No.

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

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

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL SEEKING TEMPORARY "HOLD SEPARATE" ORDER

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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.

MOTION

Pursuant to Federal Rule of Appellate Procedure 8(a), plaintiffs-appellants Michael C. Malaney, *et. al.*, by and through their undersigned attorneys, hereby move this Court for a "hold separate order" enjoining defendants UAL Corporation, United Air Lines, Inc. (collectively "United") and Continental Airlines, Inc. ("Continental"), their officers, directors, employees, agents, and all persons acting in concert with them or subject to their direction or control, from combining their assets, operation, or management in any way, pending appeal of the District Court's Order Denying Motion For Preliminary Injunction, filed September 27, 2010 (attached as Appendix).

The grounds for this motion are that the plaintiffs will suffer irreparable harm if the assets of the merged companies are not held separately; the threatened harm to the plaintiffs if the injunction is not issued greatly outweighs the threatened injury to the defendant if the injunction issues; there is a high probability that plaintiffs will succeed on the merits in establishing that the merger violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18; and the public interest strongly favors granting the preliminary injunction.

A "hold separate" order is a less drastic form of preliminary relief which permits the challenged transaction to go forward, but requires the acquiring company to preserve the acquired company as a separate and independent entity during the course of antitrust proceedings. *Federal Trade Comm'n v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075, n.7 (D.C. Cir. 1981). "The aim of such an order is to maintain an acquired unit as a viable competitor while the litigation unfolds, and to safeguard 'unscrambled' the assets acquired so that they may be divested effectively should the [plaintiff] ultimately prevail." *Id.*

NATURE OF URGENCY

United and Continental formally closed their merger this morning, October 1, 2010 at approximately 9:00 am PDT. Defendants have indicated that they will move swiftly to integrate their operations. The urgency of this emergency motion is aimed at temporarily stopping this integration through issuance of a "hold separate" order. Every day that lapses without such an order will increase the irreparable harm and the hardship of both the courts and the plaintiffs in "unscrambling" the merged entity should it be found illegal.

JURISDICTION

Plaintiffs are authorized to bring this motion under Federal Rule of Appellate Procedure 8(a)(2). Although Fed.R.App.P. 8(a)(1) requires that "a party must ordinarily move first in the district court" under Fed.R.Civ.P. 62(c), it authorizes parties to move in the Court of Appeals where "moving first in the district court would be impracticable." Fed.R.App.P. 8(a)(2)(A). The defendants closed their transaction hours ago, on the morning of October 1, 2010. On Monday, September 27, 2010, the district court denied plaintiffs' motion for preliminary injunction, which is based on a legal standard similar to the standard governing motions for injunctions pending appeal. Therefore, it is impracticable to move the district court for the requested relief because

(1) it has just denied plaintiffs' motion for preliminary injunction and would more than likely deny plaintiffs' motion for injunction pending appeal; and (2) there is insufficient time to move the district court, given the pending consummation of defendants' merger. 16 Wright, Miller, Cooper & Gressman, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3954 (1977) at 381, n. 5 ("[i]mpracticability of obtaining relief in the district court might be shown by the fact that ... the need for relief is so immediate that an application to the district judge would unduly prolong the crisis, or that prior actions or statements of the district judge indicate the improbability of any relief being granted") (citing, *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5th Cir. 1964).

This Court has jurisdiction over the underlying appeal of the district court's denial of plaintiffs' motion for preliminary injunction under 28 U.S.C § 1292(a)(1).

STATEMENT OF THE CASE

A. Nature of the Action

This is a private antitrust action brought by forty-nine airplane travelers seeking to enjoin as violative of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, the proposed merger of United Airlines and Continental Airlines. The merger is scheduled to close today, October 1, 2010. The merger would create the largest domestic airline in the United States.

B. Procedural History

Defendants announced their plans to merge on May 3, 2010. Plaintiffs filed their complaint on June 29, 2010. On August 9, 2010, plaintiffs moved the district court to preliminarily enjoin the defendants' merger. The district court conducted a two-day evidentiary hearing on August 31 and September 1, 2010. The parties each filed opening and reply memoranda with the district court, as well as various exhibits, affidavits, expert reports and designations of deposition transcripts. Oral argument and summation were conducted on September 17, 2010.

C. Disposition Below

On September 27, 2010, the district court entered an order denying plaintiffs' motion for preliminary injunction. The court based its decision on two conclusions: first, that plaintiffs failed to demonstrate they were likely to succeed on the merits or that there were serious questions going to the merits; and second, that plaintiffs failed to show they would be irreparably harmed or that the balance of hardships would tip in their favor. App. 13.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960, *available at* 2010 U.S.App.LEXIS 15537, *9 (9th Cir. 2010) (citing, *Winter v. Natural Res.*

Def. Council, ___ U.S. ___, 129 S. Ct. 365, 374 (2008)).[1] In *Alliance for the Wild Rockies*, this Circuit adopted a version of this standard referred to as the "serious questions" test, which posits that "'serious questions going to the merits'" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." *Id.* at *10-*11.

ARGUMENT

I. THE DISTRICT COURT IDENTIFIED, AND THEN REJECTED, A LINE OF BINDING SUPREME COURT CASES, RAISING AT LEAST A "SERIOUS QUESTION GOING TO THE MERITS"

Mergers that threaten the competitive vitality of United States markets are so vilified that Congress specifically wrote the statute to reach mergers whose anticompetitive effects were not *actually known*. Section 7 of the Clayton Act makes any merger illegal if its effect "*may* be substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Congress used the word "may" in formulating its "expansive definition of antitrust liability" (*California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990)), to "indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

In a series of decisions which have never been overruled, the Supreme Court established a resolute intolerance for mergers that result in over-concentration of United States markets. These decisions, if applied to the present case, would by themselves require the instant

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[1] Pin cites to the *Alliance for the Wild Rockies* opinion are only available in the electronic format.

merger to be enjoined. The district court here specifically identified these decisions and then refused to follow them. App. 11-12, 13.

Two central points are to be gleaned from these decisions. First, they adamantly strive to prevent "trends toward concentration": "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." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966). 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.* 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." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 365, n.42 (1963).

Second, these cases enjoined mergers between two direct competitors in industries marked by a trend toward concentration, *even* where the increases in market share of the combined entity were slight:

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 *United States v. Philadelphia Nat'l Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank, holding 36% of all assets in the area. 374 U.S. at 330-31, 364. The merger was enjoined.

In *United States v. Aluminum Co. of America* (*Alcoa*), 377 U.S. 271, 278 (1964), Alcoa's acquisition of Rome Cable would have increased Alcoa's market share by *less than 1.5%*, from 27.8% to 29.1%. The merger was enjoined.

In *United States v. Continental Can Co.*, 378 U.S. 441, 445-46 (1964), the Supreme Court enjoined a merger between the 2nd largest metal container company in the country, with a 33% share of the can market, and the country's 3rd largest glass container company, with a share of 9.6% of the glass container market.

United States v. Von's Grocery Co., 384 U.S. 270 (1966) involved the proposed merger of Von's, the 3rd largest retail grocery store in Los Angeles with a 4.7% market share, and Shopping Bag, the 6th largest grocery store controlling 4.2% of the market. The Supreme Court enjoined the merger.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966), the Supreme Court enjoined the merger of Pabst and Blatz, the 10th and 18th largest brewers in the United States, the combination of which would have resulted in just the 5th largest brewer with less than 5% of total domestic beer sales.

In *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner 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.

Applied to this case, these decisions all but mandate that the merger here be enjoined. First, the airline industry is marked by a pattern of ever-increasing concentration, having been distilled down to only 5 major airlines from 34 in the last twenty-five years. (Pl. Ex. 108, attached as Exhibit A to Appendix.) United is the third largest airline in the United States measured by 2009 revenue, with 16.7% of the United States network airline market, while Continental is the fourth largest airline in the United States measured by 2009 revenue, with 12.9% of the United States network airline market. *Id.* The combined airline will be the single largest airline in the world, with over a 29.6% share of the United States network airline market. *Id.*

The district court did not dispute that under these decisions, the merger here should be enjoined. Instead, it identified each of these Supreme Court cases (App. 12) and then specifically declined to follow them, stating that "plaintiffs' proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong." App. 13. This outright refusal to follow binding Supreme Court precedent properly supports a temporary injunction in order to review the underlying decision.

In support of its conclusion, the district court relied on only one Supreme Court decision, specifically *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). The district court stated that "*General Dynamics* separately held that market share statistics alone are 'not conclusive indicators of anticompetitive effects.'" App. 12 (citing *Gen. Dynamics*, 415 U.S. at 498).

However, in *General Dynamics*, the Supreme Court never overruled, or even questioned, its earlier decisions. In fact, the district court did not quote the entire passage from *General Dynamics*, which states the opposite proposition for which it was cited, that market share and concentration statistics are "of great importance":

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

415 U.S. at 498 (emphasis added). Finally, *General Dynamics* merely stated that market share statistics were not "conclusive" indicators of anticompetitive effects; this statement cannot, as a matter of law, support the district court's ruling, since plaintiffs are not required at the preliminary injunction stage to "conclusively" demonstrate anticompetitive effects.

By specifically rejecting an entire line of binding Supreme Court decisions which have been neither questioned nor overruled by the high court, the district court made a fundamental error of law which raises, at the very least, "serious questions going to the merits" of plaintiffs' case.

II. THE DISTRICT COURT ERRONEOUSLY APPLIED A HEIGHTENED STANDARD FOR PLAINTIFFS' SHOWING OF IRREPARABLE HARM, AND IT WEIGHED THE WRONG HARM WHEN BALANCING PLAINTIFFS' HARDSHIP

In its decision, the district court ruled that the plaintiffs "failed to demonstrate any irreparable harm as a result of the merger or that the balance of equities in this case tips at all, let alone sharply, in their favor." App. 23 (emphasis added). The ruling is premised on plain legal error.

First, the district court held that plaintiffs failed to establish that they will suffer any "significant harm." App. 22. But a showing of "significant harm" is not required (and no authority is given for it); rather, the district court seems to have conflated the terms from the Supreme Court's admonition that a plaintiff "need only demonstrate a *significant threat of injury* from an impending violation of the antitrust laws ...." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969) (emphasis added). So while there is a requirement that the *threat* of injury be significant, the law does not require a specific *degree* of harm.

The district court admitted that "each plaintiff submitted an affidavit stating that he or she has purchased, and plans to purchase, commercial airline tickets for personal use ...." App. 22. And, based on that, the district court found that plaintiffs indeed would sustain "antitrust injury." App. 22. That is to say, the district court conceded that plaintiffs would be harmed. That harm is irreparable, not compensable in money damages, because the provision under which plaintiffs have sued, Section 16 of the Clayton Act (15 U.S.C. §26), provides *only* for injunctive relief. The district court nowhere disputed that the harm suffered by plaintiffs was "irreparable." Accordingly, plaintiffs have shown irreparable harm.

But, the district court presented a litany of facts ostensibly showing that plaintiffs' harm was somehow less than "significant." App. 23. But there is, for example, no requirement that plaintiffs "hav[e] flown *regularly*" (*id.*) – only that they have flown and will continue to do so. The district court stated that "only one" of four plaintiffs who testified was "likely to use United or Continental." *Id.* But, all the plaintiffs testified that they had purchased airline tickets from defendants in the past and would continue to do so in the future. (9/1 Tr., 358:20-362:11; 377:22-384:8; 585:16-588:19; 609:17-618:14.) Moreover, the district court conceded, under even its flawed rubric, that one of four plaintiffs *was* likely to use United or Continenal and therefore would sustain "significant harm." The plaintiffs testified that they are consumers and buyers of airline tickets from defendants for business travel. (9/1 Tr., 358:20-362:11; 377:22-384:8; 585:16-588:19; 609:17-618:14.) Yet, the district court faulted them for not "traveling *regularly* for business." *Id.* (emphasis added). This is not the law. Having demonstrated that they were current consumers of airline tickets and probable future consumers, they adequately established irreparable harm.

Second, the district court also found that the balance of equities did not tip in plaintiffs' favor. App. 23. But in its balancing, the district court placed the wrong "harms" on the plaintiffs' side of the scale. Rather than consider the hardship plaintiffs and the courts would face in trying to unwind a consummated merger later found to be illegal, the district court instead weighed the injuries a plaintiff might later expect from transacting with a merged company – harms like the payment of higher prices for fares. The district court dismissed these harms totally out-of-hand, describing them as so "insufficient[ly] show[n]" that "the Court need not address" the issue at all. App. 24. But, the district court was incorrectly analyzing the plaintiffs' possible future *damages*, not the hardship associated with having to dismantle a multi-billion dollar merger involving tens of thousands of employees.

The district court should have placed on the plaintiffs' side of the scale the difficulty the courts and plaintiffs would face in having to *unscramble* a merger later found to be illegal. *Alliance for the Wild Rockies*, 613 F.3d 960, *27 ("[o]nce those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost"). Congress itself has sought to avoid the monumental task of unscrambling an anticompetitive merger, describing a pre-merger injunction as

> often the only effective and realistic remedy against large, illegal mergers – before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act.

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2637, 2627. The merger in this case involves "tens of thousands of employees" as well as the substantial comingling of each airline's "capital and technology." App. 24.

The defendants' side of the scale has grown lighter. This morning, the defendants' merger was formally consummated. Therefore, plaintiffs seek only a "hold separate" order, which is "less drastic" than a preliminary injunction. *Weyerhaeuser*, 665 F.2d at 1084. The decision below should be reviewed *before* these companies continue their march toward irreversible integration.

In short, the district court erred as a matter of law by requiring the plaintiffs to demonstrate some *quantum* of irreparable harm, rather than the fact of irreparable harm. Moreover, by confusing plaintiffs' potential future harm with the *hardship* of unscrambling a major merger, the district court completely failed to analyze the balance of hardships.

CONCLUSION

This motion is based entirely on questions of law. The decision below made three substantial legal errors, including the refusal to follow established Supreme Court precedent. Plaintiffs do not seek a lengthy stay – only the amount of time sufficient for this Court to review the decision below. Plaintiffs respectfully pray for an order of this Court temporarily requiring defendants to hold their assets separately until this Court can hear and rule on plaintiffs' appeal of the underlying decision on an expedited basis.

October 1, 2010

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael C. Malaney, et al.,

Plaintiffs,

vs.

UAL CORPORATION, UNITED AIR LINES, INC., and CONTINENTAL AIRLINES, INC.,

Defendants.

CASE NO. 3:10-CV-02858-RS

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Forty-nine individual plaintiffs seek a preliminary injunction under the Clayton Antitrust Act, pending a trial on the merits, to enjoin the merger of defendants UAL Corporation, United Air Lines, Inc. ("United") and Continental Airlines, Inc. ("Continental"), scheduled to close on October 1, 2010. The merger would create the largest domestic airline as measured in revenue, revenue passenger miles ("RPMs") and available seat miles ("ASMs").[1] Defendants have received all necessary regulatory approvals from the Department of Justice ("DOJ"), the Department of Transportation and the European Commission, as well as the approval of their respective shareholders. The parties have submitted a thorough record by way of a two-day evidentiary hearing, post-hearing closing arguments, and extensive briefing. After careful consideration of the record and arguments presented, the Court finds that plaintiffs have failed to satisfy the requirements for the extraordinary remedy of preliminary injunctive relief and therefore their motion must be denied.

II. BACKGROUND

A. Factual Background

1. *Defendants*

United and Continental are major airline carriers with extensive domestic and international operations. Both are considered "network carriers," characterized as airlines operating on a "hub-and-spoke" business model, and also "legacy carriers," which consist of airlines that existed prior to the 1978 deregulation of the airline industry. Tr. 238:16-19; Smisek Dep., 43:25-44:16. In the hub-and-spoke model, hub airports serve as transfer points through which travelers move between connecting flights as opposed to flying directly point-to-point. The network carriers, United, Continental, Delta Airlines, American Airlines, USAir and to some extent Alaska Airlines, are able

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[1] RPMs equal the number of miles flown by passengers, and are commonly used to measure airline size. One ASM equals one seat flown one mile, regardless of whether or not a passenger occupies that seat. ASMs are a common measurement of airline capacity.

to serve both large and small communities through their extensive route networks, and are distinguished from "low cost carriers" ("LCCs"), which traditionally have operated on a point-to-point basis, focusing on high density routes rather than small communities and utilizing a single aircraft type. Southwest Airlines, jetBlue, Spirit Airlines, Virgin America, Allegiant, AirTran Airways, Frontier Airlines and Sun Country Airlines, among others, are categorized as LCCs.[2] Despite the historical delineation separating the network carrier and LCC business models, a number of LCCs, such as AirTran and Frontier, have begun developing "hubbing networks" that resemble those of a network carrier, and some LCCs have begun to serve small community routes. Rubinfeld Report ¶ 12; Knight Aff. ¶ 7.

Since the passage of airline deregulation, capacity and output in the industry has increased significantly. The number of ASMs has grown from approximately 259 billion in 1978 to over 756 billion in 2007, decreasing to 681 billion in 2008 and 2009 due to poor economic conditions. Rubinfeld Report ¶ 13. Similarly, RSMs grew from 161 billion to 602 billion in 2007, before falling back to 551 billion in 2009. *Id.* During that time, inflation-adjusted airline fares have fallen. While a number of factors have contributed to this pattern of fare decline, a significant reason, according to Dr. Daniel Rubinfeld, defendants' expert, has been the entry and expansion of LCCs in the industry. *Id.* ¶ 16. As the evidence adduced during the hearing demonstrated, LCCs have significantly expanded the number of routes and cities that they serve, and have taken a correspondingly increased share of origin and destination ("O&D")[3] passengers, growing from 19.9% in 1998 to 37.7% in 2009.

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[2] Plaintiffs request that the Court take judicial notice pursuant to Rule 201 of the Federal Rules of Evidence of an announcement reported in the media on this date that two LCCs - Southwest and AirTran - intend to merge. While the Court will take judicial notice of that fact, it does not alter the analysis or result herein. In addition, plaintiffs request that the Court take judicial notice of a number of media reports concerning the current condition of the airline industry. The Court finds that those reports are outside the scope of Rule 201, and therefore plaintiffs' additional requests for judicial notice are denied.

[3] O&D passengers are those who are boarding or deplaning at a particular stop, as distinct from those remaining on the plane in order to continue to another destination.

Ex. 1020; Bush Dep. Tr. 86:4-17; Rubinfeld Rebuttal ¶ 19. Indeed, while a merged United and Continental (the third and fourth largest domestic carriers by RPMs and revenue, respectively) would be the largest domestic airline based upon it projected RPMs, revenue and ASMs, both parties agree that Southwest (an LCC) is the largest domestic carrier by O&D passenger share, a position it would continue to occupy after consummation of the merger. Ex. 1012; Bush Dep. Tr. 64:6-65:6.

United's domestic hubs are located in Los Angeles, San Francisco, Denver, Chicago O'Hare and Washington Dulles, while Continental operates domestic hubs in Houston (Bush International), Cleveland and Newark. In other words, of the eight domestic hubs that the merged entity will operate, none currently overlap between United and Continental. Of the extensive networks operated by the two airlines (the merged entity would serve 347 destinations, 889 nonstop domestic routes, and a substantial connecting route network), there are fifteen domestic non-stop city-pair overlaps, each of which is served by airline carriers other than defendants (including LCCs), and 113 connecting city-pair overlaps, only three of which would be served by only a single competitor following the merger, with the remainder facing competition from one or two other airlines. Knight Aff. ¶¶ 17, 19; Rubinfeld Report ¶ 104, Ex. 32.[4]

In their complaint, Plaintiffs make three claims regarding concentration at the airport and city level that will result from the merger. Compl. ¶¶ 72-80. First, they allege that there will be increased market concentration in four metropolitan areas (*i.e.*, Washington, D.C., New Orleans, San Diego, and Seattle). *Id.* at ¶ 72. Second, they identify seventeen airports that will experience excessive concentration. *Id.* at ¶ 73. Third, they allege that the merger will create monopolies, duopolies and oligopolies at a number of unnamed airports.[5] *Id.* at ¶¶ 76-80. In addition, Professor

[4] Dr. Rubinfeld identified connecting city-pair overlaps by focusing on airports where United and Continental each have at least ten percent of O&D passengers, have at least forty percent of O&D passengers on a combined basis, and where at least five passengers travel per day in each direction on the city pair. He considered another carrier to be a competitor if it had at least ten percent of annual O&D passengers.

[5] Notwithstanding the allegations in their complaint, plaintiffs provided no explanation for, or evidence to suggest why, concentration at *airports* as opposed to *airport-routes* was significant.

Darren Bush, plaintiffs' expert, identified thirteen airport-pair overlaps at which United and Continental is each present that he believes would become highly concentrated as a result of the merger. Bush Report at 3. Of the four identified metropolitan areas, the merged United/Continental entity would carry fewer than twenty percent of O&D passengers, with Southwest or Alaska Airlines controlling the largest market share in each. Rubinfeld Ex. 30. Of the seventeen airports identified in the complaint and the thirteen airport-pairs identified by Professor Bush, each will be served by multiple other carriers, including LCCs.[6]

2. *Plaintiffs*

The plaintiffs in this action are forty-nine individuals, some of whom are retired while others remain actively employed. Each of the plaintiffs submitted an identical affidavit, which reads:

> I am a plaintiff in the action captioned above.
> In the past 5 years I have purchased commercial air travel for my personal use.
> I anticipate that I will purchase commercial air travel for my personal use in the future, and I have no reason to believe that I will not.
> I anticipate that if the proposed merger between United Airlines and Continental Airlines is consummated, the result will be higher ticket prices, reduced capacity, fewer flights, fewer origin and destination cities, decreased levels of service, and increased fees for fuel, baggage, in-flight service and other items.

See, e.g., Malaney Aff.

Additionally, plaintiffs Jan Marie Brown, Rosemary D'Augusta, Michael Malaney, Clyde Stensrud, and Dana Robinson were each deposed, with all except Ms. D'Augusta later providing live testimony at the evidentiary hearing. Of the forty-nine plaintiffs, there are none whose nearest airport is served to a substantial degree by United or Continental (*i.e.*, with at least ten percent of the

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Indeed, plaintiffs appear to have abandoned any focus on airports alone, as the arguments presented in the briefing and at oral argument focused primarily on the anticompetitive effect of the merger on specific routes.

[6] Defendants' combined O&D passenger shares is less than ten percent at fifteen of the seventeen identified airports. Each of the seventeen airports, and the thirteen identified airport-pairs, has at least one nearby airport that offers competing service from other airlines, including LCCs. Of the 669 domestic airports, United and Continental each have at least a ten percent share of O&D passengers at only four. Rubinfeld Ex. 32.

passengers). Seven plaintiffs reported having flown on a United/Continental overlap route, but only one (Ms. D'Augusta) recounted flying more than one trip on such a route. Rubinfeld Report ¶¶ 98, 106. Ms. D'Augusta was also the sole plaintiff to testify (by deposition) that she had flown on any of the thirteen airport-pairs identified by Professor Bush, or to express any intention to fly any of those specific routes in the future. While some of the plaintiffs continue to work, none of them testified that they have traveled or plan to travel for business to any significant extent or to any particular destination. Each of the plaintiffs who provided live or deposition testimony testified that they work in, have worked in, or have some economic interest in the travel agency business, but none testified that a merger between United and Continental would have any specific economic or other impact on their businesses.[7]

B. Procedural History

After United and Continental announced their plans to merge on May 3, 2010, plaintiffs filed this action on June 29, 2010, alleging a violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18 and seeking injunctive relief under Section 16 of the Act, 15 U.S.C. § 26. On August 9, 2010, plaintiffs moved for a preliminary injunction seeking to block the merger pending a trial on the merits of their Section 7 claim. The parties each filed opening and reply memoranda with the Court prior to a scheduled evidentiary hearing, which was conducted on August 31 and September 1, 2010.

Prior to the evidentiary hearing, the parties also submitted numerous exhibits, witness declarations, expert reports and designations of deposition transcripts as their direct testimony.[8] As stated above, each of the forty-nine plaintiffs' submitted nearly identical short affidavits. In

[7] Mr. Stensrud testified that he owns a travel agency but is not involved in the day-to-day operations of the business. Ms. Robinson testified that she owned a travel agency, but has since sold the business and retired.

[8] Other than defendants' limited objections as to the deposition testimony of Glenn Tilton, Zane Rowe and Kathryn Mikells, which the Court need not address in making its ruling on the preliminary injunction, and plaintiffs' objection to the Passengers Against Mergers Agreement, which is addressed below, neither party objected to the other's evidentiary submissions.

addition, defendants designated certain portions of the deposition testimony of Ms. Brown, Mr. Malaney, Mr. Stensrud, Ms. Robinson and Ms. D'Augusta to be admitted into the record.[9] The defendants direct testimony consisted of written declarations from Jeffrey Smisek, Chairman of the Board, President and Chief Executive Officer of Continental and the CEO-designate of the new merged entity, Glenn Tilton, United's Chief Executive Officer who will serve as a non-executive Chairman for the new merged entity, and Kevin Knight, United's Senior Vice President for Planning. Additionally, the parties each designated to be admitted into the record certain portions of the deposition testimony of Mr. Smisek, Mr. Tilton, Mr. Knight, Vaughn Cordle (a security analyst and former United pilot), Kathryn Mikells (United's Chief Financial Officer), and Zane Rowe (Continental's Chief Financial Officer).

Each party further submitted expert testimony as to the relevant markets impacted by the merger and its effect on those markets. This expert testimony consisted of a report and rebuttal report by Dr. Rubinfeld prepared on behalf of defendants, and a report and rebuttal report prepared for plaintiffs by Professor Bush. Dr. Rubinfeld, who received a Ph.D. in economics from the Massachusetts Institute of Technology, served as the Deputy Assistant Attorney General and chief economist for the Antitrust Division of DOJ in 1997 and 1998. He presented his findings after conducting extensive economic analysis and modeling of the airline industry. Professor Bush, who received a J.D. and a Ph.D in economics from the University of Utah, served as a junior staff attorney for the Antitrust Division of DOJ prior to becoming an associate law professor at the University of Houston. He conducted no econometric or quantitative analysis of the anticompetitive effects of the merger on the airline industry, finding instead that such analysis is not required when

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[9] Defendants did not originally designate Ms. D'Augusta's entire deposition testimony because she was listed as a live witness. However, because Ms. D'Augusta did not testify at the evidentiary hearing due to illness, defendants later designated her entire deposition transcript.

"the anticompetitive effects of a merger are readily apparent." Bush Rebuttal at 2; Tr. 550:2-551:11.[10]

At the evidentiary hearing on August 31 and September 1, 2010, the Court heard live testimony from Mr. Smisek, Mr. Tilton, Mr. Knight, Dr. Rubinfeld, Professor Bush, Ms. Brown, Mr. Malaney, Mr. Stensrud and Ms. Robinson. The parties then provided post-hearing briefing, followed by final closing arguments on the motion on September 17, 2010.

III. LEGAL STANDARD

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary remedy never awarded as a matter of right." *Alliance for the Wild Rockies v. Cottrell*, __ F.3d__, 2010 WL 2926463, *3 (9th Cir. July 28, 2010) (quoting *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* (quoting *Winter*, 129 S. Ct. at 374). While the Supreme Court in *Winter* rejected the Ninth Circuit's prior holding that a "possibility" of irreparable harm was sufficient, in certain circumstances, to warrant a preliminary injunction, it did not, according to *Alliance for the Wild Rockies*, reject the notion of a "sliding scale" approach to preliminary injunctions utilized by this and other circuit courts of appeal. *Id.* at *3-4. Under the "sliding scale" approach, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at *4. The Ninth Circuit has adopted, as articulated in *Alliance for the Wild Rockies*, a version of this approach often referred to as the "serious questions" test. *Id.* Under that test, a preliminary injunction is warranted

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[10] While the Court will not revisit the issue of Professor Bush's qualifications for designation as an economics expert, in light of his limited professional background in that field and his failure to conduct any relevant quantitative or other sufficiently thorough analysis, as well as his largely unpersuasive hearing testimony, the Court affords his opinion little weight, particularly with regards to his identification of applicable relevant markets.

where a plaintiff demonstrates "serious questions going to the merits and hardship balance that tips sharply toward the plaintiff…assuming the other two elements of the *Winter* test are also met." *Id.*

B. Clayton Act Standard

Section 7 of the Clayton Act proscribes any person who is "engaged in commerce or in any activity affecting commerce" from acquiring "the whole or any part" of a business if the effect of that acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Under Section 16 of the Clayton Act, a private plaintiff may obtain injunctive relief for a violation of Section 7 upon a showing of "threatened loss or damage." 15 U.S.C. § 26. An injunction may be awarded to a private plaintiff, however, only when he or she shows that the antitrust injuries are personal. *U.S. v. Borden Co.*, 347 U.S. 514, 518 (1954) ("The private-injunction action… supplements Government enforcement of the antitrust laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.") (citations omitted); *see also Cal. v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) ("In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief…. A private litigant, however, must have standing -- in the words of § 16, he must prove 'threatened loss or damage' to his own interests in order to obtain relief.") (citations omitted).

To advance the requisite showing of a likely violation of Section 7, and thereby warrant injunctive relief, a plaintiff must, by a preponderance of the evidence, first show the existence of a relevant market and then establish that the pending acquisition is "reasonably likely to cause anticompetitive effects" in that market. *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004) (citing *U.S. v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171 (1964)); *Cal. v. Sutter Health Sys.*, 130 F.Supp.2d 1109, 1118 (N.D.Cal. 2001) (on a motion for a preliminary injunction, "[t]o establish a prima facie case under Section 7 of the Clayton Act, a plaintiff must first define the relevant market, and then establish that the proposed merger will create an appreciable danger of anticompetitive consequences.") (citing *U.S. v. Phila. Nat'l Bank,* 374 U.S. 321, 362 (1963)).

In delineating the boundaries of a relevant market, plaintiffs must establish both the relevant product market and the relevant geographic market. *See Oracle*, 331 F. Supp. 2d at 1110; *see also E.I. Du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 683 F. Supp 2d 401, 409 (E.D. Va. 2009). The relevant product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. 294, 325 (1962). "Reasonable interchangeability of use" means that the products "have 'reasonable interchangeability' based upon 'price, use and qualities,'" *Oracle*, 331 F. Supp. 2d at 1131 (citing *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1954)), while "cross-elasticity of demand" is the degree to which purchasers will accept substitute products based upon changes in characteristics such as price. *See U.S. v. Syufy Enters.*, 712 F. Supp. 1386, 1398-1399 (N.D. Cal. 1989). To be part of the same relevant product market, products need only be "viable substitutes," even if they would not necessarily be a customer's first choice. *Id.* at 1399; *see also Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989) (product market includes "sellers or producers who have actual or potential ability to deprive each other of significant levels of business.") (citations omitted). Additionally, within a market, 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 and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325. While a relevant product market can include submarkets, "[d]efining a narrow 'submarket' tends to require a relatively long laundry list of factors, which creates the danger of narrowing the market by factors that have little economic basis." *Oracle*, 331 F. Supp. 2d at 1119. Therefore, a market definition that is too narrow or excludes relevant competition is misleading.

The relevant geographic market is the "geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Sutter Health Sys.*, 130 F. Supp. 2d at 1120; *see also F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 268-269 (9th Cir. 1995). In other words, rather than a snapshot view of customer choices in a particular community, the geographic market is the area where customers can turn in response to a "hypothetical monopolist" increasing prices. Horizontal Merger Guidelines § 4.2.1 (Aug. 9, 2010) ("Merger Guidelines"); *see also Sutter Health Sys.*, 130 F. Supp. 2d at 1120, 1128-32 (adopting the Merger Guidelines "hypothetical monopolist" test); *Kolon Indus., Inc.*, 683 F. Supp. 2d at 411 ("When framing the geographic market, the examination does not look merely at a snapshot in time of the present market.").

In defining anticompetitive effects, "Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. Although market share and the overall concentration level of the industry are relevant in an antitrust review, these factors are "not conclusive indicators of anticompetitive effects." *U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). Instead, an analysis of the acquisition must include "further examination of the particular market -- its structure, history and probable future." *Id.* (quoting *Brown Shoe*, 370 U.S. at 322 n.38). This requires looking into factors such as the characteristics of the customers, trends towards competition or concentration in the industry, the existence of small but significant competitors, or the barriers to entry into the market. *See, e.g., Brown Shoe*, 370 U.S. at 344-345; *Phila. Nat'l Bank*, 374 U.S. at 366-367; *U.S. v. Aluminum Co. of Am.*, 377 U.S. 271, 279-281 (1964); *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 277-278 (1966); *U.S. v. Pabst Brewing Co.*, 384 U.S. 546, 550-553 (1966); *Syufy Enter.*, 903 F.2d at 664; Merger Guidelines §§ 5-10.

Plaintiffs contend that, in order to prove a violation of Section 7, they need only demonstrate that the merger between United and Continental is a non-trivial acquisition of a significant competitor. In support of this, they rely upon a number of cases in which the Supreme Court enjoined mergers involving companies with smaller market shares than those found here. *See Brown Shoe*, 370 U.S. at 294; *Phila. Nat'l Bank*, 374 U.S. at 321; *Aluminum Co. of Am.*, 377 U.S. at 271; *U.S. v. Cont'l Can Co.*, 378 U.S. 441 (1964); *Pabst Brewing Co.*, 384 U.S. at 546; *Von's Grocery Co.*, 384 U.S. at 270. They further rely upon *Hosp. Corp. of Am. v. Fed. Trade Comm'n*, in which the Seventh Circuit noted, in dicta, the continued viability of those decisions that "seemed, taken as a group, to establish the illegality of any non-trivial acquisition of a competitor." 807 F.2d 1381, 1385 (7th Cir. 1986).

Of course, while dicta from a Seventh Circuit decision (in which a Federal Trade Commission ruling was subject to clear error review) would not be binding on this Court, in any event, as both defendants and the decision in *Hosp. Corp. of Am.* itself point out, the Supreme Court in *Gen. Dynamics* separately held that market share statistics alone are "not conclusive indicators of anticompetitive effects." 415 U.S. at 498. Indeed, *Hosp. Corp. of Am.* went on to observe that "[t]he most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition,… is the lodestar that shall guide the contemporary application of the antitrust laws." 807 F.2d at 1386. The Court then held that it was prudent for the Commission, which "rather than resting on the very strict merger decisions of the 1960s… inquire[d] into the probability of harm to consumers," to employ an economic approach in its merger review that analyzed competitive effects by considering a number of economic factors. *Id.*; *see also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) (plaintiff incorrectly argued that "[e]ase of entry and the absence of barriers do not matter if the defendant has a large market share" because "[m]arket share is just a way of estimating market power, which is the ultimate consideration."). Therefore, plaintiffs' proposed approach that any non-trivial acquisition of a significant rival is per se violative of the Clayton Act is wrong.[11]

IV. DISCUSSION

Regardless of whether the Court adopts the standard four-factor test articulated in *Winter*, or the "serious questions" formulation reiterated in *Alliance for the Wild Rockies*, plaintiffs are unable to satisfy the requirements for the "extraordinary remedy" of a preliminary injunction. As discussed in more detail below, their failure to establish a viable relevant market dooms any effort to show this merger will substantially lessen competition, thereby negating their ability to raise even serious questions, let alone a likelihood of success on the merits. Moreover, nothing in the record presented to the Court suggests that these forty-nine individual plaintiffs will be irreparably harmed by the merger or, if so, that the balance of hardships would tip at all in their favor.

A. Success on the Merits -- Relevant Markets

Plaintiffs have identified what they maintain are three alternative relevant markets against which to measure alleged anticompetitive effects flowing from the United/Continental merger. First, they propose a market limited to network carriers competing for business travelers. Second, they identify thirteen airport-pairs where they maintain the merger is likely to lessen competition. Third, they argue that the United States airline industry as a whole can operate as a relevant market and that, given the ease of entry for established carriers into regional markets, the merger would result in anticompetitive effects because it eliminates potential nationwide competition between United and Continental. Despite a vigorous and forceful attempt, plaintiffs have not carried their burden, under

[11] Moreover, plaintiffs have presented no authority for the proposition that, upon demonstrating that the merger involves the non-trivial acquisition of a significant competitor, they can simply ignore their burden of identifying a viable relevant product and geographic market. Simply put, there is no support for the notion that, merely by removing one competitor, any horizontal merger in the airline industry will be anticompetitive and thereby violate Section 7 even where a plaintiff has failed to establish a viable relevant market. *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (citations omitted).

any injunctive relief merits standard, of demonstrating the existence of a viable relevant geographic and product market.

1. *Network Carrier Market Catering to Business Travelers*

In presenting their proposed network carrier market catering to business travelers, plaintiffs maintain that United and Continental compete for business passengers against each other, Delta, American and USAir, but do not compete against any of the LCCs. Supporting this argument, plaintiffs assert that network carriers are distinguished from LCCs because, according to plaintiffs, LCCs do not offer the package of services that network carriers provide and which business travelers require. In particular, plaintiffs contend that LCCs cannot serve the smaller communities where business passengers often need to travel because they lack the extensive hubbing networks and therefore can only fly high density point-to-point routes. Plaintiffs' evidentiary support for this rests primarily upon deposition testimony from Mr. Smisek, in which he describes the differences between hub-and-spoke and point-to-point business models, and explains why Continental's products are attractive to the business traveler. Smisek Depo. Tr., 33:2-33:9, 36:10-36:11, 43:25-44:16, 45:4-46:5, 96:18-97:8. Additionally, plaintiffs maintain network/legacy carriers offer multiple classes of service, a higher frequency schedule, and frequent flyer programs that differentiates them from LCCs and therefore excludes those newer airlines from their proposed network carrier-business traveler market. While the evidence shows that no one LCC may offer the entire package of services that network carriers provide to the business segment (i.e., a large network, multiple classes of service and frequent flyer programs), plaintiffs have failed to show that LCCs should be excluded when setting the parameters of a relevant market. Indeed, all of the evidence presented demonstrates that LCCs do in fact compete with network carriers for the business traveler and should be included in that market.[12]

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[12] In their post-hearing briefing, plaintiffs cite to an article by Peter C. Carstensen that discussed the emergence of airline competition on a network basis using something called "contestability theory." Peter C. Carstensen & Susan Beth Farmer: Airline Mergers -- Second Best Results in a Changed Environment: *Competition Policy and Mergers Analysis in Deregulated and Newly*

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As an initial matter, both Professor Bush and Dr. Rubinfeld provided evidence supporting the inclusion of LCCs into a market for business travelers. Dr. Rubinfeld testified that, while LCCs have differing models, they do compete with network carriers for all passengers, including business travelers. Tr. 453:9-454:2. Indeed, as noted above, Dr. Rubinfeld explained in his report that LCCs have continued to increase their presence by entering new routes and new cities and have increased their market share such that Southwest (an LCC) is now the largest airline measured by O&D passengers. Rubinfeld Report ¶¶ 18-20, 80; *see also* Smisek Aff. ¶¶ 17-18. Currently, approximately seventy percent of all airline passengers travel on routes where LCCs compete and, with the exception of Alaska Airlines, all network carriers have at least fifty percent of their revenue exposed to LCC competition.[13] Rubinfeld Report ¶ 17. United and Continental themselves each face significant competition from LCCs, with sixty-six percent of United's domestic passengers and seventy-one percent of Continental's domestic passengers traveling on routes where at least one LCC has ten percent or more market share. *Id.* ¶ 66. Additionally, with some LCCs adopting a hub-and-spoke model and others significantly increasing their nonstop routes originating out of hubs or focus cities (Southwest, for example, now serves 64 cities and originates seventy-four percent of its routes from hubs), LCCs have been able to serve most routes that domestic passengers fly. Rubinfeld Report ¶ 12; Rubinfeld Rebuttal Report ¶ 11.

While Professor Bush testified to the existence of a network market in which he believed there would be anticompetitive effects resulting from the merger, Tr. 546:24-550:1, he also testified

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Competitive Industries (Edward Elgar Publishing Ltd., 2008). As defendants pointed out during closing arguments, however, Professor Carstensen is a law professor and not an economist, his findings relied on sources that were ten, nineteen and twenty-two years old, and he acknowledged that "[c]onstestability analysis must be applied with care… because networks may, or may not, constitute alternatives for specific travel points of origin and destination." *Id.* Accordingly, to the extent this reference was meant to support the notion that network carriers do not compete with LCCs (many of whom entered the market after the sources upon which Professor Carstensen relied were published), it fails to achieve that objective.

[13] According to Dr. Rubinfeld, network carrier revenue is exposed to an LCC if an LCC has at least ten percent of O&D passengers on a route.

that there are certain categories of business traveler that would fly LCCs, that LCCs and network carriers do compete, and that he had no reason to doubt the accuracy of Dr. Rubinfeld's findings. Tr. 547:7-11, 573:24-25; Bush Dep. Tr. 141:1-9. Indeed, Professor Bush testified that there has been significant entry by LCCs into airline routes served by network carriers and that he had no reason to believe any LCCs would exit the market as a result of the merger. Tr. 578:10-25. In addition, Dr. Rubinfeld testified that, while there is no LCC that offers the entire range of services traditionally associated with a network carrier, business travelers are able to, and do, choose LCCs based upon services targeted to them specifically as business travelers. Rubinfeld Report ¶ 66; *see also* Tr. 453:20-24. Professor Bush agreed. Tr. 573:14-16 (all LCCs have frequent flyer programs to attract business travelers).

Mr. Smisek and Mr. Tilton, while recognizing that network carriers and LCCs operate on different business models, also both testified that they experience severe competition from LCCs for business travelers. Mr. Tilton testified, and Professor Bush agreed, that LCCs now compete for eighty percent of all domestic travelers, and over eighty-five percent of passengers traveling nonstop on United or Continental have an LCC alternative. Tilton Aff. ¶ 20; Exs. 1021, 1030. According to Mr. Tilton, one way in which LCCs are targeting business travelers in particular is by offering services such as preferred seating or boarding, business or first class seats, and in some instances even adopting a hub-and-spoke model. Tilton Aff. ¶ 22; Tilton Dep. Tr. 109:7-24, 110:17-111:14. Mr. Knight further testified that some LCCs are growing significant networks and that all compete aggressively for business travelers every day. Tr. 331:5-19, 338:11-17. As a result, as Mr. Smisek testified, LCCs are "a very disciplining factor on price" and have caused "continued downward pressure on fares." Tr. 159:24-160:5, 161:11-14.

Plaintiffs presented no evidence suggesting that the ability of LCCs to discipline prices would not continue. Indeed, each of the plaintiffs who testified stated that they, either for themselves or in booking flights for clients through their travel agencies, have chosen LCCs to take advantage of better fares or schedules. Mr. Malaney, for example, testified that, in his home town of Grand Rapids, Michigan, the entry of three LCCs caused a major decline in fares offered by both the LCCs and the network carriers. Tr. 619:12:623:7. In short, because the plaintiffs have failed to show why LCCs should be excluded from a market for business passengers - indeed, the substantial evidence suggests that they should not - network carriers catering to business passengers simply does not fly as a viable relevant geographic and product market for purposes of a Section 7 analysis.[14]

2. *Airport-Pairs*

Plaintiffs' second proposed market comprises the thirteen airport-pairs that Professor Bush contends would experience significant decreases in competition were the merger to be consummated. *See* Bush Report at 7. In support of this market, plaintiffs rely primarily on testimony from Professor Bush. In addition, they cite the Carstensen article, General Accounting Office ("GAO") studies, a statement from J. Bruce McDonald (former Deputy Assistant Attorney General in the Antitrust Division of DOJ), and four district court cases in which DOJ purportedly used airport pairs in support of an antitrust market analysis. In response, Dr. Rubinfeld persuasively testified that, consistent with the approach favored by both DOJ and GAO, his analysis and experience suggest that city-pairs, and not airport-pairs, is the appropriate parameter for identifying airline markets for antitrust purposes.

As an initial matter, plaintiffs' proffered evidence provides no support for the notion of an airport-pair market. As noted above, Professor Carstensen's article has little if any bearing on the current competitive conditions in the market in that it relies on sources that largely pre-date the influence of LCCs. While some GAO studies refer to both airport-pairs and city-pairs, the GAO

[14] To the extent plaintiffs propose a market divided even further to include only routes serving business passengers traveling to small communities, the Court finds this market too narrow. *See Brown Shoe*, 370 at 325; *see also*, *Oracle*, 331 F. Supp. 2d at 1119. Additionally, plaintiffs have not shown which communities would constitute such a market or why, based upon the evidence presented going to the growth of the LCCs, those carriers would not be able to fill a void in any market exited by one or other defendant by virtue of the merger.

report for this merger specifically noted that "[i]t is generally preferable, time permitting, to assess city pair rather than airport pair changes in competition." Ex. 71. Mr. McDonald, who said that passenger markets are "occasionally airport pairs," went on to clarify in the course of that same speech, "[i]t is competition in particular city pair markets that is relevant for passengers" and "[r]eviewing any particular merger, we first identify the city pairs in which the merging carriers both provide service." *See* http://www.justice.gov/atr/public/speeches/217987.htm. Moreover, the cases that plaintiffs rely upon fail to support the proposition that DOJ has delineated airport-pairs as a relevant market in the airline industry. [15]

Indeed, the airport-pair versus city-pair question is where Professor Bush's failure to conduct any significant economic or other analysis highlights the problems with plaintiffs' proposed relevant market. While Professor Bush suggested that there are "time-sensitive passengers" who are willing to pay more to fly out of a preferred airport (Tr. 544:4-15), he provided no supporting analysis, economic or otherwise. He never defined "time-sensitive passengers" in terms of who they are or what fares they are willing to pay, nor has he evaluated the airfares for any of the identified thirteen airport-pairs or studied the number of passengers that prefer one airport over another within any of the regions containing such an airport-pair. Tr. 562:10-13, 559:4-6. Instead, he relied upon a

[15] In *U.S. v. AMR Corp.*, the court granted summary judgment in favor of defendant airlines where DOJ alleged predatory pricing on routes out of the Dallas-Fort Worth Airport and referred to both city-pair and airport-pair markets. 140 F.Supp.2d 1141 (D. Kan. 2001). However, that case, in focusing on price fixing of routes coming in and out of a single airport, is markedly different from the action brought here, which addresses a merger's effect on competition in the airline industry and its relevant markets. *AMR Corp.*, in sum, provides no support for the contention that airport-pairs represent an appropriate market when evaluating the merger of two airlines. In *In re Northwest Airlines Corp. Antitrust Litigation*, contrary to plaintiffs' assertion in their post-hearing briefing, the district court denied a motion to exclude expert testimony that applied city-pairs. 197 F.Supp.2d 908 (E.D. Mich. 2002). In other words, the applicable market in that case was city-pairs and not, as plaintiffs suggest, airport-pairs. Lastly, plaintiffs cite two cases in which DOJ entered into consent decrees where the terms city-pairs and airport-pairs were both used. *See U.S. v. Airline Tariff Pub. Co.*, 1994 WL 502091 (D.D.C. Aug. 10, 1994); *U.S. v. Airline Pub. Co.*, 1993 WL 527923 (D.D.C. Nov. 1, 1993). Nothing in either of these cases, however, suggests that airport-pairs provides an appropriate market when evaluating the airline industry for antitrust purposes. Moreover, as these were consent decrees, final judgment was entered in both without trial or adjudication of any issue of fact or law.

snapshot view of customer choices, consisting of airfares on a single day for airports in nine randomly selected metropolitan regions. Bush Rebuttal Report App. A. As Professor Bush concedes, however, airfares are not static when considering different fare classes. Tr. 537:18-25. Therefore, his snapshot of customer choices on a single day lends no support to the notion that price differentials between airports within the same metropolitan area suggest that there are "time-sensitive passengers" who will pay more for access to a preferred airport. *See Kolon Indus., Inc.*, 683 F. Supp. 2d at 411. In short, none of Professor Bush's testimony can support the idea that airport-pairs are a viable relevant market when conducting a Section 7 analysis.

In contrast, Dr. Rubinfeld testified that airport-pairs are an inaccurate market because they "miss out on some of the important sources of competition that come from [] the fact that many customers fly from alternative airports." Tr. 449:7-9. Dr. Rubinfeld contends that the more appropriate market would be city-pairs because they take into account the effect that substitutable airports have on price, in large part because of the competitive impact of LCCs. Tr. 440:24-441:11, 461:3-4; *see Freeman Hosp.*, 69 F.3d at 269 (a relevant geographic market includes locations where customers could possibly go and not simply where they actually go). Dr. Rubinfeld pointed out that twelve of the thirteen airport-pairs cited by Professor Bush are subject to competition from adjacent airports[16] (Rubinfeld Rebuttal Ex. 1), which Mr. Smisek confirmed when he testified that Continental does not set its pricing on an airport-pair basis.[17] Tr. 195:9-197:3. Indeed, as Dr. Rubinfeld explained, even if some passengers would not use an alternative airport, city-pairs remains the appropriate market because those passengers "would be protected [from a price increase] by other people who would be willing to switch [to a substitutable airport]." Tr. 461:3-4.[18] Professor

[16] Indeed, according to Dr. Rubinfeld, "[n]early 40 percent of San Francisco-Houston passengers use an airport other than the one cited by Professor Bush." Rubinfeld Rebuttal ¶ 5.

[17] Mr. Smisek testified that, for example, an LCC offering service between JFK and Oakland would affect Continental's pricing of a flight between Newark and San Francisco. Tr. 196:3-24.

[18] According to Dr. Rubinfeld, when ten to twenty percent of customers are willing to switch, a price increase at an adjacent airport will be defeated. Tr. 461:5-10.

Bush even conceded this point during the hearing when he testified that "for some classes of passengers, it is very much the case that [adjacent] airports are substitutable." Tr. 561:22-24. Dr. Rubinfeld went on to explain that his preference for city-pair analysis is consistent with the approach taken by DOJ, GAO and a host of top economists who study airlines. Tr. 442:11-14. In agreement, Professor Bush testified that he is not aware of any instance in which DOJ employed an airport-pair analysis in litigation (Tr. 562:14-21), and further that the GAO report he himself cites states that airport-pairs is the preferred mode of analysis in an antitrust review. Tr. 563:8-10; *see* Ex. 71 at 16 n.22.

Finally, none of the behavior engaged in by the plaintiffs themselves suggests that airport-pairs represent a relevant market. Ms. Robinson testified that she uses alternatives to Palm Beach International Airport (the airport closest to her), even flying to the hearing in San Francisco from Fort Lauderdale-Hollywood International Airport on Virgin America (an LCC) because she was able to get a nonstop flight. Tr. 605:8-15. Similarly, both Ms. Brown and Mr. Malaney testified that they book business travelers into alternative airports in certain metropolitan regions (such as New York, Phoenix and Orlando). The upshot of this is that plaintiffs' own experiences are consistent with the position taken by defendants - that competition from adjacent airports disciplines pricing and must be considered when defining the relevant market. Indeed, although defendants need not establish what they believe to be the relevant market on plaintiffs' motion for a preliminary injunction, given the substantial evidence suggesting city-pairs, plaintiffs' effort to establish anything else never leaves the gate.

3. *National Market*

Plaintiffs' third proposed relevant market is the national airline industry taken as a whole, and can be more quickly dispatched than the two previously discussed alternatives. First, "[t]he boundaries of a product market are determined by the reasonable interchangeability of use or **1524 the cross-elasticity of demand between the product itself and substitutes for it," *Brown Shoe*, 370

U.S. at 325, and plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami. Indeed, while Professor Bush did no economic modeling to support a national market, Dr. Rubinfeld testified that, not only is a national market inappropriate in that it fails to examine individual markets involving passenger origins and destinations, but when concentration in the airline industry is measured on a national basis, taking into account all LLCs and network carriers, the Herfindahl-Hirschman Index is far below the Merger Guidelines threshold that would trigger DOJ scrutiny.[19] Tr. 445:2-16, 581:9-11; Rubinfeld Report Ex. 29; *see* Merger Guidelines § 5.3. Moreover, employing plaintiffs' proposed national market for the proposition that the merger between United and Continental will limit the potential for future competition between the airlines again fails to address the fact that LCCs have continued to demonstrate an ability successfully to enter new routes, increase market share and discipline prices. *See* Rubinfeld Report ¶¶ 12, 18-20, 80. In short, nothing put forth by the plaintiffs establishes the national airline industry as a viable relevant market against which to evaluate an antitrust claim under the Clayton Act.

Having failed to satisfy their burden of demonstrating a viable relevant market (a necessary predicate for injunctive relief under Section 16) plaintiffs cannot show a likelihood of success on, or even a serious question going to, the merits of their claim. Therefore, their motion for a preliminary injunction, under either merits standard, must be denied. Moreover, without a viable relevant market by which to measure any purported anticompetitive effects of the merger, the Court cannot address whether it does in fact substantially lessen competition or tend to create a monopoly. While the

[19] The Herfindahl-Hirschman Index ("HHI") is an index used to measure concentration in a market, which is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. DOJ uses HHI numbers to determine thresholds for when an industry is considered highly concentrated or when potential mergers require investigation.

deficiency in plaintiffs' merits showing is therefore fatal to the relief they seek, as discussed below they similarly fail to shoulder their burden on the remaining requisites for injunctive relief.

B. Irreparable Harm and Balance of Hardships

Initially, defendants argue that plaintiffs lack standing because they have not proven that they themselves will suffer "antitrust injury" as a result of the merger. "Standing under Article III of the United States Constitution demands that the plaintiff have a sufficient interest in the outcome of the controversy to ensure that the court will be provided with a fair presentation of the issues." *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1194 (N.D.Cal. 2000) (citing *Northeastern Florida Contractors v. Jacksonville,* 508 U.S. 656, 663 (1993) for the requirement that a party seeking to invoke federal jurisdiction demonstrate: (1) injury to a legally protected interest; (2) a causal relationship between the injury and the challenged conduct and (3) a likelihood that the injury will be redressed by a favorable decision). Additionally, standing in an antitrust action requires that plaintiffs also show that they are subject to injury "of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 111 (1986) (plaintiff must show threatened loss or injury to have standing under Section 16). Here, each plaintiff submitted an affidavit stating that he or she has purchased, and plans to purchase, commercial airline tickets for personal use, and five plaintiffs provided deposition or hearing testimony as to the specifics of their limited air travel. As consumers of airline tickets, then, plaintiffs have established standing such that they are permitted to attempt to prove that the proposed merger will substantially lessen competition. *See Reilly*, 107 F. Supp. 2d at 1195.

Despite satisfying this low threshold for standing under the Clayton Act, however, plaintiffs fail to establish any significant harm they will personally suffer that would warrant preliminary injunctive relief. In evaluating plaintiffs' purported irreparable harm as well as the balance of equities, the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general air carrier flying public as a whole. *See Borden Co.*, 347 U.S. at 518 ("The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff… may be expected to exercise [his injunctive remedy] only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive."). Evaluating the purported injury to these specific forty-nine individuals, the record reflects that they have failed to demonstrate any irreparable harm as a result of the merger or that the balance of equities in this case tips at all, let alone sharply, in their favor. *See Alliance for the Wild Rockies*, 2010 WL 2926463, *3-4.

None of the plaintiffs testified to having flown regularly, and only one (Ms. D'Augusta) stated that when she does fly she is likely to use United or Continental. Rubinfeld Report Ex. 33. Moreover, not one of the forty-nine reside near an airport with at least ten percent of the passengers served by United or Continental, and of the seven who reported having flown on a United/Continental overlap route, only Ms. D'Augusta recounted taking such a flight more than once. Rubinfeld Report ¶¶ 98, 106. Ms. D'Augusta was also the sole plaintiff to fly on any of the thirteen airport-pairs identified by Professor Bush, or, perhaps more significantly, to express any intention to travel on any of those specific routes in the future. Tr. 373:10-14 (Ms. Brown has no "set plan" to travel on any of the thirteen routes), 394:12-14 (Mr. Stensrud does not have a "current plan" to fly between the thirteen airport-pairs), 608:1-8 (Ms. Robinson has no plans "to fly any of [the thirteen] routes in the foreseeable future"); Malaney Dep. Tr. 133:11-14 (Mr. Malaney does not think he will fly any of the thirteen routes in the future). Additionally, none of the plaintiffs established themselves as traveling regularly for business. Moreover, while each of the plaintiffs who provided live or deposition testimony had connections to the travel agency business, none testified as to any specific effects a merger would have on their particular clients. Furthermore, all the plaintiffs who testified stated that they had alternate airports and LCCs available to them. For example, Ms. D'Augusta has flown jetBlue from JFK to Oakland, rather than another carrier to San

Francisco, even though SFO is her closest airport (D'Augusta Dep. Tr. 71-72), and Mr. Malaney testified that he has offered his business traveler clients the option of flying from Grand Rapids to Phoenix on Allegiant (an LCC) even though that carrier only flies into Chandler, Arizona, twenty-five miles from Phoenix. Tr. 625:12-626:8.

While each plaintiff provided an affidavit stating an unformed hope of future air travel, this speculative and *de minimus* injury (assuming there would be injury) is insufficient to establish irreparable harm or tip the scale in plaintiffs' favor. Although plaintiffs allege, in their briefing, that this merger will adversely affect consumer choice and purchasing power by resulting in increased airfares, decreased capacity, poorer service, and a constraint on the ability of other network carriers to compete (Pls.' Post-Hr'g Mem. at 14, 33), they still must establish that these alleged effects will be personal to them. *See Borden Co.*, 347 U.S. at 518. They have not done so. Simply put, plaintiffs have not demonstrated in any way that they themselves will suffer any specific harm were preliminary relief denied.

Indeed, in the face of such an insufficient showing of harm to the plaintiffs, the Court need not address what defendants argue will be substantial injury to them were the merger preliminarily enjoined. Suffice it to say that defendants presented evidence that delaying the merger would result, among other things, in the loss of significant revenue synergies and cost savings, in their continued vulnerability to exogenous shocks that a merged entity could withstand, in threatened job security for tens of thousands of employees who will benefit from a more stable employer, and in the continued deferral of capital and technology investments. While not reaching directly the substance and extent of these proffered hardships, it is fair to observe, as did then-Justice O'Connor, sitting as Circuit Justice, in reversing the Ninth Circuit's stay of an airline merger, "[t]he cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the 'status quo,' in the face of this upheaval, would be to blink at reality." *Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1309 (1987).[20] In other words, just as plaintiffs failed to satisfy their burden on the merits, they do not approach what is required to prove irreparable harm or a balancing of equities in their favor. Therefore, for this reason alone, their motion for a preliminary injunction must be denied.

C. Public Interest

"The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Alliance for the Wild Rockies*, 2010 WL 2926463, *11 (internal quotations omitted). The Ninth Circuit has held that courts shall not grant preliminary injunctions "unless those public interests [favoring an injunction] outweigh other public interests that cut in favor of *not* issuing the injunction." *Id.* (emphasis in original). The parties here presented widely divergent views on what impact a merger of United and Continental would have on the public interest. According to defendants, this merger is simply the latest (and not the last) in a long line of airline consolidations that will result in cut capacity, rising airfares, degraded customer service, and labor force reductions. Defendants, on the other hand, proffer that this merger is necessary to bring stability to a turbulent and ailing industry and that, as a result of a combined United and Continental, consumers will benefit from passed on cost savings, new system wide destinations and routes, increased capacity, and a better overall product, and further that employees will benefit from a

[20] Defendants argue that evidence reflecting that a number of these same plaintiffs settled a similar lawsuit attempting to enjoin the Delta Airlines/Northwest Airlines merger for a monetary award is indicative of the fact that, at most, the plaintiffs will suffer economic injuries that are compensable with monetary damages, and therefore not irreparable. Although the Court required plaintiffs to produce the settlement agreement from the Delta/Northwest case as well as the Passengers Against Mergers Agreement executed prior to filing that lawsuit, the policy of favoring settlement, *see Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), counsels against using the terms of those agreements as evidence in another case. Accordingly, those agreements will not be considered here on the issue of whether plaintiffs' purported injury is compensable by way of money damages. Moreover, plaintiffs' failure to demonstrate any injury personal to *them* obviates the need to consider whether their alleged harm could be addressed through a monetary award.

healthier and more competitive employer. Given plaintiffs' failure to shoulder their burden to demonstrate irreparable harm, a balancing of equities in their favor or a likelihood of success on the merits, the Court at this juncture need not reach the relative value to the public interest that would flow from enjoining, or refusing to enjoin, this merger.

V. CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction is denied.

IT SO ORDERED.

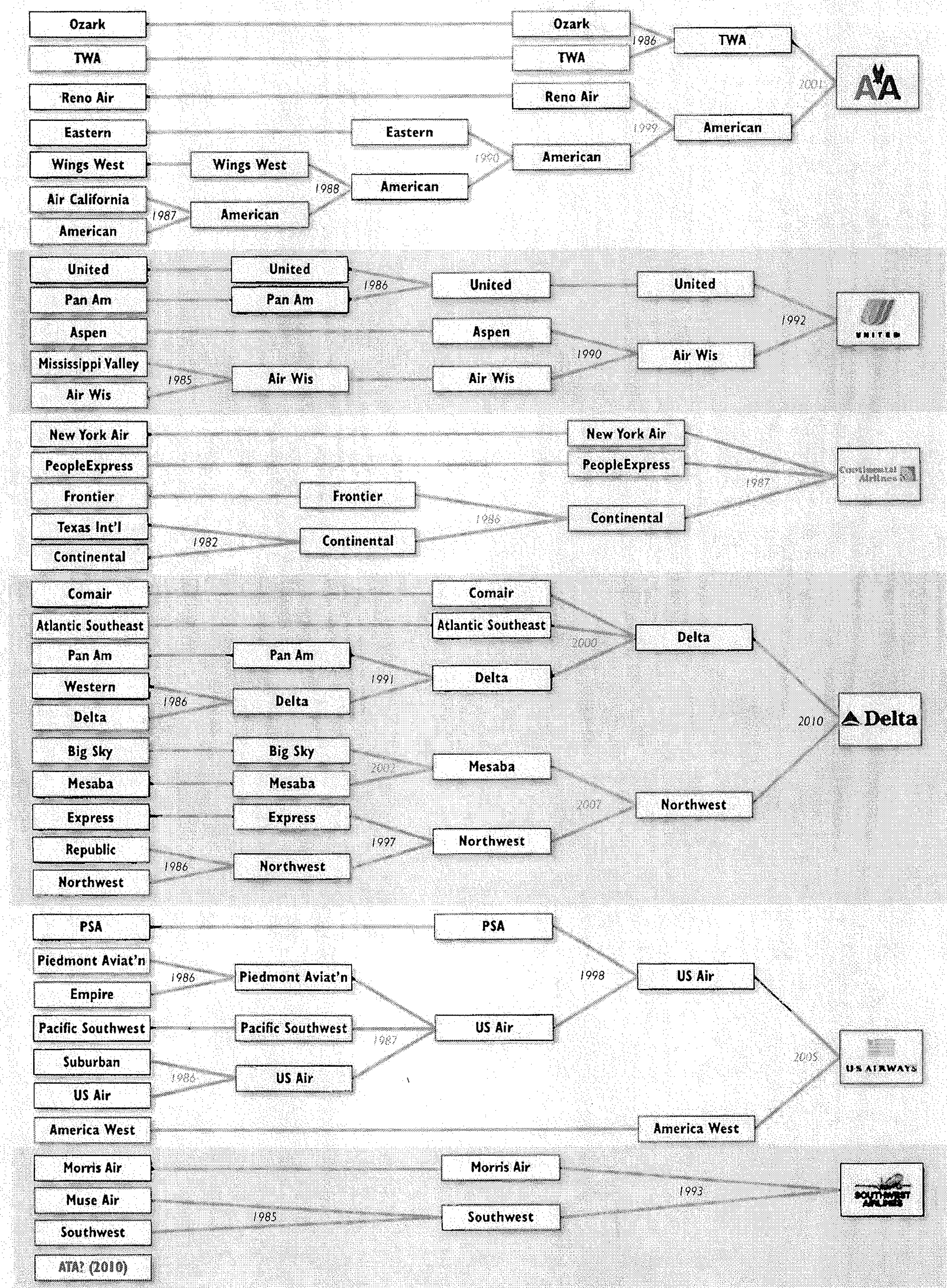
Dated: September 27,2010

Richard Seeborg
United States District Judge

EXHIBIT A

Origins of Legacy Airlines and Southwest

History of Mergers and Acquisitions



CERTIFICATE OF SERVICE

I certify that on October 1, 2010 I served the foregoing motion on counsel for defendants by send a .pdf version of this brief to the following persons at the following email addresses:

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