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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

|                                          |                                  |
|------------------------------------------|----------------------------------|
| CYNTHIA PROSTERMAN, JAN MARIE )          |                                  |
| BROWN, CAROLYN FJORD, KATHERINE R. )     |                                  |
| ARCELL, KEITH DEAN BRADT, JUDY BRAY, )   |                                  |
| JOSÉ M. BRITO, ROBERT D. CONWAY, JUDY )  |                                  |
| CRANDALL, ROSEMARY D'AUGUSTA, )          |                                  |
| BRENDA K. DAVIS, PAMELA FAUST, DON )     |                                  |
| FREELAND, DONNA FRY, GABRIEL )           |                                  |
| GARAVANIAN, HARRY GARAVANIAN, )          | <b>PLAINTIFFS' EX PARTE</b>      |
| YVONNE JOCELYN GARDNER, LEE M. )         | <b>APPLICATION FOR TEMPORARY</b> |
| GENTRY, VALARIE ANN JOLLY, GAIL S. )     | <b>RESTRAINING ORDER AND</b>     |
| KOSACH, JOHN LOVELL, MICHAEL C. )        | <b>ORDER TO SHOW CAUSE</b>       |
| MALANEY, LEN MARAZZO, LISA )             | <b>REGARDING PRELIMINARY</b>     |
| MCCARTHY, PATRICIA ANN MEEUWSEN, )       | <b>INJUNCTION</b>                |
| L. WEST OEHMIG, JR., DEBORAH M. )        |                                  |
| PULFER, DANA L. ROBINSON, ROBERT A. )    | <b>MEMORANDUM OF POINTS AND</b>  |
| ROSENTHAL, BILL RUBINSOHN, SONDRRA K. )  | <b>AUTHORITIES IN SUPPORT</b>    |
| RUSSELL, SYLVIA N. SPARKS, JUNE )        |                                  |
| STANSBURY, CLYDE D. STENSRUD, WAYNE )    |                                  |
| TALEFF, GARY TALEWSKY, ANNETTE M. )      |                                  |
| TIPPETTS, DIANA LYNN ULTICAN, )          |                                  |
| J. MICHAEL WALKER, PAMELA S. WARD, )     |                                  |
| and CHRISTINE WHALEN, )                  |                                  |
| Plaintiffs, )                            |                                  |
| v. )                                     |                                  |
| )                                        |                                  |
| AIRLINE TARIFF PUBLISHING COMPANY, )     |                                  |
| AMERICAN AIRLINES, INC., DELTA AIR )     |                                  |
| LINES, INC. and UNITED AIRLINES, INC., ) |                                  |
| Defendants. )                            |                                  |
| )                                        |                                  |

*Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction - Memorandum of Points and Authorities in Support*

**EX PARTE APPLICATION**

PLEASE TAKE NOTICE THAT on April , 2016, or as soon as the matter may be heard, in Courtroom \_\_\_\_\_ of the Honorable \_\_\_\_\_ at the United States District Court for the Northern District of California, \_\_\_\_th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs Cynthia Prosterman, *et al.*, shall and hereby do move this Court pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and Fed. R. Civ. P. 65 for an *ex parte* temporary restraining order, prohibiting each of the defendants, American Airlines, Inc. (“American”), Delta Air Lines, Inc. (“Delta”) and United Airlines, Inc. (“United”) (collectively, the “Airline Defendants”), and any of their officers, directors, agents, employees and successors and all other persons acting in concert with them, pending a hearing on a Motion for Preliminary Injunction, from:

- (i) enforcing any policy, practice and procedure requiring that flights to multi-city destinations for passengers of the Airline Defendants be booked at fares which are greater than the sum of the combined one-way fares for each leg of a passenger’s destination without also providing the protections and benefits the passenger would receive if the flight were booked as a single-ticketed flight;
- (ii) agreeing with any other airline to fix, establish, raise, stabilize, or maintain any fare or fare restriction;
- (iii) disseminating to the other Airline Defendants certain information concerning any planned or contemplated fare or fare restriction or any planned or contemplated change to fares or fare restrictions;
- (iv) penalizing Plaintiffs for booking multi-city destination flights in the manner proscribed by (i) above, including, without limitation, by issuing debit memos or limiting or terminating Plaintiffs’ authorization to book flights on the Airline Defendants.

Because of the serious, immediate, and irreparable harm Plaintiffs have suffered and will continue to suffer in the absence of the requested order, Plaintiffs request an emergency hearing.

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1 The undersigned hereby certifies that on April 18, 2016, Plaintiffs informed the Airline  
2 Defendants and defendant, Airline Tariff Publishing Company, that it would file this application  
3 by emailing to the defendants and to counsel believed to represent them, at the addresses  
4 indicated, a copy of the Verified Complaint, *Ex Parte* Application for Temporary Restraining  
5 Order and Order to Show Cause Regarding Preliminary Injunction and Memorandum of Points  
6 and Authorities in Support, together with the Declarations filed in support.  
7

8  
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11 Associate General Counsel for American Airlines, Inc.  
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13 Daniel Wall  
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11 Dated: April 18, 2016

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*Attorneys for Plaintiffs*

*Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Regarding  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

On or before April 1, 2016, American Airlines, United Airlines, and Delta Airlines (collectively, the “Airline Defendants”) agreed to overcharge air travel passengers on multi-city routes two to ten times more than the passengers would pay if they bought one-way tickets for each segment on the very same flights at the very same time.

The agreed-upon formula among the Airline Defendants is that the passenger will be charged a round-trip inflated price and disallowed to purchase lower priced round-trip segment tickets of a multi-city itinerary. For example, a passenger flying from San Francisco to Washington DC, then from Washington DC to Dallas and then back to San Francisco will pay a round-trip fare of \$1,837.20, rather than \$412.80 if the segments were purchased individually for the very same flights at the very same time on the very same aircraft in the very same seat; an overcharge of \$1,424.40.

The Airline Defendants agreed not to inform the general public of the price gouging agreement. Then, in order to enforce the agreement, they threatened travel agents (which include the Plaintiffs) with punitive measures if the round-trip prices are not paid, that include, *inter alia*, refusals to deal, complex and unnecessary booking procedures never before required, charges to change flights by charging an additional \$200.00 per segment, lost or delayed baggage problems, and the issuance of “debit memos” that require the travel agents to pay the Airline Defendants the unlawful overcharges that the travel agents fail or refuse to charge their customers.

The agreement among the defendants American, United and Delta to charge round-trip rather than one-way prices is a classic *per se* price-fixing violation of Section 1 of the Sherman

1 Antitrust Act and Section 16720 of California's Cartwright Antitrust Act, without regard to any  
2 claimed business excuse for its use.

3  
4 This private antitrust suit, brought under Sections 4 and 16 of the Clayton Antitrust Act  
5 and Section 16750 of the Cartwright Act, seeks a ruling by this Court that the agreement is a  
6 violation of the law, as a matter of law; that the agreement is null, void, and unenforceable; and  
7 that the Plaintiffs are entitled to treble the amount of their damages, reasonable attorneys' fees,  
8 and their costs of suit.

## 10 **II. STATEMENT OF FACTS**

11 This action arises out of a combination and conspiracy by the three largest commercial  
12 passenger airlines in the United States, United Airlines, Inc., American Airlines, Inc. and Delta  
13 Air Lines, Inc. (collectively, the "Airline Defendants") and the Airline Tariff Publishing  
14 Company ("ATP") (all defendants are collectively referred to as the "Defendants") in which the  
15 Airline Defendants, aided and abetted by ATP, agreed on or before April 1, 2016 to increase  
16 fares for domestic multi-city flights by no longer permitting non-refundable fares for each leg of  
17 such flights to be combined to arrive at the price for the multi-city itineraries, thereby causing  
18 consumers to pay hundreds and even thousands of dollars more for exactly the same flights to  
19 exactly the same destinations. Verified Complaint ("Cmplt.") ¶¶ 1, 6.

20 The combination and conspiracy began on or about March 28, 2016, and it continues to  
21 the present. Cmplt. ¶ 2.

22 The intent, purpose and effect of the conspiracy was and is to fix, raise, maintain, and or  
23 stabilize prices for air passenger transportation services on multi-city trips within the United  
24 States in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 16720

of the Cartwright Act, Cal. Bus. and Prof. Code § 16720, by, among other actions, colluding to fix the prices of airfares on multi-city trips in the United States. Cmplt. ¶ 3.

The Airline Defendants each announced their agreement in substantially identical terms in written notifications given to members of the travel agency industry, including Plaintiffs. Cmplt. ¶¶ 4, 39-42. The coordinated nature of their actions is highlighted in each airline's announcement:

- American: “Recently American Airlines, along with other U.S. carriers, made changes to CAT10 domestic combinability fare rules that impact certain one-way fares. These changes prevent combining nonrefundable local fares to create a connecting itinerary.”
- United: “Multiple U.S. carriers recently made changes to the CAT10 domestic combinability fare rules.”
- Delta: “Delta Air Lines recently made a change to the combinability category in the rules of certain one-way fare products impacting some one-way fares.” And, “End-on-end combinability of non-refundable fares has been restricted.”

Cmplt. Exhibits A-C.

Examples of the effects of the Defendants' agreement are set out in the Verified Complaint and declarations of some of the Plaintiffs. For example, the Associated Press performed a sampling of the effects of the Airline Defendants' new pricing rules for multi-city trips and found that:

- 1) the price of a **Delta** itinerary from **Orlando to Detroit to New York and back to Orlando** will increase by nearly **800 percent**, from \$282.00 to \$2,174.00 (an increase of \$1,892.00);

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2) the price of an **American** itinerary from **Miami to Chicago to San Francisco and back to Miami** will increase by more than **60 percent**, from \$664.00 to \$1,064.00 (an increase of \$400.00); and

3) the price of a United itinerary from **New York to Ft. Lauderdale to Chicago and back to New York** will increase by nearly **65 percent**, from \$308.00 to \$507.00 (an increase of \$199.00).

Complt. ¶ 45.

The “Cranky Flier,” a blog devoted to air travel issues, reported on March 31, 2016, that under the Defendants’ agreement:

the price of an **American** itinerary flown in May 2016, from **San Francisco to Washington DC to Dallas and back to San Francisco** will increase by **345 percent**, from \$412.80 (the sum of the individual legs, \$206.60 + \$88.10 + \$118.10) to \$1,837.20 (an increase of \$1,424.40).

Complt. ¶ 46.

Similarly, a check of the Airline Defendants’ fares for mid-week travel in May 2016, disclosed price increases for the following multi-city itineraries.

1) the price of a **United** itinerary flying May 10-13, 2016, from **New Orleans to Denver to Chicago and back to New Orleans** will increase by **47 percent**, from \$312.30 to \$457.70 (an increase of \$145.40);

2) the price of a **Delta** itinerary flying May 10-13, 2016, from **New Orleans to Atlanta to New York and back to New Orleans** will increase by **62 percent**, from \$321.30 to \$520.70 (an increase of \$199.40); and

3) the price of an **American** itinerary flying May 10-13, 2016, from **New Orleans to Dallas to Minneapolis and back to New Orleans** will increase by **96 percent**, from \$263.80 to \$517.20 (an increase of \$253.54).

Complt. ¶ 47.

The Plaintiffs are air travel passengers and travel agents who have brought this action under Sections 4 and 16 of the Clayton Antitrust Act to prohibit the Defendants, who control

1 over 70 percent of domestic air passenger travel in the United States from continuing to fix and  
2 stabilize airfares for multi-city air travel in violation of Section 1 of the Sherman Antitrust Act  
3 and Section 16720 of the California Cartwright Act, and to prevent defendant ATP, which is  
4 owned by the Airline Defendants and other airlines, from aiding and abetting the Airline  
5 Defendants in their illegal acts. Cmplt. ¶¶ 6, 15.

7  
8 The illegal acts of the Defendants have caused, and they are continuing to cause,  
9 irreparable injury, loss or damage to the Plaintiffs in their property and businesses, requiring the  
10 immediate issuance of a temporary restraining order to return the marketplace to the *status quo*  
11 *ante* as it existed before the implementation by Defendants' of their price-fixing scheme. Cmplt.  
12 ¶¶ 49-51, 55.

14 Unless Defendants are restrained, the Plaintiffs will continue to suffer irreparable harm  
15 because they and their customers have been deprived of the benefits of free and open competition  
16 in the sale of air passenger transportation services in the U.S. and they have paid, and will pay,  
17 monopoly prices for multi-destination flights as a result of the Airline Defendants' combination  
18 and conspiracy. Cmplt. ¶ 55. In addition, Plaintiffs are now required to expend an inordinate  
19 amount of non-compensable time – up to four or five times the amount of time previously  
20 required to book multi-destination flights – to book individual one-way legs of multi-city flights  
21 in order to save their customers hundreds, and in some cases thousands, of dollars that they  
22 would otherwise pay as a result of the Airline Defendants' price fix. By booking multi-city  
23 flights as a series of lower cost one-way flights, in violation of the Defendants' new rule, the  
24 Plaintiffs' customers risk losing baggage, incurring additional baggage charges, or incurring  
25 flight cancellation or change fees of up to \$200.00 per person if the leg of a flight is delayed or  
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1 cancelled. By booking multi-city flights for their customers as a series of one-way fares at lower  
 2 cost than the higher fares newly imposed by the Airline Defendants, the Plaintiffs have been  
 3 threatened by the Airline Defendants with the imposition of substantial “debit memos” and the  
 4 complete termination of their authority to book passengers on the Airline Defendants’ flights in  
 5 the future, resulting in the probable loss of Plaintiffs’ travel agency businesses. Cmplt. ¶¶ 37, 49.

7 The above consequences will necessarily adversely affect Plaintiffs’ relationships with  
 8 their customers and cause injury to their reputations, property and businesses, which will either  
 9 not be compensable by money damages or their monetary damages will be extraordinarily  
 10 difficult, if not impossible, to ascertain. Cmplt. ¶¶ 50-51. The relief sought by Plaintiffs to  
 11 prevent the irreparable harm to them, their customers, and the public at large is to restrain and  
 12 ultimately enjoin the Defendants from continuing to engage in their price-fixing scheme.

### 13 **III. ARGUMENT**

#### 14 **A. THE COURT SHOULD GRANT PLAINTIFFS’ REQUEST FOR A TEMPORARY RESTRAINING ORDER**

15 Federal Rule of Civil Procedure 65(b) permits the Court to issue a temporary restraining  
 16 order without notice, only if:

- 17 (A) specific facts in an affidavit or a verified complaint clearly show that
- 18 immediate and irreparable injury, loss, or damage will result to the movant
- 19 before the adverse party can be heard in opposition; and
- 20 (B) the movant’s attorney certifies in writing any efforts made to give
- 21 notice and the reasons why it should not be required.

22 “When considering a motion for a temporary restraining order, the Court turns to the  
 23 factors relevant to the determination of whether to grant a preliminary injunction.” *Sobin v.*  
 24 *Bechtol*, 168 Fed. Appx. 452, 452 (D.C. Cir. 2005) (citing *Jacksonville Port Auth. v. Adams*, 556

1 F.2d 52, 57 (D.C. Cir. 1977)); *see, e.g., Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D. Pa. 1994)  
 2 (acknowledging that “[t]he standards for a temporary restraining order are the same as those for a  
 3 preliminary injunction’).” *Elite Entm’t, Inc. v. Reshammiya*, 2008 U.S. Dist. LEXIS 31580  
 4 (D.D.C. Apr. 18, 2008).

6 The basis for injunctive relief has always focused on irreparable injury and the  
 7 inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982);  
 8 *Stanley v. University of So. California*, 13 F.3d 1313, 1320 (9th Cir. 1994). To prevail on a  
 9 motion for preliminary injunction, Plaintiffs must establish that (1) they are likely to succeed on  
 10 the merits; (2) they face irreparable harm in the absence of injunctive relief; (3) the balance of  
 11 equities tip in their favor; and (4) an injunction is in the public interest. *See Winter v. N.R.D.C.*,  
 12 555 U.S. 7, 19 (2008).

15 The Ninth Circuit uses a “sliding scale” approach, such that “the elements of the  
 16 preliminary injunction test are balanced, so that a stronger showing of one element may offset a  
 17 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131,  
 18 1134 (9th Cir. 2011). Under the so-called “serious questions” test, an injunction is “appropriate  
 19 when a plaintiff demonstrates that serious questions going to the merits were raised and the  
 20 balance of hardships tips sharply in the plaintiff’s favor,” so long as plaintiff also shows that  
 21 there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at  
 22 1134-35. Plaintiffs easily meet and exceed each requirement for obtaining a temporary  
 23 restraining order.

27 ///

28 ///

**i. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS BECAUSE THE ACTIONS OF THE DEFENDANTS – ENTERING INTO AN AGREEMENT TO FIX PRICES – IS A *PER SE* VIOLATION OF SECTION 1 OF THE SHERMAN ANTITRUST ACT**

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, states in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

In turn, Section 4 of the Clayton Antitrust 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[.]”

Furthermore, Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, permits Plaintiffs “to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws[.]”

The California Cartwright Act affords essentially the same relief under Section 16750 for violations of Section 16720, Cal. Bus. and Prof. Code, §§ 16750, 16720.

Price fixing by competitors such as the Airline Defendants has long been held to be a *per se* violation of Section 1 of the Sherman Act. It is so obviously pernicious, and inherently anticompetitive that it is considered to have no redeeming virtue and is illegal *per se*, in other words, it is a violation of the antitrust laws in and of itself. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213 (1940) (power to fix prices involves power to control the market and to fix arbitrary and unreasonable prices). The prohibition applies to “combinations operating directly on prices or price structures.” *Id.* at 214. “Any combination which tampers with price

////

1 structures is engaged in an unlawful activity.” *Id.* at 221. The Defendants’ agreement goes to the  
2 very heart of their price structures for multi-city domestic flights.

3  
4 “Price fixing” is a term with a broad meaning in antitrust law.

5 Under the Sherman Act a combination formed for the purpose and with the effect  
6 of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in  
interstate or foreign commerce is illegal *per se*.

7  
8 *Id.* at 223.

9 Defendant American stated through its spokesman, Joshua Freed, the justification for  
10 Defendants’ agreement: “The change was made in mid-March to stop flyers from paying fares  
11 lower than the airline had intended for certain markets.” Cmpl. ¶ 40. This excuse avails nothing  
12 because “no showing of so-called competitive abuses or evils which those agreements were  
13 designed to eliminate or alleviate may be interposed as a defense.” *Id.* at 218. To make matters  
14 worse, the Defendants’ changes to the price structure are not intended to eliminate any “evil” or  
15 “abuse” in the marketplace, but are instead targeting the beneficial fares that were lower than the  
16 airline wanted. Freed’s admission about “flyers paying fares lower than the airline had intended  
17 for certain markets” refers to the airline’s practice of charging lower prices in segments in which  
18 they are competing against low cost carriers, supported by higher prices in other segments where  
19 they have limited or no competition, a practice that has been long condemned by the Supreme  
20 Court as an act in furtherance of violations of the antitrust laws. *Schine Chain Theatres, Inc. v.*  
21 *United States*, 334 U.S. 110 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173  
22 (1944).

23  
24 Delta’s explanation was essentially the same: “Sum of sector pricing is when multiple  
25 fare types are combined in order to price a fare lower than the available path (O&D) fare. Under  
26

1 the new combinability rules, this ticketing behavior is more restricted.” Cmplt., Exhibit B.

2 As the Supreme Court stated in *Arizona v. Maricopa County Medical Society*: “We have  
3 not wavered in our enforcement of the per se rule against price fixing. Indeed, in our most recent  
4 price-fixing case we summarily reversed the decision of another Ninth Circuit panel that a  
5 horizontal agreement among competitors to fix credit terms does not necessarily contravene the  
6 antitrust laws.” 457 U.S. 332, 347-48 (1982) (citing *Catalano, Inc. v. Target Sales, Inc.*, 446  
7 U.S. 643 (1980)).

10 No antitrust violation is more abominated than the agreement to fix prices. With  
11 few exceptions, “price-fixing agreements are unlawful *per se* under the Sherman  
12 Act and . . . no showing of so-called competitive abuses or evils which those  
13 agreements were designed to eliminate or alleviate may be interposed as a  
14 defense.” *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. [at] 345 (quoting  
15 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). The dispositive  
question generally is not whether any price fixing was justified, but simply  
whether it occurred.

16 *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9<sup>th</sup> Cir. 2003) (emphasis added).

17 and

18 The effectiveness of price-fixing agreements is dependent on many factors, such  
19 as competitive tactics, position in the industry, the formula underlying price  
20 policies. Whatever economic justification particular price-fixing agreements may  
21 be thought to have, the law does not permit an inquiry into their reasonableness.  
22 They are all banned because of their actual or potential threat to the central  
nervous system of the economy.

23 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 224, n.59.

24 Likewise, under California law, price fixing is deemed to constitute an illegal restraint of  
25 trade as a matter of law. This rule applies whether the price fixing scheme is horizontal or  
26 vertical, that is, whether the price is fixed among competitors or businesses at different economic  
27 levels. *Cellular Plus, Inc. v. Superior Court* (1993, Cal. App. 4th Dist) 14 Cal. App. 4th 1224,  
28

1 18 Cal. Rptr. 2d 308, *review denied*, *Cellular Plus, Inc. v. San Diego County Superior Court*  
2 (July 1, 1993) 1993 Cal. LEXIS 3613.

3  
4 The Airline Defendants, aided and abetted by ATP which they own, dominated ATP's  
5 rule making for fares on multi-city flights which gave them the power to change those rules  
6 when, how and if they wanted. (ATP is the established front for the Airline Defendants to  
7 coordinate all fares, itself a violation of the law. *United States v. Associated Press*, 326 U.S. 1  
8 (1945)).

9  
10 In addition, the decision by the Airline Defendants resulting in the fixing of the price  
11 structure for multi-city flights and their decisions to increase the prices so drastically was plainly  
12 and admittedly the result of an agreement or concerted action by them. The facts demonstrate  
13 this with respect to the timing and similarity of the announcements disseminated to the travel  
14 agency industry, which the Supreme Court has acknowledged to be one of the procedures  
15 followed by competitors when fixing prices. As the Supreme Court has long held:  
16  
17

18 It is elementary that an unlawful conspiracy may be and often is formed  
19 without simultaneous action or agreement on the part of the conspirators. *United*  
20 *States v. Schenck*, 253 F. 212, 213, *aff'd*, 249 U.S. 47; *Levey v. United States*, 92  
21 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an  
22 invitation to participate in a plan, the necessary consequence of which, if carried  
23 out, is restraint of interstate commerce, is sufficient to establish an unlawful  
24 conspiracy under the Sherman Act. *Eastern States Lumber Ass'n v. United*  
*States*, 234 U.S. 600 ; *Lawlor v. Loewe*, 235 U.S. 522, 534; *American Column Co.*  
*v. United States*, 257 U.S. 377; *United States v. American Linseed Oil Co.*, 262  
U.S. 371.

25 *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

26 The Defendants' actions are illegal *per se* and Plaintiffs are likely to prevail on the merits.

27  
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*Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Regarding*  
*Preliminary Injunction - Memorandum of Points and Authorities in Support*

1           **ii.     PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE**  
 2           **OF THE REQUESTED RELIEF**

3           The Plaintiffs will continue to suffer irreparable harm in the absence of a temporary  
 4           restraining order and an injunction.

5           The natural result of the Airline Defendants' agreement is that price competition among  
 6           them for the provision of air passenger transportation services in the case of domestic multi-city  
 7           destination flights has been unreasonably restrained and Plaintiffs and their customers have been  
 8           deprived of the benefits of free and open competition in the sale of air passenger transportation  
 9           services resulting from the monopoly prices now being imposed and paid.  
 10           

11           In their capacities as travel agents, Plaintiffs have suffered irreparable harm. They  
 12           continue to suffer damages the extent of which are currently unknown and will be extraordinarily  
 13           difficult to ascertain, as well as other irreparable harm by reason of the Airline Defendants'  
 14           illegal agreement to fix fares.  
 15           

16           For example, Plaintiffs are now required to expend an inordinate amount of time booking  
 17           individual one-way legs of multi-city flights in order to save their customers hundreds, and in  
 18           some cases thousands, of dollars they would otherwise pay as a result of the Airline Defendants'  
 19           price fix. Before the Defendants' announcement, this was not required. Now, in many cases, the  
 20           time required to book the identical multi-city trip has increased from approximately five minutes  
 21           to twenty minutes or more by reason of the need to enter full data sets for each passenger on each  
 22           one-way leg and obtain a Personal Name Report ("PNR") for each leg. This is a time-consuming  
 23           process for which Plaintiffs cannot be compensated. Cmpl't. ¶ 49. This is but another means  
 24           

25           ///  
 26

1 used by the Airline Defendants to coerce the Plaintiffs to abide by the Defendants' unlawful  
 2 price-fixing agreement.

3  
 4 By booking multi-city flights for their customers by combining one-way fares – in  
 5 violation of the Defendants' new rule – at lower aggregate cost than the illegal fares imposed by  
 6 the Airline Defendants, the Plaintiffs are threatened by the Airline Defendants with the  
 7 imposition of substantial “debit memos” in the future and are threatened with being cut off from  
 8 booking flights on the airlines altogether for having violated their rules. The obvious  
 9 consequences are the imposition of ruinous financial penalties and the loss of Plaintiffs' travel  
 10 agency businesses. As noted by United currently in its ticketing guidelines for travel agents:

11  
 12  
 13 Authorization to sell United tickets and services is contingent upon compliance  
 14 with United's policies and guidelines for bookings, inventory availability,  
 15 ticketing, refunds, exchanges, tariffs and commission. Violations or failure to  
 16 meet these guidelines may result in loss of an agency's appointment, which will  
 17 prohibit participation in the sale of United transportation and services, including  
 18 booking active and passive segments or claiming United segments in any  
 19 computer reservation system.

20 Cmplt. ¶ 49 (emphasis added).

21 Plaintiffs may either accede to the Defendants' actions and book flights costing their  
 22 customers up to thousands of dollars in illegal charges, or they can attempt to circumvent the  
 23 restrictions and risk the destruction of their travel businesses. In addition, as ominously  
 24 predicted by the Airline Defendants, by booking multi-city flights for their customers' travel by  
 25 combining lower cost one-way flights, the Plaintiffs' customers risk losing baggage, incurring  
 26 additional baggage charges, or incurring flight cancellation or change fees of up to \$200.00 per  
 27 person, per leg, if a flight is delayed or canceled. The damage to Plaintiffs' businesses by reason  
 28 of the harmful fallout from customers by having to charge them monopoly prices at the outset or

1 else risk excessive change fees, lost baggage and other inconveniences by booking less costly  
 2 flights is another form of irreparable harm leaving Plaintiffs in an untenable “damned if they do  
 3 and damned if they don’t” situation.  
 4

5 Plaintiffs have made an adequate showing of irreparable harm. As Justice O’Connor  
 6 found in *California v. American Stores Company*, 492 U.S. 1301, 1305 (1989):  
 7

8 I agree with both the District Court and the Court of Appeals that applicant has  
 9 made an adequate showing of irreparable injury. See 872 F. 2d, at 844 (lessening  
 10 of competition ‘is precisely the kind of irreparable injury that injunctive relief  
 11 under section 16 of the Clayton Act was intended to prevent’) (citations omitted);  
 12 697 F. Supp., at 1134. Even if applicant is free to seek other appropriate  
 13 injunctive relief on remand, the possibility of irreparable injury, it seems to me,  
 14 remains to the extent that such other relief would be inadequate to remedy the  
 15 injury. [Omitted citations in original.]

13 **iii. THE BALANCE OF EQUITIES FAVORS THE ISSUANCE OF THE**  
 14 **REQUESTED INJUNCTIVE RELIEF**

15 Harm to these Plaintiffs is irreparable. If the Defendants are not stopped from continuing  
 16 their price-fixing agreement, the Plaintiffs will continue to be injured in their businesses and  
 17 restoration of the *status quo ante* will be impossible at worst and difficult at best. However, if a  
 18 restraining order issues, the Airline Defendants will not suffer comparable harm; they will each  
 19 revert to their prior fare structure which has over the past several years consistently returned to  
 20 them record levels of revenues and profits. Cmplt. ¶¶ 21-23.  
 21

22 Here, the equities are heavily weighted in favor of the Plaintiffs, the industry in which  
 23 they strive to compete, and the traveling public they serve.  
 24

25 When applying the “balance of harms” test, this Court should consider the likelihood of  
 26 success on the merits. “[A] sliding scale can be employed, balancing the hardships associated  
 27 with the issuance or denial of a preliminary injunction with the degree of likelihood of success on  
 28

1 the merits.” *Florida Medical Association v. U.S. Dept. of Health, Education and Welfare*, 601  
 2 F.2d 199, 201, n.2 (5th Cir. 1979); *State of Texas v. Seatrain, International, S.A.*, 518 F.2d 175,  
 3 180 (5th Cir. 1975).

4  
 5 In this case, the likelihood that the Plaintiffs will prevail on the merits is overwhelming:  
 6 Defendants’ actions are illegal *per se*. When weighing the relative harms, this Court should  
 7 consider the high probability of success on the merits against the relative absence of harm to the  
 8 Defendants. The likelihood of success is important to the “balancing of harms” test because the  
 9 virtual certainty that the price-fixing agreement will be struck down – meaning that the  
 10 Defendants are not entitled to charge and retain the illegal airfares they are reaping by the  
 11 millions – yet allowing that practice to continue in the face of the harm Plaintiffs are facing,  
 12 would permit any large, monied Defendant to defeat a motion for a restraining order merely by  
 13 placing on the scale of equities the sheer magnitude of its thievery.  
 14

15  
 16 Here, the balancing of the equities decidedly favors the Plaintiffs.  
 17

18 **iv. THE REQUESTED RELIEF IS IN THE PUBLIC INTEREST**

19 The public interest is strongly in favor of effective enforcement of the antitrust laws and  
 20 the preservation of competition whenever and wherever possible. It has long been recognized  
 21 that the public interest is served by enforcement of the antitrust laws:  
 22

23 In principle, any practice that impedes or otherwise interferes with the natural  
 24 flow of interstate commerce, even if there is no evident harm to the economy as a  
 25 whole, because the victim’s business is so minimal that its destruction made little  
 26 impression upon the economy, is nonetheless injurious to the public interest.  
 27 Accordingly, public injury necessarily results whenever there is an assault upon  
 28 the principle of free and unhampered competition, as expressed in the antitrust  
 laws...Therefore, the complaint need not allege injury to the public; the allegation  
 is superfluous.

1 Callman on Unfair Comp., Tr. & Mono. § 4:24 (4th Ed.).

2 In the oft-cited words of Justice Thurgood Marshall in *United States v. Topco Associates,*  
3  
4 *Inc.*, 405 U.S. 596, 610 (1972):

5 Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta  
6 of free enterprise. They are as important to the preservation of economic freedom  
7 as our free-enterprise system as the Bill of Rights is to the protection of our  
8 fundamental personal freedoms. And the freedom guaranteed each and every  
9 business, no matter how small, is the freedom to compete – to assert with vigor,  
10 imagination, devotion, and ingenuity whatever economic muscle it can muster.  
11 Implicit in such freedom is the notion that it cannot be foreclosed with respect to  
one sector of the economy because certain private citizens or groups believe that  
such foreclosure might promote greater competition in a more important sector of  
the economy. [Citation omitted.]

12 The public interest favors the use of private antitrust cases as a crucial means of ensuring  
13 that the antitrust laws are enforced. As the Supreme Court stated in *Zenith Radio Corp. v.*  
14 *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), “...the purpose of giving private parties  
15 treble-damage and injunctive remedies was not merely to provide private relief, but was to serve  
16 as well the high purpose of enforcing the antitrust laws...Section 16 should be construed and  
17 applied with this purpose in mind... .” *Id.* at 130-31. *American Society of Engineers, Inc. v.*  
18 *Hydrolevel Corporation*, 456 U.S. 556 (1982) is in accord:

21 In the past, the Court has refused to permit broad common-law barriers to relief to  
22 constrict the antitrust private right of action. It stated . . . that “the private action  
23 will be an ever-present threat” to deter antitrust violations.  
24 *Id.* at 569 (quoting *Perma Life Mufflers, Inc., v. International Parts Corp.*, 392 U.S. 134  
(1968)).

25 Economic and legal principles uniformly hold that competition best serves the public. As  
26 the Supreme Court has said, the antitrust laws are the charter of economic freedom. If injunctive  
27  
28 ///

1 relief is not granted, airfares will remain at monopoly levels, competition will be lessened, and  
 2 the Plaintiffs and public will be damaged to an extent not subject to remediation.

3  
 4 **B. A BOND SHOULD NOT BE REQUIRED**

5 Lastly, whether to impose a bond requirement on the Plaintiffs is not mandatory under  
 6 Fed. R. Civ. P. 65(c), but is within the discretion of the District Court. *Barahona-Gomez v.*  
 7 *Reno*, 167 F.3d 1228 (9<sup>th</sup> Cir. 1999). The Court in *Reno* cited the same construction of the rule in  
 8 other circuits. *Id.* at 1237 (citing, *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir.  
 9 1996) (affirming district court's decision not to require bond); *Moltan Co. v. Eagle-Picher*  
 10 *Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (district court has discretion to require  
 11 posting of security); *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976)  
 12 (amount of bond required upon the issuance of a preliminary injunction vests within the sound  
 13 discretion of the trial court and will not be reversed on appeal unless there is a clear abuse of  
 14 discretion)). "The district court is in a far better position to determine the amount and  
 15 appropriateness of the security required under Rule 65, and we will review the court's  
 16 determination only for an abuse of discretion." *Id.*

17  
 18 In not requiring a bond in *Reno*, the Court took note of the public interest underlying the  
 19 litigation and "the unremarkable financial means of the class as a whole." *Id.* Also, in *Moltan*  
 20 *Co. v. Eagle-Picher Industries, Inc.*, *supra* – cited in *Reno* – the Sixth Circuit held that the  
 21 posting of security under Rule 65(c) was not required "because of the strength of Eagle-Picher's  
 22 case and the strong public interest involved." *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55  
 23 F.3d at 1176. These same principles apply to the instant case and this Court should likewise  
 24 waive the requirement for a bond given the strength of Plaintiffs' *per se* case and the broad

1 public interest in stopping the illegal price-fix in its tracks and avoiding further injury to the  
 2 flying public and the travel agencies serving them.

#### 3 4 IV. CONCLUSION

5 For the above reasons, the Court should issue a temporary restraining order enjoining the  
 6 Defendants from continuing with their agreement fixing the prices and price structures for multi-  
 7 city domestic air transportation and require that they revert to their former practice of allowing  
 8 such airfares to be booked by a single ticket which is priced according to the sum of the non-  
 9 refundable airfares for each leg of the multi-city trip.

11 Dated: April 17, 2016

Respectfully submitted,

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