No. 10-17208

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

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

APPELLANTS' REPLY BRIEF

JOSEPH M. ALIOTO (SBN 42680)
THERESA D. MOORE (SBN 99978)
ANGELINA ALIOTO-GRACE (SBN 206899)
JOSEPH M. ALIOTO, JR. (SBN 215544)
THOMAS P. PIER (SBN 235740)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Plaintiffs-Appellants
(Attorneys continued next page)

DANIEL R. SHULMAN, *pro hac vice*
JULIE L. BOEHMKE, *pro hac vice*
JEREMY L. JOHNSON, *pro hac vice*
GRAY PLANT MOOTY
500 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402
TEL: (612) 632-3335
FAX: (612) 632-4335
DANIEL.SHULMAN@GPMLAW.COM

JACK W. LEE
DEREK HOWARD
MINAMI TAMAKI LLP
360 POST STREET, 8TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108
TEL: (415) 788-0204
FAX: (415) 398-3887
JLEE@MINAMITAMAKI.COM

GIL D. MESSINA, *pro hac vice*
MESSINA LAW FIRM PC
961 HOLMDEL ROAD
HOLMDEL, NJ 07733
TEL: (732) 332-9300
FAX: (732) 332-9301
GMESSINA@MESSINALAWFIRM.COM

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AIRLINES' ATTEMPT TO DISTINGUISH THE SUPREME COURT CASES THAT GUIDE THIS APPEAL IS BASED ON OVERSIGHT AND MISUNDERSTANDING 4

A. Relevant Product Markets Must Be Defined Broadly Enough To Recognize Competition Where It Exists 4

B. Airlines Do Not Contest That Reliance On The Merger Guidelines To The Exclusion Of Supreme Court Precedent Constitutes An Abuse Of Discretion 13

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ANALYZING PLAINTIFFS' IRREPARABLE HARM 21

A. The District Court Failed To Analyze Plaintiffs' Harm Within The Context Of The National Airline Market 21

B. Whether Plaintiffs' Harm Is "Irreparable" Is Not An Issue Before This Court 23

III. IN BALANCING THE EQUITIES THE AIRLINES, LIKE THE DISTRICT COURT, CONFLATED THE "HARDSHIP" TO BE BALANCED 24

IV. WHETHER AN INJUNCTION WOULD BE IN THE PUBLIC'S INTEREST IS NOT AN ISSUE BEFORE THIS COURT 26

V. THIS APPEAL IS NOT MOOT 26

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 1a

TABLE OF AUTHORITIES

Cases **page**

Alliance for the Wild Rockies v. Cottrell
622 F.3d 1045 (9th Cir. 2010) 26

Brown Shoe Co. v. United States
370 U.S. 294 (1962) .... *passim*

Hospital Corporation of America v. Federal Trade Commission
807 F.2d 1381 (7th Cir. 1986) 19, 20

United States v. Aluminum Co. of America (*Alcoa*)
377 U.S. 271 (1964) 9, 21

United States v. Continental Can Co.
217 F.Supp. 761 (S.D.N.Y. 1963) 8

United States v. Continental Can Co.
378 U.S. 441 (1964) .... *passim*

United States v. E. I. duPont de Nemours & Co. (*Cellophane*)
351 U.S. 377 (1956) 9, 11, 12

United States v. General Dynamics Corp.
415 U.S. 486 (1974) 18, 19

United States v. Grinnell Corp.
384 U.S. 563 (1966) 13

United States v. Pabst Brewing Co.
384 U.S. 546 (1966) 18, 20

United States v. Philadelphia National Bank
374 U.S. 321 (1963) .... *passim*

United States v. Von's Grocery Co.
384 U.S. 270 (1966) 18, 20

Western Airlines, Inc. v. International Board of Teamsters
480 U.S. 1301 (1987) 25

TABLE OF AUTHORITIES – CONT'D

Other Authorities **page**

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976),
reprinted in 1976 U.S. Code Cong. & Ad. News 2637......................25

SUMMARY OF ARGUMENT

This appeal comes to the Court on a challenge of the district court's denial of Plaintiffs' motion for preliminary injunction and, as such, the standard of review is abuse of discretion. Accordingly, there is only one overriding question here and it is legal in nature: Whether the district court based its decision on erroneous legal standards. This it did in four ways, three of which are directly related to the court's specific rejection of a half-dozen Supreme Court cases. As argued in the Opening Brief, by ignoring this binding precedent the court first applied an incorrect standard in defining the relevant market. Second, it relied on the government's Horizontal Merger Guidelines to the exclusion of Supreme Court law in calculating market concentration levels. Third, by failing to properly define the market, the court infected its analysis of Plaintiffs' irreparable harm. Finally, the court placed the wrong "hardships" on the scale when it attempted to balance the equities.

Unable to adequately address any of these issues, the Airlines resort to overstatement and distraction. They dedicate the lion's share of their Answering Brief to arguing a slew or irrelevant facts and issues – many of which are not even subject to review under an abuse of discretion standard. They dedicate ten pages to a statement of facts, none of which is relevant to whether the district court applied the correct legal standard. They incorrectly accuse Plaintiffs of appealing a relevant market that was not argued below, even though they include in their excerpts the portion of Plaintiffs' trial brief where it was, in fact, argued. (III SER 673.) They even mock

Plaintiffs' counsel for "wandering" through his opening statement. (Ans. Br. 26.) At the end of the day, only a third of the nearly sixty-page, 13,998-word Answering Brief is relevant to the actual issues on appeal. (See Ans. Br. 31-49, 53-54, 56-58.)

The Supreme Court case law rejected by the district court provides a wide swath of examples of how courts are to apply the rules governing the definition of the relevant market. In each of these cases, without fail, the markets defined have included products that serve demonstrably non-substitutable end-uses. Thus, when the district court based its rejection of the national airline market on the mere fact that not every flight is a substitute for every other flight, it applied a standard that has no basis in, and is directly contrary to, binding authority. While the Airlines offer some reactionary arguments to this conclusion, most of them are based on oversights and incomplete readings of the decisions.

The same Supreme Court cases also discuss, at length, the market concentration levels and the trends toward concentration that Congress specifically sought to prevent when it passed and amended Section 7 of the Clayton Act. Instead of applying these concentration level standards, the district court instead based its decision on the government's Horizontal Merger Guidelines. In response to this argument, Airlines offer merely eight words, tucked into the bottom of a footnote toward the back of their brief: "the Guidelines are relied upon as persuasive authority." (Ans. Br. 49, n.17.) Not a single other word is uttered on this topic. They cannot and do not respond to the central conclusion that where the Guidelines conflict with Supreme Court law, a district court's

deference to the former at the expense of the latter constitutes a definitional abuse of discretion.

These same Supreme Court precedents drive the district court's abuse of discretion when it analyzed Plaintiffs' irreparable harm. By failing to define the proper relevant market, the district court also failed to analyze Plaintiffs' harms within that market. The Airlines respond to this with a three-sentence conclusory paragraph. (Ans. Br. 49.)

The district court also abused its discretion in balancing the hardships by putting the wrong hardship on Plaintiffs' side of the scale. Instead of weighing the hardship that would befall Plaintiffs if an illegal merger were not enjoined – including the administrative and practical difficulty of unscrambling a merger found illegal at trial – the district court instead weighed Plaintiffs' future damages. Failing to understand the law, Airlines respond by simply repeating the district court's error.

Finally, Airlines argued that this appeal is moot since the merger has already been legally consummated. It may be true that the Airlines have signed and filed their legal merger papers, but they concede that they continue to operate their respective airlines as separate entities, pursuant to an agreement with the United States Department of Transportation, which has not yet approved the merger. Because Airlines admit that they have not yet completed merging, this appeal presents a live controversy.

In sum, for all its length, very little of Airlines' brief is responsive to the only issue presented here: whether the district court applied the wrong legal standards in denying Plaintiffs' motion for

preliminary injunction. On this score, the law is clear. The district court's refusal to follow binding Supreme Court authority must not go uncorrected. The decision below should be reversed and remanded with orders to enjoin further completion of the merger pending trial on the merits.

ARGUMENT

I. AIRLINES' ATTEMPT TO DISTINGUISH THE SUPREME COURT CASES THAT GUIDE THIS APPEAL IS BASED ON OVERSIGHT AND MISUNDERSTANDING

A. Relevant Product Markets Must Be Defined Broadly Enough To Recognize Competition Where It Exists

In its decision, the district court held that the national airline market was not cognizable because "plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami." (I ER 21.) The issue presented here is thus succinctly stated: Whether the district court abused its discretion by applying the wrong standard, namely, that a relevant antitrust market is not cognizable unless all of the products within it are interchangeable.[1] As argued in the Opening Brief, the Supreme

[1] Throughout their Answering Brief, Airlines argue that the Low Cost Carrier (LCC) airlines should also be included in the national airline market. Plaintiffs have not argued for their exclusion. (Open. Br. 4 & graph.) On the contrary, their analysis included Southwest Airlines and Airtran. (*Id.*) No other LCC has more than 2% of the national market, and their inclusion would only result in a *de minimis* change in concentration levels.

Court cases, specifically denounced by the district court, hold that a product market need not be made up entirely of interchangeable products. In fact, practically all of the markets construed by the high court have included products within them that are patently non-substitutable.

In support of their argument that a national airline market does not exist, Airlines boldly argue to this Court – like the district court – that it should overlook the half-dozen Supreme Court cases in lieu of other materials. Thus, Airlines first urge the Court to rely instead on the personal views of two former government lawyers and a law review article. (Ans. Br. 29-30.) Little need be said in reply. The views of the former government lawyers are based on restatements of the Horizontal Merger Guidelines, which cease to be persuasive when in conflict with Supreme Court law[2] (see Open. Br. 25-28), and the cited law review article was limited in scope to studying the effect of one airline, not an industry. The remaining discussion will be limited to arguing the law.

In their Opening Brief, Plaintiffs stated that the "outer boundaries of the product market" in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) consisted of "all footwear" and that men's, women's and children's shoes were submarkets within the "outer boundaries" of the all footwear product market. (Open. Br. 12.) The Airlines object to this characterization as "flat out wrong" and claim the Court "did no such thing" and held "[n]othing remotely like this."

[2] Perhaps more indicative of their personal views is the fact that both lawyers have left government work to defend antitrust actions for major law firms.

(Ans. Br. 32-33.) But, as a close reading of *Brown Shoe* demonstrates, these arguments are based on a failed reading of the decision.

The Supreme Court began by reiterating the rule for defining the "outer boundaries" of a 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, 370 U.S. at 325. The Court then established the rules for defining "submarkets" within the overall product market:

> However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Id. The rules guiding the definition of these submarkets were announced with reference to seven "practical indicia":

> The boundaries of such a submarket may be determined by examining such practical indicia as [(1)] industry or public recognition of the submarket as a separate economic entity, [(2)] the product's peculiar characteristics and uses, [(3)] unique production facilities, [(4)] distinct customers, [(5)] distinct prices, [(6)] sensitivity to price changes, and [(7)] specialized vendors.

Id. Applying those rules, the Court issued its holding on the facts of the case and recognized the submarkets of men's, women's and children's shoes:

> Applying these considerations to the present case, we conclude that the record supports the District Court's finding that the relevant lines of commerce are men's, women's, and children's shoes.

Id. Finally, and most important for present purposes, the Court outlined its reasons for recognizing the men's, women's, and children's segments, doing so only in reference to the "practical indicia" used to establish *submarkets*:

> These product lines are [(1)] recognized by the public; [(2)] each line is manufactured in separate plants; [(3)] each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and [(4)] each is, of course, directed toward a distinct class of customers.

Id. at 326. Therefore, the various shoe markets defined in *Brown Shoe* were *submarkets* – not overall product markets whose "outer boundaries" were outlined with reference to interchangeability and cross-elasticity of demand. Because men's, women's, and children's shoes are submarkets, they must, per force, be submarkets of a broader product market – here, the "overall footwear" market. Since the overall footwear market included products whose end-uses are plainly not substitutes (e.g., men's shoes and women's shoes), it cannot be contested that a relevant product market need not consist only of products that serve substitutable end-uses. In fact, even the children's shoes submarket included non-interchangeable products including, for example, "infants' and babies' shoes," "misses and children's shoes," and youths' and boys' shoes." 370 U.S. at 327. As a result, the district court's rejection of the national airline market cannot be legally supported solely on the basis that "a flight from San Francisco to Newark [is not substitutable] with a flight from Seattle to Miami." (I ER 21.)

The reasoning in *United States v. Continental Can Co.*, 378 U.S. 441 (1964) is to the same effect. There, the market was held to consist of all containers, whether made of glass or metal. This all-container market consisted of products that serve "thousands of different [and non-substitutable] end uses," *United States v. Continental Can Co.*, 217 F.Supp. 761, 780 (S.D.N.Y. 1963), like baby food bottles and soft drink cans, 378 U.S. at 450-52. But, the fact that there was "substantial and vigorous" "inter-industry competition" in submarkets of containers for food, chemicals, toiletries or industrial products, *id.* at 448 – none of which is a substitute for the other – did not negate the existence of the overall container market, just as competition in submarket routes from San Francisco to Newark or Seattle to Miami cannot legally negate the existence of an overall airline market.

In response, the Airlines side-step the issue. Rather than confront the fact that the "all container" market included products that served different non-substitutable end-uses, Airlines only muster the distracting conclusion that "in contrast to glass and metal containers, there is absolutely no competitive intersection between a flight from San Francisco to Newark and a flight from Seattle to Miami." (Ans. Br. 36.) But, they ignore the central thrust of the Opening Brief's argument that no "competitive intersection" exists between, for example, containers for baby food and soft drinks, yet the Supreme Court nevertheless grouped those products within the same relevant product market. Airlines argue that a flight from San Francisco to Newark "could never replace the [Seattle to Miami] route"(Ans. Br. 36-7); but while that may be true, it is no less true that a tuna can

"could never replace" a soda bottle, and yet *Continental Can* determined that both those containers were in the same market. In applying the market definition rule to the all-container market – "commodities reasonably interchangeable by consumers for the same purposes make up [the relevant market]," *United States v. E. I. duPont de Nemours & Co.* (*Cellophane*), 351 U.S. 377, 395 (1956) – the "purpose" of the product at issue must be defined generally enough to "recognize meaningful competition where it is found to exist," *Continental Can*, 378 U.S. at 449, even if "inter-industry" competition exists within a variety of submarkets.

Moreover, because the Airlines seek to compete against one another not just on specific routes but throughout the United States – and, in fact, can and do enter specific routes with ease[3] – the fact that consumers cannot readily substitute one route for another is "not sufficient to obscure the competitive relationships" between the nation's airlines. *Continental Can*, 378 U.S. at 450.

Airlines also argue that in *United States v. Aluminum Co. of America* (*Alcoa*), 377 U.S. 271 (1964), insulated aluminum conductor

---

[3] As United CEO Mr. Smisek testified:

> A. … competitors can enter your market at 540 miles per hour, so it's very easy to enter a market when you are already an airline.

(Smisek Dep. 278:13-279:1.)

> A. … 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 Dep. 280:10-15.)

and copper conductor were not placed in the same overall product market because "[i]nsulated aluminum conductor is so intrinsically inferior to insulated copper conductor" and the prices of each "do not respond to one another." (Ans. Br. 37, *citing* 377 U.S. at 275-76 (emphasis omitted).) But, this argument is based on an another oversight. In fact, although the Court concluded it was proper to define "*submarket*[*s*]" of aluminum and copper conductor, it held that the district court was "justif[ied] [in] grouping aluminum and copper conductors together in a single product market." 377 U.S. at 275. Thus, just as they erred in failing to recognize that men's, women's and children's shoes were *submarkets* of a broader all footwear market in *Brown Shoe*, Airlines likewise fail to acknowledge that the aluminum and copper conductor submarkets were part of an overall conductor market, since both served the "same general purpose" of conducting electricity. *Id*. at 273. By arguing, therefore, that copper conductor is "intrinsically inferior" to aluminum and that the prices of each "do not respond to one another," Airlines effectively concede that an overall product market may include products that are non-interchangeable – just like the various flight routes throughout the nation.

Airlines also claim that *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) "undercuts plaintiffs' proffered 'national' market," but this is overstated, as Airlines fail to understand the significance of the passages they quote. (Ans. Br. 38.) Airlines state that the geographic market in that case was determined by the location of "supplier-customer relations" because in commercial banking, "convenience of location is essential to effective

competition." (Ans. Br. 38 *quoting Philadephia Nat'l Bank*, 374 U.S. at 358-59.) But, the Airlines overlook the explanatory footnote attached to the passages they cite, which quotes testimony showing that a bank's customer base is roughly within "a mile or two of [the] branch." 374 U.S. at 358, n.35. The "four-county" geographic market defined by the Supreme Court, on the other hand, is likely hundreds of square miles in area and tens of miles or more in breadth. Thus, since customers will not travel more than approximately two miles to do their banking, the wide-ranging four-county market necessarily includes branches that are not substitutes for one another. If the Airlines were correct in claiming that their merger must be analyzed on a route-by-route basis, then the geographic market in *Philadelphia National Bank* would not have been a single four-county area, bur rather dozens of 2-mile radius "mini-markets" scattered across the state of Pennsylvania. In truth, the four-county area in *Philadelphia National Bank* was deemed to be the relevant geographic market – not because every branch within it was a substitutes for every other – but because that is where "appellees' offices are located," and "the vast bulk of appellees' business originates in the four-county area," *Philadelphia National Bank*, 374 U.S. at 359. The same is undisputedly true of the eight major airlines in the United States.

Airlines also cite *United States v. E.I. duPont de Nemours & Co.* (*Cellophane*), 351 U.S. 377, only they cite it in the wrong order. *Cellophane* [4] was one of the first, not last, decisions to discuss market

[4] The Answering Brief uses the short form *duPont*.

definition with reference to "cross-elasticity of demand" and "reasonably interchangeab[ility]." *Cellophane*, 351 U.S. at 395. As such, the subsequently-dated cases cited above and in the Opening Brief apply and interpret the *Cellophane* rule, doing so in a way that allows for the inclusion of products that do not serve interchangeable end-uses. These cases define markets broadly so as to "recognize competition where, in fact, competition exists," *Brown Shoe*, 370 U.S. at 326, and admonish courts that "[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition." *Continental Can*, 378 U.S. at 453.

But, the Airlines cite the *Cellophane* case in support of the untenable position that United and Continental do not compete against one another, or any other airline, in the United States. Airlines cite *Cellophane*'s statement that "interchangeability is largely gauged by the *purchase of competing products for similar uses* ...." (Ans. Br. 39, *quoting Cellophane*, 351 U.S. at 380-81 (emphasis in Ans. Br.).) Based on that, they essentially contend that a product's "use" must be stated so specifically as to render the only available substitutes as essentially fungible for the product at issue, a rule *Cellophane* specifically rejected. 351 U.S. at 394. In every Supreme Court case, as shown, products that serve demonstrably non-interchangeable end-uses have been included in the relevant market in order to recognize competition where in fact it exists.[5]

---

[5] Airlines also cite *Cellophane*'s use of price sensitivity between products in defining the relevant market. (Ans. Br. 40.) They argue that, in contrast to the facts in *Cellophane*, "a flight from San Francisco to Newark does not 'meet competition' from a flight from Seattle to Miami." (Ans. Br. 40.) However, notably absent from this

Finally, that the product's "use" must be interpreted broadly in order to recognize competition where in fact it exists finds further support in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), a case relied on by Plaintiffs but ignored by the Airlines. (Open. Br. 16.) In that decision, the Court held that the district court was "justified" in treating the central station alarm business as "a single market," even though "burglar alarm services are not interchangeable with fire alarm services." *Id.* at 571-72. The Court did so by interpreting the products' general use: "there is here a single use, *i.e.*, the protection of property." *Id.* at 572. Here, while various flight routes across the nation may not be specifically interchangeable, nation wide air travel must be recognized as the product's general purpose in order to identify the obvious fact that airlines compete against one another in the United States.

B. Airlines Do Not Contest That Reliance On The Merger Guidelines To The Exclusion Of Supreme Court Precedent Constitutes An Abuse Of Discretion

Airlines next argue that Plaintiffs "do not raise a serious question of substantially lessening of competition" because "the only evidence

---

assertion is any citation to either a fact showing that air fares from different routes are not responsive to one another, or to the district court's reliance on any such fact. The lower court's decision was based entirely on its conclusion that the national airline market cannot legally exist because all products within it must be substitutes for one another. (I ER 20-21.) That is the wrong standard, as shown, so the conclusion constitutes an abuse of discretion.

they offer … is market share data." (Ans. Br. 42.) While that statement is incorrect, it also addresses the wrong issue. The question here is simply whether the district court arrived at the wrong standard. Plaintiffs have argued that, by eschewing Supreme Court authority in deference to the government's Horizontal Merger Guidelines – which have never been adopted by the Supreme Court – the district court abused its discretion. (Open. Br. 17, 25-28.) The Airlines respond to this central argument with a single phrase, buried in a footnote: "the Guidelines are relied upon as persuasive authority." (Ans. Br. 49, n.17.) No other response is offered. Where the Guidelines directly conflict with Supreme Court law, as they do here, they cease to have even persuasive effect. The point must be deemed conceded.

The remainder of Airlines' argument is largely off topic and the thrust of it relies on an overstatement of Plaintiffs' position. They claim that "[p]laintiffs argue that the Supreme Court has established a *per se rule*" of liability under Section 7 for any merger that results in a combined market share of 30%. (Ans. Br. 42, 44 (emphasis added).) But, in fact, not once in their opening brief, or in any brief below, did Plaintiffs argue that the Supreme Court established a *per se* rule of liability. Plaintiffs have shown that the Supreme Court established a *presumption* of illegality based on market shares, but a "presumption" is quite different from a "per se" rule, and this misrepresentation is repeated throughout the Answering Brief.[6]

[6] Airlines paraphrase Plaintiffs' views again by referring to "[Plaintiffs'] suggestion that 'market share statistics alone' can be 'conclusive indicators of anticompetitive effects.'" (Ans. Br. 44,

The post-merger market shares in this case are so high and the market concentration so great that Airlines' only response is an attempt to diminish the legal importance of such data. They claim that "the Supreme Court's approach in *Brown Shoe* is flatly inconsistent" with a focus on market share data (Ans. Br. 44), that "[t]he Supreme Court cases upon which [Plaintiffs] rely do not support any such market share centric view of Section 7" (*id*. at 43), and that the most the Supreme Court will allow is that market share data is "relevant," (*id*. at 45). These remarks overstate the Supreme Court's position. In fact, the Court made nearly the opposite conclusion:

> The market share which companies may control by merging *is one of the most important factors* to be

---

quoting Open. Br. at 3, 7, 24.) The internal quotation marks, however, are not cited, and the citation form may lead the Court to believe it is a statement from Plaintiffs' Opening Brief. In fact, it is a quote from a decision that Plaintiffs were themselves quoting. (Open. Br. 24.)

The same breach is found in Airlines' summary of the argument, where they state that "Plaintiffs rely entirely upon a *per se* market share test to show alleged anticompetitive effects and argue that "any non-trivial acquisition of a significant rival is per se violative of the Clayton Act." (Ans. Br. 21, *citing* Open. Br. 7 (emphasis added).) But again, no indication is made in Airlines' citation form that the quoted language is a direct quotation from the district court's opinion and not from Plaintiffs' argument. (Open. Br. 7.) In any event, the origin of this "per se" language is not Plaintiffs' briefs, but the district court's decision. (ER 13.) Plaintiffs never argued for a "per se" rule below, so the district court's use of that term only emphasizes how mistaken it was in comprehending the Supreme Court edicts.

> considered when determining the probable effects of the combination on effective competition in the relevant market.

Brown Shoe, 370 U.S. at 343 (emphasis added).

It is true that market share data is not the only factor to be considered; however, as Airlines refuse to concede, it is always the primary factor. In *Brown Shoe*, for example, the Court explained that market shares "are, of course, the primary index of market power…." 370 U.S. at 322, n.38. The Court then went on to list the other factors: "only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger."

Brown Shoe was decided in 1962. The following term, the Supreme Court decided *Philadelphia National Bank*, which established a presumption of illegality based on post-merger market share data. Accordingly, the Court "dispense[d] with" elaborate proof of the *Brown Shoe* factors in mergers resulting in a market share of 30% or more:

> Th[e] intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. [¶] Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in

> light of Congress' design in § 7 to prevent undue concentration.
>
> * * *
>
> Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.

Philadelphia Nat'l Bank, 374 U.S. at 363.

The Court reiterated this position in *Continental Can*, issued the next term, and again placing primary importance on market share data, holding, "[m]arket shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test." *Continental Can*, 378 U.S. at 458. Repeating the "structure, history and probable future" language from *Brown Shoe*, the Court went on to say that "[t]he merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *Id.* But then, reiterating the presumption established in *Philadelphia National Bank* it held:

> Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration.

378 U.S. at 458. Applying this presumption, the Court in *Continental Can* then held the merger illegal where it resulted in a post-merger market share of 25%. *Id.* at 459-461. Its analysis was based almost entirely on the firm's market shares. *Id.* Thus, whereas the *Philadelphia National Bank* presumption was triggered by mergers creating 30% market share or more, in *Continental Can*,

that threshold was lowered and transactions creating a post-merger market share of 25% were deemed "inherently suspect."

The Airlines' merger in this case will result in a market share of 25%. (Open. Br. 4.)

Airlines contend that these cases – and the concepts they embraced – were overruled by the Supreme Court in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Their argument is laden with hyperbole. They contend that *General Dynamics* "makes clear" that market share and concentration data are "insufficient to assess the competitive effects of a merger." (Ans. Br. 46.) They state that the market's "structure, history and probable future" factors "*must* be considered." (*Id.* (emphasis added).) But, that is not what *General Dynamics* held at all – it did not *require* courts to consider these factors, it merely *allowed* their introduction in unique cases where market share data clearly mischaracterized the merger's probable future effects, a situation not present here. Notably, nowhere in its decision did the district court cite facts showing that the market share data mischaracterized the probable future effects of Airlines' merger.

General Dynamics allowed for the "discounting" of market share data only because *past* market shares in that case failed to reflect what was likely to happen in the *future*. It explained that in most industries, market share data *does* explain likely future impact: "[i]n markets involving groceries or beer, as in *Von's Grocery*, and *Pabst*, statistics involving annual sales naturally indicate the power of each company to compete in the future." *General Dynamics*, 415 U.S. at 501. "In the coal market" at issue in *General Dynamics* on the other

hand, coal production statistics were "of considerably less significance" because the bulk of coal production is delivered under long-term contracts. This meant that a company's ability to compete in the *future* was not reflected by the amount of coal it had produced in the *past*; rather, "the focus of competition … is on the procurement of new long-term supply contracts." *Id.* Based on this unique fact, the district court was permitted to discount *production* market share data because one of the acquired firms had no uncommitted reserves – that is, even though it had produced much coal in the past, it had nothing left in stock on which to compete for new long-term contracts. The Seventh Circuit has gone so far as to describe this fact pattern as being "like a failing-company case." *Hospital Corporation of America v. Federal Trade Commission*, 807 F.2d 1381, 1386 (7th Cir. 1986). So, *General Dynamics* did not create a new rule, but merely carved out an exception to the *Philadelphia National Bank* presumption, as Judge Posner explained in *Hospital Corp.*:

> Although [*General Dynamics*] … refused to equate the possession of a significant market share with a significant threat to competition, [it] involved highly unusual facts, having no counterpart in this case, that required discounting large market shares. In *General Dynamics* the shares were of current sales (of coal) made pursuant to long-term contracts entered into a long time ago; future sales would depend on uncommitted reserves, and one of the acquired firms had no uncommitted reserves. * * * [¶] [*General Dynamics*] show[s] that market share figures are not always decisive in a section 7 case, but it can be argued that the case[] [itself] carve[s] only limited exceptions to the broad holdings of some of the merger decisions of the 1960s.

Hosp. Corp., 807 F.2d at 1385. "None of these decisions" Judge Posner wrote, "has been overruled," and they "seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor." *Id.* Airlines offer nothing in rebuttal.

Airlines also argue that Plaintiffs have offered only market share data, but that is not so. (Open. Br. 23-24.) Plaintiffs have presented evidence that the national airline industry is highly concentrated, and if the merger is permitted, the top two firms will control more than 50% of the market; the top three firms will control 67% of the market; and the top five firms will control 85%. (Open. Br. 4.) There is also evidence that the industry is rapidly trending toward greater concentration, having gone from thirty-four firms to only five in the past two decades. (II ER 75, 97.) As Plaintiffs argued in the Opening Brief (Open. Br. 17-18, 23-24), this trend toward concentration in an industry has been one of the most important factors in nearly every Section 7 case the Supreme Court has decided. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552-53 (1966) ("[w]e hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be"); *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966) ("[i]f ever … a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with the power to do so, declared must be arrested"); *Continental Can*, 378 U.S. at 461 ("where there has been a 'history of tendency toward concentration in the industry' tendencies toward

further concentration 'are to be curbed in their incipiency'"); *Philadelphia Nat'l Bank*, 374 U.S. at 363 ("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"); *Alcoa*, 377 U.S. at 279 (same); *Brown Shoe*, 370 U.S. at 345 ("[w]e cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency").

Like the district court, the Airlines ignored these holdings.[7]

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ANALYZING PLAINTIFFS' IRREPARABLE HARM

A. The District Court Failed To Analyze Plaintiffs' Harm Within The Context Of The National Airline Market

Plaintiffs' argued in their Opening Brief that the district court's refusal to acknowledge binding Supreme Court authority infected its analysis of Plaintiffs' harm in this case. By refusing to recognize the national airline market, the lower court's ruling failed to analyze Plaintiffs' harms within that market, focusing instead on eight factual findings which, as demonstrated in the Opening Brief, were irrelevant to Plaintiffs' harm within that market. (Open. Br. 29-33.) On this central score, Airlines respond with a single sentence, arguing without further analysis that "[a]mong the factual findings

[7] Airlines do argue a series of facts. (Ans. Br. 48-49.) However, none of them was relied upon or even cited by the district court, so none played a role in the exercise of the district court's discretion.

that relate to plaintiffs' supposed 'national' market, the district court found that 'none of the plaintiffs testified to having flown regularly' and that they expressed only a non-specific and 'uninformed hope' of future air travel." (Ans. Br. 49, *quoting* ER 23-24.) That is all they say on the issue.

To begin with, having ignored seven of the eight factual findings, it must be concluded that Airlines concede to their irrelevance to Plaintiffs' harm in the national airline market, as argued in the Opening Brief. (Open. Br. 31-33.)

Second, no serious rebuttal is offered to Plaintiffs' argument that Finding No. 1 – "none of the plaintiffs testified to having flown regularly" (I ER 23) – is legally defective as to its reliance on the vague, undefined word "regularly" or that, even if it not vague, that it is a "clearly erroneous finding of fact" constituting an abuse of discretion, as explained in detail in the Opening Brief. (Open. Br. 32-33.)

Third, Airlines assert, without further explanation, that the district court was correct in concluding that Plaintiffs' "unformed hope" of future air travel was "speculative and *de minimus* [sic]." (Ans. Br. 49-50; ER 24). But, the district court was not analyzing Plaintiffs' harms within the national airline market, an error that reflects back to its choice not to follow the Supreme Court decisions. Moreover, the district court based this conclusion solely on Plaintiffs' affidavits. (ER 24.) The evidence, apart from Plaintiffs affidavits, in fact indicates a strong probability of future travel. For one, the flight records for the three plaintiffs who testified indicate very regular travel over the past five years – on average, approximately 35 flights

on 17 separate trips per person (II ER 131-134) – and it is not conceivable that all of them would suddenly abstain from flying. More directly, Plaintiffs testified that they had specific trips planned to specific places to visit specific people or events in the future (Open. Br. 5-7; II ER 39:11-25; II ER 46:12-23; II ER 57:19-58:2), and one of the three who testified said "it is 100 percent for sure that I will be … traveling in the future to cities around the United States." (II ER 40:8-11.)

In sum, Airlines offer a single conclusory sentence in response to Plaintiffs' argument that the district court abused its discretion by failing to analyze Plaintiffs' harm in the national airline market. The point must be deemed conceded.

B. Whether Plaintiffs' Harm Is "Irreparable" Is Not An Issue Before This Court

Airlines argue that Plaintiffs' harm is not irreparable because one of the merger's future impacts will be higher fares, and "[h]igher prices … are classically remedied through money damages and do not constitute irreparable harm." (Ans. Br. 51.) However, the standard of review on this appeal is for abuse of discretion. Because the lower court never analyzed the irreparability of Plaintiffs' harm, and it played no role in any ruling by the district court, the matter is not subject to review by this Court. In any event, the argument has been addressed in Plaintiffs' Opening Brief. (Open. Br. 29, n.5.)

III. IN BALANCING THE EQUITIES THE AIRLINES, LIKE THE DISTRICT COURT, CONFLATED THE "HARDSHIP" TO BE BALANCED

On the issue of balancing the hardships, Airlines simply misunderstand the law, and like the district court, they incorrectly define Plaintiffs' hardship. The "hardships" to be balanced are the relative pains the parties will experience from the injunction being either granted or denied. In a merger case like this, the balance is between, on the one hand, the hardship Airlines will experience if a *legal* merger is temporarily halted – and on the other hand, the hardship Plaintiffs will experience if an *illegal* merger is permitted to go forward. Airlines proclaim "that is not the law." (Ans. Br. 54.) But, it is they who are mistaken, and they insist on placing on the scale Plaintiffs' future damages from the merger's anticompetitive effects. The district court made the same error. (ER 23-24.)

In this case, Airlines argue that "delaying the merger" will result in hardships like "the loss of significant revenue synergies and cost savings" for example. (Ans. Br. 53-54.) But, these are only hardships caused by delay if the merger is later found to be *legal*. Of course, no one could complain of hardship in delaying an illegal merger.

Plaintiffs' side of the scale demands inquiring into the burden associated with allowing an *illegal* merger to temporarily proceed. Here, it is assumed that the merger is consummated, completed but then later at trial, found to be illegal. As outlined in the Opening Brief (Open. Br. 34), the hardship associated with legally and practically unscrambling any merger – particularly one of the

magnitude in this case – is so enormous that it sparked congressional creation of the Hart-Scott-Rodino Antitrust Improvement Act, which now requires merging companies to file pre-merger notification with the regulatory agencies. (Open. Br. 34, *quoting* H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2637, 2627.) Nowhere in the district court's decision is such a hardship even contemplated. No mention, anywhere in the decision, is made to the difficulty Plaintiffs will have in unscrambling this merger if it is found to be illegal. Instead, the district court improperly placed on the scale Plaintiffs' future damages from the violation. (I ER 23-24.) That is the wrong standard.

The district court also failed to properly analyze the Airlines' hardship. It discussed at length the "cost savings" and "synergies" that would be delayed if the merger were enjoined (I ER 24), and it quoted a statement from Justice O'Connor in *Western Airlines, Inc. v. International Board of Teamsters*, 480 U.S. 1301, 1309 (1987). But the facts in this case are different from that case and show that there would have been *no hardship* associated with temporarily halting the merger here. Still today, the two Airlines operate separately pursuant to an agreement with the United States Department of Transportation (Open. Br. 36; Defs.' Ex. 1076; II ER 186 (Dkt. Doc. No. 109-1)), so the purported cost savings and synergies have not yet occurred. Had the district court preliminarily enjoined the merger in September, 2010, trial would have been completed months ago and – if the verdict had come down in Airlines' favor – since they are still operating separately, the delay would have cost them nothing.

IV. WHETHER AN INJUNCTION WOULD BE IN THE PUBLIC'S INTEREST IS NOT AN ISSUE BEFORE THIS COURT

Airlines argue that an order enjoining them from completing their merger would not be in the public interest. (Ans. Br. 55-56.) The standard of review for this appeal is abuse of discretion and, since the district court specifically declined to reach the public interest issue (I ER 26), it is not properly before the Court.

V. THIS APPEAL IS NOT MOOT

As noted above, Airlines have agreed with the United States government to operate their entities separately pending final approval from the Department of Transportation, which has not yet occurred. (Open. Br. 36; Defs.' Ex. 1076; II ER 186 (Dkt Doc. No. 109-1).) By declining to address this fact in their Answering Brief, Airlines concede that their merger has not been completed, and that this appeal presents a live controversy. *See Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045 (9th Cir. 2010) (appeal not moot where district court refused injunction, but only "49% of the planned logging was completed" at the time of oral argument).

CONCLUSION

The decision of the district court should be reversed with direction to enjoin further completion of Airlines' merger pending trial on the merits.

January 10, 2011

Respectfully submitted,

ALIOTO LAW FIRM

By: *s/ Joseph M. Alioto, Jr.*

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to FED.R.APP.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6912 words excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

January 10, 2011

s/ Joseph M. Alioto, Jr.

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 10, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

January 10, 2011

s/ Joseph M. Alioto, Jr.

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants

CERTIFICATE FOR BRIEF IN PAPER FORMAT

I, Joseph M. Alioto, Jr., certify that this brief is identical to the version submitted electronically on January 10, 2011.

January ___, 2011

____

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
JAliotoJr@AliotoLaw.com

Attorneys for Appellants