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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL MALANEY, et al.,

No. C 10-02858 RS

Plaintiffs,

**ORDER GRANTING MOTION TO
DISMISS**

v.

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

Defendants.

_____ /

I. INTRODUCTION

Defendants United Air Lines and Continental Airlines (“United”) move to dismiss plaintiffs’ complaint under the Clayton Antitrust Act for failure to state a claim, on the grounds that plaintiffs’ proposed market definition lacks legal and factual support. Plaintiffs maintain that their complaint satisfies Federal Rule of Civil Procedure 12(b)(6) and suggest that United is judicially estopped from objecting to their proffered market definition based on a position they took in a prior litigation. Upon consideration of the briefs, the arguments raised at the hearing, and for the reasons discussed below, the motion must be granted. The complaint is dismissed with prejudice.

II. BACKGROUND

Plaintiffs filed this lawsuit on June 29, 2010, seeking to enjoin an announced merger between United and Continental, under § 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. The merger, which has since been consummated, created the largest domestic airline by several

1 measures. The operative first amended complaint (FAC), like the original complaint, avers that “the
2 relevant product and geographic markets for purposes of this action are the transportation of airline
3 passengers in the United States, and the transportation of airline passengers to and from the United
4 States on international flights.” FAC, ¶ 29.

5 On August 9, 2010, the plaintiffs moved for a preliminary injunction. In preparation for the
6 hearing, the parties conducted substantial fact and expert discovery, including depositions and
7 document production, culminating in a two day evidentiary hearing. A key issue addressed in the
8 briefing and at the hearing was plaintiffs’ proposed market definition. In addition to the national
9 market set forth in their complaint, plaintiffs advanced two alternative theories: (1) a market limited
10 to network carriers competing for business travelers; and alternatively, (2) thirteen airport-pairs
11 where the merger allegedly lessened competition. On September 27, 2010, after post-hearing
12 briefing and argument, the Court denied plaintiffs’ motion for preliminary relief, finding, among
13 other things, that the plaintiffs had not established a viable market, dooming their efforts to show
14 that the impending merger would substantially lessen competition, and precluding a finding of
15 plaintiffs’ likelihood of success on the merits. Specifically, the Court found that the network
16 carrier-based market definition failed to account for substantial evidence of competition for business
17 travelers from low cost carriers. As for airport-pairs, the Court found substantial evidence
18 demonstrating that instead city-pairs provide the accepted framework for antitrust analysis. Finally,
19 the Court rejected the national market because plaintiffs failed to show any reasonable
20 interchangeability of use, or cross-elasticity of demand, between flights connecting distant cities. In
21 other words, there was no evidentiary support for plaintiffs’ position that a New York-Los Angeles
22 flight is a substitute for a Miami-Seattle flight. In rejecting the national market, the Court also noted
23 that the concentration of the national airline industry falls far below the Herfindahl-Hirschman
24 Index threshold specified by the Department of Justice’s Merger Guidelines.

25 The merger was consummated on October 1, 2010. Plaintiffs immediately appealed this
26 Court’s order denying them a preliminary injunction. In their appeal, plaintiffs focused on the
27 national market, and raised many of the arguments that they now seek to advance in opposition to
28 the instant motion to dismiss. On May 23, 2011, the Ninth Circuit Court of Appeals affirmed the

1 decision denying plaintiffs a preliminary injunction, holding “[t]he city-pair market endorsed by the
 2 district court does satisfy the reasonable interchangeability standard,” but “[p]laintiffs have failed to
 3 demonstrate that the national market in air travel satisfies this standard.” As a result, the Court
 4 concluded, “[p]laintiffs failed to establish a relevant market for antitrust analysis, a necessary
 5 predicate for making a claim under § 7 of the Clayton Act.” After an unsuccessful petition for
 6 rehearing en banc, plaintiffs filed a petition for writ of certiorari challenging the Ninth Circuit’s
 7 decision, which was also denied.

8 Finally, on November 2, 2011, plaintiffs filed their FAC, for the dual purposes of adding a
 9 prayer for money damages, and a demand for a jury trial.¹ As noted, the FAC does not alter the
 10 proposed market definition, and United now moves to dismiss based on the lack of a viable market
 11 definition under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs continue to insist in their
 12 opposition to the motion to dismiss that a national market is consistent with precedent and provides
 13 an adequate basis to proceed on their claim.

14 III. LEGAL STANDARD

15 A complaint must contain “a short and plain statement of the claim showing that the pleader
 16 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Pleadings are “so construed as to do substantial
 17 justice.” Fed. R. Civ. P. 8(f). While “detailed factual allegations are not required,” a complaint
 18 must have sufficient factual allegations to “state a claim to relief that is plausible on its face.”
 19 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 20 544, 570 (2007). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
 21 more than a sheer possibility that a defendant has acted unlawfully.” *Moss v. United States Secret*
 22 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct at 1951). A claim may be
 23 dismissed under Federal Rule of Civil Procedure 12(b)(6) based on the “lack of a cognizable legal
 24 theory” or on “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v.*
 25 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). When evaluating such a motion, the court
 26 must accept all material allegations in the complaint as true, even if doubtful, and construe them in

27 _____
 28 ¹ Several days later, plaintiffs supplemented that pleading with additional factual averments directed to harm.

1 the light most favorable to the non-moving party. *Twombly*, 550 U.S. at 570. “[C]onclusory
 2 allegations of law and unwarranted inferences,” however, “are insufficient to defeat a motion to
 3 dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.
 4 1996). When dismissing a complaint, leave to amend must be granted unless it is clear that the
 5 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corrections*, 66 F.3d
 6 245, 248 (9th Cir. 1995).

7 IV. DISCUSSION

8 1. Judicial estoppel

9 As a threshold matter, plaintiffs contend that the United’s attacks on the national market
 10 definition may not be countenanced because they are inconsistent with a position adopted by United
 11 in a previous case. Judicial estoppel “is an equitable doctrine invoked by a court at its discretion.”
 12 *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). It generally precludes a party from adopting a
 13 position that is clearly inconsistent with a position successfully asserted in earlier proceedings,
 14 particularly where permitting them to do so would prejudice the opposing party. *New Hampshire v.*
 15 *Maine*, 532 U.S. 742, 749 (2001). The purpose of the doctrine is “to protect the integrity of the
 16 judicial process.” *Id.* (citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).
 17 Although, as an equitable doctrine, judicial estoppel cannot be reduced to a universal principle or
 18 rigid formula, the Supreme Court has identified several discretionary factors which guide its
 19 application by the courts. First, the later position should be “clearly inconsistent” with the earlier-
 20 adopted position. *Id.* at 750. Second, the estopped party should have successfully asserted the
 21 earlier position, such that acceptance of the later, inconsistent argument would lead to “the
 22 perception that either the first or the second court was misled.” *Id.* (citing *Edwards*, 690 F.2d at
 23 599). Finally, the doctrine has particular relevance where the party seeking to adopt an inconsistent
 24 position gains “unfair advantage” or imposes an “unfair detriment” on the opposing party. *Id.* at
 25 751.

26 Here, plaintiffs argue that United and American Airlines successfully obtained summary
 27 judgment in *In re Air Passenger Computer Reservation Sys.*, 694 F. Supp. 1443 (C.D. Cal. 1988)
 28 (hereinafter *CRS*) as defendants, by asserting the existence of a national market for air

1 transportation. Plaintiffs' argument, however, does not accurately reflect the position of the parties
2 in *CRS*, or the court's ultimate holding. In *CRS*, plaintiffs, including Continental and other airlines,
3 alleged that an electronic ticket reservation system developed by United and American Airlines
4 constituted an "essential facility." Among other things, the complaint apparently asserted that
5 United and American leveraged the reservation system to monopolize, or attempt to monopolize the
6 downstream "national air transportation market" as well as "various local air transportation
7 markets." *Id.* at 1466, 1471. Plaintiffs here assert that United argued in favor of adopting the
8 national market as the relevant market for antitrust purposes.

9 In fact, the opinion states only that "[t]he evidence submitted supports defendant's
10 contention that the only relevant air transportation market is the national market." *Id.* at 1472. It
11 appears that United took this position because there was no evidence to establish local air
12 transportation markets as a viable alternative to the national market, and as for the national market,
13 "[p]laintiffs have provided no competent evidence supporting a claim that United monopolized the
14 national air transportation market." *Id.* at 1466. *CRS* contains no other substantive discussion
15 about the viability of the local or the national market, and it is not even clear from the opinion that
16 United affirmatively argued that a national air transportation market provides a viable basis for
17 antitrust analysis. Rather, it appears equally likely from the face of the opinion that the airline
18 merely accepted the national market for argument's sake given the lack of any competent evidence.
19 As a result, plaintiffs here have failed to establish that United took a clearly inconsistent position.
20 Of course, even if United did accept the national market as the relevant market for antitrust
21 purposes, because of the absence of any competent evidence directed to either the local or the
22 national market, nothing turned on its position. Plaintiffs in this case have therefore also failed to
23 show that United maintained its purported prior position with success. It follows that *CRS* does not
24 provide any basis for the application of estoppel against defendants in this case. Even assuming,
25 however, for argument's sake, that estoppel did bar defendants from attacking the sufficiency of
26 plaintiffs' pleadings, plaintiffs simply could not proceed on a legally deficient complaint, for the
27 reasons articulated below.

28 2. Sufficiency of the pleadings

1 United contends that plaintiffs' complaint is deficient because they have failed to plead a
2 viable market for antitrust purposes. As the order denying a preliminary injunction, and the Ninth
3 Circuit opinion affirming that order, discussed at length, to state a claim under the Clayton Act,
4 plaintiffs *must* plead a viable relevant market in which the defendant has market power. *Malaney v.*
5 *UAL Corp.*, No. 10–17208, 2011 WL 1979870, at *1 (9th Cir. May 23, 2011) (citing *Brown Shoe*
6 *Co. v. United States*, 370 U.S. 294, 324 (1962)). Failure to do so renders the complaint
7 unsustainable and appropriate for dismissal. *United States v. E.I. du Pont de Nemours & Co.*, 353
8 U.S. 586, 593 (1957) (“[d]etermination of the relevant market is a necessary predicate to a finding
9 of a violation of the Clayton Act because the threatened monopoly must be one which will
10 substantially lessen competition within the area of effective competition” (internal quotation marks
11 omitted)). *Accord Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 10-15978, 2011 WL
12 1898150, at *1 (9th Cir. May 19, 2011) (“In order to state an antitrust claim, a plaintiff must identify
13 a relevant market within which the defendant has market power.”). To define the relevant market,
14 the court must consider “the reasonable interchangeability of use or the cross-elasticity of demand
15 between the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325. To meet this
16 standard, products need not be perfect substitutes, “but must be sufficiently interchangeable that a
17 potential price increase in one product would be defeated by the threat of a sufficient number of
18 customers switching to the alternate product.” *Malaney*, 2011 WL 1979870, at *1.

19 Here, plaintiffs have already enjoyed ample opportunity to develop a substantial record on
20 this question, yet both this Court and the Ninth Circuit have held that their pleadings, at least in their
21 current form, fail to state a viable market. As both courts have explained, the national market for air
22 transportation does meet *Brown Shoe*'s standard because flights between distant cities are simply
23 not reasonably interchangeable. A passenger would never choose a flight from San Francisco to
24 Newark as an alternative to a flight from Seattle to Miami, regardless of price. Plaintiffs have
25 expressly refused to amend their pleadings to cure this defect since denial of the preliminary
26 injunction. Instead, they now seek to re-litigate the viability of the national market, insisting that
27 both this Court and the Ninth Circuit incorrectly rejected their previous position. Although the
28 Ninth Circuit's articulation of the relevant market standard was handed down in response to

1 plaintiffs' request for a preliminary injunction, it is now the binding law of this case. *Ranchers*
2 *Cattlemen Action Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114
3 (9th Cir. 2007) (appellate ruling on pure point of law related to party's application for a preliminary
4 injunction is binding for remainder of trial proceedings). Because plaintiffs' arguments on this issue
5 have already been considered, discussed at length, and rejected, they need not be addressed again
6 here.

7 Plaintiffs other attempts to avoid pleading a legally adequate market are equally unavailing.
8 It would be improper to allow plaintiffs to present the issue to the jury because their market theory
9 has already been deemed legally deficient and unsupported by "substantial evidence." *Syufy Enter.*
10 *v. American Multicinema*, 793 F.2d 990, 994 (9th Cir. 1986). Likewise, their new averments
11 concerning the harm that will allegedly befall plaintiffs are irrelevant in light of their failure to
12 establish, first, a relevant market within which these harmful effects may be analyzed. *California v.*
13 *Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) ("plaintiff must first define the
14 relevant market, and then establish that the proposed merger will create an appreciable danger of
15 anticompetitive consequences"). Furthermore, given that plaintiffs have already been granted an
16 opportunity to amend, and yet have expressly refused to alter their averment that the relevant
17 antitrust market is national in scope, their complaint must be dismissed with prejudice. *Lucas*, 66
18 F.3d at 248.

19 V. CONCLUSION

20 For all of the foregoing reasons, the motion to dismiss must be granted. The complaint is
21 dismissed with prejudice.

22 IT IS SO ORDERED.

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24 Dated: 12/29/11

25 
26 RICHARD SEEBORG
27 UNITED STATES DISTRICT JUDGE
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