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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL C. MALANEY, et al., Plaintiffs, v. UAL CORPORATION, et al., Defendants.	**CASE NO.: CV-10-02858 (RS)** Date: September 17, 2010 Time: 2:00 p.m. Judge: Hon. Richard Seeborg

PLAINTIFFS' POST-HEARING MEMORANDUM

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I. INTRODUCTION

Plaintiffs above-named submit this post-trial memorandum in support of their motion for a preliminary injunction against the proposed merger of defendants United Airlines, Inc. ("United"), and Continental Airlines, Inc. ("Continental"). Plaintiffs have moved this Court to enter a preliminary injunction against defendants' proposed merger as violative of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, pending trial on the merits, which plaintiffs are prepared to conduct at the Court's earliest convenience.

As the evidence at the hearing in this matter on August 31 – September 1 clearly establishes, the effect of the defendants' merger may be substantially to lessen competition or to tend to create a monopoly in three distinct markets: (1) the network carrier market for business travelers in the United States; (2) 13 overlapping airport pairs in which defendants now compete; and (3) the United States airport industry as a whole, where both actual and potential competition will be eliminated by the defendants' merger.

Hereafter, plaintiffs will address the following issues: (a) standards for a preliminary injunction; (b) plaintiffs' likelihood of success on the merits, including the relevant markets, the likely effects of defendants' merger, and the plaintiffs' standing to obtain injunctive relief; (c) irreparable harm and the balance of hardships; and (d) the public interest. In their discussion, plaintiffs will deal with the evidence of record in these proceedings as it relates to the various issues, with appropriate citations to the record.

II. STANDARDS FOR A PRELIMINARY INJUNCTION

For a plaintiff to obtain a preliminary injunction, the plaintiff 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." *Winter v. Natural Res. Def. Cil.*, ___ U.S. ____, 129 S.Ct. 365, 374 (2008). The United States Court of Appeals for the Ninth Circuit continues to recognize a "sliding scale" as appropriate for preliminary injunctions. *Alliance for the Wild Rockies v. Cottrell*, 2010 U.S. App. Lexis 15537, *10-11 (9th Cir. July 28, 2010). The sliding scale approach, also known as the "serious questions test," provides 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.* In addition, the Supreme Court has held that a "preliminary injunction is customarily granted on the basis of procedures that are less formal and on evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing." *University of Texas v. Comenisch*, 451 U.S. 390, 395 (1981). This means that a court may consider, in ruling on the preliminary injunction, evidence that may be inadmissible at trial. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

Regardless of whether this Court employs the four-factor test or the serious questions test, however, and regardless of what evidentiary standard the Court applies, plaintiffs have met their burden for a preliminary injunction to preserve the status quo pending trial on the merits.

III. LIKELIHOOD OF SUCCESS ON THE MERITS

A. ELEMENTS OF A SECTION 7 VIOLATION.

As this Court is aware, Section 7 requires a showing only that a defendant's merger **may** substantially lessen competition, not that it will in fact do so. *California v. Sutter Home System*, 130 F.Supp.2d 1109, 1117-18 (N.D. Cal. 2001), quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (quotations and other citation omitted). "Competition is so important that mergers or acquisitions that '**may**' lessen competition are prohibited. The Supreme Court has specifically recognized that by using the phrase 'may,' **Congress was concerned with probabilities, not certainties."** *Bon-Ton Stores, Inc. v. May Department Stores Co.*, 881 F. Supp. 860, 867 (W.D.N.Y. 1994) (granting preliminary injunction enjoining merger) (emphasis added), citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

Section 7 is intended "primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil." *United States v. E.I. duPont deNemours & Co.*, 353 U.S. 586, 597 (1957); *Brown Shoe*, 370 U.S. at 317. The statute proscribes a merger if there is a "reasonable probability" that the merger will substantially lessen competition or tend to create a monopoly. *Brown Shoe*, *id.* at 323; *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 577 (1967). Central to the purpose of the statute is Congressional intent "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); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966). *A fortiori*, where "that trend [has] developed to the point that a market … [has been] left in the grip of a few big companies," a merger that further concentrates the industry violates Section 7 and must be enjoined. "If concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia Nat'l Bank*, 374 U.S. at 365 n. 42.

The Supreme Court decisions construing and applying Section 7 demonstrate just how seriously the Court took the principles it saw embodied in Section 7, as the Court repeatedly prohibited mergers involving much smaller concentrations of power than what is involved in this case. In *Brown Shoe*, the Supreme Court enjoined the merger, in an already concentrated market, of Brown Shoe, the third largest shoe retailer and fourth largest shoe manufacturer, and Kinney, the eighth largest show retailer and twelfth largest shoe manufacturer. Pre-merger, Brown and Kinney held manufacturing shares of 6 percent and 0.5 percent, respectively; post-merger, the combined company retained only the 6 percent manufacturing share and a 9.5 percent share of the domestic retail shoe market. 370 U.S. at 297, 303, 327, 331, 346. In *United States v. Philadelphia Nat'l Bank*, the Supreme Court enjoined the merger of the second and third largest banks in the relevant four-county geographic market, which would have created the largest bank, holding 36 percent of all bank assets in the area. 374 U.S. at 330-31, 364. In *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 278 (1964), the Supreme Court enjoined Alcoa's acquisition of Rome Cable, which would have increased Alcoa's market share from 27.8 percent to only 29.1 percent. In *United States v. Continental Can Co.*, 378 U.S. 441, 445-46 (1964), the Supreme Court enjoined a merger between the second largest metal container company in the country, with a 33 percent share of the can market, and the country's third largest glass container company, with a share of 9.6 percent of the glass container market. In *United States v. Von's Grocery Co.*, 384 U.S. at 272, 281, the Supreme Court enjoined the merger of Von's, the third largest retail grocer in Los Angeles with a 4.7 percent market share, and Shopping Bag, the sixth largest grocery store controlling 4.2 percent of the Los Angeles market. In *United States v. Pabst Brewing Co.*, 384 at 550, the Supreme Court enjoined the merger of Pabst and Blatz, the tenth and eighteenth largest brewers in the United States, the combination of which would have made Pabst the nation's fifth largest brewer with 4.49 percent of total domestic beer sales.

In *Hospital Corp. of America v. Federal Trade Comm'n*, 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Richard Posner observed that the cases discussed above, taken *in toto*, stand for the rule that Section 7 prohibits a non-trivial acquisition of a significant competitor, like United's merger with Continental:

> [The decisions] seemed, taken as a group, to **establish the illegality of any non-trivial 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 have been overruled.**

Id. (emphasis added), citing *Brown Shoe, Alcoa*, *Von's Grocery,* and *Pabst Brewing* (other citations omitted).

These cases remain good law because the Supreme Court has not considered a merger case since 1975, when it decided *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975), and *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), two cases on which defendants here mistakenly rely. Although the Court refused to enjoin either merger, the cases involved "highly unusual facts," *HCA v. FTC*, 807 F.2d at 1385, and in no sense altered the law of the Court's prior merger decisions. In *Citizens & Southern Bank*, "the merger was a mere formality — like a marriage ceremony between common law spouses." *HCA, id.* at 1386. In *General Dynamics*, "which was like a failing company case, " *HCA, id.*, the Court allowed

General Dynamics to acquire the stock of United Electric Coal Cos., because the acquired company had committed most of its reserves under long-term contracts, and had little prospect "to compete for subsequent long-term contracts" due to "scarce uncommitted resources." Thus, "irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the district court and fully substantiated that court's conclusion that its acquisition … would not 'substantially … lessen competition.…'" 415 U.S. at 503-04.

Neither case is relevant here. United and Continental are not already intertwined like the banks in *Citizens & Southern Bank*. Nor is the future competitive strength of either airline trammeled or diminished by future commitments, unlike United Electric Coal Cos. Both *Citizens & Southern Bank* and *General Dynamics* presented truly unique and special circumstances that have no bearing or relevance here. Moreover, in *General Dynamics* the Court reiterated the controlling force of its prior decisions, such as *Brown Shoe*, *Philadelphia Nat'l Bank*, *Continental Can*, *Von's*, and *Pabst*, in the absence of special circumstances unique to the particular industry at issue.

> The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing … [*Id.* at 497.]

Hence, *Citizens & Southern Bank* and *General Dynamics* are of no help to defendants in this case.

B. RELEVANT MARKETS AND EFFECTS.

1. Required Elements of Proof.

Although determination of the relevant geographic and product markets may be "a necessary predicate" to deciding whether a proposed merger violates Section 7, mathematical exactitude is not required. *United States v. Marine Bancorporation*, 418 U.S. at 618. The geographic market is determined by "the area of effective overlap, [where] the effect of the merger on competition will be direct and immediate. This depends upon the geographic structure of supplier-customer relations." *Philadelphia Nat'l Bank*, 374 U.S. at 357. Even if the defendants compete on a nationwide basis, or in more than one area of the country, as is the case here, plaintiffs need not show that the defendants' merger is likely to lessen competition in **every** one, or even the majority, of those markets. Instead, plaintiffs must show only that the merger may tend to create a monopoly or restrain competition in **any** market where the defendants actually or potentially compete:

> The language of … section [7] requires merely that the Government prove the merger may have a substantial anticompetitive effect **somewhere** in the United States--'in any section' of the United States. This phrase does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground. The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in **one or more** sections of the country. In either event a violation of § 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant "economic" or "geographic" market is not an adequate ground on which to dismiss a § 7 case.

Pabst Brewing Co., 384 U.S. at 559-60 (emphasis added); *see also Philadelphia Nat'l Bank*, 374 U.S. at 355 ("The statutory test is whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country'") (citation omitted).

The second dimension of the relevant market is the relevant product market. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.*, 370 at 325 (citation omitted); s*ee 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"). Under Supreme Court precedent, the relevant product market is not limited to only those products of each defendant that directly compete with each other. To the contrary, the Court may view the relevant product market in terms of the industry in which the defendants compete and the entire range of products in that industry, even though each defendant does not manufacture or sell each product.

For example, in *Brown Shoe*, the Supreme Court found the relevant markets to be the manufacture and sale of shoes, and not men's, women's or children's shoes. The Court rejected any such fine "age/sex distinctions," premised on the defendants' reasoning that "a little boy does not wear a little girl's black patent leather pump and … a male baby cannot wear a growing boy's shoes." 370 U.S. at 327. Rather than engage in such fine distinctions, which do "not aid … in analyzing the effects of the merger," the Court required that the focus be on "practical indicia" of the industry in question. *Id.*

Similarly, in *Philadelphia Nat'l Bank*, the Court found the relevant market to be "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'" 374 U.S. at 356. The Court rejected the defendant's argument that the relevant market should consist of distinct markets involving separate "product lines," such as checking accounts, lines of credit, and trust administration products and services. In *United States v. Aluminum Co. of Am.*, the Court defined a broad relevant product market of "aluminum conductor" wiring consisting of both "bare" and "insulated" wiring, inasmuch as both were "used for the purpose of conducting electricity," although the two products were not interchangeable 377 U.S. at 274-75, 77.

In *Continental Can*, the Court found the relevant market to consist of both metal and glass containers. The Court "reject[ed]" the view that "competition protected by Section 7 [is limited] to competition between identical products." 379 U.S. at 452. Reasoning that "[i]nterchangeability of use and cross-elasticity of demand are not be used to obscure competition but to recognize competition where, in fact, competition exists," *id.* at 453, the Court instead recognized the real world "existence of a large area of effective competition between the makers of cans and the makers of glass containers." *Id.* at 456. In *Von's Grocery*, the Supreme Court found the relevant market to be the grocery store industry, not the specific lines of products carried by grocers, such as dairy, canned goods, and meat. 384

U.S. at 272-72. Finally, in *Pabst*, the Supreme Court held the relevant market to be the beer industry, not the specific types of beer and ale offered by the defendants. 384 U.S. at 550.

The foregoing cases are instructive and relevant here, because they counsel conclusively against defining the relevant market only in terms of specific products and places where the defendants actually compete, when the defendants are involved in a nationwide, multifaceted industry.

On the other hand, the Supreme Court expressly authorizes viewing such limited and defined areas of competition as relevant markets under Section 7, where they in fact exist. As the Supreme Court famously said in *Brown Shoe*,

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

370 U.S. at 325. Hence, the inquiry as to the relevant market is confined neither to the forest nor the trees, but, as appropriate, may take account of either or both. If competition is likely to be restrained by the defendants' merger in the industry as a whole, the entire industry may constitute a proper relevant market. If anticompetitive effects are likely to manifest themselves in only a part of the industry, then that segment or submarket is a proper relevant market. What informs the search for the relevant market is ultimately the intent of Congress in enacting Section 7 and its various amendments, the last in 1950, which is to foreclose and reverse trends in concentration, whether in their incipiency or full flower.

In this particular case, the Supreme Court's admonitions regarding relevant markets are particularly important, inasmuch as defendants seek to confine the analysis only to a limited number of "city pairs" where defendants now compete. As will be shown, the defendants' analysis is improper, because it is both too narrow in failing to recognize network competition, and too broad in failing to recognize airport pair competition, both of which are likely to be adversely affected by defendants' merger.

2. The Network Competition Market.

Both United and Continental are "network carriers," which compete against each other through hub and spoke networks. The network carriers also include Delta, American, and U.S. Air. They are to be distinguished from the low-cost carriers ("LCCs"), which primarily compete by flying high-density point-to-point routes, *i.e.*, airport-to-airport routes not connecting with a hub. In certain key respects relevant to the defendants' proposed merger, network carriers and LCCs do not compete with each other. Jeffery Smisek, the CEO of Continental described this competitive landscape in his testimony in these proceedings. "We are a business airline and business passengers are important to us …. Business passengers are attracted to large networks." (Smisek Depo., 29:16-29:20.) "We are an airline that focuses on the business traveler." (*Id*., 36:10-36:11.) As Mr. Smisek testified:

> We and Southwest are in a different business model. We are a global hub and spoke carrier. They're a -- they're a domestic low-cost competitor. They generally fly to larger markets on a point-to-point basis. They don't tend to serve small communities and gather consumers from around the globe as we do -- or around the U.S. system, since we're talking about the U.S. system.

(*Id*., 33:2-33:9.)

> They are hub and spoke carriers and we are a hub and spoke carrier. And being a hub and spoke carrier and being a carrier that tends to focus on business travelers is our niche and selling point compared to, on the other extreme, Spirit Airlines, Frontier, JetBlue, Midwest, Southwest, which are low-cost, point-to-point carriers not focused so much on the business traveler. Those are the two extremes, if that answers your question. United is a hub and spoke carrier focused on the business traveler.

(*Id*., 43:25-44:16.)

> Q. So that -- what is it about business persons that you say is that this hub and spoke makes -- why is that attractive, in your understanding, to business persons, as opposed to anybody else?
>
> A. Well, business people -- it's not so much as opposed to but what business people often need to and wish to travel to

> destinations that are not large cities. And typically, smaller communities are not served by low-cost carriers, point-to-point carriers.
>
> Q. Okay. So then why would service --talking about business people, why was – why would that make a difference to business people?
>
> A. Because we fly to places business people want to go.
>
> Q. So you're saying that you would --that you or people with hub and spoke would fly to more destinations that would be like small communities because you think that that attracts business people?
>
> A. It is an attractive network for business people in the context of the broader network itself, yes.
>
> Q. And the low-cost don't provide that?
>
> A. That's correct, in general, for small [communities].

(*Id.*, 45:4-46:5.)

> Q. And you think that by serving these small communities this broadens your network and that this is attractive to business people?
>
> A. That's correct.
>
> Q. So that basically you're not in competition with the LCCs for these smaller communities?
>
> A. They don't serve -- they don't typically serve those smaller communities, that's correct.

(*Id.*, 96:18-97:8.)

Defendants and the other network carriers offer business travelers features unavailable from the low-cost airlines, including broad networks with a multiplicity of destinations (*id.*, 53:4-53:5: "A vast array of destinations that [LCCs] do not serve"); multiple classes of service (*id.*, 53:20-21), with first and business class options; higher "frequency of service" (*id.*, 54:6); and frequent flyer programs allowing for free upgrades after the attainment of mileage goals. In the hearing in this matter on September 1, 2010, Kevin Knight, Senior Vice President for Planning at United Airlines, testified that there is no LCC that can offer this complete package available from each of the network carriers.

> Q. ….Is there any low-cost carrier that offers that combination? A network as extensive as yours, a frequent flyer program, multiple classes of service, and upgrades.
> Is there -- tell me if there's a low-cost carrier that offers that combination.
> A There is no single carrier that will offer that combination.

(September 1, 2010, Hearing Transcript ("9/1 Tr."), 326:24-327:5.)

Both the direct testimony and Congressional testimony of defendants' executives support the existence of the network market catering to business travelers. According to United's CEO, Glenn Tilton, in his Senate testimony, "As you know, low cost carriers have not and will not serve small communities, as such service is inconsistent with their point-to-point business models that rely largely on local traffic." (Exhibit ("Ex.") 70, p. 7.) Mr. Smisek, Continental's CEO, concurred: "Low cost carriers will never serve those markets, it's antithetical to their business model. We are the only carriers that can and will serve it, because we need to gather those customers and bring them through our hubs." (*Id.*, p. 54.) According to Mr. Smisek,

> A large portion of the revenue synergies of this transaction are predicated on improving the mix on board our aircraft, not so much the price of any given ticket, but the mix of more business travelers because – the business travelers because of their necessity to travel quickly and at the last minute are willing to pay a higher fare. [*Id.*, p. 66.]
>
> * * *
>
> Both United and Continental are principally a business airline. We are attracted to a broad range of consumers, but we are principally business airlines. *It is a differentiated product*. We do a very good job of it. This merger will put us in a position to create a network that will be far more attractive to corporate travelers than either of our networks could be alone … . [*Id.*, p. 74 (emphasis added).]

In his deposition, Mr. Tilton acknowledged the "significant" difference between LCCs and network carriers: "It's significantly different. The reason it's significantly different is point-to-point operators do not serve small business communities. In other words, for small business communities to be served, there really has to be a hub, because those small communities are in large part flown into a connecting hub so that they can fly on." (Tilton Depo., 90:9-17); *see also* Direct Testimony of Kevin Knight (Ex. 1059, ¶ 7.) The direct testimony of Messrs. Tilton and Smisek are virtually identical in asserting that defendants do not compete with LCCs for business travelers in smaller communities.[1]

Of course, plaintiffs' expert, Professor Darren Bush, testified to the existence of a network market, in which he found likely anticompetitive effects resulting from defendants' merger. (9/1 Tr., 546:24-550:1.) Professor Bush is not alone in his view of legacy airlines competing with each other on a network basis. Peter C. Carstensen, "Airline Mergers – Second Best Results in a Changed Environment," *Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries* (Edward Elgar Publishing Ltd., 2008) (Carstensen and Farmer, eds.). In his chapter, Professor Carstensen describes at length and in detail the emergence of airline competition on a network basis, and the failure of policymakers and antitrust enforcers to recognize and deal effectively with network competition and its potential abuses. *Id.*, pp. 107-22.[2] Professor Carstensen concludes,

> Even today, policymakers and law enforcers seem to have an undue focus on specific city pairs in which two airlines presently compete in the analysis of both mergers and code

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[1] Smisek: LCCs use "a strategy focused on point-to-point service on high volume routes" (Ex. 1057, p. 5); and LCCs do not serve airports in smaller communities "because service to these communities is typically inconsistent with their business model. They are more often dependent on point-to-point, high density routes and often have one size aircraft, which makes it difficult for them to serve these small communities." (*Id.*, p. 6) Mr. Smisek also cited as a "reason" for the merger: "helps rationalize network carrier structure." (Ex. 88.)

Tilton: "LCCs operate profitably at lower unit revenues than traditional network airlines, generally due to significant cost advantages related to their less costly point-to-point business models." (Ex. 1058, p. 5) "LCCs have not addressed the need for small community service because it is typically inconsistent with their business model. LCCs are more often dependent on point-to-point, high density routes." (*Id.*)

[2] For example, "The market power inherent in such networks allows inefficient incumbents to drive more efficient entrants from the market. This is consistent with the existence of price discrimination and other exploitation of travelers by incumbent airlines that still fail or risk bankruptcy." *Id.*, p. 114.

> sharing or other strategic alliances …. [Citation omitted.] The problem with this narrow view is that it ignores the fact that effective competition involves networks that provide alternative routes for travelers. Moreover, the contestable market theory has more merit with regard to the potential for internetwork competition than the original, and now discredited, theory that applied to city pair markets. … The location of hubs and spokes are the defining characteristics for determining which airline networks can compete effectively for which consumer traffic. This suggests that antitrust policy should focus equally on actual and potential internetwork competition in both merger analysis and the evaluation of code sharing or other strategic alliances. [*Id.*, p. 122.]

Defining network competition for business travelers as a relevant market is also fully consistent with the language of *Brown Shoe*, which lists "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." 370 U.S. at 325. [3] Here, the network carriers recognize themselves as unique and separate competitors. Likewise, the product has peculiar characteristics and uses, in that it is specifically targeted to business customers, "distinct customers" paying "distinct prices" in the words of *Brown Shoe*. There are also "unique production facilities," in that extensive networks are required to provide the product. The product also has the peculiar characteristics of having an extensive network, multiple classes of service, frequent flyer programs, and free upgrades once certain mileage levels are reached—a package that no single LCC is able to provide. Thus, at the very least, the plaintiffs have raised serious questions with regard to network competition for business travelers as a relevant market.

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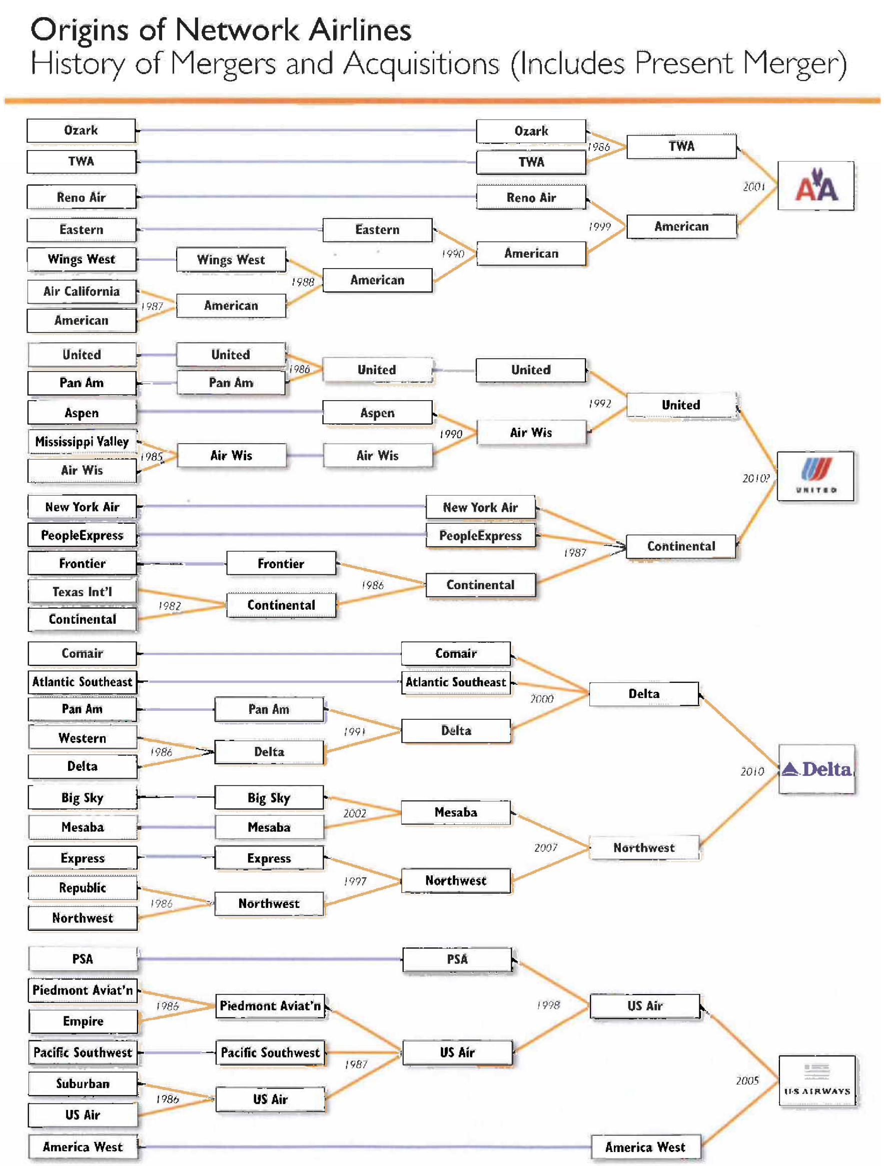
[3] It is also consistent with the Department of Transportation's recent decision in a current dispute between DOT and Delta and US Air: "The competitive harm, we feared, would occur not just at the city-pair level, but at the **network or airport level** as well, particularly given the finding that the other area airports did not serve as effective substitutes for each other." *Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport*, 75 F. R. 26322, 26324 (Docket No. FAA-2010-0109) (May 11, 2010) available at http://regulations.vlex.com/vid/204537765 (emphasis added).

In addition, there can be absolutely no question as to the likely adverse effect of defendants' merger on competition in the network market. First, the Supreme Court cases counsel, as a prime predictor, the trend toward concentration in the industry. Here, the trend is stark and unmistakable. If defendants' merger is approved, the history of the airline industry, with respect to network carriers, will look like what appears in Demonstrative Ex. 108, p. 2, a depiction that in itself requires that the defendants' merger be enjoined under the Supreme Court's decisions:



Second, the defendants' merger is likely to have an adverse effect on the ability of the remaining network carriers to compete with the merged entity. This is most readily apparent from the testimony of Mr. Smisek, who admitted that he reopened merger negotiations with United because of his fear that United would merge with U.S. Air, which would threaten the long-term viability of Continental:

> Q. And the reason that you changed your mind was with regard to United because you found out that United was dealing with US Air, is that correct?
> A. That was part of it, yes.
> Q. Well, that was certainly one of the reasons, was it not?
> A. It was one of the reasons, yes.
> Q. And you felt that if United went forward with US Air, that you would be marginalized; is that correct?
> A. I felt we ran the risk of that, yes.
> Q. And by being marginalized, you felt that those two networks would be able to harm you economically; is that right?
> A. By the "two networks," you mean a combined United/US Airways?
> Q. Yes.
> A. Yes, that's correct.

(August 31, 2010, Hearing Transcript ("8/31 Tr."), 80:19-81:8.) Obviously, if the combination of United and U.S. Air, the smallest network carrier, would threaten the continued viability of Continental, then the United-Continental combination is likely to have even more of an adverse effect on U.S. Air, not to mention American, which will also be smaller than the defendants' combined network.[4]

Third, still another likely anticompetitive effect of the defendants' merger will be a reduction in capacity and service over the combined network. Plaintiffs' Exhibit 15, a pre-merger simulation prepared at the direction of Mr. Smisek, who will be the CEO of the merged airline, provides a picture of a network with capacity reduced at every one of the eight hubs except Newark and Houston, with cuts of 84 percent of departures at Cleveland, 10 percent at Denver, 5 percent at Los Angeles, 3 percent at Chicago, and 9 percent at San

[4] Mr. Smisek also feared being "crushed" by the new Delta network, formed from the merger of Delta and Northwest. (Ex. 88; 8/31 Tr., 81:20-82:9.)

Francisco. This is an "optimized schedule" with "a primary focus on returning the joint airline to sustained profitability." (*Id.*, p. 2; for hubs, see pages 31-38.) Significantly, the recent practice of all of the network carriers has been to reduce and limit capacity in order to increase profitability. (Ex. 74, May 23, 2010, Travel Weekly, "Airlines Limit Capacity Despite Strong Q2.") Defendants also plan to eliminate over 2,200 jobs following their merger, which is also hardly consistent with expanding output. (9/1 Tr., 313:4-12.)

A further likely effect of the defendants' merger, the natural result of diminished capacity, will be increased prices. Here, events are happening even more rapidly than the pace of these proceedings. Three days after the hearing in this matter, the New York Times reported, on September 4, "After Bargains of Recession, Air Fares Soar":

> Air fares have marched steadily upward in recent months and are now close to pre-recession levels – and that's not even counting all the fees that airlines have introduced lately.
>
> The increase in fares is the result of a remarkable discipline shown by the airlines, which have generally not added more flights this year even as the economy has improved and demand has picked up. For the airlines, flying fewer and fuller planes has paid off.
>
> Passengers are paying the price. For leisure travelers, domestic fares have increased by more than 20 percent in the second quarter compared with a year earlier, according to data compiled by the travel Web site Orbitz. On international routes in that period, the climb was even steeper, with fares rising 30 percent. For business travelers, ticket prices increased by 12 percent in the first half of the year.
>
> The price of round-trip coach tickets for a flight between Chicago and Atlanta, for instance, was about $250 this summer, a $50 increase over last year. A round-trip ticket from New York to Paris, which sold for less than $700 last year, cost more than $1,000 this summer.

available at http://www.nytimes.com/2010/09/05/business/05air.html. What the New York Times reports is consistent with the expectations of industry insiders. On April 30, 2010, industry analyst Vaughn Cordle, a former United pilot, emailed congratulations to Mr. Tilton on the defendants' impending merger. Mr. Cordle observed, "The higher market concentration (HHI) after a merger will reduce risk and increase pricing power for all airlines. This benefit was not considered but should result in expanded valuation multiples and higher valuation." Mr. Tilton responded, "Straight ahead. No ideas in Dallas [a reference to American Airlines] …." (Ex. 31.) Mr. Cordle is not alone in his views:

> "The combined firm would have more staying power than each of them individually," Robert Mann, airline consultant at RW Mann & Co., said. "Part of it is the consolidation provides pricing power and the opportunity for pricing power for the entire industry."
>
> "The margins on the combined business would be better," Mann said. [Ex. 37, May 3, 2010, email.]

The defendants themselves expect margins to be better as a result of the merger, in that they foresee selling more seats to business travelers at higher prices and thereby improving the merged airlines' revenue "mix." (Smisek Congressional Testimony, Ex. 70, p. 66.)

The Court must also consider the likelihood of future mergers if the defendants are permitted to combine. Certainly, it is difficult to imagine that U.S. Air will seek to remain independent and not attempt to merge with American. Such a course of action is readily inferable from Continental's course of conduct, when confronted with the possibility of United and U.S. Air combining. Seriously doubting Continental's ability to survive as the odd man out in such a scenario, Mr. Smisek cut into the negotiations in order to supplant U.S. Air as United's merger partner.

> Q. You called Mr. Tilton two days after you heard about the possibility that United was going to merge with US Air, correct?
> A. Yes.
> Q. So in those two days you thought on your own that this was the time that you had to do something or you might be left behind, is that right?
> A. Yes. [8/31 Tr., 93:3-10.]

Finally, there is the issue of the alleged synergies and efficiencies claimed by defendants to justify their merger. As made clear at the hearing, these so-called efficiencies fall into two categories: (1) cost savings resulting largely from the elimination of redundancies, which exist only if defendants merge; and (2) revenue synergies, which are largely the result of the merged company's being able to attract more business than either airline standing alone because of the increased attractiveness of the combined network. (9/1 Tr., 303:22-320:23; Knight Direct Testimony, Ex. 1059, ¶¶ 34-74.) With regard to the claimed synergies, there are three important points for the Court to consider.

First, defendants have no intention of passing any of their projected cost savings on to the customer in the form of lower airfares. (9/1 Tr., 317:23-319:18; Mikells Depo., 213:24-215:24; Smisek Depo., 126:7-128:20.) To the extent Courts have considered cost savings as a justification for a merger, they have invariably required the merging companies to demonstrate that any such cost savings will be passed on to consumers in the form of lower prices, and will not simply increase the profits of the merging company. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.D.C. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088-89 (D.D.C. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991); *California v. Am. Stores Co.*, 697 F. Supp. 1125, 1132-33 (C.D. Cal. 1988), *aff'd* in part and *rev'd* in part on other grounds, 872 F.2d 837 (9th Cir. 1989), *rev'd*, 495 U.S. 271 (1990); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 148-49 (E.D.N.Y. 1997) ("The second prong of the 'efficiencies' analysis is whether these savings would be passed on to the consumers.").

Second, with regard to the alleged revenue synergies, defendants have made no showing that such increased revenue is the result of an increase in total demand for air travel, rather than simply revenues siphoned off from the competitors of the merged airline. (9/1 Tr., 329:9-331:4.)

> Q Okay. So, doesn't that mean that every dollar of the so-called revenue synergies that you're going to get is -- is a dollar that you are taking away from one of your competitors?
> A The synergies that we're generating are a result of the increased share that we have in the marketplace.
> Q So the answer is yes, this is all increased revenue that you're going to get by taking revenue from your competitors?
> A It makes us more competitive. As a result, we will get a larger share of the traffic.

(9/1 Tr., 330:17-25.) Again, the merged airline's increased revenue will simply increase its bottom line to the damage of its competitors. Moreover, the increased revenues and profits of the merged airline, largely the result of more business travelers paying higher fares, will enable the merged airline to subsidize low fares to drive out LCCs flying point-to-point to and from the merged airline's hubs. (9/1 Tr., 340:25-342:1.)

Third, the alleged cost savings and revenue synergies from the merger are more than highly speculative and deserving of little credibility. History itself provides a convincing refutation of the defendants' efficiency claims. As Professor Bush remarks in his report, "[T]he history of airline mergers already teaches us the outcome. Airlines have consolidated but have not improved profitability in the long run." (Ex. 105, p. 17.) Indeed, United's CEO Tilton graphically and convincingly expatiated on the utter unpredictability of the airline industry:

> Q. So, even with the backdrop of a questionable economic recovery, you've been able to --
> A. To make a profit.
> Q. And you anticipate that you're going to continue to do that?
> A. Now, that's really the key question is, what I anticipate is, there are going to be circumstances that I can't predict that are going to make it almost impossible, if history is my judge, to predict the future of what this industry is going to have to confront. Because, from the moment that I stepped into the industry, there were more unpredictable global events that ill-affected the industry than in any other industry I've ever been associated with.

(Tilton Depo., 29:21-30:12; see, also, 148:9-149:1.)

Significantly, defendants do not expect to achieve the full effect of their claimed synergies for at least three years, until 2014 (9/1 Tr., 315:16-316:12), and expect to lose nearly $500 million in the first year because of the one-time costs incurred in combining the two airlines. (Ex. 6; Mikells Depo., 110:1-111:1.) Accordingly, as a matter of both fact and law, the synergies and efficiencies claimed by defendants are no justification for their anticompetitive merger. *FTC v. Proctor & Gamble* Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.")

Nor can defendants justify their merger by claiming that LCCs will eliminate or mitigate the merger's likely anticompetitive effects. By defendants' own admission, they are not competing with LCCs for business travelers in much of the network market, particularly smaller destinations where LCCs do not fly. Also by defendants' own admission, LCCs face two huge problems if they are effectively to challenge the network carriers in their own market. First, they must morph their business model from point-to-point carriers to converge with the network model of defendants. (Tilton Depo., 102:22-105:16; Tilton Congressional Testimony, Ex. 70, pp. 61:20-62:7 .) Second, to the extent LCCs attempt to replicate the hub and spoke model of the network carriers, they face potentially insuperable hurdles. Again, Mr. Tilton has testified:

> One thing to keep in mind, hubs are really expensive. I mean, the fixed capital cost associated with a hub is, you have to think of it in this industry as a capital investment. So, you want some, you know, depth of opportunity before you make that capital investment.

(Tilton Depo., 80:22-81:3.) Mr. Tilton's opinion is also consistent with that of Professor Bush (Ex. 105, pp. 13-14), and Professor Carstensen in his chapter on airline mergers:

> These inherent characteristics of the network nature of the airline business suggests several observations supported by empirical study. First, incumbent airlines have great advantages

> over new entrants because they have already established networks of hubs while new entrants must enter into multiple markets to offer networks of service to customers. … [Citations omitted.] Moreover, the incumbents will have a strong incentive to dominate a hub airport with a substantial customer base because this gives the incumbent a set of travelers – those coming to the hub and those traveling out of the hub – over which it can have significant pricing discretion. … [Citation omitted.] Once it has established such a hub, the incumbent can defend it against new entry by selective competition. Other established networks will, on the other hand, have little interest in creating significant price competition into or out of that hub. [*Id.*, pp. 111-12.]

Finally, as defendants acknowledge, the fleets of LCCs consist almost entirely of planes of one size, which militates against effective competition with the network carriers in their bread and butter smaller markets. As Mr. Smisek testified,

> Q. … I think you have suggested that these LCC operators don't go to the small communities?
> A. In general, they don't go to smaller communities, that's correct.
> Q. And you don't expect them to go into small communities?
> A. **It's hard for them to do because they tend to operate a fairly simple fleet, often even only one aircraft size,** and if you're operating an aircraft, a minimum aircraft size of, you know, 150 seats, you're not likely to serve – and certainly not likely to serve with any frequency – a small community because the demand isn't there to fill the aircraft.
> Q. And you think that by serving these small communities this broadens your network and that this is attractive to business people?
> A. That's correct.
> Q. So that basically you're not in competition with the LLCs [sic] for these smaller communities?
> A. They don't serve – they don't typically serve those smaller communities, that's correct.
> Q. Okay. And then you think that because you serve these smaller communities, business people are more likely to use your airline than an LCC airline?
> A. With respect to those travel needs, that's correct.

(Smisek Depo., 96:3-97:8; emphasis added. *See, also*, Tilton Depo., 84:21: "For example, Southwest flies only 737's.")[5]

In summary, as the foregoing evidence makes clear, network carrier competition for business travelers constitutes a cognizable market, in which defendants' merger is likely to have anticompetitive effects, which cannot be mitigated by LCC competition. The merger therefore violates Section 7.[6]

3. Airport Pair Markets.

Moving from the general to the particular, the Court must also find the defendants' merger likely to lessen competition in 13 airport pair markets, *i.e.*, hub-to-hub routes in which defendants' merger will eliminate present competition between them. As with the network market, there are two issues the Court must resolve: first, whether airport pairs are indeed a relevant market, as opposed to city pairs; and, second, whether the effects of defendants' merger may be substantially to lessen competition in these airport pair markets.

The second issue is relatively clear and can be quickly disposed of. The Court need only look at Table 3 to the rebuttal report of Professor Bush, in which Professor Bush has calculated the pre- and post-merger market shares for the defendants' overlapping routes:

[5] Any argument by defendants that their merger is necessary to enable them to compete with international carriers outside the United States is foreclosed by the Supreme Court's decision in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963): "If anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."

[6] Nor does its approval by the Department of Justice require or warrant a different result. The DOJ's action in no way legally binds this Court, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 13 (1979); rests on merger guidelines that not only lack the force of law, but are not even unanimously supported within the enforcement agencies, STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES, available at http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pd .; ignores network competition in favor of "now discredited" reliance on city pair analysis, Carstensen, *id*., p. 122; and has failed to convince numerous states Attorneys General to terminate their investigation of the merger's effects.

Table 3: Market Shares for Selected Airports

Origin	Destination	United Share	Continental Share	Merged	Pre-Merger HHI	HHI Change	Post-Merger HHI
DEN	EWR	60.2%	39.8%	100.0	5,206	4,794	10,000
DEN	IAH	35.7%	46.2%	81.9	3,632	3,302	6,934
EWR	DEN	56.3%	43.7%	100.0	5,079	4,921	10,000
EWR	ORD	42.1%	11.0%	53.1	2,805	927	3,731
EWR	SFO	30.8%	69.2%	100.0	5,734	4,266	10,000
HNL	LA	32.0%	3.7%	35.7	2,473	236	2,709
IAH	DEN	38.3%	46.7%	85.0	3,843	3,574	7,417
IAH	IAD	66.1%	33.9%	100.0	5,517	4,483	10,000
IAH	ORD	17.9%	55.2%	73.1	3,552	1,978	5,530
IAH	SFO	14.5%	85.5%	100.0	7,519	2,481	10,000
LAX	HNL	31.4%	3.0%	34.3	2,503	94	2,597
ORD	EWR	41.9%	12.0%	53.9	3,058	1,008	4,067
ORD	IAH	24.8%	50.1%	74.9	3,314	2,483	5,797
ORD	CLE	18.2%	0.3%	18.5	2,152	10	2,162
SFO	EWR	42.8%	57.2%	100.0	5,105	4,895	10,000
SFO	IAH	15.0%	85.0%	100.0	7,449	2,551	10,000

(Ex. 112, p. 14.)

As is apparent from the table, seven routes will become monopoly markets: Denver - Newark; Newark-Denver; Newark-San Francisco International; Houston Intercontinental-Dulles; Houston Intercontinental-San Francisco International; San Francisco International-Newark; and San Francisco International-Houston Intercontinental. Of the remaining routes, six will have HHI numbers far in excess of what is permitted by even the revised Merger Guidelines, issued three days before the DOJ closed its investigation of defendants' merger, and now define a "highly concentrated" market as having an HHI of at least 2,500. These routes are Denver-Houston Intercontinental (HHI 6,934); Newark-O'Hare (3,731); Houston Intercontinental-Denver (7,417); Houston Intercontinental-O'Hare (5,530); O'Hare-Newark (4,067); and O'Hare-Houston Intercontinental (5,797).[7] Thus, if airport pairs are a relevant

[7] In its *Notice on Petition* on May 11, 2010, referenced in note 3, *supra*, the Department of Transportation found that projected increases in market concentration at LaGuardia and Dulles airports as a result of the proposal of Delta and US Air to swap airport "slots" would raise serious antitrust concerns, even where those increases would be far less drastic than those resulting from a Continental – United merger. *Id.* at 75 F.R. 26322, 26329.

market, as opposed to city pairs, the anticompetitive effects of the merger are manifest and not open to debate.

The argument for using city pairs, as opposed to airport pairs, as relevant markets is twofold: first, that a second or third airport in a city disciplines prices at the first airport; and, second, that the weight of authority, in particular the practice of the Department of Justice, favors the use of city pairs over airport pairs. There are, however, a number of compelling answers to this argument that make airport pairs appropriate as relevant markets in these proceedings.

First, there is not universal agreement on the appropriateness of city pairs as a measure to use in analyzing competitive effects in the airline industry. Indeed, Professor Carstensen considers the "theory that applied to city pair markets" to be "now discredited." (Carstensen, *id.*, p. 122.) The General Accounting Office, in more than one study, has used airport pairs to analyze competition in the airline industry. Airline Competition: Effects of Airline Market Concentration and Barriers to Entry on Airfares (April 1991); Airline Mergers: Issues Raised By the Proposed Merger of United and Continental Airlines (May 27, 2010). The Department of Justice itself does not even consistently advocate the use of city pairs in lieu of airport pairs. In *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1145-46 (D. Kan. 2001), *aff'd*, 335 F.3d 1109 (10th Cir. 2003), the Department alleged that defendant American Airlines monopolized or attempted to monopolize numerous *airport* pairs, not city pairs, between its Dallas-Fort Worth hub and, *inter alia*, Baltimore, Cleveland Hopkins, Washington Reagan, Dulles, Los Angeles International, LaGuardia, Ontario, California, Orange County, California, San Francisco International, and San Jose. The Government also alleged that American engaged in predatory conduct in the Dallas-Fort Worth-Newark and Dallas-Fort Worth-Chicago Midway airport pair "markets." *Id.*, 1146. The Department made these allegations while also alleging monopolization of ten city pairs, which included many of the airport pairs the Department claimed American monopolized or attempted to monopolize.

Subsequent to the *AMR* case, J. Bruce McDonald, Deputy Assistant Attorney General in the Antitrust Division, told the Regional Airline Association Presidents' Council Meeting,

> The so-called "relevant market" in which we evaluate whether a particular merger will lessen competition is not the whole industry. Rather, we have to look at the markets in which passengers buy air travel. These markets are the particular origin and destination city pairs (*and occasionally airport pairs*) on which passengers fly. …
>
> The relevant market can actually be more narrow than a city pair. As airlines know well, not all passengers are the same. Some passengers will always fly non-stop, and be willing to pay more for it, while others will accept the inconvenience of stops to get a lower fare. For some business travelers, the availability of connect service may be irrelevant, because they will never accept the inconvenience. For many leisure travelers, either as a possibility, airlines take this difference into account in their pricing. Antitrust analysis takes this "business" versus "leisure" distinction into account and considers the effect of mergers in non-stop city pair markets and also the effect in non-stop and connect markets together.

Antitrust For Airlines, available at http://www.justice.gov/atr/public/speeches/217987.htm.; www.gao.gov/new.items/d02293r.pdf, emphasis added. The Department of Justice has also used airport pairs in fashioning consent decrees for airport price-fixing. *United States v. Airlines Tariff Pub. Co.*, 1994-2 CCH Trade Cases ¶ 70,687 (D.D.C. 1994); *United States v. Airline Pub. Co.*, 1993-2 CCH Trade Cases ¶ 70,410 (D.D.C. 1993). *See also In Re Northwest Airlines Corp. Antitrust Litig.*, 2002-2 CCH Trade Cases ¶ 73,764 (E.D. Mich. 2002) (denying motion to exclude report of expert economist employing airport pairs rather than city pairs).

More important than the split of authority over airport pairs, however, is the rationale that makes using airport pairs appropriate in particular cases, including this one. The argument for using city pairs instead of airport pairs is that neighboring airports in the same metropolitan area discipline prices at the city's principal airport or hub. If this in fact occurs, then one would expect to see price uniformity at the hub, occupied by the network carrier, and the surrounding satellite airports, from which LCCs fly. If there is not price convergence or uniformity, then one can conclude that the hub and its airport pairs are separate markets, at least for a significant segment of customers, who are subject to the price disparity. Defining the relevant market as airport pairs on the basis of separate pricing and the absence of price convergence is fully consistent with the Supreme Court's statement in *Brown Shoe* that the "boundaries of such a submarket may be determined by examining such practical indicia as … distinct customers, distinct prices, [and] sensitivity to price changes …." 370 U.S. at 325.

Here, the record in fact demonstrates the absence of price convergence between the subject hubs and surrounding satellite airports, and reveals uniformly higher prices at the hubs. The LCCs at the satellite airports are thus not disciplining prices sufficiently at the hubs to warrant the use of city pairs, rather than airport pairs. The defendants have determined that there is a distinct and sufficiently large group of customers at the hub airports that can be charged, and will pay, higher prices.[8]

For example, in his rebuttal report, Professor Bush examined pricing from Houston to Washington, D.C. airports. From its hub at Houston Intercontinental to Reagan National, Continental offered a round-trip coach fare of $1,443 on September 1, as compared with Southwest's fare of roughly $600 from Houston Hobby to Baltimore. (Ex. 112, p. 6.) From

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[8] The Department of Justice addressed this very issue in public comments on March 24, 2010, concerning the proposed Delta-US Air slot swap at LaGuardia and Dulles referenced in notes 3 and 7, *supra*:

> It also is unlikely that service from other New York or Washington area airports will completely offset lost competition between US Airways and Delta. Although other airports may be acceptable substitutes for some passengers (particularly price-sensitive passengers), they clearly are not close substitutes for other passengers, and competition among carriers at LGA and DCA matters. Indeed, data cited in the Notice show sometimes significant differences in average fares at the various airports, and the high values attached to slots and the carriers' efforts to protect these slots show there is differentiation between LGA and DCA and other area airports. **While differences in average fares are not necessarily dispositive of market definition issues, the magnitude and persistence of the differences strongly suggest that the airports are not substitutes for some passengers**.
>
> *Comments of the United States Department of Justice, Notice of Petition for Waiver of the Terms of the Order Limiting Schedules Operations at LaGuardia Airport and Solicitation of Comments on Grant of Petition with Conditions* at p.16 (Docket No. FAA-2010-0109) available at http://www.justice.gov/atr/public/comments/257463.pdf (emphasis added; footnote omitted).

San Francisco to Newark, Continental and United offered round-trip coach fares of $809 on September 1, as compared with nonstop fares of $535 on JetBlue from San Francisco, Oakland, and San Jose to JFK, and lower fares from San Francisco to JFK on other carriers. (*Id.*, p. 7.) Appendix A to Professor Bush's rebuttal report sets forth similar price differentials for other hubs. From San Francisco to Houston Intercontinental, United and Continental offered a round-trip coach fare of $1,097, as compared with Southwest's round-trip fare of $689 from Oakland to Houston Hobby. From Chicago O'Hare to Houston Intercontinental, Continental and United had a round-trip coach fare of $783, as compared with a Southwest fare from Chicago Midway to Houston Hobby of $490. From O'Hare to Newark, the Continental and United fares were $973, while the fare from O'Hare to JFK and LaGuardia on other carriers was $225. From Denver to Newark, the round-trip coach fare on Continental and United was $767, while the round-trip from Denver to JFK on JetBlue was $289. (*Id.*, pp. 18-19.)

At the hearing in this matter, plaintiffs put in evidence Exhibits 109, 110, and 111; and defendants offered Exhibit 1077. These exhibits show round-trip fares from San Francisco International and Oakland to Houston. For a September 1, 2010, round-trip, the Continental coach fare from San Francisco to Houston Intercontinental was $1,148. The Southwest round-trip fare from Oakland to Houston Hobby was $818. (Exs. 109, 111.) Defendants' Exhibit 1077 purported to show a round-trip nonstop coach fare for Continental from San Francisco to Houston Intercontinental of $728. When Professor Bush tried to book that fare, however, it was available only with a connection through Las Vegas on the return leg. Instead, the round-trip, nonstop coach fare on Continental from San Francisco to Houston was actually $1,000. (9/1 Tr., 541:9-543:3.) Defendants entirely failed to rebut this evidence at the hearing, notwithstanding their unlimited access to their own fare information.

The Court inquired of Professor Bush whether his "snapshot in time" of fares on September 1, 2010, was adequate for him "to conclude that that snapshot in time is representative of prices over a particular – any kind of other period that you might identify." (9/1 Tr., 537:4-9.) Professor Bush responded that he also looked at fares for October, "relatively the same dates." (9/1 Tr., 537:10-12.) Significantly, the defendants have offered no evidence to contradict Professor Bush's testimony with regard to the fare differential between hubs and satellite airports, although defendants had Professor Bush's rebuttal report and were aware of this evidence in advance of the hearing. If Professor Bush's data had been inaccurate, defendants could easily have rebutted it. Instead, their only effort to contradict this evidence was to offer their own Exhibit 1077, purporting to show a low round-trip fare on Continental from San Francisco to Houston, which turned out to be inaccurate, unavailable, and illusory.

These fare differentials are not insignificant. The DOJ's own framework for analyzing competitive effects of a merger in a relevant market in the revised Merger Guidelines posits a small but significant non-transitory increase in price ("SSNIP") of 5 percent. Each of the price differentials between the defendants' fares at hub airports and LCC fares at the surrounding satellite airports far exceeds the DOJ's 5 percent guideline, and demonstrates that the prices charged at the satellite airports cannot constrain the defendants' hub pricing, The satellite airports are therefore not in the same market even under the DOJ's own Guidelines.

Further, in response to another specific inquiry from the Court, Professor Bush referenced the widely accepted phenomenon of a "hub premium."

> THE COURT: Do you have any, any bases for studies or any other bases for the conclusion that the hub airport is the preferred airport for either business or time sensitive travel, other than anecdotal information which I share? Go ahead.
>
> THE WITNESS: There is a -- there is a hub premium literature out there that talks about the -- this proportionate price of fares charged out of hub pairs compared to other types of city pairs that also indicates that we're talking about attracting a certain type of customer.

(9/1 Tr., 554:22-555:5.)

Indeed, there is a "hub premium literature," as alluded to by Professor Bush. Mara Lederman, "Are Frequent Flyer Programs a Cause of the 'Hub Premium'?," 17 *Journal of Economics & Management Strategy*, No. 1, pp. 35-66 (Spring 2008); Severin Borenstein, "Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry," 20 *Rand*

Journal of Economics, No. 3, pp. 344-65 (Autumn 1989); Dominated Hub Fares, United States Department of Transportation (January 2001), available at http://ostpxweb.dot.gov/aviation/Data/dominatedhubfares.pdf; Darin Lee and Maria Jose Luengo Prado, "The Impact of Passenger Mix on Reported 'Hub Premiums' in the U.S. Airline Industry" (September 14, 2002), available at http://www.economics.neu.edu/papers/documents/03-012.pdf; Severin Borenstein, "Airline Mergers, Airport Dominance, and Market Power," 80 *The American Economic Review*, No. 2, pp. 400-04 (May 1990); United States General Accounting Office, Report to Congressional Requestors, July 11, 1990, "Fares and Service at Major Airports," available at http://archive.gao.gov/t2pbat10/141783.pdf; United States General Accounting Office, Aviation Competition: Challenges in Enhancing Competition in Dominated Markets (March 13, 2001), available at http://www.gao.gov/new.items/d01518t.pdf; United States General Accounting Office, Airline Competition: Higher Fares and Less Competition Continue at Concentrated Airports (July 1993), available at http://archive.gao.gov/t2pbat5/149695.pdf.

In her article, cited above, Dr. Lederman observes that "The existence of a 'hub premium' … has now been clearly established." *Id.*, p. 36. She notes,

> Shortly after deregulation, many airlines replaced their point-to-point networks with hub-and-spoke systems. There is now considerable evidence documenting that hub-and-spoke networks provide airlines with cost and scheduling advantages. [Footnote omitted.] *However, there is also evidence indicating that hub-and-spoke systems provide airlines with market power at their hub airports.* Studies have shown that airlines receive higher fares on hub routes than they do on comparable routes elsewhere in their network. In addition, studies have found that—on routes that depart from an airline's hub—the hub carrier receives higher fares than its competitors. [Footnote omitted; emphasis added.]

Id., pp. 35-36.

In her article, Dr. Lederman concludes that the frequent flyer program "of the dominant carrier at an airport confers a pricing premium," which contributes substantially to the total hub premium. *Id.*, p. 38. She quantifies the effects of the frequent flyer program of the dominant carrier as increasing "the mean fare that an airline received by between 3.7% and 5% and the 80th percentile fare that an airline received by between 7% and 9%." *Id.* She further finds that "[c]ombining these estimates with estimates of the hub premium that are in the range of 14% suggests that FFPs [frequent flyer programs] account for between 25% and 37% of the fare premium that hub carriers receive." *Id.*

All of the foregoing establishes the following facts with regard to the hub airports that form the airport pairs analyzed by Professor Bush: (1) defendants are able to charge higher fares at these airports than LCCs charge at the same or satellite airports; (2) the presence of low-cost competitors at satellite airports does not constrain defendants from being able to charge these higher prices at their hubs; (3) defendants would not be able to charge higher prices at their hub airports unless there were a class or classes of particular customers willing to pay such higher fares, such as business travelers; (4) defendants' ability to charge higher prices at their hubs is consistent with the well recognized "hub premium"; and (5) the ability to charge higher fares at hubs results from the intrinsic character of a network carrier, specifically the ability to offer a large network, with multiple classes of service, high frequency, a frequent flyer program, and free upgrades once certain mileage goals are achieved, a package no LCC can offer. All of these points provide a valid evidentiary and theoretical basis for treating airport pairs as relevant markets in this case. At the very least, they raise serious questions on the merits of whether airport pairs, as opposed to city pairs, constitute proper relevant markets.

One final point worth noting is the nature of the "remedy" the Department of Justice accepted as a condition for closing its investigation, the defendants' lease of 18 slots at Newark to Southwest. In response to whether the Newark transaction supported his opinion that airport pairs, rather than city pairs, were an appropriate relevant market, Professor Bush observed,

> Well, as I say, it's an interesting remedy because Southwest already flies from Islip and I believe it's LaGuardia. So to release slots at Newark would suggest to me that we're worried about the competition at an airport.

> Otherwise, why would we be concerned about this particular slots at Newark versus -- couldn't Southwest discipline fares out of Newark from Islip or from LaGuardia, if these were, in fact, competing for -- and they do compete for certain classes of customers, but for some others, perhaps not. (9/1 Tr., 546:15-23.)[9]

If airport pairs are cognizable as relevant markets in this case—and the foregoing discussion shows that they are—then the likely effects on competition in those markets from defendants' merger require entry of a preliminary injunction, inasmuch as seven of them will merge to monopoly.

4. The Airline Industry As a Whole.

In addition to viewing as relevant markets the competition of network carriers for business travelers and the specific airport pairs described above, the Court can also consider the United States airline industry as a whole as a relevant market. Because United and Continental are both able to enter any route in the United States where the other flies, they are potential, if not actual, competitors *everywhere*. Continental CEO Smisek put the matter well and succinctly:

> Q. You said earlier that there was an ease of entry into the market?

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[9] Other industry observers have also commented on the unusual nature of the Newark transaction and the DOJ's review of the merger. "Closed-door Newark slot deal has the airline industry buzzing," Travel Weekly, September 7, 2010, available at http://www.travelweekly.com/article3_ektid220180.aspx?terms=*closed-door*. The article notes, "The Obama Justice Department, which vowed to be a tougher sell than its predecessor when it came to mergers, took less than two-thirds the time to review and approve the United-Continental merger than it took the Bush Justice Department to give its nod to the Delta acquisition of Northwest." Remarking on the apparent favoritism shown to Southwest, the article states, "But what really has the industry buzzing is the single condition imposed by the DOJ and how the airlines responded: The government demanded that the merger partners give up slots at Newark Liberty Airport, and the two airlines did just that by turning the slots over to Southwest in a closed-door deal." This of course calls to mind Chief Judge Walker's comment in *Reilly v. The Hearst Corp*., 107 F. Supp. 2d 1192, 1211(ND Cal., 2000), , that he was "astonished and disappointed that DOJ would allow itself to be put in a position where the inference can be so easily drawn that its action or inaction in this case was political favoritism masquerading as law enforcement." Judge Walker's comments are even more apposite in view of the DOJ's comments on March 24, 2010, disapproving the Delta-US Air slot swap referenced in notes 3, 7, and 8, *supra,* and advocating a public auction of the slots: "Any mechanism that allows the seller to choose the buyer would permit discrimination against buyers inclined to use slots to compete against the parties." DOJ Comments, *supra* at p. 20.

> A. Yes.
> Q. Would you state briefly and give us an example as to what one would have to do in order to get into servicing passengers with airplanes?
> A. You mean de novo?
> Q. Yes. Well, that's what you were talking about, wasn't it?
> A. Well, no, no, not at all. I mean, there are -- competitors can enter your market at 540 miles an hour, so it's very easy to enter a market when you are already an airline.

(Smisek Depo., 278:13-279:1.)

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> … If I decide I want to fly to Charlotte tomorrow, all I have to do -- I would want to sell the seats of the aircraft, but I could take a 737 and point it to Charlotte and there I'd be. So it's actually fairly easy to enter markets.

(Smisek Depo., 280:10-15.)

Obviously, each of the defendants is an important potential entrant against the other, particularly given the breadth of their networks and the similarity of the package they offer to business travelers. The Supreme Court has prohibited acquisitions where the acquiring firm is a potential entrant and competitor in the market of the acquired firm. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 571-72 (1973); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967). There is also justification for finding the entire United States airport industry to be a relevant market, just as the Supreme Court found the manufacture and sale of shoes to be relevant markets in *Brown Shoe*, banking to be the relevant market in *Philadelphia Nat'l Bank*, and the container industry to be the relevant market in *Continental Can*.

C. THE PLAINTIFFS' STANDING AND ANTITRUST INJURY.

Throughout these proceedings, defendants have made an issue of the plaintiffs' right to bring this action and obtain relief, with challenges directed at plaintiffs' standing, antitrust injury, and ability to obtain equitable relief. None of the defendants' arguments has merit.

Although plaintiffs may not have flown between particular airport pairs, they are indeed consumers and buyers of airline tickets from defendants, for both business and leisure travel. (9/1 Tr., 358:20-362:11; 377:22-384:8; 585:16-588:19; 609:17-618:14.) The law is clear in this district that consumers have standing under the antitrust laws to seek to enjoin a merger involving companies with which they do business. *Reilly v. The Hearst Corp.*, 107 F. Supp. 2d 1192, 1194-95 (N.D. Cal. 2000) (Walker, J.). See, also, *Reiter v. Sonotone Corp*., 442 U.S. 330, 343-44 (1979) (describing the Sherman Act as "conceived of primarily as a remedy for `[t]he people of the United States as individuals,' especially consumers.").

All plaintiffs testified not only that they had flown on one or both of the defendant airlines in the past, but also that they intended 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.) This both confers standing and establishes antitrust injury. The potential anticompetitive effects of defendants' merger are increased airfares and diminished output in terms of less service and poorer quality of service, adversely affecting consumer choice and purchasing power. These are the very types of effects Section 7 was enacted to prevent. Plaintiffs as consumers are thus directly threatened with "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Their threatened injuries directly "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," and constitute "the type of loss that the claimed violations . . . would be likely to cause." *Id*. Destruction of consumer choice, as a matter of law, constitutes antitrust injury. *Ginzburg v. Memorial Healthcare Sys., Inc.*, 993 F. Supp. 998, 1015 (S.D. Tex., 1997) ("the underlying purpose of the standing inquiry is to 'ensure[ ] that the plaintiff's demand for relief ultimately serves the purposes of the antitrust law to increase consumer choice, lower prices and assist competition, not competitors.'") [10]

Both of the statutes involved in these proceedings, Sections 7 and 16 of the Clayton Act, are prospective, and do not require actual harm to have occurred in order to give rise to a cause of action. "Section 7 was enacted to prevent anticompetitive mergers in their incipiency. Therefore, all that is necessary [under Section 7] is that the merger create an

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[10] At the outset of the hearing, this Court itself made that point: "THE COURT:…doesn't the antitrust laws protect against concentration to the extent that not only are prices increasing, but consumer options are being reduced and degraded? MS. FORREST: Yes." (8/31 Tr., 56:9-14.)

appreciable danger of [anticompetitive] consequences in the future." *California v. Sutter Home Sys.*, 130 F. Supp. 2d 1109, 1117-18 (N.D. Cal. 2001). "Competition is so important that mergers or acquisitions that 'may' lessen competition are prohibited. The Supreme Court has specifically recognized that by using the phrase 'may,' Congress was concerned with probabilities, not certainties." *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 867 (W.D.N.Y. 1994).

Likewise, Section 16 of the Clayton Act permits the issuance of a preliminary injunction "even though the plaintiff has not yet suffered actual injury …, he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). Standing to obtain an injunction under Section 16 is also more relaxed and less stringent than standing to obtain damages under Section 4 of the Clayton Act. *Hawaii v. Standard Oil Co.*, 495 U.S. 251, 261 (1972); *Lucas Automotive Eng'rg v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998).

Moreover, in *Zenith v. Hazeltine Research*, in which the Court articulated the standards for injunctive relief under Section 16, the Court also stressed the importance of the private antitrust action: "The purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." 395 U.S. at 130-31. *See American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982) ("… the purposes of the antitrust laws are best served by ensuring that the private action will be an ever present threat to deter antitrust violations."); *California v. American Stores Co.*, 495 U.S. 271, 284 (1990):

> [The provisions of Section 16] manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability: to show that a merger is unlawful, a plaintiff need only prove that its effect "*may* be substantially to lessen competition." [Emphasis in original.]

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) ("The purposes of the antitrust laws are best served by ensuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws."); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom in our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity, whatever economic muscle it can muster.

The importance of the private antitrust action becomes even more pronounced in view of the limited resources available to the Department of Justice to enforce the antitrust laws. *In Re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664-65 (7th Cir. 2002) (Posner, J.) ("The Justice Department has limited resources; in the entire decade of the 1990s it brought fewer than 200 civil antitrust cases, an average of fewer than 20 per year.")

There is thus no question as to the standing of these plaintiffs and their being threatened with an antitrust injury of the type that allows them to bring this action to challenge defendants' merger. If defendants are allowed to merge, by their own admission, they will operate a network that flies almost anywhere in the world, including all United States destinations. As past and future users of that network, plaintiffs have the right to fly wherever they wish without being subjected to monopoly prices, limited choice, and reductions in the quantity and quality of service enabled by an anticompetitive merger.

The defendants' argument that plaintiffs have an adequate remedy at law through damages or at equity through divestiture is also ill-founded. As this Court observed at the outset of the hearing, there is no damages remedy for loss of service:

> If these 49 plaintiffs are -- can make the argument that they are going to be deprived of options on particular routes, it's one thing if fares increase and that's -- I was asking Mr. Alioto, why can't that be

> compensable with money damages? But how can they be compensated for the absence of capacity flights on particular routes? How can monetary relief compensate them for that?

(8/31 Tr., 55:15-21.) Putting a dollar number on a reduction in output, including elimination of routes, fewer available seats, reduced frequency of flights, and diminished quality of service, is virtually impossible.

Nor is it plausible to contend that these plaintiffs have an adequate remedy in damages because of the settlement of a prior case challenging the Northwest-Delta merger. As this Court said at the hearing,

> People settle cases for all sorts of reasons and we all know that. And sometimes they are weighing the strengths and weaknesses of claims and the rest…I'm not sure how probative a case settles for X amount of money translates into there wouldn't be a basis to argue that there is irreparable harm to warrant injunctive relief, but we can get there later on. (8/31 Tr., 65:20-66:10.)

As plaintiffs have pointed out, using their settlement of the Northwest–Delta case, where the record is wholly silent as to the grounds for settlement, as a bar to equitable relief in this case would undermine the strong federal policy to encourage the settlement and extrajudicial resolution of lawsuits, *Marek v. Chesny***,** 473 U.S. 1, 10 (1985) (Fed. R. Civ. P. 68 "expresses a clear policy of favoring settlement of all lawsuits"); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1991) (noting "strong judicial policy that favors settlements"); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("Public policy strongly favors settlement of disputes without litigation.")

Finally, divestiture post-merger presents far too many problems to make it a preferable remedy to a preliminary injunction. First, it is obviously much easier to require people to stop what they intend to do than to require them to go back and undo what they have already done. Plaintiffs further presume that this Court has no great desire to put itself into the business of overseeing the unraveling and divestiture of a major merged network airline, notwithstanding defendants' invitation to do so. The defendants have presented extensive evidence of the difficulties inherent in combining their two airlines, including the enormous complexity and extensive time scale for this undertaking, which is not projected to yield steady-state synergies for at least three years. Plaintiffs can only assume that the Court would need a comparable period of time to unscramble these eggs.

IV. IRREPARABLE HARM AND THE BALANCE OF HARDSHIPS

The discussion of the plaintiffs' standing largely answers the question of whether they have demonstrated irreparable harm. As shown, plaintiffs have no adequate remedy at law. Damages cannot compensate plaintiffs for their future injuries—indeed, they have not even asked for damages, which are not available under Section 16—and divesture presents substantial difficulties. The courts have traditionally recognized such a situation as presenting irreparable harm warranting an injunction. *See, e.g.*, *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). Where mergers are involved, courts have recognized that injunctive relief is especially appropriate to remedy harm before it occurs:

> Prospective relief … is a more effective remedy for an unlawful merger than is retrospective relief. If preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be extremely difficult, if at all possible, to remedy effectively the unlawful merger. Once [the merger] becomes consummated it becomes difficult, and sometimes virtually impossible, for a court to "unscramble the eggs."

Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 600 F. Supp. 1326, 1330-32 (E.D. Mich. 1985); *accord Laidlaw Acquisition Corp. v. Mayflower Group, Inc*., 636 F. Supp. 1513, 1517 (S.D. Ind. 1986).

Thus, if the Court denies the preliminary injunction and defendants consummate their merger, plaintiffs will find themselves lacking an adequate remedy in the event that they prevail at trial in showing the merger to be violative of Section 7. By the time this case has been tried to judgment, defendants may already have cut service and eliminated various routes in their network. As this Court observed at the hearing, money damages provide no remedy for such a loss. (8/31 Tr., 55:15-21.) Likewise, ordering a restoration of service on cancelled routes presents issues of oversight and administration that, at the least, will constitute a formidable challenge to any court. Further, in the event that the defendants merge and eliminate one of their hubs, such as Cleveland, neither damages nor equitable relief appears likely to provide an adequate remedy for the injury to affected consumers. Inherent in the very nature of this case, involving two major airlines the operations of which profoundly affect the public interest, is the difficulty of providing a remedy once their merger is consummated.

On the other hand, enjoining the merger before it takes place is clearly an adequate and administrable remedy. The plaintiffs receive exactly the relief they are seeking, and the Court is spared the aggravation and complexities of dismantling or running a major network airline.

The foregoing considerations also bear directly on the issue of the balance of hardships. For the plaintiffs, failure to enjoin the merger *ex ante* threatens to deprive them, practically, of a remedy. For the defendants, however, all a preliminary injunction means is that they must delay their merger until trial on the merits and a final decision. In this regard, two points are worth noting. First, defendants, not plaintiffs, have elected to separate the preliminary injunction hearing from trial on the merits. Plaintiffs offered to consolidate the preliminary injunction hearing with trial on the merits; defendants refused. Thus, the delay between the hearing and trial on the merits is of defendants' own making. They should not be heard to complain about that delay. Second, plaintiffs are prepared to proceed expeditiously to trial, on a truncated and accelerated schedule similar to that used for the preliminary injunction hearing. Plaintiffs anticipate that in a matter of weeks they can be ready for trial. Plaintiffs have some further limited discovery they would like to undertake, which they anticipate can be completed within two to three weeks. After that, at the Court's convenience, plaintiffs will be prepared to try this case on the merits.

The Court may also recall that defendants' public statements at the time of the announcement of their merger anticipated closing their merger in the fourth quarter of 2010. (Ex. 95, p. COUA-ORHE000001820: "The companies expect to close the deal in the fourth quarter, with approval needed from shareholders and regulators." (*Associated Press* Article); p. COUA-ORHE000001822, "The companies aim to close a deal by the fourth quarter." May 3, 2010 *Wall Street Journal* Article; p. COUA-ORHE000001828, "But the companies said they expected to complete the transaction in the fourth quarter of 2010." (May 3, 2010 *Sydney Morning Herald*.) Defendants can still meet their schedule even with a full trial on the merits.

In essence, defendants face only delay until trial on the merits, which, at the Court's convenience, can proceed on an expedited basis. That delay is only what defendants in fact anticipated when they announced their merger on May 3 and stated that they hoped to close in the fourth quarter of this year. If defendants prevail at trial, they can still do so. In *Christian Schmidt Brewing v. Heileman Brewing*, the court minimized the harm to defendant from a preliminary injunction against a proposed merger by setting the case for trial within three months. 600 F. Supp. at 1332. Here, plaintiffs are prepared to go to trial within one month. Accordingly, the balance of hardships tips "sharply" towards the plaintiffs, who have also clearly raised serious questions going to the merits, and are therefore entitled to the issuance of a preliminary injunction.

V. THE PUBLIC INTEREST

The public interest here clearly favors the entry of a preliminary injunction. There are two important reasons for this. The first is the industry involved; the second is the nature of this proceeding brought under Sections 7 and 16 of the Clayton Act.

The airline industry in the United States affects virtually everyone. The history of the industry has regrettably been one of mergers and consolidations. Although that history has also involved failures and bankruptcies, the defendants before this court are not failing companies. Tilton Depo., 25:14-19; Mikells Depo., 39:20-40:1; 8/31 Tr. 96:4-5; (8/31 Tr. 225:5-15.) The record in this case is devoid of testimonials and laudatory tributes to the industry's performance. Air fares may have fallen since deregulation, and particularly in the recession of the last two years, but so have performance standards, as the millions of passengers now paying fees to check their bags would undoubtedly attest. And now, as the New York Times reported on September 4, 2010, airfares are rapidly and drastically rising again. In view of the importance of this industry, surely the public interest warrants maintenance of the status quo and a full trial on the merits, before these two profitable airlines are allowed to merge and further concentrate their industry.

The second public interest favoring entry of a preliminary injunction in this case is the importance of rigorous enforcement of the antitrust laws, and particularly its enforcement by private plaintiffs. As noted, the antitrust laws are "the Magna Carta of free enterprise." *United States v. Topco*, 405 U.S. at 610. In addition, Section 16 "manifest[s] a clear intent to encourage vigorous private litigation against any competitive mergers." *California v. American Stores Co.*, 495 U.S. at 284. As the Supreme Court made clear in *Philadelphia National Bank*, 374 U.S. at 370, "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."[11] In light of these objectives embodied in the antitrust laws, as interpreted by the Supreme Court, the public interest is obviously best served by a full trial on the merits before the defendants are allowed to consummate this merger, which, on its face, transgresses every merger decision of the United States Supreme Court.

VI. CONCLUSION

On the basis of the foregoing arguments and authorities, and the evidence of record received at the hearing on their motion for a preliminary injunction, plaintiffs respectfully request that this Court enter an injunction preliminarily enjoining the defendants' merger pending trial on the merits, which the plaintiffs ask this Court to set at its earliest convenience.

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[11] See, also, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); *Citizens & Southern Nat'l Bank*, 422 U.S. at 116 (""The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion — that is, by competing successfully rather than by arranging treaties with its competitors.") Further, although Mr. Smisek stated as a "reason" for the merger that it "reduces fragmentation in the industry," (Ex. 88), the Supreme Court in *Brown Shoe* emphasized the importance of preserving "fragmented" industries, 370 U.S. at 343-44, and the need "to call a halt" to "tendencies toward concentration in industry," *id*., 346, words that could not ring truer than they do in this case.

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