarity to an issue that has

become muddied by courts' increasing unwillingness to recognize a remedy that has been affirmed by the Supreme Court.

ARGUMENT

I. PLAINTIFFS ARE NOT BARRED AS A MATTER OF LAW FROM SEEKING PERMANENT INJUNCTIVE RELIEF

A. The Cases Cited By The District Court Cannot be Reconciled with the Law of this Circuit because They Bar Plaintiffs' Claims on the Basis of Laches Without Considering the Analogous Statute of Limitations

Since the beginning of this action, the lower court's focus has been on the timing of Plaintiffs' action. The timing of Plaintiffs' action and whether any delay in bringing suit bars that action, necessarily implicates the doctrine of laches. At the hearing on the motion to dismiss, the court's emphasis was clear:

> The Court: But time has been a problem for the plaintiffs having started the lawsuit at the very beginning. I am somewhat confused, I'll tell you, why the law provides the remedy of the divestiture and seems to take it away post-merger. It seems to me it's inconsistent to provide that as a remedy in the law and not allow it post-merger. So it seems to me that that's something that I'm trying to sort out. But even if I allow that a private litigant can seek that, and the Supreme Court has said that it does, it hasn't said that I shouldn't take into consideration the timing at which divestiture is sought. (II ER 68:9-24.)
>
> The Court: …Assume as it's true that they have the right to equitable remedies, the argument is that, number one, they

> were tardy in coming to the Court with their request. (II ER 55: 11-13.)
>
> The Court: My question had to do with private litigants in general, in other words, if I'm trying to set up the law with respect to what is a timely action. (II ER 36:20-23.)
>
> The 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. (II ER 67:24-25; 68:1-2.)
>
> The Court: Was there anything that precluded the Plaintiffs here from bringing this case back in September of 2010 when the merger was announced? (II ER 63:14-17.)

Defendants' argument that the district court did not dismiss Plaintiffs' claims on the basis of laches is a distortion of the court's holding. The district 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 support of that decision, the court cited *Ginsburg,* 623 F.3d 1229 and *Garabet,*116 F.Supp.2d 1159. (I ER 10:13-18; 11:10-19; 12:1-2.) Both of these decisions address laches. Tellingly, Defendants' Answering Brief omits a discussion of *Garabet*, which barred plaintiffs' claim on the basis of laches. Also, *Ginsberg*,

relied upon substantially by Defendants, cites *Garabet* in support of its holding.

Finally, even if the district court, as Defendants' argue, held instead that the post-merger filing tipped the balance of equities in Defendants' favor, this argument cannot be reconciled with this Court's decisions in *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, and *Internet Specialties West, Inc. v. Milon-Digiorgio Enterprises* (9th Cir. 2009) 559 F.3d 985.

The test for laches is two-fold: first, was the plaintiffs' delay in bringing suit unreasonable? Second, was the defendant prejudiced by the delay? (citations omitted) As to whether [the plaintiff] was diligent, we must first decide whether it filed suit within the applicable four-year statute of limitations period thereby creating a presumption against laches. *Internet Specialties West,* 559 F.3d at 990.

The law of this Circuit, as in *Jarrow, Aurora,* and *Internet Specialties West,* is that presumptively, laches will not apply to

actions filed within the analogous statute of limitations period. Plaintiffs' next-day, post-merger filing cannot tip the balance of equities in Defendants' favor where laches is presumptively inapplicable and Plaintiffs' delay not unreasonable. The argument Defendants ask this Court to adopt does not comport with the law of this Circuit. The lower court's balancing of the equities was tainted by its erroneous conclusion that Plaintiffs' had improperly delayed filing their action.

i. The Lower Court Relied on *Garabet* Which Held that Plaintiffs' Claim Was Barred by Laches

Defendants do not address the lower court's reliance on *Garabet* because the court in *Garabet* held that plaintiffs' claim was barred by laches. *Garabet,* 116 F.Supp.2d at 1234, expressly held that, "the doctrine of laches bars plaintiffs equitable remedies."

The district court cited *Garabet* holding that:

> Likewise, in Garabet the Central District of California considered a lawsuit brought by private plaintiffs who waited to file suit until the day on which the merger of two corporations was consummated. Garabet, 116 F.Supp.2d at 1163, 1173. The court explained that the plaintiffs' delay in bringing their suit 'makes [the remedy of divestiture] unavailable.'…Therefore, the court concluded that

> divestiture was 'barred as a matter of law.' (I ER 11:10-13; I ER 12:2.)

The lower court's reliance on *Garabet* is misplaced and is discussed at length in the Opening Brief because of its failure to apply the law of this Circuit—the presumption against laches. (See Opening Brief 20-23; See *Jarrow Formulas, Inc.,* 304 F.3d 829; *Aurora Enterprises, Inc.,* 688 F.2d 689, 694; *Internet Specialties West, Inc.,* 559 F.3d 985.

Defendants rely substantially on *Ginsburg* to support their argument but insist that the holding does not rest on laches. The court in *Ginsburg* held that, "When dealing with transactions of this nature, these were *inexcusable delays*." *Ginsburg,* 623 F.3d at 1235. [Emphasis added.] (Referring to plaintiffs' filing their action two months after the defendants had announced their intent to merge and plaintiffs' filing their motion for a preliminary injunction before the scheduled closing of the merger.)

Whether or not delay is unreasonable or "inexcusable" is the first prong of the test for laches in this Circuit. *Internet Specialties West,* 559 F.3d at 990. The *Ginsburg* court relied on

the reasoning of *Garabet,* which held that plaintiffs' action was barred by laches and ignored the authority of this Circuit.

Additionally, the court in *Ginsburg* ignored its own prior authority. In *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.* (8th Cir. 2004) 392 F.3d 265, examined more fully in the Opening Brief (pp 18-20) and which considered the analogous statute of limitations in a § 16 case involving an airline merger, the *Ginsberg* court entirely failed to address the analogous statute of limitations and its own prior holding in *Midwestern Machinery.*

Plaintiffs' discussion of laches is not at all "puzzling" when the cases cited by the lower court are reviewed.

ii. *Ginsberg* and *Garabet* Cannot be Reconciled with the Authority of this Court

Even if the district court, as Defendants' argue, held that the delay in filing tipped the equities in Defendants' favor, this holding cannot be squared with this Court's decisions in *Aurora, Jarrow Formulas* and *Internet Specialties West.*

The test for laches is two-fold: first, was the plaintiffs' delay in bringing suit unreasonable? Second, was the defendant

prejudiced by the delay? (citations omitted) As to whether [the plaintiff] was diligent, we must first decide whether it filed suit within the applicable four-year statute of limitations period thereby creating a presumption against laches. *Internet Specialties West,* 559 F.3d at 990.

In this Circuit, presumptively, laches does not apply to actions filed within the analogous statute of limitations period. Plaintiffs' filing of their action one day after the closing of the merger cannot tip the balance of equities in Defendants' favor where laches is not applicable— because Plaintiffs have not unreasonably delayed bringing their action. If an action is not barred by laches and delay is not unreasonable, the timing of the action should not then tip the balance of equities in defendants' favor.

B. Irreparable Injury

Defendants argue that Plaintiffs have not pled irreparable injury because Plaintiffs have not pled a cognizable relevant

market and because Plaintiffs' allegations of irreparable injury are deficient. Plaintiffs have pled a cognizable relevant market for the reasons discussed more fully in Part, III.

In *In re Air Passenger Computer Reservation Systems,* 694 F.Supp. 1443, airlines, including United airlines and Continental airlines' expert, admit the existence of a national market for air transportation. A national relevant market for air transportation must be "plausible" within the meaning of *Twombly* when competitors in the industry have acknowledged its existence and have prevailed in previous litigation on that position.

Moreover, Plaintiffs have alleged a lessening of competition, which is 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. Defendants entirely overlook Plaintiffs' specific allegations of lessening of competition. (Opening Brief at 32-35.)

Defendants also argue that the allegations that "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" (II ER 94; FAC ¶ 6) are conclusory and that there are no factual allegations to indicate their future or past travel plans or histories. Assuming, *arguendo,* that this is a defect in the complaint, leave could have and should have been granted to cure it.

C. Remedies at Law Are Inadequate

In *American Stores,* the Supreme Court recognized that lessening of competition is the kind of injury that the antitrust laws were intended to prevent. *American Stores Company,* 492 U.S. at 1304. The irreparable injuries and anticompetitive effects alleged by Plaintiffs are detailed at Opening Brief 32-35; 44-48. These injuries, also detailed in Plaintiffs' Motion for a Temporary Restraining Order, include curtailment of service and elimination of routes, in addition to the end of service at Dallas-Fort Worth. (I Supp ER 9; 41-49.) Competition and lost services cannot be restored through the payment of money damages. Following Defendants' flawed reasoning, every antitrust violation would be fully compensable by monetary damages.

II. UNDER *GINSBURG* AND *CASSAN,* THE TIME PROVIDED FOR BRINGING CLAIMS UNDER § 16 OF THE CLAYTON ACT IS UNREASONABLE

Defendants do not directly address the inconsistency in the law that exists in filing private actions for relief under § 16 of the Clayton Act. Decisions barring injunctive relief even before a merger has closed, like *Garabet* and *Ginsberg,* cannot be reconciled with the Washington District Court's decision in *Cassan*, which 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.

It is impossible for a Plaintiff bringing an action for injunctive relief under §16 of the Clayton Act to follow the holding in *Cassan*, waiting until agency review has been completed, while at the same time filing an action as soon as possible after an intent to merge is announced, as required by the holdings in *Garabet* and *Ginsberg*.

The timing for actions brought under § 16 of the Clayton Act is at issue in this case. The erroneous decisions in *Garabet* and *Ginsburg,* barring plaintiffs' claims before a merger closes, coupled

with the court's decision in *Cassan,* renders permanent injunctive relief for a private litigant under this section impossible to obtain.

III. PLAINTIFFS HAVE PLED A PLAUSIBLE RELEVANT MARKET

Plaintiffs have pled a plausible relevant product market. The national market for air transportation is the same relevant market acknowledged by United, Continental and American airlines in *In re Air Passenger Computer Reservation Systems* (C.D. Cal. 1988) 694 F.Supp. 1443.

Defendants rely extensively on this Court's decision in *Malaney v. UAL Corp.* (9th Cir. 2011) 434 F.App'x 620, cert. denied, 132 S. Ct. 855 and *Malaney v. UAL Corp.,* (N.D. Cal. 2011) No. C 10-02858 RS, 2011 WL 6845773), however, the admissions of airlines *In re Air Passenger Computer Reservation Systems* were not discovered by plaintiffs until after this Court rendered its decision in *Malaney,* and thus they were not brought to this Court's attention before it issued its opinion.

The district court's decision, which is currently on appeal before this Court, reviewed *In re Air Passenger Computer Reservation Systems* as it related to judicial estoppel and failed to

address the admissions by the airlines in *In re Air Passenger Computer Reservations Systems* as they relate to the "plausibility" of a national market for air transportation. A relevant market acknowledged and relied upon by competitor airlines in previous litigation must be a "plausible" one within the meaning of *Twombly.*

A. Airlines in *In Re Air Passenger* Admit the Existence of a National Air Transportation Market

In *In re Air Passenger Computer Reservation Systems,* 694 F.Supp 1443, Continental and other airlines brought an action against United and other competitors alleging antitrust violations and attempts to monopolize certain air transportation markets and computerized reservation systems. In that case, Defendant United moved for summary judgment against Plaintiff Continental, claiming that "the *only* relevant air transportation market is the national market." *Id* at 1472. [Emphasis added.] The court, agreeing with United, granted United's Motion for Summary Judgment re: monopolization of national air transportation market, various local air transportation markets and certain local CRS markets, and noted that, "In this case there

is no dispute that the national CRS market and the national air transportation market are distinct markets for antitrust purposes." *Id.* at 1474.

United prevailed in *In re Air Passenger Computer Reservations Systems* acknowledging the existence of the national market for air transportation--the very same relevant market that Defendants claim cannot support a § 7 claim in this case. Other airlines in *In re Air Passenger Computer Reservations Systems* acknowledged a national relevant market for air transportation. "The USAir plaintiffs have acknowledged that the national market is the only relevant air transportation market in this case." *In re Air Passenger Computer Reservations Systems Antitrust Litigation,* 694 F.Supp. at 1467.

Continental's expert recognized the ability of airlines to compete anywhere it would be profitable to do so through the availability of slots at airports and testified that a city-pair cannot be a relevant market absent unusual circumstances:

> In fact, Continental's own expert (Franklin Fischer) testified that a city pair cannot be a relevant market absent unusual circumstances, such as slot-constrained airports and the absence of a market for slots at those airports. Plaintiffs'

> expert Fischer has also stated that a city or hub cannot constitute a relevant market either.

In re Air Passenger Computer Reservations Systems Antitrust Litigation, 694 F.Supp. at 1468.

B. The Lower Court in *Malaney* Did Not Address the Admissions of Airlines in *In Re Air Passenger Computer Reservation Systems*

Defendants make much of the court's decision in *Malaney v. UAL Corp.,* (N.D. Cal. 2011) No. C 10-02858 RS, 2011 WL 6845773), which is currently on appeal to this Court. However, Defendants fail to address the airlines admissions regarding the national air transportation market in *In Re Air Passenger Computer Reservation Systems*. The district court in *Malaney*, only reviewed *In Re Air Passenger Computer Reservation Systems* in determining whether the doctrine of judicial estoppel applied to the case. The lower court did not consider the defendants' admissions in that case as it related to the "plausibility" requirements of *Twombly.* At minimum, Plaintiffs have met the requirements of Rule 8 and *Twombly* in pleading the same relevant market relied upon by airline defendants in a prior proceeding in which they prevailed.

C. The Commercial Realities of the Industry are that Defendants Operate on a National Level

In *Brown Shoe,* the Supreme Court recognized the importance of "examining such practical indicia as industry or public recognition" in determining market definitions. *Brown Shoe Co. v. U.S.* (1962) 370 U.S. 294, 325. Airlines have acknowledged a national relevant market for air transportation in *In re Air Passenger Computer Reservations Systems Antitrust Litigation,*694 F.Supp. at 1467.

The commercial realities of the industry are the major factors in determining the relevant geographic market. *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.* (9th Cir. 1986) 794 F.2d 1359, 1363. The commercial realities of the airline industry are such that Defendants operate on a national level—including national planning, marketing, and fare increases.

In *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 576, the defendant was accused of monopolizing a local market for the provision of home security services. The court, rejecting the argument that the relevant geographic market was local recognized, "that the business of providing such a service [home

security services] is operated on a national level." They further considered the fact that defendant engaged in national planning, was subject to inspection, certification and rate-making by national insurers, and had a national schedule of prices, rates, and terms, although such rates could be varied to meet local conditions, and it dealt with multistate businesses on the basis of multistate contracts. *Id.* at 576. And just as Defendants in this case operate on a national level, the appropriate relevant market is the national air transportation market.

D. A National Market for the Transportation of Air Passengers is Consistent with a Line of Binding Supreme Court Precedent

The Supreme Court has likened the importance of the enforcement antitrust laws to the Bill of Rights:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete-to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a

> more important sector of the economy. (citation omitted) *U.S. v. Topco Associates, Inc.* (1972) 405 U.S. 596, 611[1].

Earlier, the Supreme Court issued decisions in a series merger cases, which have never been overruled. These decisions set forth the rules regarding definition a relevant market, are not being followed.

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

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[1] Justice Marshall, who wrote the *Topco* opinion, also represented plaintiffs in *Brown v. Board of Education* (1954) 347 U.S. 483, which was decided by the court that ruled on the line of merger cases discussed herein.

Supreme Court has never demanded such specificity in defining a relevant market, and there is *no* requirement that every product within the market be a substitute for every other product from the perspective of the consumer. This fundamental guiding principle is apparent in almost every Supreme Court decision since the Clayton Act's amendment in 1950.

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

proposed rule, holding that "it is [not] a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market." *Id.*

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

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

Brown Shoe, 370 U.S. at 325.

The "outer boundaries of the product market" in *Brown Shoe* consisted of *all* "footwear." 370 U.S. at 326 (holding that submarkets consist of men's, women's, and children's shoes implies per force that the overall market is all footwear). This

market included within it men's, women's, and children's shoes – products that plainly do not serve perfectly interchangeable end uses for consumers. For instance, a grown man faced with escalating men's shoe prices cannot turn to infants' boots as a substitute. But, this overall "footwear" market was nevertheless defined with respect to "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Although unstated in the opinion, the rationale of the holding demonstrates that the Court defined the overall market with respect to the broad, general purpose served by shoes – to cover and/or protect the feet.

Moreover, within this overall "footwear" market, *Brown Shoe* identified submarkets of "Men's," "Women's," and "Children's" shoes. *Brown Shoe*, 370 U.S. at 326. But even these submarkets included non-interchangeable substitutes. For instance, the defendant argued that "children's shoes [does not] constitute[ ] a single line of commerce" since "a little boy does not wear a little girl's black patent leather pump," and "a male baby cannot wear a growing boy's shoes." *Id.* at 327. The Supreme

Court rejected these arguments, reasoning that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Id.* at 326.

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

market areas, and, most importantly, different types of competitors and competition." *United States v. Philadelphia Nat'l Bank* (E.D.Pa. 1962) 201 F.Supp. 348, 361. Again, the Supreme Court rejected these arguments, determining with "no difficulty" that the relevant market included all the non-interchangeable products and services denoted by the general term "commercial banking." 374 U.S. at 356.

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

judged by the *general* purpose served by the product at issue, in *Alcoa*, "the purpose of conducting electricity." *Id.* at 277.

Similar reasoning was applied in *United States v. Continental Can Co.* (1964) 378 U.S. 441, a Section 7 challenge concerning an illegal merger of a glass bottle manufacturer and a maker of tin cans. In that case, the district court had held that the markets for glass containers and tin cans served different purposes and were therefore separate; thus, the merger did not threaten to lessen competition in any market. *Id.* at 444. The Supreme Court reversed, finding that both markets were part of the overall container market. *Id.* at 457. But, most important for present purposes was the existence of *thousands* of idiosyncratic end uses of glass and tin containers. As the district court noted:

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

United States v. Continental Can Co. (S.D.N.Y. 1963) 217 F.Supp. 761, 780. These "thousands" of different uses for containers were found in industries as varied as soft drinks, canning, toiletry, cosmetics, medicines and health, and chemicals. 378 U.S. at 447.

But, even though a soda-pop bottle is not a possible substitute vessel for a sardine canner, the Supreme Court had no trouble placing both containers into the overall market for purposes of judging the legality of the merger. The Supreme Court held, "we think the District Court employed an unduly narrow construction of … 'reasonable interchangeability of use or the cross-elasticity of demand' in judging the facts of this case." *Id.* at 452. The Court continued:

> We reject the opinion below insofar as it holds that these terms as used in the statute or in *Brown Shoe* were intended to limit the competition protected by § 7 to competition between identical products …. Certainly, that the competition here involved … is between products with distinctive characteristics does not automatically remove it from the reach of § 7.

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

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

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

Grinnell, 384 U.S. at 572.

These cases directly contradict the proposition that the United States airline market cannot exist because a "flight from San Francisco to Newark" is not a competitive substitute for a flight "from Seattle to Miami." The general purpose of commercial air carriage--the long-distance transportation of passengers—should be considered. But, requiring overly-detailed specificity within the airline market violates the Supreme court's direct admonition that "[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition, but to 'recognize competition where, in fact, competition exists.'"

Continental Can, 378 U.S. at 453 (quoting *Brown Shoe*, 370 U.S. at 326.) The conclusion that United, Continental, American, Delta, US Airways, Southwest and other airlines do not compete against one another in the United States is as unsupportable under the law as it is belied by common sense.

IV. AMENDMENT WAS IMPROPERLY DENIED

The lower court improperly denied further amendment. First, Defendants articulate an improper standard of review for the lower court's denial of amendment. Abuse of discretion is not the proper standard of review. The lower court held that amendment would be futile. (I ER 12:9.) Accordingly, 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 F.3d 876, 892-893.

Defendants argue that amendment would be futile because Plaintiffs have failed to plead a plausible relevant market and because no amendment could alter the balance of equities. Addressed above, Plaintiffs, having pled the same relevant

market acknowledged by airlines in the *In re Air Passenger Computer Reservations Systems* case, have pled a "plausible" relevant product market. Additionally, the balancing of equities approach of *Ginsburg* espoused by Defendants does not comport with the law of this Circuit as it relates to laches. Leave to amend was improperly denied by the district court.

CONCLUSION

Private litigants' right to relief under §16 of the Clayton Act has been improperly limited. In this case, this Court has the opportunity to correct a series of erroneous holdings. For the foregoing reasons, the decision of the district court should be reversed.

July 5, 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' Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 5,761 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES

1. *Malaney v. UAL Corp.,* United States District Court, Northern District of California, Case No. C 10-02858 RS, appeal docketed, No. 12-15182 (9th Cir. Jan 26, 2012).

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 July 5, 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 July 5, 2012.

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