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13-1494
No. _____

In the Supreme Court of the United States

MICHAEL C. MALANEY, ET AL.,
Petitioners,

v.

UAL CORPORATION; UNITED AIRLINES, INC.;
CONTINENTAL AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph M. Alioto
Counsel of Record
Jamie Miller
Alioto Law Firm
One Sansome Street, 35th Floor
San Francisco, CA 94104
(415) 434-8900
jmalioto@aliotolaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

- Relevant market analysis impacts every antitrust action brought pursuant to § 7 of the Clayton Act, 15 U.S.C. § 18. This Court held that relevant market definition is a "necessary predicate to a finding of a violation of the Clayton Act," *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

  For the purposes of defining a relevant product market under § 7 of the Clayton Act, is it erroneous to define a relevant market based on demand considerations alone?

- Is it a violation of Due Process when a lower court uses its application of standards for preliminary injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, to subsequently bind a litigant in a claim for damages under § 4 of the Clayton Act, 15 U.S.C. § 15?

- Whether this Court's decisions enjoining mergers under § 7 of the Clayton Act, which have never been overruled and which have been interpreted by the 7th Circuit to collectively stand for the proposition that a nontrivial acquisition of a significant rival in an industry with a trend towards concentration is presumptively illegal, are still binding and viable since many of the lower courts have either ignored them completely or overruled them *de facto*?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, plaintiffs-appellants below, are:

MICHAEL C. MALANEY, KATHERINE R. ARCELL, KEITH DEAN BRADT, JOSE' M. BRITO, JAN MARIE BROWN, ROBERT D. CONWAY, ROSEMARY D'AUGUSTA, BRENDA K. DAVIS, PAMELA FAUST, CAROLYN FJORD, DON FREELAND, TED FRIEDLI, DONALD V. FRY, GABRIEL GARAVANIAN, HARRY GARAVANIAN, YVONNE JOCELYN GARDNER, LEE M. GENTRY, JAY GLIKMAN, DONNA M. JOHNSON, VALARIE ANN JOLLY, GAIL S. KOSACH, ROZANN KUNSTLE, STEVE KUNSTLE, JOHN LOVELL, LEN MARAZZO, LEE MCCARTHY, LISA MCCARTHY, PATRICIA ANN MEEUWSEN, L. WEST OEHMIG, JR., CYNTHIA PROSTERMAN, DEBORAH M. PULFER, SHARON HOLMES REED, DANA L. ROBINSON, ROBERT A. ROSENTHAL, BILL RUBINSOHN, SONDRA K. RUSSELL, SYLVIA N. SPARKS, JUNE STANSBURY, CLYDE D. STENSRUD, SHERRY LYNNE STEWART, WAYNE TALEFF, GARY TALEWSKY, ANNETTE M. TIPPETTS, DIANA LYNN ULTICAN, J. MICHAEL WALKER, PAMELA S. WARD, DAVID P. WENDELL, CHRISTINE O. WHALEN, AND SURAJ ZUTSHI

Respondents in this Court, defendants-appellees below, are:

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

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is unreported. Appendix to the Petition for Writ of Certiorari (hereinafter "App") 1-6. The opinion of the District Court (App. 7-17) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals issued its decision on January 16, 2014. (App. 1-6.) The court denied a timely petition for rehearing with a suggestion for rehearing en banc on February 28, 2014. (App. 59-60.)

On May 21, 2014, Justice Kennedy granted Petitioners' Application (13A1152) to extend the time to file a petition for writ of certiorari, extending the time to file until June 13, 2014.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

> controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes any person who is "engaged in commerce or in any activity affecting "commerce" from acquiring "the whole or any part" of a business if the effect of that acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

Under Section 16 of the Clayton Act, a private plaintiff may obtain injunctive relief for a violation of Section 7 upon a showing of "threatened loss or damage." 15 U.S.C. § 26.

Under the Fifth Amendment to the United States Constitution, "No person shall be...deprived of life, liberty, or property without due process of law."

INTRODUCTION

Since 2008, the United States airline industry has become increasingly concentrated through a series of mergers. The number of major U.S. airlines has been reduced from seven to four in only a few years (Delta-Northwest in 2008; United-Continental in 2010; Southwest-Airtran in 2011; and American-US Airways in 2013.) Major competitors in the airline industry have been eliminated because of the airlines' desire to grow through acquisition rather than competition, which § 7 of the Clayton Act, 15 U.S.C. § 18, prohibits expressly. Each airline merger, including most recently, the American and US Airways merger, has been permitted to proceed by the Department of Justice and the courts with minor divestitures of slots at airports, if any. In the antitrust context, an overly

narrow relevant market definition, such as the one advocated by the Defendants in this case, city-pair relevant markets, allows mergers to proceed largely intact, with only minor concessions, if any, by the merging entities. With only minor slot divestitures, the anticompetitive effects of these mergers have been realized[1].

If defining a relevant market is a "necessary predicate" to an antitrust action under the Clayton Act, then decisions analyzing relevant market have the potential to impact any antitrust case or major merger, and thereby consumers throughout the United States. *Brown Shoe Co. v. United States,* 370 U.S. 294, 324 (1962). It is incumbent upon this Court to clarify precedent regarding relevant market definition. This case should and must be viewed within this background.

In a decision that not only conflicts with the authority within the Circuit but with authority in numerous other circuit courts and the United States Supreme Court, the Ninth Circuit panel rubber stamped an erroneous, one-dimensional approach to defining a relevant market. The relevant market analysis validated by the panel is erroneous as a matter of law because cross-elasticity of supply should and must be considered in relevant market definition,

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[1] "In essence, industry consolidation has left fewer, more-similar airlines, making it easier for the remaining airlines to raise prices, impose new or higher baggage and other ancillary fees, and reduce capacity and service." *United States v. US Airways Group, Inc., et al.*, Case No. 13-cv-1326, United States District Court for the District of Columbia, Amended Complaint, Dkt. No. 73, at ¶ 4.

rather than the one-sided demand elasticity approach it upheld. The panel's decision stands in opposition to decades of established law in its own circuit, other United States Circuit Courts of Appeal, and the United States Supreme Court. This decision undermines federal antitrust law. The consequences of this erroneous approach to relevant market definition will be serious and lasting.

STATEMENT OF THE CASE

In 2010, Defendants UAL Corporation and Continental announced their intention to merge. Plaintiffs brought suit for injunctive relief to enjoin Defendants' merger as illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18. (Op. Br. at 3.) Plaintiffs filed a motion for preliminary injunction. In the briefing on the motion, Plaintiffs argued that the national market for air transportation was the relevant product market, that the airlines were actual and potential competitors in the United States market for air transportation, and that the ability of airlines to enter markets where it would be profitable to do so must be considered in relevant market definition, which was supported by the deposition of former Continental CEO Smisek:

> 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.
>
> * * *
>
> ...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.

(APP. SER 39-40) Plaintiffs also argued that a national market for air transportation was consistent with a line of Supreme Court precedent. (APP. SER 13-16.) In the order denying Plaintiffs' motion, the district court held that: "Plaintiffs' third proposed relevant market is the national airline industry taken as a whole, and can be more quickly dispatched than the two previously discussed alternatives. First, '[t]he boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it,' *Brown Shoe*, 370 U.S. at 325, and plaintiffs have not shown how, for example, a flight from San Francisco to Newark would compete with a flight from Seattle to Miami." *Malaney v. UAL Corp.*, WL 3790296, *12 (N.D.Cal. 2010).

The lower court rejected Plaintiffs' proposed market definition as a matter of law, because a "flight from San Francisco to Newark" does not compete with "a flight from Seattle to Miami," because routes in the national market for air transportation are not perfectly interchangeable. The lower court conducted a one-sided relevant market analysis based on cross-elasticity of demand and stopped there. The lower court did not address in any way, cross-elasticity of supply or the evidence presented that "it's very easy to enter a market when you are already an airline."

On the first appeal to the Ninth Circuit, Plaintiffs argued that a national market for air transportation was consistent with a line of binding Supreme Court precedent, including *Brown Shoe Co. v. United States,*

370 U.S. 294 (1962). In *Malaney I*, the Ninth Circuit panel adopted the same one-sided relevant market analysis of the lower court, ignoring cross-elasticity of supply, and held that:

> Plaintiffs have failed to demonstrate that the national market in air travel satisfies this standard. As the district court noted, a flight from San Francisco to Newark is not interchangeable with a flight from Seattle to Miami. No matter how much an airline raised the price of the San Francisco–Newark flight, a passenger would not respond by switching to the Seattle–Miami flight.

Malaney v. UAL Corp., 434 Fed.Appx. 620, 621 (9th Cir. 2011) ("*Malaney I*).

Upon return to the district court, Plaintiffs amended the complaint with additional factual allegations, adding a damages claim, and later filed a supplemental complaint. (II ER 51 and 47.) Defendants filed a motion to dismiss the amended complaint. In opposition to the motion to dismiss, Plaintiffs brought to the attention of the lower court the decision in *In re Air Passenger Computer Reservation Systems,* 694 F.Supp. 1443, 1468 and 1472 (CD Cal. 1988), which held that:

> Continental has failed to present any evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry. In fact, Continental's own expert (Franklin Fischer) has testified that a city pair cannot be a relevant market absent unusual circumstances, such as slot-constrained

> airports and the absence of a market for slots at those airports. Plaintiffs' expert Fischer has also stated that a city or hub cannot constitute a relevant market either. *Id.* at 1468.
>
> * * *
>
> **The evidence submitted supports [United's] contention that the only relevant air transportation market is the national market**. Continental's own expert (Fischer) supports this conclusion...Thus, summary judgment should be granted for failure to establish that the local air transportation markets are relevant markets for antitrust purposes. *Id.* at 1472. [Emphasis added.]

Plaintiffs also relied upon the binding authority of the United States Supreme Court, including *Brown Shoe,* precedents which define relevant market broadly. The lower court granted Defendants' motion to dismiss, holding that:

> As both courts have explained, the national market for air transportation does not meet *Brown Shoe's* standard because flights between distant cities are simply not reasonably interchangeable. A passenger would never choose a flight from San Francisco to Newark as an alternative to a flight from Seattle to Miami, regardless of price.

(I ER 007.) No analysis or mention of cross-elasticity of supply has ever been applied to this case by any court. The line of Supreme Court decisions, including *Brown Shoe*, have never been addressed. The plausibility of Plaintiffs' relevant market definition in

light of the *In re Air Passenger CRS* was also disregarded by the lower court.

Plaintiffs again appealed to the Ninth Circuit. On appeal, Plaintiffs argued that *Malaney I* was erroneous because it did not consider authority within the Ninth Circuit requiring cross-elasticity of supply to be considered in defining a relevant market. Plaintiffs also noted that airlines had previously acknowledged and alleged the existence of a national relevant market for air transportation for antitrust purposes in not only *In re Air Passengers CRS* but also in *Continental Airlines v. American Airlines*, 1993 WL 379396 (S.D. Tex. 1993). The panel refused Plaintiffs' request to take judicial notice of the fact that in the *Continental* jury instructions, a jury was instructed that they could find a national relevant market for air transportation:

> The parties disagree about the relevant geographic market in this case, and you must decide this issue... Defendants claim that the national United States air passenger service market includes all air passenger service within the United States. Defendants also claim that, for purposes of analyzing their national pricing actions, hubs and regions are not relevant markets separate from the national market that contains them...
>
> *You may consider how readily airlines shift from selling in one location to selling in another. Evidence that airlines tend to shift readily among different locations in response to price changes may be considered by you in determining whether the different locations are in the same geographic market.*

* * *

> [Y]ou may conclude that a relevant market exists only for the entire United States, or you may conclude that relevant markets exist both for the entire United States and for particular hubs within or regions of the United States.

Id. at *2. [Emphasis added.]

Despite Ninth Circuit authority to the contrary, the panel affirmed the decision of the lower court and determined that it was bound by its prior holding on the preliminary injunction appeal under the doctrine of the law of the case, even though Plaintiffs had added a damages claim under Section 4 of the Clayton Act. The Ninth Circuit held that:

> "*Malaney I* is not Clearly Erroneous":
>
> Appellants argue *Malaney I*, in affirming the district court's denial of a preliminary injunction, fails to account for the cross-elasticity of supply within the passenger airline industry. *See Equifax, Inc. v. F.T.C.*, 618 F.2d 63, 66 (9th Cir. 1980) (recognizing it is "well settled that cross-elasticity of supply is a valid basis for determining that two commodities should be within the same market"); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975)5 (similar). We disagree.
>
> Appellants have not pleaded any specific facts establishing relevance of supply interchangeability to the product market inquiry in this case.

Malaney v. UAL Corp., Memorandum Decision, January 16, 2014 (9th Cir. 2014). ("*Malaney II.*") Though CEO Smisek's statements regarding ease of entry into markets were brought to the attention of the panel, they were ignored. (Reply Br. at 5.) The panel's decision finds that *Malaney I* is not "clearly erroneous" without analyzing the previous panel's holding against the weight of the authority of the Ninth Circuit, other Circuits, and the Supreme Court. *Malaney I* and *Malaney II*, without question, rejected Plaintiffs' proposed market definition, erroneously, based on demand considerations alone.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Conflicts with the Authority of its Own Circuit Requiring Relevant Market Definition to Include Consideration of Cross-Elasticity of Supply

The panel's decision upheld a standard for defining a relevant market for antitrust purposes that conflicts with the standard articulated within the Circuit in *Rebel Oil, Twin City Sportservice, Equifax, Inc.*, and *Calnetics*. Specifically, the panel held that *Malaney I,* the previous panel's decision which rejected Plaintiffs' proposed market definition based on demand considerations alone, was not "clearly erroneous." Under *Rebel Oil,* and the other authority of the Circuit, the court is required to consider cross-elasticity of supply in relevant market definition. Failure to do so, in the face of binding authority to the contrary, is clear error.

In addressing the issue of relevant market in *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995), the Ninth Circuit held that:

> Rebel's expert relied on "demand elasticity"-that is, whether a price rise in self-serve, cash-only gasoline would cause self-serve consumers to shift their demand to full-service gasoline...***But defining a market on the basis of demand considerations alone is erroneous***. *Virtual Maintenance, Inc., v. Prime Computer, Inc.,* 11 F.3d 660, 664 (6th Cir. 1993) (citing Areeda & Hovenkamp, ¶ 518.1 at 543), *cert. dismissed,* 512 U.S. 1216, 114 S.Ct. 2700, 129 L.Ed.2d 829 (1994). ***A reasonable market definition must also be based on "supply elasticity***." *Id. Twin City Sportservice, Inc., v. Charles O. Findley & Co.,* 512 F.2d 1264, 1274 (9th Cir. 1975.) Supply elasticity measures the responsiveness of producers to price increases. Sullivan & Harrison, § 6.02. ***If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market.*** Areeda & Turner ¶ 521a, at 354. The affidavit of Rebel's expert fails to account for the fact that sellers of self-serve gasoline can easily convert their full-serve pumps, at virtually no cost, into self-serve, cash-only pumps, expanding output and thus constraining any attempt by ARCO to charge supracompetitive prices for self-serve gasoline. The ease by which marketers can convert their full-serve facilities to increase their output of self-serve gasoline requires that full-serve sales be part of the relevant market; ***it is***

> ***immaterial that consumers do not regard the products as substitutes***, that a price differential exists, or that prices are not closely correlated. Areeda & Turner ¶ 521 at 354....*See Thurman Indus....*875 F.2d at 1374 (***a relevant market includes those sellers who have the "actual or potential ability" to compete and deprive the defendant of significant amounts of business***).

Instead of following the standard in *Rebel Oil,* the panel in *Malaney I* and *Malaney II* validated a one-sided, demand consideration approach to relevant market definition—an approach which is described in *Rebel Oil* as "erroneous." It is impossible to reconcile the holding of the panel in *Malaney I* that, "No matter how much an airline raised the price of the San Francisco–Newark flight, a passenger would not respond by switching to the Seattle–Miami flight" with the mandate of the Ninth Circuit in *Rebel Oil,* "If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market... *it is immaterial that consumers do not regard the products as substitutes.*" *Id. at 1436.* [Emphasis added.]

Cross-elasticity of supply in the context of this case is the ability of airlines to easily enter markets where it would be profitable to do so. This was admitted in the testimony of CEO Smisek and brought to the attention of the lower court and the panel, but disregarded. The issue of supply elasticity has never been addressed by any court in this case.

Rebel Oil is not the only Ninth Circuit case requiring consideration of cross-elasticity of supply in relevant market definition. In its decision, the panel also either misapprehended or overlooked:

a. *Twin City Sportservice, Inc., v. Charles O. Finley & Company, Inc.*, 512 F.2d 1264 (9th Cir. 1975) (holding that, "A like analysis applies when the market is viewed from the production rather than the consumption standpoint...Where the degree of substitutability in production is high, cross-elasticities of supply will also be high, and again the two commodities in question should be treated as part of the same market...While the majority of decided cases in which the rule of reasonable interchangeability is employed deal with the "use" side of the market, the courts have not been unaware of the importance of substitutability on the "production" side as well.")

b. *Calnetics Corporation v. Volkswagon of America*, 532 F.2d 674 (9th Cir. 1976), (holding that, "In defining the product market, the district court explicitly refused to consider the cross-elasticity of production facilities or capacity. (citation omitted) VW and Subsidiary argue that ***this refusal rendered the ensuing market definition...clearly erroneous...The district court's failure to consider production cross-elasticity was inconsistent with the views of the Supreme Court and of this circuit***.) [Emphasis added.]

c. *Equifax, Inc., v. Federal Trade Commission,* 618 F.2d 63 (9th Cir. 1980), (holding that, "It is well settled that cross-elasticity of supply is a valid basis for determining that two commodities should be within the same market. ")

Based on *Rebel Oil, Twin City Sportservice, Equifax, Inc.*, and *Calnetics,* there should have been no question that it was erroneous to define a relevant market from demand considerations alone, and that supply elasticity must be considered. Rehearing is not only required to reconcile the conflict between the panel's rulings in *Malaney I* and *Malaney II* and these Circuit precedents, but also to correct the errors of law that underlie the panel's decision.

2. Cross-Elasticity of Supply was Brought to the Attention of the Lower Court But was Disregarded

Testimony from the deposition of Continental CEO Smisek, which acknowledges that airlines can enter markets easily (in other words, cross-elasticity of supply), was brought to the attention of the district court and the panel (APP SER 39-40), but was overlooked or misapprehended. Continental's CEO admitted that:

> Well, no, no not at all. I mean, there are—competitors can enter your market at 540 miles an hour, so its very easy to enter a market when you are already an airline.
>
> * * *
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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.

(APP. SER 39-40.) Though this information was before the lower court and the panel, the panel in *Malaney II*

held that, "Appellants cobble together bald factual allegations with a citation to out-of-circuit authority to allege that cross-elasticity of supply is relevant to the passenger airline industry." Smisek's testimony has never been addressed by the lower court or a panel of the Ninth Circuit.

3. The Ninth Circuit's Panel Decision Conflicts with the Authority of Nearly Every Other United States Circuit Court and the United States Supreme Court

The panels' holdings in *Malaney I* and *Malaney II* conflict with precedent in a number of other Circuit Courts and the United States Supreme Court, including the following:

a. In a recent 11th Circuit decision, *Gulf States Reorganization Group, Inc. v. Nucor*, 721 F.3d 1281 (11th Cir. 2013), the court cited and relied on the Ninth Circuit's decision in *Rebel Oil* (at 1286) regarding cross-elasticity of supply and held that, "[Plaintiff's] definition of the product market is too restrictive...it refuses to acknowledge that...manufacturers could (and likely would) enter the fray...That would, in turn, increase the supply, and lower the price...***[Plaintiff] ignores this "actual or potential" economic construct, U.S. Anchor Mfg., 7 F.3d at 995, and its failure to account for cross-elasticity of supply is fatal...***" *Id.* at 1287. [Emphasis added.]

b. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), ("The cross-elasticity of production facilities may also be an important factor in defining a product market...)

c. *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 665 (6th Cir. 1993) (***"Defining a market, or "submarket," on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market***. Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law,* ¶ 518.1g at 471 & n. 26 (Supp.1990) (citing *United States v. Central State Bank, 817 F.2d 22 (6th Cir.1987)*). ***The relevant product market cannot be determined without considering the cross-elasticity of supply***.") [Emphasis added.]

d. *United States v. Empire Gas Corp.*, 537 F.2d 296, 303 (8th Cir. 1976), ("The cross-elasticity of supply would seem to be as important as the demand factor in determining relevant product market.")

e. *Larry V. Muko, Inc., v. Southwestern Pennsylvania Bldg. and Const. Trades Council,* 670 F.2d 421, 434 (3rd Cir. 1982) ("A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.")

f. *Spectrofuge Corp. v. Beckman Instruments, Inc.,* 575 F.2d 256, 282 (5th Cir. 1978), ("The fact that a company limits its competitive activity...cannot control the definition of the relevant market. (citations omitted)..The [] Court reasoned that limiting the relevant market...ignored...the low cost involved...in supplying peripheral products compatible with equipment manufactured by...competitors (cross-elasticity of supply).")

g. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C. Cir. 1986), ("[T]he

capability of other production facilities to be converted to produce a substitutable product is referred to as the cross-elasticity of supply. The higher these cross-elasticities, the more likely it is that similar products or the capacity of production facilities now used for other purposes are to be counted in the relevant market.")

The panel's departure from well-established precedent of its own Circuit, and in other circuits and the United States Supreme Court, threatens consequences far beyond this case. The panel's decision validates an erroneous, one-sided analysis of relevant market definition, which accounts for demand elasticity but ignores supply elasticity.

4. The Ninth Circuit's Opinion Conflicts with a Line of Binding Supreme Court Precedent

The memorandum decision by the panel overlooked, indeed in the opinion of the petitioners, simply ignored, the binding decisions by the Supreme Court of the United States in Section 7 cases, in which the statute's concern about the lessening of competition or the tendency to create a monopoly is to be judged. Those Supreme Court decisions are *Brown Shoe, Co. v. United States,* 370 U.S. 294 (1962), *United States v. Philadelphia Nat'l Bank,* 372 U.S. 321 (1963), *United States v. Aluminum Co. of America et al.,* 377 U.S. 271 (1964), *United States v. Vons Grocery Co.,* 384 U.S. 270 (1966), *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966). Under the authority of the Supreme Court, Defendants' merger was and is presumptively illegal. Judge Posner summarized this line of binding Supreme Court precedent as *establishing the illegality of any nontrivial acquisition of a competitor*:

> The Commission's detailed analysis of those effects fills most of a 117-page opinion that, whatever its substantive merits or demerits, is a model of lucidity. The Commission may have made its task harder (and opinion longer) than strictly necessary, however, by studiously avoiding reliance on any of the Supreme Court's section 7 decisions from the 1960s except *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), which took an explicitly economic approach to the interpretation of the statute. The other decisions in that decade-in particular *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Aluminum Co. of America,* 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); *United States v. Von's Grocery Co.,* 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), and *United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966)-*seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor,* whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. *The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may ... substantially ... lessen competition." Hospital Corp. of America v. F.T.C,* 807 F.2d 1381, 1385. [Emphasis added.]

In the above-mentioned line of precedent, the Supreme Court simultaneously established a resolute

intolerance for mergers that result in over-concentration of United States markets. The panel ignored these decisions. These Supreme Court cases establish two fundamental themes with respect to merger legality. First, they adamantly strive to prevent any "trend toward concentration," as forcefully explained by the Court in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966):

> Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.

Thus, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers." *Id.* As the Court put it in *Philadelphia Nat'l Bank*, 374 U.S. at 365, n.42, where market "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Second, the cases not only enjoined, but required divestiture, of mergers involving two direct competitors in concentrated industries, even where the increases in market share of the combined entity were *slight*, in some cases, less than 2%. These two fundamental principles clearly establishing the law are echoed through each case.

In *Brown Shoe*, the named-defendant was the 4th largest shoe manufacturer with 6% of the market, and its competitor Kinney was the 12th largest firm with only 0.5%. In the shoe retailing market, Brown Shoe

was the 3rd largest firm and Kinney was number eight. When the two firms proposed to merge, their combined share of the manufacturing market would only amount to 6%, while their combined share of the retail market would only be 9.5%. 370 U.S. at 297, 303, 327, 331, 346. The Supreme Court enjoined the merger.

In *Philadelphia National Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank in the market, with 36% of all assets. 374 U.S. at 330-31, 364. Moreover, the merger would have resulted in intense concentration of the market: the first and second largest firms would have controlled 58% of the market, and the top four firms would have controlled 77% of the market. *Id.* at 331. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant increase of concentration in the market, were both so high as to be *presumptively* illegal. Based on the "intense congressional concern with the trend toward concentration," the Court dispensed with the plaintiffs' need for "elaborate proof of market structure, market behavior, or probable anticompetitive effects" and instead established a presumption of illegality for any merger that results in a combined-firm market share of 30%. This case similar market data as those deemed presumptively illegal in *Philadelphia National Bank*.

In *Alcoa*, 377 U.S. 271, the Supreme Court ordered Aluminum Company of America to divest itself of Rome Cable Corporation where Alcoa's market share of 27.8% had been increased by merely 1.3% through the acquisition of Rome. The decision was driven by what

the Supreme Court considered to be unacceptably high levels of concentration in the aluminum wiring industry. In that case, Alcoa was the leading producer of aluminum conductor, with 28% of the market. *Id.* at 278. Alcoa plus Kaiser, the second leading competitor, together controlled 50% of the market. *Id.* The top three competitors had a combined market share of 76%. *Id.* Nine firms in total – including Rome with only 1.3% of the market – controlled 95% of all aluminum created in the United States. *Id.* In the narrower submarket of insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures, the Supreme Court deemed both of these markets "highly concentrated." The market concentrations in the present case are almost identical.

United States v. Continental Can Co., 378 U.S. 441 (1964), concerned the market for glass and metal containers with the following competitive positions: American Can (26.8% market share), Continental Can (21.9%), Owens-Illinois Glass (11.2%), Anchor-Hocking Glass (3.8%), National Can (3.3%) and Hazel-Atlas Glass (3.1%). 378 U.S. at 461, n.11. Some 125 other firms manufactured the remaining 30% of the market units. *Id.* at 445-446 (75 to 90 other firms manufacturing metal containers; 39 other firms manufacturing glass containers). The 2nd largest competitor, Continental Can, acquired the 6th competitor, Hazel-Atlas. The acquisition would have only increased Continental's market share from 21.9% to 25%, and it still would not have become the largest player in the market. Nevertheless, the Supreme Court ordered divestiture. It reasoned that the acquisition

not only increased Continental's market share by 14%, it also "reduced from five to four the most significant competitors who might have threatened its dominant position." 378 U.S. at 461. The resulting percentage of the combined firm of 25% "approaches that held presumptively bad" in *Philadelphia National Bank*, "and is almost the same as that involved in [*Alcoa*]." *Id.* Thus, the Court held, "[t]he case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 346). The trend toward concentration and the resultant market shares in the present appeal dwarf those found in *Alcoa*.

In *Von's*, 384 U.S. 270, the Supreme Court "not only reverse[d] the judgment below but direct[ed] the District Court to order divestiture without delay." *Id.* at 279. That case involved the acquisition by Von's, which had merely a 4.7% share of the market, of Shopping Bag, with only a 4.2% of the market. *Id.* at 281 (White, J., concurring). The premerger market leader had only 8% of total market sales. *Id.* But, the growing number of grocery market chains and the shrinking number of independently-owned stores, *id.* at 272-273, resulted in the Court holding that "these facts alone are enough to cause us to conclude ...that the Von's-Shopping Bag merger did violate § 7." *Id.* at 273. The Supreme Court stated that "the basic purpose" of the law "was to prevent economic concentration in the American economy by keeping a large number of small competitors in business," *id.* at 275, and that "congress sought to preserve competition among many small businesses by arresting a trend toward concentration

in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *Id.* at 277. In his concurring opinion, Justice White interpreted the majority decision as establishing the following rule:

> [W]here the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary.

Id. at 281 (White, J., concurring). Here, the top four firms, now control nearly 90% of the market.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court again ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550. "In accord with" the cases already discussed above, the Court "h[e]ld that the evidence on competition ... was sufficient to show a violation of § 7 ...." *Id.* at 551-52. As in *Von's*, the Court relied heavily on evidence indicating that the merger had taken place "in an industry marked by a steady trend toward economic concentration," *id.* at 550, and then went on to "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." *Id.* at 552-53.

None of these Supreme Court cases has been overruled or even diminished by later opinions. Each of

them was later discussed by Judge Posner in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), in which the Seventh Circuit observed that these cases, taken together, prohibited "any nontrivial acquisition of a competitor":

> [These cases] seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may ... substantially ... lessen competition." [¶] None of these decisions has been overruled.

There is little question that, under the authority of these cases, an order of divestiture should ultimately be mandated in this case. First, the airline industry is highly concentrated: The top four firms have a combined 87% of all sales and the number of competitors gone from seven to four in just a few years: in 2008, Delta, merged with Northwest; in 2010, United and Continental merged to create the then largest airline in the world; in 2011, Southwest merged with low-cost carrier, AirTran; and in 2013, American Airlines and US Airways merged, creating a new largest airline in the world.

The decisions by the Supreme Court of the United States should and must be honored. In Section 7 cases, regardless of whether a particular judge or panel agrees or disagrees with those decisions, the Supreme Court has emphasized that a trend toward

concentration, even in situations with very small market percentages, was and is a primary concern of Congress and that should and must be followed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph M. Alioto
Counsel of Record
Jamie Miller
Alioto Law Firm
One Sansome Street, 35th Floor
San Francisco, CA 94104
(415) 434-8900
jmalioto@aliotolaw.com

Counsel for Petitioners