Joseph M. Alioto (SBN 42680)
Theresa D. Moore (SBN 99978)
Thomas P. Pier (SBN 235740)
Angelina Alioto-Grace (SBN 206899)
ALIOTO LAW FIRM
225 Bush Street, 16th Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
Email: jmalioto@aliotolaw.com
Email: jmiller@aliotolaw.com

[ADDITIONAL COUNSEL LISTED ON LAST PAGE]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael C. Malaney, Katherine R. Arcell, Kieth Dean Bradt, Jose' M. Brito, Jan Marie Brown, Robert D. Conway, Rosemary D'Augusta, Brenda K. Davis, Pamela Faust, Carolyn Fjord, Don Freeland, Ted Friedli, Donald V. Fry, Gabriel Garavanian, Harry Garavanian, Yvonne Jocelyn Gardner, Lee M. Gentry, Jay Glikman, Donna M. Johnson, Valarie Ann Jolly, Gail S. Kosach, Rozann Kunstle, Steve Kunstle, John Lovell, Len Marazzo, Lee McCarthy, Lisa McCarthy, Patricia Ann Meeuwsen, L. West Oehmig, Jr., Cynthia Prosterman, Deborah M. Pulfer, Sharon Holmes Reed, Dana L. Robinson, Robert A. Rosenthal, Bill Rubinsohn, Sondra K. Russell, Sylvia N. Sparks, June Stansbury, Clyde D. Stensrud, Sherry Lynne Stewart, Wayne Taleff, Gary Talewsky, Annette M. Tippetts, Diana Lynn Ultican, J. Michael Walker, Pamela S. Ward, David P. Wendell, Christine O. Whalen, and Suraj Zutshi,

Plaintiffs,

v.

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

Defendants.

CASE NO.: **CV-10-02858 (RS)**

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT TO ADD DAMAGES CLAIM

Hearing: October 27, 2011
Time: 1:30 p.m.
Courtroom: 3
Judge: Hon. Richard Seeborg

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

It is well-known that leave to amend is granted with "extreme liberality" and that a presumption exists in favor of granting leave to amend. Defendants' arguments fall far from overcoming the presumption in Plaintiffs' favor. Plaintiffs' Motion to Amend their complaint is not "gamesmanship" but instead a proper request to amend following the closing of Defendants' merger and the ensuing damages. Furthermore, as Plaintiffs could not have requested damages until after the closing of the merger but only injunctive relief to prevent future injury, the jury trial demand is timely.

II. ARGUMENT

A. Defendants' Have Failed to Overcome the Strong Presumption in Favor of Granting Leave to Amend.

Leave to amend is to be granted with "extreme liberality." *DCD Programs, Ltd v. Leighton,* 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted); *see, e.g., Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (leave to amend should be freely given); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend."

Of the factors considered by the Ninth Circuit in granting or denying leave to amend, "bad faith, undue delay, prejudice to the opposing party, and futility of amendment," Defendants' have failed to make a sufficient showing to overcome the strong presumption in favor and "extreme liberality" permitted in granting leave to amend in the present case. *DCD Programs,* 833 F.2d at 186.

1. Relevant Market is a Question of Fact for the Jury.

Plaintiffs have alleged in their Complaint that the relevant product and geographic

markets are the transportation of airline passengers for charge in the United States and many submarkets, including various overlapping routes and airports. (Proposed First Amended Complaint ¶ 2, 78, 79, 81, 83, 84, 85, 87, 89, 90, 91, 92, 94, 95.)

Defendants argue that it would be futile for Plaintiffs amend the Complaint because the Complaint would be subject to immediate dismissal. And yet, it is well-established that the issue of relevant market is a question of fact for the jury. Defining the "[r]elevant market is a factual issue which is decided by the jury." *Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 994 (9th Cir. 1986)* (citing *Los Angeles Memorial Coliseum Comm'n v. N.F.L., 726 F.2d 1381, 1392 (9th Cir. 1984))*; see also *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir.1991)* ("Ordinarily, the relevant market is a question of fact for the jury"); *Agron, Inc. v. Lin, 2004 U.S. Dist. LEXIS 26605, 2004 WL 555377, at *8 (C.D. Cal. 2004)* (same); *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 133 F.R.D. 41, 44 (D. Nev.1990)* ("The Ninth Circuit has established that both market definition and market power are essentially questions of fact appropriate for jury consideration"); *Nobody in Particular Presents, 311 F. Supp. 2d at 1083* ("The scope of the market is usually a question of fact for the jury.") (citing *Telecor Comm., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002))*.

2. The Supreme Court has Consistently Analyzed Relevant Market By Looking at the Purpose of the Business and Not Individual Uses of Different Products or Services.

"Substitutability" or "reasonably interchangeable products" are not the only criteria by which to determine a relevant product market, nor has the Supreme Court required just and only that analysis. The Supreme Court has consistently analyzed relevant market by looking at the purpose of the business and not the individual uses of the products.

"Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined terms in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). In *Brown Shoe*, even though there could be no real question that girls' shoes and boys' shoes are not and could not be "reasonably interchangeable products" or "substitutes," it made no difference. Notwithstanding all the indicia distinguishing those products, the Supreme Court accepted the District Court's designation of "children's shoes." *Id.* at 327. Similarly, in the sensitive area of price differentials of products, and in the face of testimony of the President of Brown Shoe that the combine would bring Brown Shoe "into the field of prices which we were not covering," *Id.* at 304 n8, the Supreme Court dismissed the effort because "in this case a further division of product lines based on 'price/quality' differences would be 'unrealistic.'" *Id.* at 326.

In the progeny of *Brown Shoe*, all of which required the Supreme Court to reverse the District Courts, there was no problem with viewing the broad picture of the industries involved: *United States v. Philadelphia Bank*, 374 U.S. 321, 356 (1963) held that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking," (cite omitted), composes a distinct line of commerce"; *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) held that copper and aluminum conductors could be combined into electrical conductors notwithstanding price differentials and only 1.3% of aluminum products produced by the acquired company; *United States v. Vons Grocery Company*, 384 U.S. 270, 279 (1966), after denial of the Government's Motion for a Restraining Order, and the Court's famous tour de force of the history and purpose of Section 7, simply noted the "Los Angeles retail grocery

market" and ordered "divestiture without delay"; *United States v. Falstaff Brewing Co.,* 410 U.S. 526 (1973) made it plain that a potential competitor who doesn't even compete in the market and who testifies that it would never enter a market except by acquisition was nonetheless in violation of Section 7 because it was able to enter.

In the line of Supreme Court cases mentioned above, the product markets include within them products that have patently non-interchangeable end uses. None of the relevant product markets in those Supreme Court cases would have withstood scrutiny under the relevant market analyses espoused by Defendants'.

A jury could easily find and probably would find that there is a national airline industry as a relevant market and that there is actual and potential competition between and among the individual airlines.

3. Defendants Fail to Distinguish Between Injunctive Relief Against the Threat of Future Injury under Section 16 of the Clayton Act and Damages under Section 4 of the Clayton Act.

Defendants entirely fail to distinguish between injunctive relief against the threat of a *future* injury as authorized by Section 16 of the Clayton Act and damages as provided by Section 4 of the Clayton Act—and instead call it "gamesmanship."

Section 16 of the Clayton Act, 28 U.S.C. §26 provides for injunctive relief against the threat of a *future* injury:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against *threatened* loss or damage by a violation of the antitrust laws. [emphasis added]

When Plaintiffs filed their original Complaint on June 29, 2010, the Defendants had not yet closed their merger. There were no damages to be claimed at that time but only a request for injunctive relief against the *future* injury and damages that would occur as a result

of the Defendants' merger. Accordingly, the original Complaint requested only injunctive relief. On October 1, 2010, United and Continental announced that they had closed their merger. (Proposed First Amended Complaint at 8.)

Section 4 of the Clayton Act, 15 U.S.C. § 15 provides for damages *after* injury is sustained:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States ... and shall recover threefold the damages by him sustained.

Plaintiffs' Proposed First Amended Complaint includes a claim for damages pursuant to Section 4 of the Clayton Act, following Defendants' merger. As the Plaintiffs have alleged in Paragraphs 3, 103, 104, and 105, et seq., of the First Amended Complaint, that since the merger there have been higher airfares, a reduced number of flights, and elimination of air service to smaller communities.

Plaintiffs Motion for Leave to Amend is not "gamesmanship", but instead necessary since when the initial Complaint had been filed, the Defendants' merger had not yet closed and damages were only prospective in nature.

4. Defendants Completely Fail to Show Any Prejudice in the Granting of Leave to Amend.

Defendants have not and cannot make any credible argument of prejudice as a result of granting leave to amend the Complaint. Defendants argue that they will be subject to "severe prejudice" if leave to amend is granted, but cite only past events that have already transpired during the course of these proceedings to support that contention. Further, at the same time Defendants claim that they will be "severely prejudiced" by further proceedings, they claim that amendment is futile and that the Amended Complaint will be subject to immediate dismissal.

Moreover, Plaintiffs' First Amended Complaint does not change the underlying contention that the merger is illegal, and Defendants are not precluded from seeking discovery. Defendants arguments that "severe prejudice" will ensue are not only illogical but wholly unfounded.

In sum, Defendants' have failed to overcome the strong presumption in favor of granting leave to amend. Thus, Plaintiffs' Motion for Leave to Amend should be granted.

B. Plaintiffs' Request for a Jury Trial is Timely.

Federal Rule of Civil Procedure 38(b) provides that, "on any issue triable of right by a jury, a party may demand a jury trial." Plaintiffs sought injunctive relief against the *threat* of future injury under Section 16 of the Clayton Act in their original Complaint, and Plaintiffs could not have requested a jury trial at that time.

Defendants fail to recognize that when Plaintiffs original Complaint was filed, injunctive relief pursuant to Section 16 of the Clayton Act was the *only* remedy available to Plaintiffs, as Defendants' merger had not yet closed. At that time, there was only the threat of future injury.

Now that Defendants' merger has closed, Plaintiffs seek to amend the Complaint under Section 4 of the Clayton Act to add damages that have been sustained so far following the close of Defendants' merger. As alleged in the First Amended Complaint, the very anticompetitive effects that the Plaintiffs originally alleged "may" take place, are in fact taking place. As alleged, prices have increased; availability of flights have been curtailed; capacity has been lessened; routes have been changed; and services for otherwise gratuitous amenities have been eliminated and subject to service charges. Accordingly, requesting a jury trial is also proper at this time.

Plaintiffs have not delayed in requesting leave to amend or in requesting a jury trial. Proceedings in the Ninth Circuit Court of Appeal only concluded recently, as the mandate was issued on July 18, 2011. Plaintiffs' Motion to Amend was filed on August 22, 2011.

It is illogical to argue that a request for a jury trial is untimely, when a request for a jury trial was not available to Plaintiffs in their request for injunctive relief against the threat of *future* injury. Damages could not have been requested when the original Complaint was filed before the Defendants' merger was completed.

Moreover, Defendants falsely state in their Opposition that *American Home Products Corporation v. Johnson & Johnson,* 111 F.R.D. 448 "Addressed exactly Plaintiffs' situation here…a defendant served counterclaims that sought only injunctive relief and did not assert a jury trial demand." (Opposition at 12.) This case does not address Plaintiffs position "exactly." In *American Home Products,* while defendants sought only injunctive relief on their counterclaims, they could have also sought damages. In the case currently before the Court, when the Complaint was initially filed, there were no damages to claim because the future injury to be caused by Defendants' merger had not yet occurred.

Not one of the cases cited by Defendants addresses the exact same issue here. The difference is clear, fundamental, and elementary--in those cases the plaintiffs could have claimed damages and accordingly requested a jury trial. In this case and because Defendants' had not yet closed their merger-- damages were not available to Plaintiffs nor was a demand for a jury trial. Thus, Plaintiffs' request for a jury trial in conjunction with this Motion to Amend the Complaint is timely.

//

//

//

III. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully seek leave of this Court to file the proposed First Amended Complaint.

Dated: October 4, 2011

ALIOTO LAW FIRM

By: *Joseph M. Alioto*

Joseph M. Alioto
ALIOTO LAW FIRM
225 Bush Street, 16th Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
E-mail: jmalioto@aliotolaw.com
Email: jmiller@aliotolaw.com

PLAINTIFFS' COUNSEL

Joseph M. Alioto (SBN 42680)
Theresa D. Moore (SBN 99978)
Thomas P. Pier (SBN 235740)
Angelina Alioto-Grace (SBN 206899)
ALIOTO LAW FIRM
225 Bush Street, 16th Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
Email: jmalioto@aliotolaw.com
Email: jmiller@aliotolaw.com

Daniel R. Shulman (MN SBN 100651)
Pending Pro Hac Vice
Julie Lynn Boehmke (MN SBN 317330)
Pending Pro Hac Vice
Jeremy L. Johnson (MN SBN 328558)
Pending Pro Hac Vice
GRAY, PLANT, MOOTY, MOOTY & BENNETT
500 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 632-3000
Facsimile: (612) 632-4335
Email: daniel.shulman@gpmlaw.com
Email: julie.boehmke@gpmlaw.com
Email: jeremy.johnson@gpmlaw.com

Gil D. Messina (NJ SBN GM5079)
Pending Pro Hac Vice
MESSINA LAW FIRM PC
961 Holmdel Road
Holmdel, NJ 07733
Telephone: (732) 332-9300
Facsimile: (732) 332-9301
Email: gmessina@messinalawfirm.com